

IN THE HIGH COURT OF TANZANIA  
AT IRINGA

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APPELLATE JURISDICTION  
(Iringa Registry)

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(DC) CRIMINAL APPEAL NO. 44 OF 2010  
(Originating from Criminal Case No. 179 of 2008  
of the District Court of Mufindi District  
at Mafinga  
Before: M. A. Moyo, R.M.)

1. STEPHEN DUGANGE } ..... APPELLANTS  
2. HILARY KALINGA }

VERSUS

THE REPUBLIC ..... RESPONDENT

(Date of last Order 19.4.2012  
Date of Judgement 13.6.2012)

**JUDGMENT**

KIHIO, J.

The appellants, Stephen Dugange (hereinafter referred as 1<sup>st</sup> appellant), Hilary Kalinga (hereinafter referred as 2<sup>nd</sup> appellant) and one Double s/o Kigodi were charged with Armed Robbery contrary to Section 287 A of the Penal Code, as amended by Act No. 4/2004 on the 1<sup>st</sup> count and Gang rape contrary to Section 131 A of the Penal Code, Cap. 16 R.E. 2002

on the 2<sup>nd</sup> count in the District Court of Mafinga. The appellants were convicted of Armed Robbery and Gang Rape as charged and sentenced to thirty years imprisonment on 1<sup>st</sup> count and life imprisonment on the 2<sup>nd</sup> count, the sentence to run consecutively. Double s/o Kigodi was acquitted on both counts.

The appellants were dissatisfied with both the conviction and sentence, hence this appeal.

It was alleged, on the 1<sup>st</sup> count in the trial court that the appellants and Double s/o Kigodi on 13<sup>th</sup> day of September, 2008 at about 00.30 hours at Ifupira village within Mufindi District in Iringa Region did steal three suits valued at TShs.90,000/=, one brief case valued at TShs.30,000/=, one battery valued at TShs.50,000/=, two mobile phone Nokia No. 1600 valued at TShs.60,000/=, Nokia No. 1200 valued at TShs.60,000/=, one Jacket valued at TShs.30,000/=, Keyboard valued at TShs.300,000/= and cash Shs.13,000/=, total valued at TShs.658,500/= the property of Onesmo s/o Pakul @ Kiliwa and immediately before and after the time of stealing did wound him on his head by using Panga in order to retain and obtain the said properties.

On the 2<sup>nd</sup> count, it was alleged in the trial court that the appellants and Double s/o Kigodi on 13<sup>th</sup> day of September, 2008 at about 00.30 hours at Ifupira within Mufindi district in Iringa region after stealing the said items the properties of Onesmo s/o

Paul Kiliwa did unlawfully have carnal knowledge of one Sarah D/o Mgani aged 26 years without her consent.

Onesmo Paulo Kiliwa (PW.1) gave testimony in the trial court that he and Stephen Dugange (1<sup>st</sup> appellant) had made a contract of installing electricity at his (PW.1's) house but the contract was not fulfilled. He further gave testimony that the 1<sup>st</sup> appellant asked an advance of Shs.270,000= in the presence of his wife (PW.2) on the day he filled the TANESCO form. He said that on 13.9.2008 at about 00.30 hours when he was at his house sleeping one person knocked at the door. He further said that he wake up and when he opened the door, with the aid of a torch light, he identified Stephen (1<sup>st</sup> appellant) who wore a Black coat and hat and was accompanied by three people. He went on to say that the said Stephen asked him "*mimi unanifahamu?*" meaning "*do you know me?*" and he (PW.1) answered that he did not know him. He explained that the 1<sup>st</sup> appellant opened the hat and when he (PW.1) said that he did not know him he (1<sup>st</sup> appellant) wore a jacket and hat. He further explained that the 1<sup>st</sup> appellant ordered him to go inside the house and when he proceeded to the sitting room he raised an alarm commonly known as "*Ngolo*" after he found that the three robbers who entered into the house were not normal people. He stated that the said robbers cut him at his forehead with a "*Panga*" and stabbed him beneath the chin with a knife. He further stated that they ordered him (PW.1) to sit down, tied his (PW.1's) hands with a tie, tied his (PW.1's) legs with electricity wire and tied him

