IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 46 OF 2022

(Originating from Bariadi District Court in Criminal Case No. 142 of 2020)

1. KATALA S/O KIKAJA.....
2. NG'HULIMA S/O LILANGA ..... APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Last Order: 11/11/2022

Date of Judgment: 16/11/2022

JUDGMENT

A. MATUMA, J;

The Appellants were charged with five counts in the District Court of Bariadi for offences of Gang Rape contrary to section 131A (1) and (2), Stealing contrary to section 258 (1), (2) (a) and 265, two counts of grievous harm contrary to section 225, and armed robbery contrary to section 287A both provisions of the Penal Code Cap.16 R. E 2019. It was alleged that on 28th day of October, 2020 at Tunge Primary School Pooling Station within Dutwa Village in Bariadi District in Simiyu Region

with common intention they committed all the herein above named offences. The victim of gang rape was one of the Assistant Returning officers. She was as well the victim of theft and grievous harm. For the purposes of this judgment her name will not be disclosed for maintaining her reputation and at all times she will be referred to as PW2 the position she took at the time of trial. Deus Makungu Charles is alleged to have been the victim of grievous harm and armed robbery.

The brief facts of the matter can be summarized as follows; on the alleged crime date the victims were at Tunge Primary School Pooling station for supervision of general election as assistant returning officers. The election process ended at 17:00 hours and in the evening hours at about 18:30 hours they posted the results on the Notice board. According to the victims herein above named, some voters were not happy with the results which declared CCM candidates as winners in all posts of Presidential, Parliament and counsellorship. They thus started riots beating these victims demanding for what they termed; ***"matokeo halisi"***

Through such riots, the victims were gravely injured, PW2 raped, and various properties stolen from them including cash monies. The victims alleged to have identified the herein appellants as among the assailants to the crimes.

At the end of trial the Appellants were found guilty of gang rape and guilty of the two counts of grievous harm. They were however acquitted of armed robbery and stealing. Following their convictions as stated herein above, they were sentenced to life imprisonment in

respect of the offence of gang rape, and to suffer three years jail term for each of the grievous harm offences.

Being aggrieved by the conviction and sentence, the Appellants preferred this appeal and raised six grounds of appeal. I will however not reproduce them in this judgment because at the hearing of this appeal some were withdrawn and some others were consolidated during submissions of the learned counsel for the appellants. Gathering from the submissions of the appellants through their advocate, the major complaint in this appeal is that ***the prosecution case was not proved beyond reasonable doubts against them.***

When this appeal came for hearing the Appellants were present in person under custody and were represented by mr. Paul Kaunda learned advocate while the Respondent was represented by M/S. Edith Tuka Learned State Attorney.

Both the learned advocate for the appellants and the learned state attorney for the Respondent were of the same view that the prosecution case was not proved to the required standard for warranting the conviction of the appellants and subsequently the sentences meted against them. They both argued that the identification of the appellants was not sufficient in accordance to the guidelines stated in the cases of ***Waziri Amani versus Republic (1980) TLR 250*** for visual identication and that of ***Director of Public Prosecutions versus Ashamu Maulidi Hassan and two others, criminal appeal no. 37 of 2019*** CAT for identification of assailants at the huge crowd and at the commotion atmosphere. The two learned brethren further invited this court to find that the victims in this case were not credible for lack

of corroborations to their respective testimonies due to the fact that the nature of crimes and the manner it was alleged to have been committed, corroboration was of utmost importance. To this argument the learned advocate for the appellants cited to me the case of ***Ndalahwa Shilanga and Another versus Republic, criminal Appeal no. 247 of 2008*** while the learned state attorney cited that of ***Marwa Wangiti Mwita versus Republic (2002) TLR 39.***

They thus asked this court to allow this appeal and order for the release of the appellants from custody.

