

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

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**DC CRIMINAL APPEAL NO. 33 OF 2022**

*(Originating from Criminal Case No. 21 Of 2022 Namtumbo District Court at  
Namtumbo)*

**DAMIAN MKINGA ..... APPELLANT**

**VERSUS**

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

**JUDGEMENT**

Date of the last Order: 05/10/2022  
Date of Judgement: 07/10/2022

**MLYAMBINA, J.**

Being aggrieved with the decision of Namtumbo District Court (the Trial Court), the Appellant appealed to this Court against the conviction and the sentence imposed to him on seven (7) grounds of appeal. After careful consideration, this Court has noted that the issue to be determined is; *whether the Prosecution proved their case beyond reasonable doubt to warrant the Appellant conviction and sentenced imposed to him.*

At the hearing date the Appellant appeared in person while Mr. Venance Mkonongo learned State Attorney appeared for the Respondent. Mr. Venance Mkonongo supported this appeal on the ground that the Prosecution failed to prove their case beyond reasonable doubt. According

to him, the Prosecution paraded two witnesses including the victim of the crime (PW1). In her evidence, PW1 did not mention the Accused person to be the one who raped her. Mr. Mkonongo averred farther that; apart from the duty to prove the case beyond reasonable doubt, the Prosecution have to make sure that what is contained in the particulars of offence including the date when the offence was committed is proved and supported by the evidence. He supported his arguments with the case of **The Director of Public Prosecutions v. Yusuph Mohamed Yusuph**, Criminal Appeal No. 331 of 2014, Court of Appeal of Tanzania at Zanzibar at page 10, 2<sup>nd</sup> paragraph (unreported).

Mr. Venance Mkonongo submitted further that; during hearing, the victim did not mention the Accused person to be the one who committed the offence. Neither during cross-examination nor re-examination reveals that it is the Accused who committed the offence.

In reply, the Appellant had nothing substantive to submit rather than praying to this Court to grant his petition of appeal.

Having considered the arguments of both parties in the light of the impugned records, it is a cardinal rule that the first trial Court is vested with mandate to re evaluate the evidence of the trial Court so that it can make its own findings of facts. See the case of **Director of Public Prosecutionv. Jaffari Mfaume Kawawa** [1981] TLR 149. After re

evaluation of the evidence adduced before the Trial Court, as rightly submitted by Mr. Evance Mkonongo, this Court is of the findings that the Prosecution failed to prove their case beyond reasonable doubt.

The Appellant was charged, convicted and sentenced to serve thirty years imprisonment for the offence of rape contrary to *section 130 (1), (2) (b) and section 131 (1) of the Penal Code [Cap 16 Revised Edition 2019]*. For easy reference *section 130 (1), (2) (b)* provides:

130.-(1) it is an offence for a male person to rape  
a girl or a woman.

(2) a male person commit the offence of rape if he has  
sexual intercourse with a girl or a woman under  
circumstance falling under any of the following  
descriptions:

(a) NA

(b) with her consent where the consent has been  
obtained by the use of force, threats or intimidation by  
putting her in fear of death or of hurt or while she is in  
lawful detention.

It is upon the Prosecution side to prove their case beyond  
reasonable doubt that not only the victim was raped but also it is the

Accused who raped her without consent or with a consent obtained from the intimidation or threat.

*Section 3 (2) (a) of the Evidence Act [Cap 6 Revised Edition 2022]*

requires in criminal cases the Prosecution has to prove the case beyond reasonable doubt. This was the position in the case of **Nchangwa Marwa Wambura v. The Republic**, Criminal Appeal No. 44 of 2017, Court of Appeal of Tanzania at Mwanza, where the Court held that:

It is a trite law the burden of proof against the accused always lies on the Prosecution and no conviction shall be entered on account of weak defence but upon proof of the case beyond reasonable doubt.

The Prosecution paraded two witnesses to support their case. the victim (PW1) told the Court that; on 4<sup>th</sup> February, 2022 about 23:00 hours a person entered into her house. He inserted his penis to her vagina until he ejaculated. She claimed to identify a person who raped her. That he was a person not a resident of Lusewa Village. He was just a worker at the farms. He identified him through a torch light. PW1 informed no one until morning hours when her neighbours took her to the Hospital.