(PW.1) on the coaches at the sitting room where there was a lantern which was on. He told the trial court that when he showed the robbers the money they ordered him to show them the Key-board and he showed the 1<sup>st</sup> appellant the Key-board which was on the table. He further told the court that after the robbers took his Key-board they brought his (PW.1's) wife to his feet, laid her down and the 1<sup>st</sup> appellant had sexual intercourse with her while the other robbers said "*Kata kiuno. Kama hujui leo utaweza*". He went on to tell the court that the robbers took his wife (PW.2) to the bed room where two people had sexual intercourse with her. He deposed that he did not see when the robbers had sexual intercourse with his (PW.1's) wife (PW.2) because he lay on his stomach.

He further deposed that the robbers managed to steal his TShs.10,000/=, Yamaha Key-board – PCR175, Rising double deck radio, suit coats, big jackets valued at TShs.15,000/=, two cellular phones, motor vehicle battery No. 40, brief case, shaving machine and his guest's TShs.3,500/=. He went on to depose that he managed to untie himself and wake up his neighbours, Gerald s/o Mponzi and Aldo s/o Chuwa who took them to Stone Valley dispensary. He informed the court that in the morning on the following day after they were informed that there were bandits arrested at Itone and one of them died they went to Itone area where they saw a taxi which was upside down and they recovered a Key-board, Rising type radio, Briefcase having clothes and three coats which they took to the Scene of crime.

He further informed the court that the Yamaha Key-board PSR175, the Briefcase, the Rising double deck radio, the coats (Exhibits P.1, P.2 and P.3, respectively) were his stolen properties. In cross examination by Mr. Mushokorwa, learned defence counsel, he said that the 1<sup>st</sup> appellant wore a Black jacket and cap when he met him at the door at the scene of crime and he identified him with the aid of Nokia 1200 phone torch light he lit on his face. He further said that when the 1<sup>st</sup> appellant asked him (PW.1) if he (PW.1) knew him (1<sup>st</sup> appellant) he (PW.1) told him (1<sup>st</sup> appellant) that he did not know him (1<sup>st</sup> appellant). He told the court that he lay on his stomach for the whole time until the robbers completed the commission of the offences. He went on to say that he recorded his statement at the Police Station. In re-examination he told the trial court that he easily identified the 1<sup>st</sup> appellant outside the house at the scene of crime because he (PW.1) had a torch and they talked for almost five minutes. He went on to say that he identified the 1<sup>st</sup> appellant outside his (PW.1's) house because of his (1<sup>st</sup> appellant's) Black jacket.

Sarah Luano Mgani (PW.2), PW.1's wife, gave testimony in the trial court that she knew the 1<sup>st</sup> appellant since 2007 and that he (1<sup>st</sup> appellant) and her husband had entered a contract to install electricity in their house. She further gave testimony that on 13.9.2008 at 00.30 hours when she and her husband were sleeping they heard a person knocking at the door and her husband (PW.1) went to the door to open it. She explained that

her husband who had a phone which had a torch opened the door and he met four people standing at the door. She further explained that she heard the 1<sup>st</sup> appellant asking her husband if he knew him (PW.2's husband) and he said that he did not know him (1<sup>st</sup> appellant). She stated that she went to the sitting room where she saw three people armed with bush knives hitting her husband (PW.1). She further stated that she went outside the house to raise an alarm but another person ordered her to enter inside the house. She told the court that three robbers took her to the bed room where there was a lantern light and ordered her to give them money and she gave them Shs.10,000/=. She further told the trial court that the three robbers ordered her to proceed to the sitting room where they tied her hands and ordered her to lie on her back. She testified that the three robbers ordered her to widen her legs and the 1<sup>st</sup> appellant, Steven s/o Dugange took his male organ and inserted it to her female organ. She further testified that she was raped by three people but she identified the 1<sup>st</sup> appellant because there was torch light. She said that the robbers stole double deck radio, brief case having clothes, three suit coats, motor vehicle battery and church Key-board. She further said that at the scene of crime she identified Stephen Dugange (1<sup>st</sup> appellant) and Hilary Kalinga (2<sup>nd</sup> appellant). She went on to say that for the first time she saw Hilary Kalinga in the village and for the second time she saw him (2<sup>nd</sup> appellant) on the day of the armed robbery and rape incident. She lastly informed the court that she was called at the Police Station where she identified the 2<sup>nd</sup> appellant at

