THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
CRIMINAL APPEAL NO. 37 OF 2021
(Originating from the Court of Resident Magistrate of Mbeya at Mbeya , Criminal Case No. 177 of 2016)

SALUM ATHUMAN MALENDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

13th July & 10th August, 2021

KARAYEMAHA, J

Salum Athuman Malenda (the appellant) is currently behind the bars serving a sentence of 30 years and life imprisonment following his conviction on the charges of Armed Robbery contrary to section 187 A (1st count) and of Rape contrary to section 130 (1), (2) (a) and 131 A (1) and (2) (2nd count) of the Penal Code Cap 16 of the Revised Edition of 2002 (hereinafter the PC) respectively by the Resident Magistrate of Mbeya.

It was alleged in the 1st count that on 14/10/2016 at Iyunga area within the City and Region of Mbeya, the appellant stole Tshs. 10,000/= (ten thousand), one TV set make Samsung worth Tshs. 1,400,000/=, one techno phone worth Tshs. 300,000/=, one DVD Deck worth Tshs.

150,000/=, one gold chain worth Tshs. 200,000/= making a total of Tshs. 2,600,000/= (two million sixty thousand) from one Victoria Nswima and immediately before and after such stealing he used dangerous and offensive instrument to wit, a machete to threaten one Victoria Nswima in order to obtain and retain the said properties.

It was as well alleged in the 2nd count that on 14/10/2016 at Iyunga area within the City and Region of Mbeya, the appellant and another person who was not arrested jointly and together did have carnal knowledge of one Getruda d/o Jonas without her consent.

The appellant denied the charge leveled against him. To support the allegations, the prosecution marshaled five (5) witnesses, namely, Victoris Watson (PW1), Getruda Jonas (PW2), Inspector Ndimbwelu Yesaya Mwalukasa (PW3) Wirina Modest (PW4) and E. 382 D/CPL Simon (PW5). More importantly, PW3 and PW4 tendered at the trial a PF3 and the identification parade register which were accordingly admitted in evidence as exhibits P "A" and P "B" respectively.

After a full hearing, the trial court found the appellant guilty convicted and sentenced him as hinted earlier on. Dissatisfied, he has appealed to this court raising six (6) grounds of appeal listed as follows:

1. That, My lord the trial Magistrate grossly erred in point and fact by convicting and sentencing the appellant for all counts without take

into consideration that the prosecution side failed completely to prove their charge against the appellant beyond all reasonable doubt as the mandatory requirement of the eyes of law.

2. That, the trial lower court erred in law and facts in convicting the appellant basing on contradictory evidence of PW1 who said the stolen item TV was with SN 0260 KCG O2052M (exhibit PC) while the PW5 (investigator testified before the court that the TV was shown on different two serial number of 02603KCGC0252M and another mentioned is 02603KCGC052 we both found those on court proceedings the question is which kind of TV was admitted by the court (exhibit PC).
3. That, My lord the trial Magistrate grossly erred in law point and in fact when convicted the appellant relying on the evidence of PW1 and PW2 without take into consideration that they had the same interest against the appellant therefore it was easy for them to plant false against the appellant for their own interest. Please Hon. Judge see as ruled out in the case of: **Abrahaman Wilson Saigukan and 2 others v Republic of 1981 T.L.R**, Mr. Justice Kisanga, J it was held that *"the evidence of a person with an interest of his own must be approached with care and should not be acted upon".*

4. That, My lord the trial lower court erred both in points of law and facts by convict the appellant basing on the dock identification of PW1 (Victoria Watson Mswima) as per court proceedings page 8 paragraph 4 pleases Hon. Judge see as ruled out in the case of **Mussa Elias & 2 others v Republic 1993**, Court of Appeal of Tanzania at Mwanza Criminal Appeal No. 172, it was held *that "it is well established rule that dock identification of an accused person by a witness who is a stranger to have accused has value only where there has been an identification parade at which the witness successful identify the accused before the witness was called to evidence at the trial".*

5. That, the trial lower court erred in law and fact by its failures to consider the defence evidence and instead it relied on prosecution evidence alone, hence arriving at unjust decision by entering judgment against the appellant please Hon. Judge see as ruled out in the case of **Hussein Idd & Another (1986) T.L.R 166** (Court of Appeal of Tanzania) it was held that *"it was serious misdirected on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that I was true and credible without considering the defence evidence the Judge should have* ***deal*** *with the prosecution and defence evidence and after analyzing*

such evidence the Judge should then reach a conclusion conviction quashed" also see **James Bulolo and Another v Republic (1981) T.L.R 283 (HC)** it was held that *"it is the duty of the court first to collect analyze and asses the evidence and see how far if at all, it touches up on every accused as an individual. The court is not lump the accused person together and wrap then up generally in blanket of the prosecution evidence".* Appeal allowed.

