**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[ARUSHA DISTRICT REGISTRY]**
**AT ARUSHA.**

**CRIMINAL APPEAL NO. 32 OF 2019**
*(Originating from the District Court of Babati at Babati, Criminal Case No.79 of 2016 D.C. Kamuzora SRM)*

**MFAUME DAUD MPOTO ..... 1st APPELLANT**
**ANTHONY BANGA SAID ..... 2nd APPELLANT**
**GODFREY AUGUSTINO @ DAMIANO ..... 3rd APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*2nd July, & 14th August, 2020*

**Masara, J.**

In the District Court of Babati (the trial Court), the Appellants herein, **Mfaume Daudi Mpoto**, **Anthony Banga Said** and **Godfrey Augustino @Damiano** stood charged of two counts; namely, Armed Robbery, contrary to Section 287A of the Penal Code, Cap 16 [R.E 2002] as amended by section 10A of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2011, and Gang Rape, Contrary to Section 130(1) and 131A(1)(2) of the Penal Code, Cap 16 [R.E 2002]. In the first count, the Appellants were charged along two other persons; namely, **Adam Shaban** and **Adam Orondi.** The Appellants were found guilty and convicted of the two counts. They were sentenced to serve a prison term of thirty years imprisonment for each count, the sentence to run concurrently. The two other persons were acquitted. The factual background leading to the

Appellants' conviction and sentence and consequently this appeal can be summarized as follows:

It was the Prosecution case that on 6th June, 2016 between 1:00 to 2:00hrs Ibrahim Rajabu (PW1) and his wife Grace Rajabu (PW2) were asleep in their house at Magugu area within Babati District. Suddenly their door was broken and three people entered in. The bandits had a gun and machetes (mapanga). The bandits demanded 10 Million shillings from PW1. He informed them that he did not have such money. The bandits led PW1 and PW2 outside the house, heading to a trench with the aim of threatening them. Outside the house, Ibrahim and Grace realized that there were other two bandits outside the house holding machete. Later, Rajabu informed the bandits that he had Tshs 240, 000/= in the house. They went back to the house. The bandits searched the room. One of the bandits cut ropes tied to the mosquito net and tied Rajabu's hands. PW2's hands were tied up by using a bed sheet. They forced PW2 to open her legs, as she declined, one hit her using the flat side of the machete. To her surprise, the first Appellant opened up her legs and started raping her. The second and third Appellants also raped PW2 in the presence of PW1. After raping PW2, the bandits also stole some of the items from the house including Tshs 240,000/=, PW1's short with yellow stripes (which was admitted in evidence as exhibit P1), yellow t-shirt, one red small radio, a bag with PW1's title deeds and sofa fabrics. The bandits left after ordering the two not to raise any alarm. They locked the door from outside.

PW1 and PW2 did not raise any alarm and stayed inside the house until about at 6:00hrs whereby PW1 called their granddaughter, who sleeps in another room, to open the door for them. PW1 went to one Amos Sadan, the hamlet chairman (PW4) and reported the incident. PW4 went to the scene of crime where he found PW2 inside the house. She was in severe pain to the extent of being unable to walk. PW4 called a motorcyclist who took PW2 to the Police Station for a PF3. She then was taken to Magugu Health Centre. She was admitted for two days. The medical report concluded that she had been raped. In their evidence, PW1 and PW2 admitted to have identified the Appellants at the time of the incident since there was solar bulb lighting in the room. On the same day in the afternoon, PW3, G.334 DC Tibe, who investigated the case, visited the crime scene and found clothes scattered all over the floor.

PW3 further stated that on 7th June, 2016 the first Appellant was arrested for some other crime and was put in the police lockup. While in the lockup, he disclosed to one of inmates that he was not involved in the incident he was arrested for but that he participated in robbing the pastor (PW1) and raping PW2. This information was relayed to PW3. PW3 interrogated the first Appellant on the same day. The first Appellant admitted involvement in the robbery. He also mentioned the other persons he was with. These included the other Appellants. PW3 recorded the first Appellant's cautioned statement and the same was tendered and admitted as exhibit P2.

