

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 29 OF 2020

(C/O Criminal Case No. 13 of 2020 Mpanda District Court)

SWALEHE S/O IDDY @ HUSSEIN 1st APPELLANT
MESS TINKA 2nd APPELLANT

VERSUS

THE DPP RESPONDENT


09 & 16/08/2021

JUDGMENT

Nkwabi, J.:

The petition of appeal filed in this court by the appellants comprises 13 grounds of appeal. The appellants were convicted by the district court of gang rape contrary to section 130 (1) and 131A (1) and (2) of the Penal Code Cap 16 R.E. 2002.

The offence allegedly happened on the 24th day of January 2020 at Mizengo Pinda Bus Terminal as the appellants jointly and together had sexual intercourse with PW1 a girl aged 15. She was on transit to Kasulu where she would join secondary school. She travelled from Songwe to Sumbawanga

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with her father where her father handed her over to the bus conductor (PW2) to look for her until she catches a bus to Kasulu. She reached at Mpanda at 17:00 hrs. and got a ticket to Kasulu. She went for food in town by the motor vehicle (bus) and came back to the bus terminal at 21:00 hrs. seated near the driver's seat.

Meanwhile, at the bus terminal, while PW1 in the bus, the appellants went there and introduced themselves as Passenger Security Guards and shouted to PW2 "*Wewe Konda unataka kumbaka huyu mwanafunzi?*" PW2 denied. Then, the 1st appellant attacked PW2 and pulled him away from the bus. The 2nd appellant, slapped and asked PW1 to join him to the passenger waiting place which she did. The 2nd appellant later took her to a certain office, where after a while the 1st appellant joined them. Then they demanded her to give them T.shs 50,000/= else she should to have sex with the 1st appellant. She tried to raise an alarm, but the appellants threatened her. They forced her to lay on the floor and undressed her forcefully. The 1st appellant undressed himself and inserted his penis into her vagina and had sex until he was gratified. Then, it was the turn of the 2nd appellant who had sexual intercourse with her as well. Then the 2nd appellant locked her in the room

until 5:00 am when he escorted her to the bus and few minutes later the bus departed.

When she reached in Kasulu, after taking bath, she narrated the incidence to his uncle PW3 (young brother of her father) and the matter was reported to the police, she was supplied with a PF3 and went for medical examination.

In his defence the 1st appellant denied having committed the offence and questioned the failure by PW1 to report the incidence immediately. He works at the bus stand as Ticketing Agent. The 2nd appellant too disputed the offence and said on the material day he was at Kakese farming. He too works at Mizengo Pinda Bus Terminal as a Ticketing Agent.

After analyzing and evaluating the evidence of both parties, the learned trial magistrate concluded that:

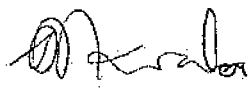
...., PW1 is a credible witness, and the honourable court is satisfied that she testified nothing but the truth. When considering her evidence and corroborating evidence adduced by PW2, PW3, and PW4 the prosecution evidence remains unshaken

(sic) ... The accused persons have failed to raise any reasonable doubt as to their guilty.

Having concluded as above, the learned trial magistrate convicted and sentenced the appellants to the mandatory sentence of life imprisonment.

Upset by the decision of the district court of Mpanda in Criminal Case No. 13 of 2020, the appellants lodged a petition of appeal to this court. The petition of appeal has 13 grounds of appeal which however I will base my decision only on three of them as hereunder:

- 1. That the offence of gang rape was not proved beyond the standard required in criminal case and left many doubt (sic) contrary to nature of criminal offences. (The 4th ground on the petition of appeal).*
- 2. That the trial magistrate made a serious misdirection of law by not considering that the Prosecution side failed completely to bring the police officer at Kasulu who recorded the evidence of the prosecution witness number one, hence the appellants were convicted without the evidence of the author who is police office (sic). (This is ground number 6 on the petition of appeal).*

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3. The trial magistrate erred in both laws and facts by not evaluating that the evidence of PW1 did not measure up to the requisite standard both in relation to credibility and reliability. (Ground number 13th on the petition of appeal).

The hearing of this appeal was handled by way of oral submissions. The appellant appeared in person while the Respondent was represented by Ms. Marietha Maguta, learned State Attorney. In his submission, the 1st appellant prayed that his grounds of appeal be adopted as his submissions and this court does justice to him. The 2nd Appellant argued the trial court did not do him justice. He prayed this court to do justice to him.

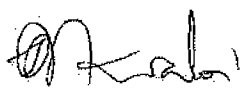
I commence deciding this appeal by deliberating the 2nd ground of appeal as per my sequence of the grounds of appeal as shown above, which is that, the trial magistrate made a serious misdirection of law by not considering that the prosecution side failed completely to bring the police officer at Kasulu who recorded the evidence of the prosecution witness number one, hence the appellants were convicted without the evidence of the author who is police office (sic).