6. That, My lord the trial Magistrate court erred in law point and fact when convicted the appellant by only basing on PW1 and PW2 while they have neighbours of where the incidence occurred but no one came to testify accordingly please Hon. Judge see as ruled out in the case of **Ngaso Masolwa v Republic (1994) T.L.R 106**, it hold that *"circumstances prevailing in the room at the time of attacked were unfavourable for proper identification attackers and the witness never reported having identified the attackers to the neither leader nor to the people who responded at the area of crime"* appeal allowed.

The facts, which were eventually accepted by the trial court, resulting into the conviction are briefly that on 14th October, 2016 around 20:00hrs Getruda Jonas (PW2) was fetching water outside their house. PW1, Victoria Watson heard dogs barking nonstop. Feeling danger, she

hurriedly told PW2 to get inside the house and lock the door. In the process of closing the door, PW2 was held and strangled by her neck. Shocked, she screamed making PW1 leave the big sitting room to the small sitting room located near the kitchen. On getting there, she heard a voice ordering her to freeze and keep silent. Shortly after, the bandits got inside armed with machetes and knives. According to PW1, she was ordered to lie down. Before that she had observed them by help of light shone from the fluorescent tubes for five minutes. At the same time bandits were demanding money. PW1 lamented to have no money but due to threats she managed to dish out Tshs. 10,000/=.

While these were going on, the appellant ordered PW1 to undress. PW1 told him that she was in menstrual cycle. According to her, the appellant placed his hand on her private part and realizing that she was wet, he left her un - raped. PW1 testified further that when they found her daughter aged five years, they took a 40" Samsung TV worth Tshs. 1,400,000/= black in colour, a deck make LG worth Tshs. 150,000/=, a phone Make Tecno Boom worth Tshs. 300,000/= and a golden chain worth Tshs. 200,000/= and cash Thshs. 10,000/=. It was PW1's further testimony that after shipping those items, they returned to demand the remote control. It appears that on return bandits ordered her to stand up

and give them a remote control. After that the bandits left by jumping the wall.

According to the prosecution evidence, PW2 was taken into PW1's room to locate where money was kept. After unfruitful search, the appellant told her to lie down. Knowing that she was about to be raped, she told him that she was in her menstrual cycle. She, however, succumbed when the appellant threatened to stub her with a knife. It was PW2's testimony that although she attempted to resist, the appellant raped her and after him another bandit raped her. To demonstrate that she identified the appellant, PW2 testified that the appellant dressed a blue sweater and faded jeans and was helped by lights from florescent tube.

It was further the prosecution case that after PW1 had notice that bandits had gone, she raised an alarm. Their neighbours responded and gathered in PW1's premises. Police were informed and according to PW1 the police officers on patrol went to her house. They took PW1 and PW2 to the police station and given the PF3. According to PW1, PW2 was told to go to META hospital.

At META, PW2 was examined by PW4, the medical doctor. When PW4 examined PW2's vagina, she found out that the same was torn and was bleeding. As to why she was torn, PW4 testified that PW2 was

forcefully penetrated and because she was a virgin her hymen was perforated.

Following the operation headed by Ass. Insp. Mwombeji, to search and arrest people who were engaging in stealing and raping, the appellant was arrested. He was later identified by PW2 at the identification parade prepared and conducted by PW3.

In his defence, the respondent denied commission of the offences. It was his defence that he was arrested on 17/10/2016 and informed that he faced civil claims. This is because, according to him, he did not complete the job given to him at Vwawa. Since he did not steal or rape anyone, he stated that the case against him was fabricated.

When the appeal was called on for hearing, the appellant appeared in person while the respondent was represented by Hanarose Kasambala, learned State Attorney.

On taking the floor, the appellant prayed his grounds of appeal to be adopted and asked this court to allow the learned State Attorney to submit first. His prayers were endorsed.

