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

**IN THE SUB- REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPEAL No. 08 of 2022**

*(Original from Hanang' District Court Criminal Case No. 90/2020)*

**EMMANUEL JOSEPH @GIDAWE .....APPELLANT**

**VERSUS**

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

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## JUDGMENT

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Date: 6/12/2022 & 14/12/2022

**BARTHY, J**

The appellant Emmanuel Joseph @Gidawe was arraigned before Hanang' District Court, charged with the offence of rape contrary to section 130 (1) (2) (b) and 131 (1) of the Penal Code Cap 16 R.E 2019, where he was convicted and sentenced to serve thirty years jail term imprisonment.

The background of this case according to the records of the trial court albeit brief are such that, the victim who is an adult (to be referred as PWI on this appeal) on the night of 9/10/2020 was sleeping in a different house with his son PW3 whom she referred as 'her young' in unconventional translation meaning 'kijana wangu'.

At 3AM of the fateful day, her bedroom door was pushed open and a man entered. She turned her flashlight on and identified the man to be

the one he used to pass at her house. The man told her she was his wife and wanted to have sexual intercourse with her without her consent. PWI tried to raise an alarm, but she was strangled and threatened. She had to stop and heed to the man's demand.

She was stripped off her clothes with the man who also took off his clothes and started to ravish her, telling PWI she was his wife. After he finished with her the man stayed up to 7AM and left. However, between 6AM, PWI asked to use the bathroom and she manage to pass at her son's house (PW3) and informed him the appellant had entered her house and strangled her.

After the assailant had left PWI managed to call her brother and informed him what had befallen of her. The appellant was arrested at 9AM after he was found sleep in the bushes about 200 metres from the scene.

The doctor (PW2) examined PWI at 1PM of the same day where he saw she was bruised, swollen with spermatozoa found in her womanhood. He filled the PF3 which was tendered and admitted at Exhibit. P1.

The investigator of the case (PW4) was assigned to investigate the case on the same day at 9AM. At that time the appellant was in the custody of the police. He wrote his caution statement between 18:30 up to 15:30 where he confessed to commit the offence of rape.

The appellant was the sole defence witness testified under oath. He denied to have committed the offence and denied to have made the confession before PW4 on the ground that he was denied his rights during the interrogation including reading the caution statement and forced to sign it.

He concluded by pleading to the court because he has the children and parents who depended on him.

The court having heard the evidence of both sides, found the prosecution evidence was sufficient and the appellant was convicted and sentenced to serve thirty years jail term.

Aggrieved with that decision of the trial court, the appellant advanced five grounds of appeal as following;

1. *That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant based on poorly visual identification done by the victim which did not meet the most important factors considered in visual identification.*
2. *That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant after failed to note that, the victim (PW) with his son (PW3) failing to identify the appellant before the court (dock identification) hence left some crucial matters unresolved.*
3. *That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant based on shakable, inconsistence prosecution evidence as the victim contradicted herself in testifying after she made alarm people responded (sic) or not hence it left some crucial matters unresolved, thus wrongly(sic) conviction and sentence to the appellant.*
4. *That, the learned trial magistrates erred both in law and fact to convict and sentence the appellant and failing to draw an adverse party (sic) of inference to the prosecution side after they failed to summon (call) the material witness i.e neighbours who*

*was alleged by PW3 to accompany together (sic) in searching and arresting the appellant in the bush, who from their connection transaction (sic) equation (sic) were able to clear or testify on the material facts hence clear the bad air or grudges' claimed by the appellant.*

5. *That the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant on a charge of offence (sic) which was not proved beyond reasonable doubt by the prosecution side.*

During the hearing of the appeal, the appellant appeared in person and the respondent was represented by Ms. Grace Mgaya the learned state attorney.

The appeal was argued orally, the appellant did not have much to submit in favour of his grounds of the appeal, he just prayed to this court to adopt his grounds of appeal to be part of his submission.

Responding to the grounds of the appeal Ms. Mgaya stoutly opposed the appeal. She submitted on the first and second grounds together which was challenging the identification evidence.

Arguing on this grounds Ms. Mgaya referred to the evidence of PW1 on page 11 and 12 of the proceedings where she stated the accused was not the stranger as she used to see him pass outside her house.

After the ordeal, PWI immediately reported to PW3 and she was able to mention her assailant to be Emma. This followed with immediate arrest of the suspect.

