

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

**AT BUKOBA**

**CRIMINAL APPEAL NO. 36 OF 2021**

*(Originating from the District Court of Biharamulo at Biharamulo in Criminal Case No. 22/2020)*

**BYERI DEZIDER..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

*Date of Judgment: 01/07/2022*

*A.Y. Mwenda, J.*

This is the first appeal by the appellant. He is challenging conviction meted against him by The District Court of BIHARAMULO at BIHARAMULO. Before the trial court the appellant was arraigned for two counts. The first count is rape where it was alleged that on the 19<sup>th</sup> day of January 2020 at night hours, at KANYAMAIZI Sub village, NYAKATUNTU Village within BIHARAMULO District in KAGERA Region he had sexual intercourse with one MAGRETH W/O DEOGRATIAS without her consent. In the second count, he was charged for grievous harm in that on the same date and time, in the same village, he caused grievous harm to one JOSAM S/O ZINGA by striking him on his head by using a stick thereby causing him to suffer severe injuries.

When the charge was read over to him he pleaded not guilty thus the prosecution's side had to call witnesses to prove its case. Upon closure of prosecutions' and defense cases, the trial court found the appellant guilty of both counts and convicted him to serve a jail term of thirty years for the first count and two years for the second count. Both sentences were ordered to run concurrently.

Aggrieved by conviction meted by the trial court, the appellant lodged the present appeal containing four grounds which reads:

1. That, the Honorable trial magistrate had grossly erred in law and fact to convict and sentence by failure to note that the prosecution case was an afterthought so far as there was no direct evidence and even the circumstantial evidence was insufficiently to establish the offence. (sic)
2. That, the Honorable trial magistrate failed to observe that the whole prosecution's witness were not credible as they contradicted themselves on evidences adduced before the court and it was just a pack of lies against the appellant. (sic)
3. That, the Honorable trial magistrate had grossly erred in law to convict as to the matter of unexplained delay for the victim to report the matter. (sic)
4. That, the Honorable trial magistrate had grossly erred in law had overcooked upon the doctor's observation as it negated the victim evidence. (sic)

Having received this appeal this court fixed a hearing date where the appellant appeared in person and the respondent Republic was represented by EMMANUEL

KAHIGI, learned State Attorney. The parties having shown readiness to proceed with the hearing, the appellant was invited to submit in support of his grounds of appeal. He however had nothing to say as he prayed the court to consider his grounds of appeal in making its decision.

On his part, the learned State Attorney for the respondent, the Republic, begun by informing this court that the appeal is not opposed. The main reason was weakness on visual identification of the assailants by the victims. He said, the incident occurred at night where the victim said she identified her assailant through electricity bulb light from the neighboring house. According to him conditions stated in the case of *WAZIRI AMANI VS. REPUBLIC* [1980] TLR 252, for correct visual identification at night were not met.

In regard to the first count, the learned State Attorney said the victim did not state the intensity of the said light, she did not describe the distance between her house to the neighboring house where the light which illuminated her room/house came from and also that she did not state the time which she put the assailant under observation. In regard to the second count the learned State Attorney submitted that PW2 did not state how the assailant was identified by her as the source of light was never mentioned and for that matter, it is clear that the visual identification was not free from mistakes. He then concluded his submission that the prosecution's side failed to prove its case to the standard required thus this appeal is meritorious.

Having summarized the submission by the parties this court asked itself as to whether the prosecution's side discharged its duty of proving the case against the appellant.