An identification parade was prepared by PW6, A/Inspector William, the Officer In charge of Criminal Investigation at Magugu Police Station. The identification parade took place at Babati Police Station on 13th June, 2016 at 14:15 hrs. The three Appellants were identified by both PW1 and PW2. PW5, an independent witness, admitted to have lined up along with other people including the Appellants on 13th June, 2016 when the identification parade was conducted. He testified that the first Appellant was identified at the parade. The identification parade form was tendered and admitted as exhibit P3. At Magugu Health Centre, PW2 was examined by Yohana Naasi (PW7), a medical doctor. Having examined her, he realized that PW2 was raped as her cervix and vagina had bruises and male sperms which were still active detected in her vagina. PW7 filled in the PF3 form which was tendered and admitted in evidence as exhibit P4.

In their defence, all the Appellants denied to have committed the offences charged against them. The first Appellant (DW1) stated that he was arrested on 7th June, 2016 at 02:00hrs at his house and was sent to Magugu Police station accused of armed robbery that took place at Ngarenaro. He denied involvement in the incident. He was brutally tortured. On 12th June, 2016 at 9:00hrs he was told that he was involved in the incident that took place at Mbugani area. He denied, and he was again tortured. He agreed to sign the paper which was already recorded without knowing the contents therein. On 13th June, 2016 he participated in the identification parade and he was touched by the PW1 and PW2.

The second Appellant testified that he was as well arrested on 7th June, 2016 at 23:00 hrs while sleeping at his home. He was told that he was charged with armed robbery using a gun in an incident that occurred in Ngarenaro Magugu. On 9th June, 2016 he was sent to Babati Police Station waiting for the complainant to identify him. On 13th June, 2016 he participated in the identification parade and he was identified by one. He faulted the investigator for failure to tender the sketch map of the scene to prove that the incident occurred.

The third Appellant testified that he was arrested on 5th June, 2016 at Magugu while he was at the Grilling Machine. He was asked if he knew anything regarding the incident that occurred in Ngarenaro but he knew nothing. He was taken to Babati police Station, where he stayed at the police lockup until 13th June, 2016 when he was identified in the identification parade by one man.

After considering the Prosecution evidence and the defence, the trial court found that the prosecution sufficiently proved all the two counts against the three Appellants. It convicted and sentenced them to serve thirty years imprisonment for each count. The trial court also directed that the sentences run concurrently. The trial magistrate, in addition, ordered each Appellant to compensate PW2 Tshs 2,000,000/= for the injuries sustained. The Appellants were dissatisfied and have preferred this Appeal on 9 grounds as hereunder:

a) *That, the trial court erred in law and fact in holding that the Appellants were properly identified both at the scene of crime and during the identification parade;*
b) *That, the purported identification parade was not conducted in accordance with the Rules that are laid down under Police General Order (PGO) 232;*
c) *That, the trial court erred in law and fact by acting on defective charge sheet;*
d) *That, the trial court erred in law and in fact for basing conviction on of 2nd and 3d Appellants on repudiated cautioned statement of the 3d Appellant;*
e) *That, the trial court erred in both law and fact for admitting the cautioned statement which was take contrary to provisions of law;*
f) *That, the trial court erred in law and fact by convicting and sentencing the Appellants herein basing on contradictory evidence of the prosecution side;*
g) *That, the prosecution failed to account on the chain of custody of exhibit P1 which was tendered by PW1;*
h) *That, the trial court erred in law and fact for failure to evaluate the evidence by defence which raised reasonable doubts and thus arrived at unfair decision towards the Appellants; and*
i) *That, the trial court erred in law and fact in its judgment when it held that the prosecution had proved its case beyond reasonable doubts.*

At the hearing of this appeal, the Appellants appeared in person, unrepresented, while the Respondent was represented by Ms. Blandina Msawa, learned State Attorney. Submitting on the substance of the Appeal, Godfrey Augustino, the third Appellant, who presented on behalf of all the Appellants, argued that identification of the Appellants was not water tight due to the fact that PW1, the victim of the robbery, at page 20 of the proceedings stated that he identified the Appellants with the aid of solar light in the room, did not state the intensity of the light and the distance where the solar light was. He also failed to explain the clothes that the

bandits put on the material date. The third Appellant added that PW1 failed to state the duration of time the incident took place.