Ms. Hanarose began by opposing the appeal. In respect of the **first ground** of appeal, the learned State Attorney submitted that the offences of armed robbery and gang rape were proved by the prosecution beyond reasonable doubt. She stated that PW1 and PW2 saw the appellant in a

company of his colleagues when they invaded them at about 20:00 hours armed with a panga. That panga was used to threaten them with a view of obtaining money. In the due course, she submitted the appellant and his colleagues managed to still a TV make Sumsung, a phone, deck and gold chain, PW1's properties.

The learned counsel submitted further that PW1 and PW2 clearly and properly identified the appellant by help of lights from florescent tube which was on in the house. She observed that that light enabled the victims to identify and describe the types of clothes the appellant wore, that is, a blue sweater and jeans.

The learned counsel submitted adding that PW1 and PW2 properly identified the appellant because they spent one hour together, they were very close, talked, attempted to rape PW1 and managed to rape PW2. To bolster her position she referred to the case of **Duda Ndugali v Republic**, Criminal Appeal No. 237 of 2004 Court of Appeal of Tanzania (Mbeya) (Unreported) at page 4, to underscore the principle that it is very easy to identify a person who is observed for a long time.

In respect of organizing and conducting the identification parade, Ms. Hanarose said that the same was important because it was the 1st time for PW1 and PW2 to see the appellant. Through it PW2 ably identified him.

Regarding the offence of rape, Ms. Hanarose submitted that there was enough evidence showing that PW2 was raped by the appellant and another person or that when the appellant was raping her there were other people with common intention at the scene of a crime. The learned state attorney relied on the evidence of PW4 the doctor to state that PW2 was not a virgin and had sustained bruises in her vagina certifying that she was penetrated by the blunt object. She submitted that during that act PW2 managed to identify the appellant and later identified him at the identification parade. Believing that the prosecution proved the case beyond reasonable doubt, she urged this court to reject the 1st ground of appeal.

Submitting on the second ground of appeal, Ms. Hanarose said that contradictions raised by the appellant do not go to the root of the offence. She said that PW1's and PW5's testimonies were referring on one TV make Samsung, which was found near the scene of a crime abandoned by the appellant and his colleagues. She prayed this court to dismiss this ground for lack of merits.

Regarding the 3rd ground, where the appellant asserted that PW1's and PW2's had the same interest and therefore their testimonies were not to be considered, Ms. Hanarose argued that there is no law prohibiting

relatives to testify in one case. What is to be considered is that the witnesses are credible. She again prayed this complaint to be dismissed.

Ms. Hanarose argued in respect of the 4th ground that it has no merits because the appellant and the victims were together for 1 hour and were very close. Under these circumstances it was very simple for PW1 to identify the appellant at the scene of the crime. She was, therefore, convinced that it was unnecessary for PW1 to identify him at the identification parade. To fortify her view, she cited the case of **Kichele Mrange v Republic, [1993] T. L. R 155 (HC)** where the court held that:

> *"there was enough evidence that the complainants were no taken by surprise when robbers invaded their house hence there was ample opportunities to identify them such that an identification parade could be dispensed with."*

Regarding the 5th ground which covers the complaint that the appellant's defence was not considered, Ms. Hanarose argued that the same was considered as reflected at page 5 and 6 of the judgment. She said that the court accorded no weight to it because it was an afterthought.

Submitting in respect of the 6th ground, Ms. Hanarose stated that it was unnecessary for the prosecution call every witness who witnessed the crime because had similar stories. Guided by Section 143 of the Evidence

Act [Cap 6 Revised Edition 2019], she remarked that no number of witnesses is needed to prove the facts. She wound up stating that witnesses who were called to testify were enough to prove the case beyond reasonable doubt.

She concluded by praying the appeal to be dismissed and the Resident Magistrate's court's decision to be upheld.

Rejoining, the appellant argued that the prosecution neither arrested him with any exhibit nor tendered any exhibit. He insisted that he was not arrested at the scene of the crime.

Regarding the aspect of identification, the appellant observed that describing the types of clothes was not enough factor of unmistaken identification.

On the 2nd ground, the appellant stated that the republic got the information of cereal numbers that is 02603 KCGC 02052M while the victim mentioned 0260 KCG02052M. To him this was a substantial contradiction and so the trial court improperly admitted the exhibit.