On this 2nd ground of appeal, the 2nd appellant argued that the Police who recorded the statement of the victim did not come to testify.

Ms. Marietha for the respondent contended that offence of gang rape was proved against the appellants. The victim stayed with the appellants for a long time from 9:00 pm to 5:00 am. She referred this court to **Waziri Amani's Case** and **Goodluck Kiando V.R. [2006] TLR 367**. She added that PW1 is a credible and reliable witness.

With respect to the learned State Attorney for the respondent, I am not enticed by her submission over this ground of appeal. The investigator's failure to appear to give evidence raises some serious doubts to the effect that the police also looked down at the case with dismay, in that the allegations were found by the police to be unfounded, that is why they did not bother to appear to give evidence in support of the charge sheet. I accord adverse inference for the investigator's failure to appear to testify. The authority for this approach in the circumstances of this case is **Aziz Abdalla v. Republic [1991] TLR 71 (CAT)**:


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"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution.

This is a serious charge/offence which attracts a life imprisonment sentence. The investigator ought to have appeared to clarify some doubts that I will show in the course of my discussion. This ground of appeal wins.

I now regress to discuss the 1st ground of appeal which Ms. Marietha gave some weight in her submissions, which is *that the offence of gang rape was not proved beyond the standard required in criminal case and left many doubt (sic) contrary to nature of criminal offences.* That was the stance of the appellants in their submissions.

Ms. Marietha insisted that that was not the case. She argued that PW1 was credible witness and her evidence is sufficient to base conviction citing **Seleman Makumba V.R. [2006] The 384.** *"The evidence of rape comes from the victim"*

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She argued, and I quote, *"My Lord, the prosecution proved gang rape. The witnesses were credible on the prosecution side. We pray the appeal be dismissed and conviction and sentence be upheld."*

I am aware that a single witness may prove a fact as per **Masudi Amlima vs. R. [1989] TLR 25** (HC) it was held that:

- (1) *"that was a single witness. The trial magistrate believed him. There is no law requiring that more than one person should be required to prove the fact that the appellant was seen coming out of the house."*

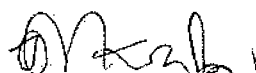
Despite the authorities in **Masudi's case** (supra) and **Makumba's case** (supra) which I fully subscribe to and with the greatest respect to the learned State Attorney for the respondent, I am not fascinated by her argument on this ground of appeal. There are doubts in the testimonies of the prosecution witnesses. For instance, PW2 did not report the assault against him that is allegedly happened. He neither made follow-up of the person who he was taking care of after been taken away when he came back to the bus nor reported to the police on her disappearance. He did not make follow-up even in the morning to know what happened to PW1. Why did PW2 fail to report the incidence to the police? Though attacked and came back and found PW1

missing, why did he fail to report to the police and make follow-up of her during the night. He used to know the appellants. Is there any case against the appellants in respect of assault against PW2? Why did PW2 fail to ask for assistance to the other persons who were in the bus? PW2 cannot be a credible witness in the circumstances.

It appears that there is something the prosecution witnesses are hiding which makes especially PW1 and PW2 to be unreliable witnesses. In criminal case, it is better to acquit a hundred criminals than convicting and sentencing one innocent person.

Looking at the testimony of PW1, there are unclear matters that make her to be unreliable witness. The first unclear matter is why did the victim fail to suspect the strangers who one of them assaulted the person who was taking care of her, and trusted them so quickly and move with one of them from the bus to the passengers' waiting place and from there to a private room? How could she even trust the person who slapped her? This is what she said when cross-examined by the 2nd appellant:

"I saw you on 24/01/2020 during night hours. It was around 21:00 hrs. You entered Ruchora Bus. You came with the 1st

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accused. You introduced yourself as security officers. The 1st accused person took the Conductor. You took me. I saw you clearly. You slapped me. You instructed me to sit in the passengers area, but later you came and told me "Twende ofisini" ... You assisted me to enter into the Bus to Kasulu."

She did not explain why she failed to report immediately at the bus stand and in the bus, in the morning. The 2nd appellant was working with Adventure bus service who eventually allegedly sent PW1 in the morning to travel with. In the morning after the offence was committed but PW1 did not complain to anyone. Was it shame/she would be ashamed of the incidence, or that she was afraid the bus would leave her that she failed even to raise an alarm? She waited not only until she reached Kasulu but also after she had taken bath.

Why she did not report the incidence to the police in Kasulu immediately on arrival? The PF3 was issued on 26/01/2020 there is the evidence of PW4 to the effect that he saw bruises on the labia manora and perforation of hymen. That is expert evidence and it is not binding to the court in proper circumstances. See for instance **DPP Vs Shida Manyama @ Seleman**

Mabuba Criminal Appeal No 285 of 2012 which quoted with approval **Davie v. Edinburgh Magistrates**, 1953 SC. 34 at page 40, the duty of such experts is:

"to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusion so as to enable the court to form its own independent judgment by the application of these criteria to the facts proven in evidence."