Having carefully considered the submissions of parties and the evidence on record, the main issue here for determination is ***whether the prosecution side proved its case beyond reasonable doubts to warrant the conviction and sentence of the Appellants.***

Under the provisions of section **110** and **111** of the Evidence Act Chapter 6 of the revised laws, the burden of proof lies to the prosecution and the standard of such proof is beyond reasonable doubts, this being a criminal case. This was decided in different cases and among them; ***Sylivester Stephano v. R. Criminal Appeal No.527 of 2016*** (unreported) and ***DPP V. Peter Kibatala, Criminal, Appeal No. 4 of 2015*** (CAT) Dar es salaam (unreported) in which the Court held that;

> *"In criminal cases, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt.*

On that legal position it is a trite law that the prosecution side must prove the case beyond reasonable doubts to warrant the conviction and sentence of the accused persons.

In the instance case, I am of the view that the learned State Attorney and the learned advocate for the appellants are absolutely right that the evidence on record of the trial court do not support their conviction and the trial magistrate could have not reached to the conclusion he made had him directed his mind properly to the evidence of the victims.

Although PW1 and PW2 testified that the crimes were committed at about 18:30 hours when it was not yet night and they knew the appellants and thus identified them as among their assailants, the declaration statement of PW2 which she made at Police and tendered in evidence as exhibit P4 show that the posting of the election results on the notice board was at 19:00 hours. Thereafter it is when the commotion started and she managed to run away and took refuge to the home of one Pili Masunga but part of the crowd including the appellants went after her and withdrew her from the house of the said Pili Masunga and went to rape her. In that statement she alleges to have identified these appellants through lamp lights which the appellants used to beam her and solar light at the home of Pili Masunga;

> *"Baada ya muda waliniona nakimbia walinikimbiza na kuanguka chini nilijifanya nimezimia huku wakinimulika na taa niliyokuwa nimeishika taa walininyang'anya, ilikuwa inatoa mwanga mkali hivyo nilikuwa nawaona vizuri tu. Na aliyekuwa ameshika hiyo*

taa ni Katala Kikaja na wengine walikuwa wanamulika kwa kutumia simu zao walizokuwa nazo"

About the source of light at the home of Pili Masunga this witness was recorded to have told the police;

"niliingia ili nijifiche mle ndani na mle ndani kulikuwa na taa ya sola inawaka. Ndipo hao watu wawili Katala Kikaja na Ng'ulima Lilanga waliingia mle ndani na kunitoa nje..."

The statement of Pili Masunga exhibit P5 also states that PW2 came at her home running at about 20:00 hours;

"Mnamo tarehe 28/10/2020 muda wa saa 20:00 hours ambayo ilikuwa ni siku ya uchaguzi mkuu wa Raisi, Wabunge na madiwani muda huo mimi nilikuwa ndani ya nyumba ...gafla nilisikia mtu sauti ya kike akiomba msaada afunguliwe mlango...akaingia ndani akanieleza anakimbizwa na kundi la watu"

With this evidence it is obvious the alleged crimes if really were committed, then it was in the night. In that respect the trial court ought to have scrutinized the evidence relating to the source of light and its intensity to ascertain whether the appellants were sufficiently identified.

In the case of **Issa s/o Magara @ Shuka V R**, Criminal Appeal No. 37 of 2005 (unreported) the Court of appeal gave us the guidlines when dealing with identification of assaillants and particularly on the lights aided identification. It observed;

"In our settled minds, we believe that ***it is not sufficient to make bare assertions that there was light at the scene of the crime.*** *It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube.* ***Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated."***

The Court went on:

"We wish to stress that even in recognition cases where such evidence may be more reliable than identification of on stranger, ***clear evidence on sources of light and its intensity is of paramount importance.*** *This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*

In the instant case the alleged lamp is stated to have been in the hands of the assailants after snatching the same from the victim PW2. She did not explain the type of such lamp as required by the cited

authority supra as lamps are of different types and varieties with different intensities.

Also exhibit P5 supra did not explain the intensity of the alleged solar light. The evidence on the source of light and its intensity was thus not exhaustive at least to show that it favoured correct identification.