Submitting on the 6th ground, the appellant argued that the police could not know the incident before the victims. It was, therefore, his argument that neighbours or local leaders were to be called to testify. He concluded by praying this court to find his appeal meritorious, allow it and set him at liberty.

Having summarized the submissions I now turn to consider and determine the six grounds of appeal by the appellant.

With regard to the first ground on the reliance of the court on evidence which did not prove the case beyond reasonable doubt to convict the appellant, the appellant submitted that there was no tight evidence to prove that he was actually the one who committed the offences. He also faulted the trial court reliance on the visual identification evidence of PW1 and PW2 to convict the appellant.

The appellant asserted that the said evidence is incredible and unreliable so ought not to have been relied on by the court to convict him. I think this ground has merit as the faulted evidence contains inconsistencies and contradictions. It is trite law that where a criminal case hinges on visual identification evidence conditions favouring that identification must be considered. This was the position in the case of **Raymond Francis v Republic** (1994) TLR 3 the Court said:

> *"It is elementary that in criminal case, whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance."*

Further to that it is clear law that any court before basing conviction on visual identification must make sure that all possibilities of mistaken identity are removed. This was also the position in the case of **Siku Saleh v Republic** (1987) TLR 193 where the court said:

"Before basing conviction solely on visual identification; such evidence must remove a all possibilities of mistaken identity and the Court must be satisfied that conviction is watertight..."

In the instant case, having gone through the evidence adduced and the challenged judgment I have noted that the trial court did not adequately address the issue of mistaken identification the duty which this court being the first appellate court is prepared to do.

In the instant case, the florescent tube which was the source of light had sufficient intensity and good illumination. PW1 said that the fluorescent tube in the small sitting room and main sitting room were big. In my considered opinion the lights in the room enabled PW1 and PW2 to identify the bandits properly. However, it is discerned from PW1's testimony that when she got in the small sitting room, she was ordered to stand where she was and bandits demanded her silence. She testified further that one of the bandits entered into the house with a panga and told her to lie down. It is conversely gleaned from her evidence that when that bandit entered into the house, she faced him for five minutes. PW1 was to be bold and tell the trial court that it was the appellant who entered in the house with a panga and faced him for five minutes. Unfortunately, on this aspect she gave a general statement which cannot help.

I have closely looked at the evidence. Some questions remain unanswered. One, at what time was she told to lie down? Two, at what

time did she get five minutes to observe the bandits? Three, was the incident take place in the small sitting room only? Four, at what time did they shifted from the small sitting room to the main sitting room? Five, at what time did the appellant and his colleagues leave the sitting room to PW1'S room? Six, did all bandits leave PW1 in the sitting room alone? Seven, did PW1 get a chance to look at the bandits albeit secretly? Considering the whole evidence, it is a naked truth that when bandits met PW1, they immediately told to lie down. She had to tell the court at what point she closely observed the bandits and differentiate the appellant from others. She was as well to tell the court that she was not disturbed by threats exerted by bandits. It is also reckoned from her evidence that she was only told to stand when bandits returned to collect the TV remote control. Subjecting her testimony to scrutiny, it is unclear whether she was told to stand from where she was forced to lie down or that she had a chance in the course of the event to stand have a good at the bandits. If so, she was better placed to tell inform the court on how she identified each bandit. Short of that she can't be heard saying that she had enough time to observe and differentiate the appellant from other bandits.

It is trite law that PW1, who said she saw and identified the appellant, had to give some details about the clothes dressed or any special mark. In the event where more than one bandit was to be

identified while the identifier is subjected to threats and is ordered to lie down, in my considered opinion, it is important to give details more than clothes the bandits dresses. This serves to know that the identifier unequivocally saw the bandits and could differentiate them without any doubt. In this view, I wish to borrow the wisdom from the decision in the case of **Yusufu Jum and Mohamed Ally v Republic,** (District Court) Criminal Appeal No. 4 of 2004 High Court (Tanga) where it was stated that:

> *"it was not enough for the witness to simply say that it was the appellants who committed the offence. That they should have gone further by specifying what feature or unusual marks, what was their built, what clothes they were wearing and so on, that enabled them to recognize the appellants at the scene of crime."*

As observed earlier above, if PW1 stayed with appellant and other bandits for one hour and there was enough light, she was expected to distinguish the appellant from other bandits, in addition to clothes he dressed, by his built, appearance and any other special marks. In my view it is very dangerous, given the whole evidence to believe that identification was water tight.