Ms. Mgaya went further to argue that, PW1 had the flashlight. There was also was broad light that enabled the victim to identify the culprit. PW1 also identified how the suspect dressed up.

She contended that the offence rape is committed ininvolves close distance between the victim and the suspect to allow proper identification. Ms. Mgaya stated, there are standard guidelines of identification need to be met as stated in the case of **Halid Mohamed Kiwanga and Ramadhani Magogo @Maandazi**, Criminal Appeal No 223/2019 CAT (unreported) at page 9.

She was firm that the evidence of the prosecution side has met all the conditions set for unmistaken identification. She argued, even if dock identification was not made, it was not fatal. She thought the two grounds had no merit.

Arguing on the third ground which challenges the evidence of the victim to have been contradicting on the alarm raised. Having gone through the testimony of PW1 she had clearly stated that her alarm was not responded because she was strangled on her neck as seen on page 11.

However, she argued the records were clear that after the ordeal the appellant had fled. PW1 reported to PW3 where the alarm was raised and the crowd appeared to her rescue. She added, not every contradiction affects the weight of the prosecution evidence. To reinforce her point, she cited the case of **Tafifu Hassan @Gumbe V. R Criminal Appeal 436 of 2017, High Court Shinyanga**.

Going further, Ms. Mgaya submitted on the fourth ground which is challenging the failure to call material witness mentioned by PW3. She argued this ground lacked merit as per section 143 of Evidence Act, Cap

6 R.E 2022. She contended; no number of witnesses is required to prove the case: As the law does not require specific number of witnesses. Failure to call the said witness did not affect the prosecution case as PW3 also took part in the arrest.

On the last fifth ground, the decision of the trial court is faulted for convicting the appellant without the proof beyond reasonable doubt. She added, the prosecution side had proved the case with four witnesses and one exhibit which were able to prove the offence beyond all reasonable doubt.

On top of that it was said PW1 gave a detailed account of her evidence which proved all necessary ingredients of penetration and that there was no consent. Her evidence was well collaborated with the evidence of PW2 the medical doctor who examined PW1 after the ordeal. It was her findings that the offence was proved beyond reasonable ground and the court should find it devoid of merit.

On the other hand, Ms. Mgaya argued that caution statement (on page 18 and 19 of proceedings) shows it was recorded out of time. As the appellant was arrested at 0900hours but the statement was recorded at 17:30 hours, out of four hours' time required under section 50(1) of the Criminal Procedure Act, Cap 20 R.E 2022.

She added that, there was no explanation for the delay of the same, then Ms. Mgaya prayed this court to expunge it from the record and be disregarded. To conclude, she prayed to this court to uphold the conviction and sentence of the trial court.

The appellant did not have anything to re-join from the reply submission of the respondent' maintained his argument as stated in his argument in chief.

This court turning to address the merit of this appeal, having heard the reply submission for the respondent, I will proceed to determine the first and second grounds of appeal which challenged the identification done by the victim to identify her assailant.

On the adopted grounds of appeal, it was argued that the visual identification by the victim did not meet the required standards. Also, it was stated the appellant could not be identified at the dock.

Ms. Mgaya on these grounds had submitted that the identification met the threshold requirement. That the appellant was not the stranger to the victim, the distance they had during rape was close enough to allow the victim identify her assailant and there was broad light and PWI was aided to identify the appellant with the flashlight. That is why soon after the ordeal the victim was able to name her rapist

To buttress her point, she referred to the case of **Khalid Mohamed Kiwanga's case (supra)** that hinted on the conditions to be met on visual identification.

In consideration of the arguments of both sides on this issue, the conditions to be met for visual identification have been stated in the number of cases. In the case of **Khalid Mohamed Kiwanga (supra)** and in the case of **Lucas Venance @ Bwandu and Godfrey Barnaba v. R, Criminal Appeal No. 392 of 2018, Court of Appeal of Tanzania at Mbeya** (unreported), citing with approval the case of

**Waziri Amani v. R [1980] TLR 250**, the court undersced what conditions should be considered on visual identification it said;

> *We would expect to find on record questions posed and resolve on the following:* ***the time*** *the witness had the accused under observation;* ***the distance*** *at which he observed him; the* ***conditions in which such observation occurred****, for instance,* ***whether it was day or night-time****, whether there was* ***good or poor lightning*** *at the scene; and further* ***whether the witness knew or had seen the accused before or not****. These matters are but a few which the trial court should direct his mind before coming to a definite conclusion on the issue of identity... (emphasis is supplied).*

The records of the trial court show that, PWI (the victim) gave a detailed account of what had transpired on the fateful date. The ordeal occurred around 3AM. After the rapist broke the door and entered in her room, she turned on the flashlight and identified the rapist was the man she used to see passing outside her house.