But as stated earlier, it is doubtful if really the alleged crimes were committed. This is because the prosecution made all what they could do to hide the fact that the first appellant was a pooling agent of CHADEMA candidate at that pooling station (Tunge Primary School). He was thus with PW1 and PW2 throughout the voting process up to the time they closed the station that night and went to the Ward office which was the collection centre of the election results in the Ward. The first appellant wanted to put in evidence three forms of election results to show that he was a pooling agent but he was technically kicked out on the ground that there were differences in names. His names are Katala Kikaja while the forms were indicating the agent was Mbarahe Kikaja. It is unfortunate that the trial magistrate did not pay attention to the appellant's arguments that it was the prosecutions who charged him with the name of Katala Kikaja without proving that he mentioned that name during interrogations.

Be as it may, we have ample evidence on record that the first appellant was a pooling agent of Chadema. We have the evidence of Saguda Malangwa DW3 who was the candidate for the Councillor seat. This witness testified that the first appellant was their Party's representative in the pooling station at Tunge Primary school. But also the prosecutor in defending that the accused persons had a case to answer made it

clear that the accused was at Tunge Primary School with the victims the whole day. That corroborates the evidence of the defence case that the first appellant was an agent of Chadema candidates. Likewise the second appellant was a motorcyclist of Chadema candidate DW3 supra who was riding him from one station to another in the ward the whole day to see the election process. All these facts were hidden by the prosecution despite the naked truth to that effect which are available on record after the defence strived to establish the same.

In that respect, the prosecution ought to have brought the Returning Officer as their material witness as rightly argued by advocate Paul Kaunda to establish whether really the crimes were committed and that the first appellant did not turn up at the collection centre where the candidates waited for their agents to give them the election result forms issued to them by assistant retuning officers. Furthermore the Returning Officer was a necessary witness because PW1 in his evidence in chief alleged that among the properties stolen by the appellants were Pooling boxes for Councillors and Member of Parliament. Failure to call such witness left the evidence of the first appellant DW1 and that of Sita Mayenga DW4 who was also one of the agents in the pooling station unchallenged to the effect that after they had fixed the results on the notice board, the police vehicle took the ballot boxes and all representatives of political parties and assistant returning officers to the collection centre where they handled result papers to candidates, signed and left to their respective homes peacefully. No even Police Officer was called to establish that such a crime was reported to police in the meaning that the allegations that there was stealing of ballot boxes were not true, and if so the remaining allegations relating to grievous

harm and gang rape remains doubtful. In the cases of ***Mohamed Said versus Republic, Criminal Appeal no. 145 of 2017*** and ***Zakaria Jackson Magayo versus The Republic, Criminal Appeal no. 411 of 2018*** the Court of Appeal held; ***"a witness who lies in an important point cannot be believed in others".***

Not only that but also the prosecution did not bring Pili Masunga as their material witness whom they alleged she tried to help the victim of rape in vain. That it is from her home the victim was forcefully taken by the appellants in her presence to somewhere and raped and that she identified the appellants to be the one who took the victim and subsequently raped her. Instead they tendered her declaration statement under section 34B of the Evidence Act on the pretext that she was nowhere to be found. But during the defence, the appellants managed to procure her and brought her as their witness to state whether anything really happened at her home relating to PW2.

In an untold manner the prosecution objected Pili Masunga to testify in favour of the appellants. The proceedings shows that on 16/03/2022 when the case came for continuation of defence hearing, the appellants' advocate Mr. Mwilu Amani informed the court that they had in attendance Pili Masunga as their witness. Unfortunately the prosecutor objected; *"We object since her statement was tendered on the party of the prosecution"*

I find that the appellants were prejudiced for having been denied to present all the evidences they had including allowing their witnesses to give evidence in their favour. Even though Pili Masunga's husband one Bahati Masunga came and testified as DW5. In his evidence he testified that he voted at 13:00 hours and went back to his home and

categorically denied to have witness any criminal incident at his home. That raises reasonable presumption that the statement tendered and alleged to have been authored by Pili Masunga was fabricated and no crime was committed at her home by the appellants. To the contrary Pili Masunga ought to have been brought physically in the witness dock and be subjected to cross examination by the defence. The allegations that she was nowhere to be seen were not true as she was available and the defence procured her and brought her to the court premises and in the court room.