Further, in her testimony, she does not show if his father made follow-up of her even there is no evidence if he instructed her daughter of the place where she would take shelter at Mpanda. He seems to be not responsible father and this water downs the prosecution case. A prudent father / or mother would have made follow-up of where his/her daughter slept and would have advised her where to sleep. Her father did not bother to come to testify. True, the prosecution is not bound to bring a certain number of witnesses see **R v. Gokaldas Kanji and another (1949) EACA 116** but where an important witness is not brought, adverse inference ought to be accorded and an advantage to the accused person or appellant as per **Aziz Abdalla's case** (supra).

These gaps in the testimony of PW1 raise a reasonable doubt. For the above reasons the 2nd ground of appeal is justified.

Lastly, I consider the 3rd ground of appeal which is *that the trial magistrate erred in both laws and facts by not evaluating that the evidence of PW1 did not measure up to the requisite standard both in relation to credibility and reliability.* (Ground number 13th on the petition of appeal).

For the trial magistrate to hold that PW1 was a reliable witness in view of the above testimony extract that I quoted when I was dealing with the 1st ground of appeal, I think the learned trial magistrate misdirected and non-directed himself on crucial evidence and in law as when he stated, *"The accused persons have failed to raise any reasonable doubt as to their guilty.* That is held to be illegal. In **Elias Kigadye and Others v R. [1981] TLR 355** (C.A) at p. 358 the Court of Appeal of Tanzania held:

"The judge in his judgement stated, in reference to the death of Twiga:

Admittedly, the defence had no obligation to prove positively that Twiga died of natural causes, they had

only to raise the possibility of it, in other words, to show that death by natural causes had not been excluded.

Mr. Lakha criticised this proposition. We agree it is a misdirection; it is for the prosecution to exclude the possibility of death by natural causes. The defence has no onus placed on it.

The trial court's decision therefore cannot stand untouched though the trial magistrate cited **Shabani Daudi v R. Criminal Appeal No. 28 of 2000** (unreported):

"The credibility of witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person".

Convicting the appellants in the circumstances of this case amounts to convicting on speculation which is prohibited in criminal law. See for instance **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006 (C.A.T.)**

"We think that a lot of what is stated as above by the learned trial Principal Resident Magistrate with Extended Jurisdiction was speculation. There was no basis for thinking as she did, that the injury, which was sustained by the appellant could as well have occurred after he recorded his statement or that it was a move taken for precautionary purposes. Conviction in a criminal matter must be based on good ground and speculation has no room. The burden is on the prosecution to prove beyond reasonable doubt, that the accused committed the offence with which he is charged.

The aspect of identification especially in respect of the lights at Mizengo Pinda bus terminal at Mpanda is unclear. The instance is allegedly happened during the night, claiming there was light with great intensity, I think with respect, is not sufficient. Description ought to be offered by the prosecution witnesses (PW1 and PW2).

The judgment of the trial court is therefore tainted with misdirection on crucial pieces of evidence of PW1 and PW2 and non-direction on very crucial

legal aspects such as expert evidence is not binding to the court and there is no onus put to the defence. Had the trial magistrate not fallen in these misdirection and non-direction, I think that the judgment and the result in this case in the trial court would have been different. The decision of the trial court cannot therefore be left without being faulted.

In the end, I endorse the appeal preferred to this court by the appellants. Conviction is therefore quashed and sentence of the appellants set aside. The appellants are to be set free from prison unless held there for other lawful cause(s).

It is so ordered.

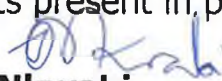
DATED and signed at SUMBAWANGA this 16th day of August 2021.



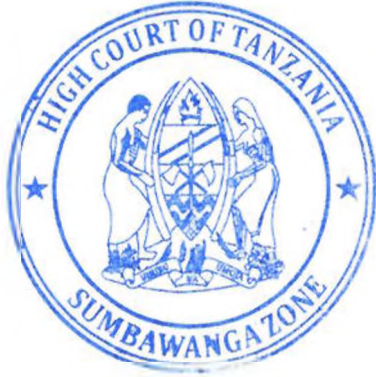

J. F. Nkwabi
Judge

Court: Judgment is delivered in open court this 16th day of August, 2021 in the presence of Mr. Fadhili Mwandoloma, learned Senior State Attorney for the respondent and the appellants present in person.




J. F. Nkwabi
Judge

Court: Right of appeal is explained.



J. F. Nkwabi
J. F. Nkwabi

Judge

16/08/2011