the identification parade as one of the robbers because she remembered his (2<sup>nd</sup> appellant's) facial structure from the day of the incident. In cross-examination by Mr. Mushokorwa, learned defence counsel in the trial court she stated that when she gave his statement to the Police she did not mention Hilary s/o Kalinga (2<sup>nd</sup> appellant) and that he (2<sup>nd</sup> appellant) was a stranger before the incident. She further stated that at the identification parade the 2<sup>nd</sup> appellant wore clothes which were different from those he wore at the scene of crime but he did not remember the clothes he (2<sup>nd</sup> appellant) wore at the identification parade. She explained that the other people wore normal clothes. She further explained that she did not see the clothes worn by the other people at the identification parade. She contended that her husband paid the 1<sup>st</sup> appellant Shs.160,000/= on the first installment and Shs.110,000/= on the second installment for electricity installation contract they made. She said that there was no lantern at the sitting room. She further said that when PW.1 opened the door they did not know it was Stephen but they thought he was a sick person. She contended that Stephen (1<sup>st</sup> appellant) wore a T-Shirt and trouser. In re-examination she stated that when the robbers had left her husband said that he identified Stephen s/o Dugange (1<sup>st</sup> appellant).

The Village Executive Officer, Daudi Langamsita Chafu (PW.3) told the trial court that on 13.9.2008 at 02.00 hours he was sleeping at his house and he woke up after he heard noises from people. He further told the trial court that he went to the

incident and he found that a person allegedly broke the house of one Adiliano Nyenza had been set on fire. He said that on 14.9.2008 when he went to his office he found a cellular phone tied with a piece of paper outside the door and on the said paper there were names of four people allegedly accompanied the deceased written by Red ink. He further said that the names of one Furaha s/o Kapuna and Steven s/o Dugange were among the four names on the said paper. In cross-examination by Mr. Mushokorwa, learned defence counsel, he stated that he did not know the person who wrote the four names on the said piece of paper.

Assistant Inspector Osca Mmole (PW.4) told the trial court that on 23.9.2008 he conducted identification parade and Hilary s/o Kalinga (2<sup>nd</sup> appellant) was identified by the witness by touching his (2<sup>nd</sup> appellant) shoulder and he (PW.4) recorded in the identification parade register – PF. 186 (Exhibit P.4). In cross-examination by Mr. Mushokorwa, learned defence counsel he stated that he did not remember the time the witness, Sarah reached the Police Station. He further stated that there were three accused at the identification parade but he did not remember the accuseds' attire. He said that he did not remember the attire of the ten people at the parade line.

Nicolina Joakim Msili (PW.5) told the trial court that he was a Clinical Officer at Mufindi District hospital and on 13.9.2008 he admitted patients who had wounds but he did not remember



their sex. He further told the trial court that after he attended the patients he filled the PF.3 forms (Exhibits P.5 and 6, respectively).

The statements of Andrew s/o Constantino and Amoni s/o Mlaponi were admitted under Section 34B (2) (a) (c) of the Evidence Act, Cap. 6 R.E. 2002 and marked as Exhibits P.7 and P.8, respectively.

The 1<sup>st</sup> appellant, Stephen Alphonse Dugange gave his defence on oath. He denied any involvement in the offence of Armed Robbery and Gang Rape. He testified in the trial court that he was arrested on 13.9.2008 at 11.00 hours at his household at Kinyanambo "B". He further testified that on the previous night he was at his household and he did not go out at all. In cross-examination by the Public Prosecutor he said that he was not at the incident.