Furthermore, PW1 evidence was supported by the evidence of PW2, a Medical Doctor who examined the victim. PW2 found some blood and bruises into PW1's vagina and she gave her a stitch and prescribed a pain

killer with antibiotic medicine. She tendered a PF3 which was unobjected admitted before the Trial Court as exhibit P1. On his side, the Appellant denied to have committed the crime.

There is no dispute that PW1 was raped as it was portrayed in Exhibit P1. The question to ask is who raped her. PW1 said that there was a torch light in her room in which she identified a person who raped her. It is a cardinal law that the best evidence in rape cases is the evidence of the victim herself. This was the position in the landmark case of **Suleiman Makumba v. The Republic** [2006] TLR 379. However, the said witness has to be credible. Also, in the case of **Majaliwa Ithemo v. The Republic**, Criminal Appeal No. 197 of 2020, Court of Appeal of Tanzania at Kigoma, page 9, the Court had this to say:

The best evidence in rape case is the evidence of the victim herself ... We however hastened to add that, that position of law is just general, it is not to be taken whole sale without considering other important points like credibility of the Prosecution evidence and the circumstances relevant to the case in point.

It is evident that the victim (PW1) failed to describe the Accused not only at the earliest point but also before the Trial Court when she was testifying. She referred a rapist as a person without a name. Moreover,

PW1 testified to have identified a person who raped her. PW1 did not tell the strength of the torch light to eliminate mistaken identity of the rapist. In the case of **Waziri Amani v. The Republic** [1980] TLR 250, the Court held *inter alia* 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 absolute watertight.

In the cited **Waziri Amani's case**, the Court went further analysing the crucial circumstances to be taken care before relying on the the visual identification evidence. These includes; the distance between the identifying witness and the accused, the time spent by the identifying witness observing the Accused committing the crime, the brightness of the light if it was during the night hours and the familiarity of the Accused and the identifying witness.

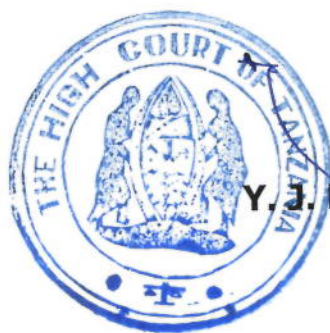
From the record, there was a zero proximity between the rapist and PW1 but the Accused failed to identify the Accused. Apart from that, PW1 claimed that there was a light in her room coming from a torch which helped her to identify a person who raped her. However, as stated earlier, the Prosecution did not explain the brightness of the light to the extend of identifying the Accused clearly without any mistake.

Furthermore, PW1 never made an alarm nor reported or mentioned to her neighbours and to the Court that the Appellant was the one who raped her. In the case of **Marwa Wangiti Mwita v. The Republic** [2002] TLR 39, the Court held that:

Naming the accused at the earliest stage is one of the criterial that the identification of PW1 had no doubt.

It follows, therefore, the evidence of PW1 was not credible enough to be relied upon. It is the finding of this Court that, PW1 was raped but the Prosecution failed to prove that it is the Appellant before this Court who raped her.

In the circumstances, I allow the appeal. The proceeding of the trial Court is hereby quashed and the sentence imposed by the Trial Court is hereby set aside. The Appellant be released forthwith from the custody unless he is been held legally on other lawful cause. Order accordingly.

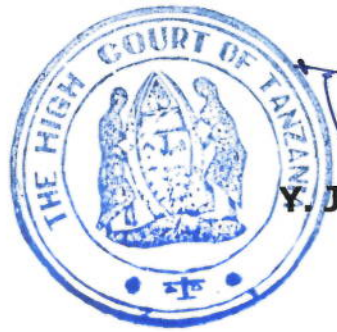


**Y. J. MLYAMBINA**

**JUDGE**

**07/10/2022**

Judgement pronounced and dated 7<sup>th</sup> October, 2022 in the presence of the Appellant and learned Senior State Attorney Hebel Kihaka for the Republic. Right of Appeal fully explained.



**Y. J. MLYAMBINA**

**JUDGE**

**07/10/2022**