On the second ground of Appeal, the third Appellant stated that the identification parade was conducted contrary to law. He argued that the Appellants' rights were not explained before the parade was conducted. Furthermore, Pw6 failed to explain how the Appellants were identified in the parade by PW1 and PW2. He added that PW6 in his evidence did not state whether he gave the Appellants the right to speak and the right to have an independent witness or relative.

Substantiating on the third ground of appeal, the third Appellant submitted that the charge sheet was defective because in the second count it only mentioned section 130. He contended that the prosecution failed to mention subsection 2(a) which affected the Appellants as they could not prepare their defence well.

On the fourth and fifth grounds of appeal, the third Appellant stated that the trial magistrate erred in convicting him and the 2nd Appellants using a confessional statement allegedly made by the first Appellant. The first Appellant had objected its admission and an inquiry was not conducted. The trial magistrate also failed to observe that the statement was made outside the prescribed time of recording statement. He stated that the record shows that the first Appellant was arrested on 7th June, 2016 and

the statement was made on 12th June, 2016 as shown at page 56 of the proceedings.

On the sixth ground of appeal, the Appellants contended that the trial magistrate erred in convicting the Appellants using inconsistent evidence of the Prosecution witnesses. They gave the example of PW5 who was at the identification parade. This witness testified that he saw one male who identified the first Appellant, while PW1, PW2 and PW6 stated that three people were identified in the parade.

Submitting on the seventh ground of appeal, the Appellants argued that the prosecution failed to explain the chain of custody of exhibit P1 (Bukta). There is no handover document from the seizing officer to the investigator and from the exhibit keeper to the complainant. That the trial magistrate failed to comply with principles governing seizure and custody of exhibits. The Appellants then prayed that the exhibit to be expunged from the record.

Submitting on the eighth ground of appeal, the Appellants' submitted that exhibit P3 was wrongly admitted in evidence as it was not read out after it was admitted. Elaborating on the last ground of appeal, the Appellants stated that PW1 in his earlier report at the police station did not describe the facial appearances of the bandits and thus the identification of the Appellants was weak.

In response to the submissions made by the Appellants, Ms Msawa opted to counter the 1st and 2nd grounds of appeal together. She argued that PW1 and PW2 were at the scene at the time of the incident. They explained at pages 19-23 and 24-28 respectively how they were invaded. There was solar light which helped them in identifying the Appellants. The identification therefore was proper as explained by the trial magistrate at pages 16-18 of the typed judgment. She added that the event took enough time to enable PW1 and PW2 to properly identify the Appellants. They also identified them properly at the identification parade. She cited the case of ***Harold Sekache @ Salehe Kombo Vs. Republic***, Appeal No. 13 of 2007 (CAT-Dodoma) at pages 8-9 which referred the case of ***Waziri Amani Vs. Republic*** [1980] TLR 250. The learned State Attorney argued that what enabled the victims to identify the Appellants in this case was based on the source of light and time spent. On identification parade, PW6 at pages 44 to 49 supported the evidence of PW1 and PW2. She urged the court to dismiss the grounds as the Appellants were properly identified.

Responding to the third ground of appeal, Ms Msawa contended that section 130(2)(e) relates to 'statutory rape' which is not the case here as the victim in this case was 45 years old. There is therefore no error in the charge sheet as asserted.