Let me briefly examine PW2's evidence. This witness said that she was strangled by her neck by somebody when she was closing the gate. She was then dragged to the sitting room and made to seat there with

PW1. She saw three people holding a panga and knife and wanted money. They then took her to her PW1's room to search for money. When they failed to get the money, the appellant raped her.

PW2's version is quite different from that of PW1. While PW1 stated that she was with the appellant all the time of the incident and attempted even to rape her, it is gleaned from PW2 that at one time the three bandits left PW1 free and went with her in PW1's room. While PW2 saw those events, PW1 was threatened to be raped by the same appellant but that failed because she was in her menstrual cycle. If the appellant left PW1 and went to find money with PW2 and ultimately raped her thereat, it is obvious that PW1 told lies. If the appellant was with PW1 all the time of the incident, then PW2 is telling lies. These contradictions destine me to a conclusion that the appellant was not properly identified at the scene of crime.

Let me now consider the rape offence at this juncture. I have carefully considered whether there was any rape committed on victim (PW2). On this I shall be guided by the evidence of PW1, PW2, PW4 and the PF. 3, Exhibit P. B, and the law.

The law on rape is very clear. Section 130 (2) of the Penal Code makes it an offence (of rape) for a male person to have sexual intercourse with a girl or woman. The law provides further under subsection (4) that

the offence of rape is proved by penetration even if it is slight. It states as follows:

> *"(4) For the purposes of proving the offence of rape-*
> *(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;"*

It is now a common principle that true evidence must be given by the victim. The rationale behind this principle, in my considered opinion, is simple to comprehend. It is that the victim of rape incident is actually the one who witnessed and knows what transpired and the one who felt what was inserted in her vagina. This principle was emphasized by the Court of Appeal in cases of **Seleman Makumba v Republic** (supra) and **Julius John Shabani v The Republic**, Criminal Appeal No. 53/2010 Court of Appeal of Tanzania, Mwanza (Unreported).

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant that there was penetration."*

It suffices to say at this moment, therefore, guided by the foregoing statutory and case law, that penetration being the necessary ingredient must be proved beyond reasonable doubt not inferred. The evidence must be led to prove every essential ingredient of rape, be it statutory or conventional rape. Worth to note is the point that it is not enough for the complainant/victim to make bare assertion that she was raped. She must

be bold and thorough and explain whether or not the accused inserted his penis into her vagina, however slight it might have been.

The requirement and importance of proving penetration in rape case has been stressed in countless decisions of the Court of Appeal of Tanzania. They include: **Nasibu Ramadhani v The Republic**, Criminal Appeal No. 310 of 2017 (Unreported); **Seleman Maumba v Republic,** Criminal Appeal No. 94 of 1999 (unreported); **Imani Charles Chimango v. The Republic,** Criminal Appeal No. 382 of 2016, **Robert Karoly @ Tiuga v The Republic**, Criminal Appeal No. 117 of 2009; **Mathayo Ngalya @ Shabani v The Republic**, Criminal Appeal No. 170 of 2006 (Unreported); **Ex-B9690 SSGT Daniel Mshambala v The Republic,** Criminal Appeal No. 183 of 2004 (unreported) to mention but a few.

In **Mathayo Ngalya @ Shabani v The Republic**, (supra) the learned superior bench made the following observation:

> *"The essence of the offence of rape is penetration of the male organ into the vagina..... For the offence of rape* ***it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place****. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence" [Emphasis is mine].*

I have carefully gone through the PW2's evidence on rape. She had just little to tell the court on rape incident. She said and I quote:

> *"...then this kaka (pointing at accd) called me and told me to lie down. I told him that I am in my monthly periods. He told me that if I don't agree he will pierce my stomach with a knife which he held by my stomach, I told him that I can give him a bed and blanket which I had bought. He then raped me. I tried to resist but he still raped me. I was injured..."*

From the above quoted extract, there is no flicker of doubt that the victim made a bare assertion that she was raped by the appellant. I am, therefore, not in agreement with Ms. Hanarose who observed that there was enough evidence to prove that the appellant raped PW2. In truth, no scintilla of evidence was given to prove, even on the balance of probabilities, that the appellant inserted his penis in her vagina. It is neither from the victim nor PW4 and the PF3. In the absence of clear evidence to that effect, it is very unsafe to hold that the offence of rape was committed be it by the appellant or any other person. I am, therefore, satisfied that the offence of rape on PW1 was not established beyond all colours of doubt.

