

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**CRIMINAL APPEAL NO 52 OF 2022**

*(From original criminal case no. 79 of 2021 in the District court of Bariadi at  
Bariadi)*

**MABULA LAMECK.....1<sup>st</sup> APPELLANT**  
**DOTTO S/O MASHAKA.....2<sup>nd</sup> APPELLANT**

**VERSUS**

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

**JUDGMENT**

Date of last order 25/1/2023

Date of judgment 20/2/2023

**MASSAM, J**

The appellants Mabula Lameck and Dotto Mashaka were charged before Bariadi District Court at Bariadi with three counts 1<sup>st</sup> count gang

robbery contrary to section 285 (2) and 287 of the Penal code, 2<sup>nd</sup> count of robbery with violence contrary to section 285 (1) and 286 of the Penal code cap 16 R.E 2019 and the 3<sup>rd</sup> count was rape contrary to section 130 (1) (2) (a) and 131 (1) of the Penal code Cap 16 R.E 2019.

The case from the prosecution was that on 27<sup>th</sup> day of august 2021 at Bukome village within Busega District in Simiyu Region did steal the Tanzanian shillings two hundred ninety thousand (290,000) from Prisca Richard and before and after such stealing they used actual violence to obtain and retain the said money, later on did have carnal knowledge with the said Prisca Richard without her consent. The appellants denied the charges and prosecution called three witnesses who proved the charge against the appellant.

At the trial the appellants were convicted and sentenced as follows for the 1<sup>st</sup> count to serve 30 years imprisonment, for 2<sup>nd</sup> which was for 1<sup>st</sup> appellant to serve 10 years imprisonment and for the 3<sup>rd</sup> count for 1<sup>st</sup> appellant to serve 30 years imprisonment.

Dissatisfied the appellants lodged the present appeal appealing against conviction and sentence .They bought five grounds of appeal thus;

*(1) That the prosecution side failed to prove the case when entered conviction because the counter of the bar did not come before the court to testify that she witnessed when we robbed the victim.*

*(2) That the trial magistrate erred both in law and in fact to convict us without calling the villagers and a village chairman who were present when the alarm was raised.*

*(3) That the trial magistrate misdirects himself to accept PF 3 as exhibits without a doctor to come in court to prove the allegation*

*(4) That the prosecution side failed to establish the offences beyond reasonable doubts thus entered wrong decision.*

*(5) That the trial magistrate erred in law and in fact to hold conviction on weak identification by using a moon light which left a shadow of doubts.*

When the matter was called for hearing the appellants were appeared in person while the respondent was represented by Ms. Glory



Ndondi State Attorney. With the leave of the court the appeal was urged by way of written submission.

Submitting in support of their appeal the appellants said that prosecution side failed to prove their case beyond reasonable doubt on the point that the trial court Magistrate entered conviction by ignore of the bar attendant (important eye witness) to testify before the trial court that he witnessed when they robbed the victim. Also the respondent objected that the counter did not witness the incidence while the victim said that the place where the incidence happened and the bar was 10 footsteps, so it his view that the said counter man was an important witness that gave the said money amounted to Tshs. 320,000 to the victim.

Appellants added that prosecution failed to call village chairperson and villagers who responded to the alarm in order to prove if the victim reported the incident to them, failure of it make the prosecution evidence weak to prove the against them.

In submitting to the third ground of appeal appellants said that the documents/exhibits were tendered with the person who is not a maker nor

the author, that act denied them their legal rights to cross examine the witnesses.

Also it was not safe for the court to convict the appellant when the victim evidence was not corroborated with the expert evidence and the documentation evidence especially when the victim is the adult, to support their argument they cement it with the case of **Marco Lushikaa vrs Director of Public Prosecution** (2010) TLR no 452 where the court held that there is no good way penetration could have been proved in absence of the evidence from the girl herself and that of medical examination. Again they said that in any, sexual offence if the person against whom the offence is alleged to have been committed is an adult the court should warn itself that it is not safe to convict on the uncollaborated testimony of the complainant.

He went on that the prosecution failed to prove their case beyond the reasonable doubt as proving the same means proving accordingly each and every ingredients stated in the particulars of the offence and preliminary hearing. In the preliminary hearing the prosecution stated that the appellants were charged with one offence that alleged to occurred on 28/7/2021 but during the trial they claimed about three offences which

occurred on the same date which was not proved the same during the furnishing their evidences and testimonies but they testified over 27/8/2021.