Regarding the fourth and fifth grounds of appeal, the learned State Attorney averred that the confessional statement of the first Appellant was admitted as exhibit P2 (Page 33 of the proceedings). The objection raised

by the first Appellant was that he does not know how to read and write which was not sufficient ground to curtail receiving of the confessional statement and an inquiry was not required. She therefore maintained that the exhibit was properly admitted.

On the sixth ground, Ms Msawa reacted that the inconsistencies do not go to the root of the case as the identification parade took place and two witnesses identified the Appellants. On the seventh ground of appeal relating to exhibit P1, Ms Msawa conceded that the chain of custody was not properly explained. She added that there was no certificate of seizure relating to that exhibit. She conceded that the same be expunged as it doesn't affect the prosecution case which proved beyond reasonable doubts the guilty of the Appellants.

On the eighth ground of appeal, Ms Msawa submitted that exhibit P3 was not read but she quickly pointed out that the witness quoted the same and explained its contents. To her view, it means that the contents of the exhibit were made known to the Appellants. She added that the error, if any, is curable under section 388 as it did not prejudice the Appellants. They knew what it meant and they cross examined PW6 on its contents

On the last ground of appeal, Ms Msawa submitted that the trial magistrate properly evaluated the evidence and reached the conclusion that the Appellants were properly identified both at the crime scene and at the identification parade. She therefore was of the view that the guilty of the Appellants was proved beyond all reasonable doubts. She urged the Court

to dismiss the appeal and both the conviction and sentence of the trial court be upheld.

In a short rejoinder, the third Appellant, on behalf of all the Appellants, was in disagreement with the learned State Attorney especially on the sixth ground of appeal. He argued that PW5 was an independent witness and in his evidence only the one person was identified. He reiterated his earlier argument that the identification was not water tight. On the ninth ground, he argued that the case against them was weak as it hinged on weak identification evidence.

Having gone through the trial court record, and the submissions made by the Appellants and the Respondent, It is apparent that there are three main issues for determination in this appeal; namely, whether the Appellants were properly identified by PW1 and PW2, whether exhibits P1, P2 and P3 were properly admitted and whether the Prosecution proved the case against the Appellants beyond all reasonable doubts.

Starting with the first issue, the record of the trial court shows that the Appellants were identified by PW1 and PW2 at the crime scene and in the identification parade conducted on 13th June, 2016. The law is settled that for visual identification of an accused person to be acted upon, especially where such identification is made at night, all possibilities of mistaken identity has to be eliminated. In the case of ***Waziri Amani Vs. Republic***

(supra) the Court of Appeal cautioned on the danger of relying on such evidence. It held:

> *"The evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, 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."*

The Court further stated:

> *Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions such as the following posed and being resolved by him:* ***the time the witness had the accused under observation: the distance at which he observed him: the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene and further whether the witness knew or had seen the accused before or not.***"(emphasis added)

As rightly submitted by the Appellants, evidence based on identification of the accused persons has to be watertight. This is the position of the law that has been held as such. The Court of Appeal in ***Taiko Lengei Vs. Republic***, Criminal Appeal No.131 of 2014 (unreported) had this to say:

> *"The law on the value of visual identification evidence is now fairly settled. In the first place, it is evidence of the weakest kind and courts should not act on such evidence unless satisfied that all possibilities of mistaken identity are eliminated and the evidence is absolutely watertight."*

It was the Prosecution evidence through PW1 and PW2 that they identified the Appellants through a solar bulb light. The light intensity of the solar bulb was explained by PW1 while under cross examination by the first accused at page 22 of the typed proceedings when he said:

> *"the solar light is a bulb and it produces enough light to assist the identification".*

In their evidence, both PW1 and PW2 stated that they had not seen the Appellants before. In his evidence PW1 did not describe the attire that the bandits wore but he described the physic of the three persons he saw. Both witnesses testified on the length the robbery and the rape took place signifying that they had sufficient time to observe their assailants. Furthermore, the rape took place in the same bed that the two were sleeping on. I therefore have no reasons to doubt that PW1 and PW2 properly identified their assailants at the scene of the crime. PW1 stated this while under cross examination by the second Appellant when he said at page 22 of the typed proceedings:

> *"I identified you when you entered our house because there was solar light. I also saw you raping my wife thus I was able to memorise you."*

Corroborating that evidence, PW2 testified at page 26 of the typed proceedings as hereunder:

> *"I was able to remember and memorise the accused because when they raped me I saw them and there was solar light in my house. I was very close to them on the date of incident thus I could see them clearly. They were not covering their faces."*

Regarding the identification parade, the Appellants' complaint is that the identification parade was in contravention of the law as they were not given their rights and that there were no independent witnesses. They further argue that PW1 and PW2 did not describe the Appellants to the police or any other witness before the identification parade. The Appellants also challenge the admissibility and reliance of the identification parade form (exhibit P3) as it was not read out in court after it was admitted.

The law is settled that for the evidence of identifying witness to be credible, such witness must have given the description of the suspect before he made identification at the identification parade. The Court of Appeal in ***Muhidin Mohamed Lila @ Emolo & 3 Others Vs. Republic,*** Criminal Appeal No. 443 of 2015 (unreported) stated that;

> *"But even if the irregularity would have been minor, in our considered view, the procedure which was adopted at the identification parade raises doubt on the identification evidence. From the evidence of PW9, after the identification has been arranged, PW1 and PW3 were in turn, called to identify the suspects. There is nothing in the prosecution evidence showing that these witnesses had, prior to the identification parade, given to the police or any other person, the description of the persons who were identified. The only evidence which is available on record is that of PW7 who stated that, PW1 and PW3 told him that they would be able to identify the bandits if they were to be apprehended."*

The record is not clear whether or not the complainants had described their assailants' physics before the identification parade was conducted. However, the evidence of PW4, the hamlet chairman, hints on the fact that such description was with the police through witness statements made by

PW1 and PW2. In his testimony, PW4, while under cross examination at page 38 of the typed proceedings, stated as follows:

> *"The complainant said that he can identify those who entered the house. I know you as a resident of Magugu. He identified the faces of those who invaded him."*

This witness was the first to receive the news of the robbery. At the same page he also testifies that the pastor (PW1) and himself recorded their statements on the same day that the incident took place. The Appellants' assertion that the parade was conducted before the identifying witnesses made a description is not backed by any evidence. It is expected that they were in possession of the complainant's statement before the case commenced. They did not tender that statement and neither did they cross examine the witnesses about such flaw, if any. This allegation, in my view, has been raised as an afterthought.

On the issue of how the identification parade was conducted, I find the issues raised against it unsubstantiated. The evidence of PW6 vividly prove that the parades were conducted as per the law. The Appellants were even allowed to change positions. There was also evidence of PW5 who participated in the parade as an independent witness. Notably, PW5's evidence appears to have been that only one person was identified at the parade. This evidence is contradicted by the evidence of PW1, PW2, PW6 and the Appellants. None of the Appellants who participated in the first parade disputed that he was identified at the parade by both PW1 and PW2. PW5 might not have been keen in the parade or he just decided to lie. When PW6 sought to tender the identification parade form, the main

challenges raised by the first and third Appellants were that they had no shoes on which made it easy for them to be identified. The third Appellant also claimed that none of the participants in the parade was his relative and the ages of the participants was indicated in the form. The two later admitted that they were given shoes, albeit that the shoes were not theirs. PW6, while responding to questions put by the Appellants described what was done and why he ensured that the Appellants had shoes on; that is, to ensure uniformity. On the premises, I find that the Identification parade was properly conducted and that all the Appellants were identified as per the evidence on record.

