

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

**DC CRIMINAL APPEAL NO. 12 OF 2022**

*(Originating from Criminal Case No. 9 of 2022 of Iramba District Court at Kiomboi)*

**JAPHET SHALUA @MGASU SINDANO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

*26/5/2022 & 15/6/2022*

**JUDGMENT**

**MASAJU, J**

The Appellant, Japhet Shalua@Mgasu Sindano, was tried and convicted of the offence of Rape contrary to sections 130(1) (2) (a) and 131 (1) of the Penal Code [Cap.16] in the District Court of Iramba at Kiomboi. He was sentenced to serve thirty (30) years imprisonment. Aggrieved with the decision, the Appellant has come to the Court by way of an appeal. The Appellant's Petition of appeal is made up of three (3) grounds of appeal in which he essentially argues that the prosecution case against him was not proved beyond reasonable doubt.

When the appeal was heard in the court on the 26<sup>th</sup> day of May, 2022 the layman Appellant appeared in person and prayed to adopt his Petition of appeal to form his submissions in support of the appeal in the Court. He prayed the Court to allow the appeal.

On her part, the Respondent Republic was represented by Ms. Neema Taji, the learned State Attorney, who contested the appeal by submitting that the Appellant was identified at the scene of crime by use of solar light and by the name of Japhet Shalua@Sindano Kileo. That, the rape encounter took some time upon resistance together with the proximity hence unmistakable identity of the Appellant at the scene of crime. That, there was evidence of penetration as per PF3, which was admitted in as prosecution exhibit P1, and evidence by Dr. Jackline Runyoro (PW5). That, the Appellant assaulted the victim, Mwanaidi Kingu prior to raping her. That, he also tore the victim's skirt. That, the Appellant also did not contest his Cautioned Statement which was admitted in evidence as prosecution Exhibit P2. That, the prosecution case was therefore proved beyond reasonable doubt. The Respondent prayed the Court to dismiss the appeal in its entirety for want of merit.

That is what was shared by the parties in support of, and against the appeal in the Court.

The victim of crime, Mwanaidi Kingu (PW1) aged 60 years old alleged to have been sleeping at her house at Ishenga village on the date of the incidence where at around 1:00 am she was allegedly invaded by the Appellant who broke the door and entered into her room.

That, she turned on her solar light and saw the accused whom she knew before. That, the Appellant allegedly jumped into her bed, lay on her chest and hit her in the mouth. That, she tried to fight him to no avail. That, the Appellant then allegedly tore her skirt and raped her. That, the Appellant then left, that she ran out of the house and found her neighbour one Jack

whom she informed of the incidence. That, they then raised alarm for assistance.

Meshack Masunzu (PW2) testified to have been informed of the incidence by PW1 her neighbour right after the Appellant ran away. That, PW1 ran out of her house naked, the medical doctor (PW5) attended and examined PW1 also testified in the trial Court that there was proof of penetration. She also tendered the Medical Examination Report (Exhibit P1) to support her testimony.

WP 9839 Detective Pendo (PW6) interrogated the Appellant at the Police Station. She testified in the trial Court alleging that the Appellant confessed to have committed the crime. PW6 tendered a cautioned Statement (Exhibit P2) in which the Appellant allegedly confessed to have raped the PW1.

The first issue for determination by the Court in the instant case is whether or not the Appellant was properly identified. Pw1 alleged to have lit a solar lamp when the Appellant allegedly broke the door. The prosecution case is silent on the intensity of the solar lamp light which allegedly enabled PW1's visual identification of the Appellant. There was no evidence on where was the solar lamp located/placed prior to PW1's picking it up and lighting it after the Appellant allegedly broke in the house. The prosecution ought to have tendered the alleged solar lamp, if any, for determination by the trial court that there was such a lamp whose light was used by PW1 in identification of the Appellant.

In **Shamir s/o John V. Republic (CAT) Criminal Appeal No. 166 of 2004; Mwanza Registry (unreported)** the Court held thus;



*"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made"*

In the instant case, despite the fact that PW1 allegedly knew the Appellant prior to the incident as her fellow villager but mistaken identification can also be done considering the fact that PW1 was allegedly attacked, assaulted and raped. Also bearing in mind that the incident took place at midnight when PW1 had just been violently awoken from sleep.

In **Sostenes Myazagiro @Nyarushasi V. The Republic (CAT) Criminal Appeal No. 276 of 2014, Tabora Registry (unreported)** the Court held, thus;

*"Watertight identification in our considered view, entails among other things the following;*

*whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration"*

In the instant case, PW1 alleged to have been assaulted by the rapist, allegedly the Appellant who hit her on the mouth and also injured her left arm hence there was an attack which obviously would interrupt PW1's concentration in identifying the rapist.

The Court finds that the alleged identification of the Appellant by PW1 was not watertight, hence there would have been mistaken identity.

In the Cautioned Statement (Exhibit P2) the Appellant alleges to have planned the rape incident with his relative one Mzungu Shalua. That, they both went to the scene of crime to rape PW1 but in PW1's evidence she only mentioned the Appellant hence the question remains whether the said Mzungu Shalua was also arrested, or not.

Also the Cautioned Statement bares a Statement, thus;

*"kuhusu huko porini kupelekwa kwa mama huyo mama Anna (Mwanaidi Kingu) sijahusika..."*

This Statement leaves so much to be desired since in her evidence, PW1 never alleged to have been taken to the bush as Exhibit P2 so alleges, hence contradiction on the prosecution evidence.

The Medical Examination Report (Exhibit P1) shows that the PW1's vagina was found with redness and fluids around the labia but it does not reveal whether the alleged fluid was sperms or not since the cautioned statement (exhibit P1) reveals that the Appellant allegedly ejaculated and there was no evidence as to whether PW1 had washed her genitalia or taken bath upon the sexual crime incident.

PW1 alleged that her skirt was torn by the Appellant but the same was not tendered in the trial Court. PW1 also alleged to have ran out of the house and found one "Jack" her neighbour whom she informed of the incident. Meshack Masunzu (PW3) testified in the trial Court to have been the neighbour who was informed of the incident by PW1 who allegedly ran from her house naked. This shakes the credibility of PW1's evidence as to whether she was being truthful or not in her testimony as to whom she informed of the incident, either Jack or Meshack Masunzu (PW3).

That said, the Court is of the considered position that the prosecution case against the Appellant was too fraught with gaps to prove the case against the Appellant .The meritorious appeal is hereby allowed. The conviction sentence and orders, respectively, thereto by the trial Court are hereby quashed and set aside accordingly. The Appellant shall be released from prison forthwith unless held for another lawful cause.

  
GEORGE M. MASAJU

**JUDGE**

15/6/2022