The assailant after raping PWI, he stayed up to 7AM where he left the house and PWI got the chance to make a call to her brother Daniel for help. Again, PWI was able to give a detailed description of how her rapist was dressed up on the fateful day.

The use of flashlight alone as a source of light to enable identify the assailant is not sufficient. As the intensity of the said light was not clear and for how long the light was not was on. In a number of the case the evidence of visual identification was said to be of the weakest kind and most unreliable and that it should not be acted upon "unless all

possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight." This was well articulated in the case of **Lucas Venance @ Bwandu (supra).**

However, PWI had stated that her rapist had stayed until 7AM when he left. This implied that PWI had spent a quality time with her rapist until morning sunrise and she was able to examine him closely as they laid in one bed. The appellant being not the stranger to her as she used to see him often before the ordeal. This showed the proximity distance between the two.

The detailed version of the dressing of the assailant was said to be white trousers, blue shirt long sleeves and shoes made of car tyre, show that the victim identified well her rapist. In the case of **Shabani Iddi Jololo and three others v. Republic, Criminal Appeal No. 200 of 2006,** Court of Appeal of Tanzania at Dodoma (unreported) the court among other things, it pointed out that the importance of giving out the description of the suspect. The detailed description of the rapist led to his immediate arrest at 9AM of the same day.

The court also considers that PWI was able to name the appellant at the earliest possible time that enabled his arrest. This was addressed in the case of **Khalid Mohamed Kiwanga (supra)** the court held among other things that, naming the suspect at the earliest possible time gives the assurance and reliability especially when the identification is not made to the stranger.

In the present case the court finds that, the evidence tendered before the trial court on identification of the suspect met all the pre-set conditions in order to eliminate possible mistake of identification.

In those circumstances, the court finds that the claim that, PWI and PW3 failed to identify the appellant at the dock is lacking the merit. The record clearly shows that during the cross examination PWI stated she knew the appellant as he used to pass outside his house. Although, PW3 stated he knew the appellant well before the court.

But again, in the case of **Khalid Mohamed Kiwanga (supra)** the court quoting the case of **Francis Majaliwa and two others v. R, Criminal Appeal No. 139 of 2005,** where it was held that dock identification is worthless unless it is preceded by proper identification parade.

In the circumstances of this case, I find that there was sufficient evidence to have properly identified the appellant. Therefore, the first and second grounds of appeal have the merit.

Having dealt with the above issue the next ground to be addressed is on the fourth ground where the trial court is faulted to have convicted and sentenced the appellant without drawing an adverse inference the failure to call material witness the neighbours who was involved in arresting the appellant.

On this ground Ms. Mgaya argued it lacked merit as per section 143 of Evidence Act, cap 6 R.E 2022. She argued there is no number of witnesses required to prove the case. As the law does not require specific number of witnesses and did not affect the prosecution case as PW3 also took part in the arrest.

On this case four prosecution witnesses were paraded to testify. However, in the cases involving rape the best evidence comes from the victim. See the case of **Suleman Makumba v. R [2006] TLR 379**. As

the court can convict solely basing on the evidence of the victim if it satisfies itself the evidence is sufficient to warrant conviction of the offence of rape.

The fact that the PWI was the material witness, other witnesses their evidence was only for corroborative purpose. This ground is therefore is devoid of merit.

Lastly, turning to the third and fifth ground of appeal which challenged the prosecution evidence for being inconsistent, shakable and contradictory. The appellant had claimed to have been wrongly convicted on the offence that has not been proved beyond reasonable doubt.

On this ground Ms. Mgaya responded that, PW1 had clearly stated that her alarm was not responded because she was strangled on her neck. After the ordeal the appellant had fled, PW1 reported to PW3 where the alarm was raised and the crowd appeared to her rescue.

She added, every contradiction did not affect the weight of the prosecution evidence. To emphasize her point she referred to the case of **Tafifu Hassan @Gumbe (supra).**

She added that, four prosecution witnesses and the PF.3 (Exhibit. PI) were able to prove the offence beyond all reasonable doubt. As PW1 gave a detailed account of her evidence which proved all necessary ingredients of penetration and that there was no consent. She contended the evidence of PWI was well collaborated with the evidence of PW2 the medical doctor who examined her to warrant conviction.