The other anomaly pointed out in line with the identification parade is the parade Identification Parade Form which was admitted as exhibit P3. The Appellants contest the exhibit for the reason that it was not read after being admitted. I have carefully perused the record of the trial court, I agree with the Appellants' contention that having admitted exhibit P3, its contents were not read in court. This is seen at page 46 of the proceedings. It has always been held by courts that failure to read or explain the contents of a document after its admission implies that the same has not been admitted and the court is mandated to expunge it from the record. The Court of Appeal in ***Nkolozi Sawa and Another Vs. Republic***, Criminal Appeal No.574 of 2016 (unreported) stated as follows:

> *"In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it*

*denied the Appellants an opportunity of knowing and understanding the contents of the said exhibits."*

The question is whether in this case the Appellants were prejudiced for failure to read Exhibit P3. It is noted that although it is true that the exhibit was not read out, PW6 provided length explanation of the contents of the exhibits. This provided the opportunity to the Appellants to vigorously cross examine him on the contents of Exhibit P3. Whereas in a fit case failure to read the document would have resulted to expunging the same from the record, the omission did not prejudice the Appellants. It is also possible that the exhibit was read but the trial magistrate omitted to record the same. I am saying so because had the same not been read the Appellants question relating to the document would not have been that extensive. Further, the record show that other admitted documents were read out, including exhibits P2. The essence of reading an admitted document is to enable the Accused person to understand the nature of evidence against him. There is no doubt that the Appellants, through the description and explanations made by PW6 were able to understand the contents of exhibit P3.

Considering the discussion above, I am of the view that the Appellants were properly identified both at the scene and in the identification parade. Therefore, the first issue is answered in the affirmative.

I now turn to the second issue regarding the admission of exhibits P1, P2 and P3. As pointed out earlier, the Appellants have raised complaint

regarding the admission of exhibit P1 (Bukta) stating that the same was improperly admitted since chain of custody was not explained. The learned State Attorney conceded adding that there was no certificate of seizure showing when and from whom such exhibit was seized. She urged that the same can be expunged from the record. I agree with her and the Appellants. The evidence does not explain without doubts the handling of the exhibits up to the time that PW1 identified the same in Court. The position is backed by case law. The Court of Appeal in ***Daniel Matiku Vs. Republic***, Criminal Appeal No. 450 of 2016 (unreported) stated as follows:

> *"If this mandatory requirement had been complied with, of necessity, what was retrieved from the Appellant would have been listed and the Appellant and independent witnesses would have appended their signatures and each retained a copy of the seizure certificate so as to put in motion a fool proof of chain of custody."*

Failure of the Prosecution to tender the record of search, seizure certificate and chain of custody form makes the admission of exhibit P1 irregular. I, without hesitation, expunge exhibit P1 (PW's short) from the record for failure to adhere with the rules relating to seizure and chain of custody.

Regarding exhibit P2, which is the first Appellant's confessional statement, the record shows that he objected its admission on the ground that he was not given his legal rights. The first Appellant also averred that he did not know how to read and write. In the appeal, the Appellants also object its admission because it was recorded outside the prescribed time of recording statements. The trial Magistrate ruled that the objections raised were insufficient and admitted the cautioned statement.

Having objected its admission, the trial court was bound to conduct an inquiry because what the first Appellant objected was that he was not accorded his legal rights. In other words, he repudiated the statement as the procedure in recording it was violated. The court in a plethora of authorities has insisted on the importance of ensuing that the confessional statements are properly admitted to avoid the danger of convicting victims whose statement were illegally recorded. In ***Daniel Matiku Vs. Republic*** (supra) the Court of Appeal while quoting with authority its previous decision in ***Twaha Ally and 5 Others Vs. Republic***, Criminal Appeal No. 78 of 2004 (unreported) observed:

> *"... if that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence..."*

See also: ***Ali Salehe Msutu Vs. Republic*** [1980] TLR 1 and ***Shihobe Seni and Another Vs. Republic*** [1992] TLR 330.