So it were their view that prosecution proved the non-existing particulars of the offence because prosecution alleged robbery to take place without stating in particular what kind of violence transpired that on the fateful night.

Again the appellants submitted that the offence of rape was too general as stated by the victim that "*akaanza kunitomba*" she said nothing about the penetration which was the key ingredient of the sexual offences, to cement their argument they mention the case of **Mathayo Ngalya @ Shaban vrs Republic** Criminal Appeal no. 2006 (unreported) the court held that **"the essence of the offence rape is penetration of the male organ into vagina, That for the offence of rape it is out most important to lead evidence of penetration and not simply to give general statement alleging that rape was committed without elaborating what took place"**.



So it was their submission that the said evidence have no weight and lack merit.

Again they said that in ground No. 5 victim brought the contradictory and misleading testimony which lead to unfair decision by the trial court the court did not well examine the evidence of the victim as to who robbed and raped her, on page 7 of the court proceeding he mention Dotto Mashaka but PW2 in his testimony mention Mabula Lameck, so prosecution side creates doubt on who exactly did rape and rob the victim. Lastly appellants prayed this court to allow the appeal, quash and set aside the proceedings and judgment of the trial court and any other order this court may deem fit and just to grant.

Responding to the appellants submission Ms. Glory Ndoni the State Attorney submitted in replying to the first ground of appeal that they failed to summon the counter of the bar to testify to the court. She admitted the same that they did not summon him because he did not witness the incident, as PW1 said that the said incident happened outside the bar, so it's their submission that the said ground lacks merit so be dismissed.

In reply to the second ground of appeal that prosecution did not summon the villagers who were present when the alarm was raised their side finds this ground lacks merit as the charge faced appellants were gang robbery, robbery with violence and the rape and chairman and villagers who arrested them they were not eye witnesses of the incident as the Republic duty was to call the witnesses who saw the offence committed. To cement her argument she mention the case of **Wambura Marwa** while making the reference in **Aziz Abdalla vrs Republic** 1991 TLR 71 which stated that the general and well known rule that the prosecutor is under prima facies duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts, if such witnesses are within reach but are not called without sufficient reasons being shown, the court may draw an inference adverse to the prosecution, the question raised by the prosecution is the said village chairman are key witnesses ,they say that was not important as all appellants known by the PW1, so she insisted that the said ground of appeal is unmerited which needs to be dismissed.

She added that in ground No. 3 appellants were challenging the tendering of PF3 which was not tendered by the maker ,in her side said



that the said PF3 did admitted against the procedure laid under section 240 (3) of CPA ,also she submitted that the omission does not affect them because there was other evidence on record sufficiently to uphold the conviction as well elaborated in the case of **Seleman Makumba vs. Republic TLR 386**, in this case the court satisfied that even in absence of the testimony of PF3 there was sufficient evidence on record to convict.

In responding to the ground no 4 that the trial court convicted the appellant based on the weak identification in her side she said that PW1 did explained how she identified them, that supported in the case of **Juma Magori @ Patrick and Four Others vs. Republic Criminal appeal no 328 of 2014** this cautioned about the danger of mistaken recognition by stating that they are aware that the recognition evidence could not be trouble free, in the court record show that 1<sup>st</sup> appellant called PW2 by her name before he strangled her and the said facts were not disputed.

She added that in reply to the 5<sup>th</sup> ground that they failed to prove its case beyond the reasonable doubt, in their side they objected it as there was enough evidence which show that PW1 was raped by the 1<sup>st</sup> appellant the record show that PW1 testified that after she was taken to the bush 1<sup>st</sup> appellant pulled down his trouser and down it, strangled her neck after

that (akaanza kunitomba) So according to the principles in sexual offences that the best evidence comes from the victim as elaborated in the case of **Godi Kasenegala vrs Republic in Criminal Appeal no 10 of 2008,** So the respondent prays that this court to upheld the decision and conviction of the trial court and dismiss the appeal.

I have considered the submission for and against for the both parties the central issue for determination is **whether the appeal has merit**

From record it was stated that PW1 was called by PW2 to meet him at the bar for a drink and later PW2 was over drunk and taken to sleep at nearest guest house, PW1 in her testimony said that one mzee Chepe the counter man did searched PW2 and found him with money Tshs 320,000 and phone which he took it and handle to PW1. PW1 on her way to sleep she was robbed the said money by 1<sup>st</sup> appellant and later on raped, but PW2 in his testimony he said that the said day he was from his daily activities and he took his friend called Mzee Chepe to join him for a drink ,after been drunk at Simon's bar he was searched by one Paulo who took his money and handle it to PW1, This court creates doubt in the issue of who took the money and handle it to Prisca (PW1) the evidence of these two witnesses are contradictory PW1 said he was given money by Mzee



Chepe while the PW2 mention Paulo to be the one who took Pw2 money and give it to PW1, also the issue of Mzee Chepe PW1 introduced him as a bar counter where they were drinking beers that day while PW2 introduced him as a friend who he took him for a drink to the Simon's bar.