It is the principal of law that the duty of proof in criminal case lies on the prosecutions side and the standard of which is beyond reasonable doubt. Please see MALIK GEORGE NGENDA KUMUNA VS. REPUBLIC, CRIMINAL APPEAL NO. 353 OF 2014,CAT.(Unreported). In proving its case the prosecutions side lined up a total of six witnesses. Among them are two victims, Pw1, (the victim of grievous harm) and Pw2 (the victim of rape). Also, the prosecutions side tendered two documentary exhibits (PW2's PF-3 Exhibit P1 & PW1'S PF-3 Exhibit P.2). On top of that three physical exhibits which are two green track suits, one black cap and boots exhibits P.3 purported to be the appellant's belongings were also tendered. In convicting the appellant, the trial Magistrate, while relying on the testimonials of PW1, PW2, PW4 & PW 5 was of view that the prosecution's side discharged its duty of proving the case beyond reasonable doubt.

In this case it is on record that the incident occurred at night. Pw1, (the victim of grievous harm) testified that on the fateful night while asleep, his bedroom window was kicked open. Three young men entered and dragged him outside the house while belaboring him using a stick. He was also stabbed with a knife on the head and his left hand. This witness stated that he managed to identify one of the assailants to be the appellant, his neighbor. He said he did so through the help of

electricity bulb light from a neighboring house. He also made a dock identification during trial of the case.

On her part, PW2, the victim of rape testified that on the fateful night she heard PW.1's window being banged. Curiously she got out of her bedroom and upon reaching at the sitting room she met with the appellant who slapped her twice and kicked her until she fell down. Upon falling down, the appellant undressed his trousers, shoes and a cap. He then raped her and having gratified his needs he left passing through the window leaving behind his cap, clothes and shoes. She said she identified him through electricity bulb which passed from a neighboring house through the open window into her house.

From PW1's and Pw.2's evidence it is apparent that this case hinge on the evidence of visual identification at night. It is trite principle that evidence of visual identification is of the weakest kind and the court should not act on it unless all the possibilities of mistaken identity are cleared. In the case of WAZIRI AMANI V. REPUBLIC [1980] TLR 252, the court held inter alia that:-

*"Where the evidence relied upon to convict is that of visual identification, then the court should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is watertight."*

In our case the learned State Attorney said PW.1 and PW.2 did not state the intensity of the light and distance from the house with electricity bulb that sourced light at the scene of crime was. Also, time spent during commission of crime was not stated.

This Court is agreement with the learned State Attorney's submission in that in the present case the possibilities for mistaken identification were not cleared. This is so because the incident took place at night and there was no source of light at the scene of crime. The testimony by the victim that the scene of crime was illuminated by the electricity light from a neighboring house left a lot to be desired. As was rightly pointed out by the learned state Attorney, the intensity of the said light, distance from the said neighboring house to the scene of crime and also time spent in putting the assailant under observation was stated. In the case of NGOSHA BUJIKU & 2 OTHERS V. THE PEUBLIC, CRIMINAL APPEAL NO.48 OF 2009 CAT, (unreported), the court held inter alia that:

*"It is not enough to say there was light at the scene of crime, hence the overriding need to give sufficient details of the source of light and its intensity."*

Again, during the trial, the prosecution's side tendered three physical exhibits which are two green track suits, one black cap and boots as exhibits P.3. It was purported that they are the appellant's belongings which were left behind at the scene of crime. The appellant objected them from being tendered as exhibits as

he declined ownership of the same. The prosecution's witnesses insisted that they belonged to him by describing colors and make. It is however important to note that no peculiar or special marks were described to link them with the appellant. Since they are common goods/items which anyone could buy from shops, failure to describe the said special mark lead to doubts as there is a likelihood that they belong to somebody else other than the appellant.

In the upshot, this court is of the view that the prosecution's side failed to prove its case and for that matter this appeal is allowed, conviction is quashed and sentence is set aside.

It is also ordered that the appellant should be released immediately unless otherwise lawfully held.

It is so ordered.



  
A.Y. Mwenda

**Judge**

01.07.2022

Judgment delivered in chamber under the seal of this court in the presence of Mr. Byeri Dezider the Appellant and in the presence of Mr. Emmanuel Kahigi learned State Attorney for the Respondent.



  
A.Y. Mwenda

**Judge**

01.07.2022