The 2<sup>nd</sup> appellant, Hilary s/o Albert Kalinga gave his defence on oath.

He denied any involvement in the offence of armed Robbery and Gag Rape.

He testified in the trial court that on 12.9.2008 at night hours he did not go to the house of PW.1 as he was at Iringa town. He further testified that he went to Iringa since 10.9.2008

to repair his father's house. He said that he returned back on 13.9.2008 at about 16:00 hours.

Double Blastus Kigodi (DW.2) told the trial court that he was arrested on 13.9.2008 on Saturday at his home at Itona. He further told the trial court that the witnesses did not identify him as the charges against him are not true.

The appellants filed a Petition of appeal containing three grounds of appeal, namely:-

1. Convictions were not proper being based on visual identification on the alleged incident which took place in horrifying conditions.
2. There were very weak, or at all, evidence to prove the alleged offence of rape.
3. Defence case was not accorded due consideration.

The appellants are represented by Mr. Mushokorwa, learned counsel while the respondent, Republic is represented by Mr. Mgavilenzi, learned state Attorney.

The hearing of the appeal proceeded by way of Written Submissions.

Mr. Mushokorwa submitted that the trial Magistrate properly

addressed herself that this case rested on visual identification and rightly cited the leading authority on this issue in the case of **Waziri Amani V. Republic** (1980) T.L.R. 250. He further submitted that the trial Magistrate did not correctly apply the principles laid therein to the facts of this case. He argued that there is room for mistaken identity by PW.1 and PW.2. He further argued that had the trial Magistrate more closely examined all the factors in the case she would have entertained some doubts about the identification of the appellants by PW.1 and PW.2. He contended that the trial Magistrate misconstrued the provisions of Section 194 (b) of the Criminal Procedure Act about the defence of alibi as the law says that where notice is not given the court may attach no weight to that defence. He further contended that there is discretion here for the court to treat each case on its particular circumstances. He pointed out that while he agrees with the trial Magistrate on her approach on the law to gang rape he differs with her to convict the appellants because of the reasons given about the deficiency of their identification. He further pointed out that while the trial Magistrate cited the correct authority in respect of identification parade however the laid down principles were not closely observed by PW.4 as he did not take care that the suspect on the parade was as near as possible of similar outlook with the other participants in the parade in terms of age mate, attire and body size. He was of the view that it was possible the suspect was seen by PW.2 before she came to the parade.

Mr. Mgavilenzi does not support the conviction and

sentence. He submitted that as to the description of the appellants PW.1 said that Steven Dugange (1<sup>st</sup> appellant) wore a Black jacket and had a cap on his head during the incident while PW.2 stated at page 17 of the proceedings that they did not know if he was Steven they thought it was the sick person and that he wore the T-Shirt and trouser. He further submitted that regarding visual identification the conditions laid down in **Waziri Aman V. Republic** (1980) T.L.R. 250 were not met. He argued that due to the horrifying conditions of identification under which it is difficult to rule out the possibility of mistaken identity, the contradictions noted in the evidence on Gang rape and the weakness of the evidence which the trial Magistrate used to convict the appellants on Gang rape there was no cogent or sufficient evidence adduced to prove the offence against any of the appellants. He further argued that as PW.2 stated at the identification parade the 2<sup>nd</sup> appellant wore different clothes from others who wore normal clothes and so he was having different outlook to enable and convince the identifying witness to easily identify him. He contended that it is evident that the identifying witness was familiar with the 2<sup>nd</sup> appellant before the incident as she used to see him at the village as recorded at page 5 of the typed judgement. He further contended that the manner of identification contravened the principles of identification parade. He referred this court to the cases of **H.J. Kanyenyera and others V. Republic** (1992) T.L.R. 106 and **K. Mpange V. Republic** (1983) T.L.R. 158.

As regards the defence of alibi, he submitted that the trial

Magistrate did not err as the defence gave no notice to rely on it hence under Section 194 (6) of the Criminal Procedure Act, Cap. 20 R.E. 2002 she had discretion to accord or not to accord weight to that alibi.