Since exhibit P2 was improperly admitted, I also expunge it from the court record. The Appellants complain that this statement was relied upon in convicting them. The trial magistrate stated in her judgment that she accorded little weight to it as it was repudiated. That is why she discharge two other accused persons who were charged alongside the Appellant. It is therefore not true that it is the confessional statement alone that led to

their conviction. I have already dealt with exhibit P3 in the first issue. Thus, with the exception of exhibit P3 which was properly admitted, exhibits P1 and P2 are accordingly expunged from the record.

Regarding the third issue, the Appellants have urged this Court to acquit them as the Prosecution did not prove the case against them. Ms Msawa, on the contrary, submits that the case against the Appellants was not water tight. The Appellants cites their identification and the inconsistencies in evidence as their main grounds. I have already determined that the identification of the Appellants was watertight.

Regarding the alleged inconsistencies in the testimony of the witnesses, the Appellants points to the evidence of PW5. I dealt with the said evidence while determining the issue of identification. As pointed out, PW5's evidence cannot be said to contradict the evidence of other witnesses. His testimony should only be limited to the fact that he participated in the identification parade as an independent witness. PW1, PW2 and PW6 who participated at the parade stated that PW1 and PW2 identified all the three Appellants at the identification parade. It is not possible that PW5 who participated in both parades did not see PW2 or the two other Appellants being identified. He was either lying in Court or he did not understand the questions put to him during examination in chief. Whereas it is true that the evidence of PW5 varies from that of PW1, PW2 and PW6, the same cannot be held to be contradictory to the extent of minimising the value of the evidence regarding identification of the

Appellants. As already stated, the first and third Appellants did not dispute the Prosecution evidence that they were identified at the identification parade. I am guided by the Court of Appeal decision in the case of ***Mohamed Said Matula Vs. Republic***, [1995] TLR 3 CAT, where the Court stated thus:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."*

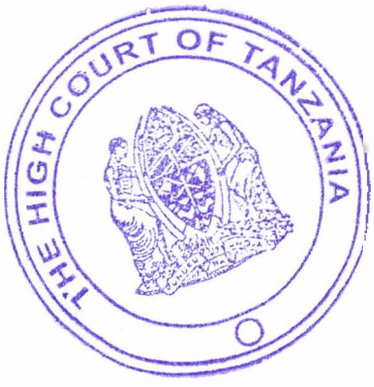
I do not consider the alleged inconsistencies grave. Like the trial court, I consider PW1 and PW2 to be witnesses of truth and that they properly identified the Appellants both at the scene and during the identification parade.

The allegation by the Appellants that evidence on record was not properly evaluated is baseless. The evidence was properly evaluated by the trial magistrate in the judgment as shown at page 17 and 18 of the typed judgment when the trial magistrate was evaluating the evidence of the Appellants regarding the identification parade. Therefore, the trial magistrate evaluated the defence evidence as she drew the conclusion that acquitted the second and fifth accused persons at the trial. Therefore, the contention by the Appellants that their defence was not considered is untrue.

Regarding the complaint raised by the Appellants that the charge sheet against them was defective for not citing subsection 2(e), as rightly responded by Ms Msawa, the same is misguided as Section 130 (2)(e) relates to statutory rape. Further, such omission, if any, would be curable under Section 388 of the Criminal Procedure Act, Cap. 20 as was held in ***Jamaly Ally @Salum Vs. The Republic***, Criminal Appeal No. 52 of 2017 CAT (unreported). That is so because the Accused persons cannot be said to have been prejudiced in their defence as the victim of the rape was properly described to them.

In the final analysis, it is the finding of this Court that the Prosecution proved the case against the Appellants beyond reasonable doubts as required by law. The Appeal before this Court is devoid of merits as expounded above. It stands dismissed in its entirety. The conviction of the Appellants by the trial court in the two counts and the sentence thereof are hereby upheld.

Order accordingly.




Y.B. Masara
**JUDGE**
August 14, 2020.