This takes me to the identification parade. PW2 was the identifying witness. In her evidence she said she only identified the clothes the appellant dressed on the fateful night. She did not give any other details. In her entire evidence she did not tell the trial court that clothes the

appellant dressed at the parade were similar to those he dressed in the fateful night. The main question now is what other features made her differentiate the appellant from other people who paraded together with him?

Apart from that in this aspect I am not in agreement with Ms. Hanarose's contention that the Identification Parade Register Exhibit PA was free from any violation of procedures when recorded and conducted. With regard to Exhibit PA, PGO 232 rule 2(s) of the Police General Orders makes it mandatory that the officer conducting parade has to ask the witness making identification in what connection is he/her identifying the suspect and record the answer. I quote:

> *"2(s). The officer conducting the parade will note carefully in his Identification Parade Register any identification or degree of identification made and any material circumstances connected therewith including any wrong identification, and any remark or objection made by the suspect.* ***He shall ask the witness who makes, the identification; "In what connection do you identify this person?" and shall similarly record precise details of the witness's reply.*** *No other questions are permissible."* [Emphasis supplied]

The purpose of this rule under PGO 232 is two folds. One, to provide assurance to the officer conducting the identification parade of the true suspect being identified and secondly to be sure of the offence in which

the suspect is connected to. In Exhibit PA this mandatory requirement was not complied with.

Further to the evidence in record is clear that before the process of identification commenced the appellant was not given his right to have his advocate present during the conduct of the parade. In addition after the process of identification was complete the appellant was not asked whether the parade was conducted in a fair manner. PW3 only recorded the appellant's certification as follows:

> *UTHIBITISHO: Mimi Salumu Athuman katika gwaride la utambulisho liliofanyika tarehe 26/10/2016 majira ya saa 15:30 nimetambuliwa na shahidi getruda jinasi kuwa ndiye niliye mbaka.*
>
> *Sgn by appellant*
> *Sgn by Insp Mwalukasa*

At any rate this certification, in my firm view, is not a comment on the manner the parade was conducted. When the court faced similar situation in the High Court (Mackanja, J as he then was) enumerated a number of factors to be considered in conducting and organizing the identification parade. He the learned Hon. Judge stated in the case of **R v. XC – 7535 PC Venance Mbuta** [2002] T.L.R 48 thus:

> *"The evidence of identification derived from an identification parade may have probative value if the following factors, as were abridged in **R v. Mwango Manaa** [1936] 18 E.A.C.A 29, are present, that is to say;*

(a) The accused person is always informed that he may have a solicitor or friend present when the parade takes place;

(b) At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply;

(c) In introducing the witness, tell him that he will see a group of people who may or may not contain the suspected person. Don't say "pick out somebody" or influence him in any way whatever;

(d) Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably."
[Emphasize provided]

In the instant case the identification parade was organized and conducted by PW4. Going by the evidence on the record, it is apparent that he did not inform the appellant of the right of seeking the presence of his advocate or friend, if any, when the parade took place. Also at the termination of the parade or during the parade, he did not ask the appellant if he was satisfied that the parade was conducted in a fair manner and did not make a note of reply. In the event I hold that Exhibit PA having violated the mandatory procedures of the law in my view lacked credence and therefore became unreliable evidence. The parade identification evidence, therefore, lacks probative value.

The combination of all these, clearly shows that identification is quiet doubtful. Plain and elaborative as it is, I share the appellant's view that the prosecution failed to prove the case against him beyond reasonable doubt.

Now, having taken such a stance for the above obvious reasons, I do not think I am called upon to labour on the remaining grounds of appeal. Findings on the raised aspects of visual identification and parade identification and unproved incident of rape suffice to dispose of the whole appeal.

This said and done, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I further order for an immediate release of the appellant unless held for other lawful reasons.

It is so ordered.

Dated at **MBEYA** this **10th** day of **August, 2021**

J. M. KARAYEMAHA
JUDGE