The crucial issue in this appeal is whether there was sufficient identification evidence against the appellants at the scene of crime.

In the case of **Waziri Amani V. Republic** (1980) T.L.R. 250 referred to this court by the learned counsel and which was relied upon by the learned trial Magistrate in convicting the appellants the Court of Appeal of Tanzania held that:-

*"no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight".*

Again, in the case of **Saidi Chaly Scania V. Republic** – C.A.T. Criminal Appeal No. 69 of 2005 – Mwanza registry (unreported), the Court of Appeal of Tanzania held that:-

*"where a witness is testifying about identifying another person in unfavourable circumstances, like during the night he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so he will need no mention all the aids*

*to unmistakable identification like proximity to the person being identified, this were of tight and it's intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger".*

In the instant case, the commission of the armed robbery and Gang rape took place in the midnight. Formerly PW.1 told the trial court that he identified the 1<sup>st</sup> appellant at the door at his (PW.1's) house with the aid of torch light whereas in cross-examination he gave testimony that he identified him with the aid of the light from Nokia phone torch. It is also in the evidence of PW.1 that the 1<sup>st</sup> appellant wore a Black colour jacket and a cap at the time he identified him. According to PW.1's evidence, when PW.1 asked him whether he knew him he (PW.1) told him (1<sup>st</sup> appellant) that he did not know him.

The evidence of PW.2 shows that on the material date the 1<sup>st</sup> appellant wore a T-Shirt and trouser. No doubt, the identification evidence of PW.1 contradicts the evidence of PW.2 on the identification of the 1<sup>st</sup> appellant.

As regards the commission of rape against PW.2, on second count PW.1 gave testimony in the trial court that the robbers brought his (PW.1's) wife (PW.2) to his feet at the sitting room and the 1<sup>st</sup> appellant had sexual intercourse with her (PW.2) but later on he (PW.1) explained that he did not see when the robbers had sexual intercourse with PW.2 because he lay on his

stomach as the robbers tied him at the coaches at the sitting room. In cross-examination by Mr. Mushokorwa, he stated that he lay on his stomach for the whole time until the robbers completed the commission of the offences.

According to the evidence of PW.1 there was lantern light in the sitting room whereas PW.2 testified that she was raped by three people but she identified the 1<sup>st</sup> appellant because there was torch light. The evidence of PW.2 further shows that she identified the 2<sup>nd</sup> appellant during the incidents at the scene of crime because she saw him at the village and she identified him at the identification parade at the Police Station because she remembered his facial structure. It was in her evidence, in cross-examination by Mr. Mushokorwa, that the 2<sup>nd</sup> appellant was a stranger before the incident. It was also in her evidence, during cross-examination, that when she gave her statements at the Police Station she did not mention the 2<sup>nd</sup> appellant.

The inconsistencies and contradictions in the evidence of PW.1 and PW.2 are not minor. In my view, the inconsistencies and contradictions in the evidence of PW.1 and PW.2 create doubts on the prosecution case. From the evidence adduced in the trial court, I am also of the view that the identification evidence of PW.1 and PW.2 on the appellants was very suspect and not clear. I, therefore, agree with Mr. Mgavilenzi's submission that regarding visual identification the conditions laid down in the case of **Waziri Aman V. Republic** (1980) T.L.R.

250 were not met.

For the reasons I have given, I am satisfied that the guilt of the appellants on both counts was not proved beyond reasonable doubt and so they were not properly convicted.

Having found that the guilt of the appellants on both counts was not proved beyond reasonable doubt I find that it is not necessary to discuss the remaining issues.

In the final result, I allow the appeal, quash the conviction on both counts and set aside the sentences.

I order that the appellants be released from prison immediately unless they are held there on other lawful cause.

  
S.S.S. KIHIO  
JUDGE  
13.6.2012

Judgment delivered in the presence of Mr. Luena, Principal State Attorney and the appellants.

  
S.S.S. KIHIO  
JUDGE  
13.6.2012