Failure to call an important witness has always been held to be fatal. This is the position in various cases including that of ***Samwel Japhet Kahaya versus Republic***, *Criminal Appeal No. 40 of 2017* in which the Court of Appeal of Tanzania at Arusha held;

> *"Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since* ***if a party to a case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act'.***

Since the prosecution failed to bring Pili Masunga as their material witness they had no any justification to deny her giving evidence in favour of the appellants and state anything relating to the declaration statement allegedly authored by her. In the case of ***Erick S/O Osena versus The Republic, Criminal Appeal no. 87 of 2022*** in the High Court of Tanzania at Shinyanga I had time to scrutiny the habit of one

party to the case hindering witnesses of the other party from giving evidence in favour of such other party. I held;

> *"It has always been the law that failure to call a material witness an adverse inference has to be drawn against the party so failed.* ***It is a high time now to develop the principle by drawing adverse inference against the party who by any unjustifiable means hinders another party to call his potential witness or witnesses".***

In the instant case the prosecution did not only fail to call their material witnesses but made all that they could do to hinder the potential defence witnesses from giving evidence in favour of the appellants. I therefore draw an adverse inference against the prosecution that had Pili Masunga testified in favour of the appellants, the allegations of gang rape which has taken the appellants into the life imprisonment would have been disproved because such offence was alleged to have been committed after the appellants dragging forcefully the victim from the home of the said Pili Masunga and in her presence. Furthermore when the victim herself declared in evidence during re-examination that her identification of the rapists was because they were the one who took her from the house of Pili Masunga; *"I identified them to be my rapists because they were the one who removed me from the house of that woman"*

In that regard the identification of the rapists was made at the homestead of Pili Masunga and not anywhere else. Therefore Pili Masunga was a very important witness for the prosecution to

explain the favourable circumstances of correct identification at her home that night.

Had the learned trial magistrate considered the credibility of witnesses, particularly the victims and the conducts of the prosecutor he would have not reached to the conclusion that the appellants were guilty of the alleged offences. It is not the law that every evidence of the prosecution witness or witnesses should be accepted as a whole truth of what happened. Such evidence should be accepted when the credibility of such witness is settled. The rationale behind of this principle was enunciated in among other cases that of ***Festo Mawata Vs Republic Criminal Appeal No. 299 of 2007*** (Unreported) in which the Court stated that:

> *"A witness might appear to be perfectly honest but mistaken at the same time.* ***On the other hand it is a fact of life again that even lying witnesses are often impressive and or convincing witnesses"***

No matter how PW1 and PW2 gave impressive and convincing evidence against the appellants, I find that they were not credible and reliable on the strength of the reasons I have demonstrated supra. Their respective evidences are hereby discarded/rejected by reasons of credibility. The remaining evidence does not suffice to hold the conviction of the appellants.

Apart from such anomalies, the proceedings of the trial court suffer a lot of procedural irregularities but the parties did not address them. Some of such irregularities are; some exhibits; P2 the victim's PF3, D1 and D2 the copies of agent's election result forms were not read

after their admission in evidence. That would cause them being expunged from the records and if that is to happen it would prejudice the appellants. Another anomaly is that the trial magistrate closed the defence case after failure of the appellants' advocate to turn up without addressing the accused persons to proceed by themselves or give them a chance to trace another advocate or to ask them whether they would opt to close their defence case.

In the upshot, it is unsafe to maintain the Appellants' conviction and the sentence meted against them. I therefore allow this appeal, quash the conviction of gang rape and grievous harm and set aside all the sentences of life imprisonment and three years jail term which were imposed to the Appellants. I order and direct that the Appellants be released immediately from prison unless they are otherwise lawful held. It is so ordered. Right of appeal explained.

A. MATUMA

JUDGE

16/11/2022