On these grounds, the court is aware that the burden of proof in criminal cases lies to the prosecution side. The court ought to convict the accused person on the strength of prosecution evidence. See the case of **Marwa Wangiti Mwita and another v. R. [ 2002] TLR 39.**

The appellant could not state in detail what were the discrepancies found in the prosecution evidence. This court could only discern the difference on the evidence of PWI and PW3 when PWI stated the she knew the appellant only by face whereas PW3 her son identified him as his relative.

Another discrepancy seen is, PWI did mention she went to use the restroom and got the chance to go to the house of PW3 to inform him about the appellant strangling her. Nevertheless, she went back inside to be with him instead of raising an alarm or ran away. Rather PWI narrated only how she made the call to her brother when the appellant had left.

At this time, it was at 6AM when PWI had the moment alone to go outside, she did not state as to why she could not raise an alarm as she got the chance to do that. Surprisingly though, PW3 who was informed at 6AM he did not take any action until later on when the appellant had fled at 7AM.

However, on the evidence of PWI it clearly gave the details of the ingredients of the offence. That there was the penetration of male organ to her womanhood without her consent, as the person of the age of majority.

Due to her evidence, it led to the immediate arrest of the appellant in the bushes. The appellant on his statement had claimed to be the family

man, but she could not call anyone to state on his whereabout on the fateful night and how he ended up sleeping in the bushes.

Despite having the weak defence evidence, the court in many occasions had warned itself on the danger of relying on the evidence of the prosecution side alone.

The records of the trial court shows that the issues raised during the trial were those trying to find out if the ingredients of the offence have been proved; that is penetration and lack of consent and if it was the appellant who committed the offence or not.

In determining the issues, the trial court was satisfied that there was the proof of penetration without her consent and the appellant was identified to have committed the said offence.

Also, the trial court relied on the confession of the appellant made on the caution statement which Ms. Mgaya had prayed to this court to be expunges, as it was recorded after the lapse of four hours.

This court agrees to expunge Exhibit P2 from the record because it is not clear as to when exactly it was recorded. It states it was recorded between 1830hrs up to 1530hrs.

However, in addressing those four issues the court did not touch the evidence of the defence side to make scrutiny in determining the issues, as seen on page 4, 5 and 6 of the judgment.

I am implored to invoke revisional powers bestowed upon this court under s. 29(b) read together with s. 49(1)(b) of the Magistrates Courts' Act, Cap 11 R.E. 2022 as the anomaly vitiate the trial.

This position has been decided in a number of cases that the accused person cannot be convicted on weakness of his defence. Rather the court must give factual evidence of the case, frame issues and the reasons of the decision which comes from the evaluation of evidence from both sides as provided under s. 312 of the Criminal Procedure Act, Cap 20 R.E. 2022.

Failure to do so will occasion a serious miscarriage of justice. See the case of **Ahmed Said v. R, Criminal Appeal No. 291 of 2015 of the Court of Appeal (unreported)**. See also the case of **Leonard Mwanashoka v. R, Criminal Appeal No. 226 of 2014, CAT at Bukoba**.

The emphasis was made by the court on the importance of summarizing and giving the proper scrutiny of the evidence. In the case of **Yasini Mwakapala v. R, Criminal Appeal No. 13 of 2012, Court of Appeal (unreported)** where it was held;

> *It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis.*

Due to the reasons established above, the failure of the trial court to consider the appellant's defence, it is the defect that has led to the miscarriage of justice which cannot be cured.

Owing to the circumstances of this case, this court finds it proper to order for retrial considering the charge, which is the basis of the trial is

in existence. See the case of **Mayala Njigailele v. R, Criminal Appeal No. 490 of 2015, Court of Appeal (unreported).**

Hence, the proceedings and the judgment of the trial court are quashed. The sentence imposed against the appellant; the orders made are also set aside. I order the retrial of the case within three months from this decision before another competent trial magistrate. In the meantime, the appellant to remain in custody pending retrial.

It is so ordered.

**DATED** at **Babati** this 14th December, 2022.

**G.N. BARTHY**
**JUDGE**
**14/12/2022**


Delivered in the presence of the appellant in person and Ms. Grace Mgaya the state attorney.