Another issue this court found in record to be contradictory was who robbed and raped the victim, PW1 said that on her way to sleep she was raped by one Dotto Mashaka (2<sup>nd</sup> appellant) while PW2 who is the lover of Pw1 mention Mabula Lameck to be the one who raped her ,so this creates doubt who exactly rape the Pw1.

Again the issue of how the offence of rape occurred the victim PW1 testified it very general ,she said nothing about the penetration, as important ingredient of sexual offence , in the record PW1 said that when they reached to the bush appellant pulled her down and pulled her trouser and his trouser, appellant slept on top of her, she shouted but appellant strangled her and (akaanza kunitomba) she said that appellant conducted a sex with her for 8 minutes, according to the prosecution side that statement they proved their case beyond the reasonable doubt as elaborated in the case of **Godi Kasenegala vrs Republic Criminal**



**Appeal no 10 2008** which stated that **the best evidence of rape comes from the victim.**

On the side of appellant they had a different view that the said offence of rape was generally stated by the victim that "akaaanza kunitomba" the said statement does not stating the issue of penetration as ingredients of rape cases, it did not show how that rape was conducted. This court is in support of the appellants submission that penetration is among important ingredient of rape cases as elaborated in the case of **Mathayo Ngalya vrs Republic** (supra) in this case insisted that the essence of the offence of rape is penetration of the male organ into the vagina, that for the offence of rape it out most important to lead evidence of penetration and not simply to give general statement alleging that the rape was committed without elaborating what took place" In this present case it is true that Pw1 (the victim) said nothing about the penetration she just say "alianza kunitomba" but she did not elaborate how and what took place, so this creates some doubts on how the said rape happened.

This court is aware that it was a principle of law that the best evidence in sexual offence comes from the victim as elaborated in the case of **Seleman Makumba vrs Republic** (supra) but the issue of penetration

is essence of offence of rape which is very important and not to give general statement alleging that the rape was conducted.

Another issue this court finds very important to discuss is the issue of collaboration, in this case the victim is adult and is very clear that in the case of rape when the victim is adult collaboration is very important, this was well discussed in the case of **Republic verse Hassan Said, in Criminal Revision no 1 of 1984 High Court Dar es salaam** in this case it was stated that *"in any sexual offence if the victim is an adult the court should warn itself that it is not safe to convict on uncorroborated testimony of the complainant"*

In this present appeal the evidence which testified by the PW2 in support of the rape case was contradictory as of Pw1 on who raped the victim, in the side of PW3 who was a policeman (investigator) said that she was testifying the hearsay evidence as she was not there to incidence, and she was the one who tendered the PF3 as exhibit but she was not the maker, so this court is in support of the appellants submission that they were denied their rights to cross examine PW3 as she was not the maker who knows nothing about the medical issues, In cross examination she said that victim was examined to see if she was infected by HIV, she talks



nothing about the issue of rape than she said doctor wrote that the victim was not virgin ,no sperms found but bruises in her vagina, this court finds the importance of calling the Doctor as the appellants and this court would have chance to ask question on that exhibit and have more explanation.

This court also find out that the offence of robbery with violence and gang robbery was not proved as the evidence of Pw1 was not collaborated with any witness, also was not well elaborated as the PW1 said that she was robbed Tshs 320,000 with appellants the money which belonged to Pw2, which handed over to her by one Mzee Chepe but Pw2 said his money was taken by one Paulo and handed it to PW1. Prosecution side did not bother to call the said Mzee Chepe nor that Paulo to testify on existence of that money and how much was it and who gave the said money to PW1. Also PW1 mention the bar attendant to be around when the said offence occurred but the prosecution for the best reasons known by themselves they did not call that bar attendant to testify as Pw1 testified that the place of incidence and the said bar was very near like 10 footsteps, so probably he heard what was going on. Again the prosecution witnesses said that Pw1 went to report the matter to village chairman and the appellants were arrested by villagers, after that report but no village



chairman was called nor any villager to testify the same this make the prosecution testimony to became weak to support the offence of gang robbery and robbery with violence.

In upshot the evidence adduced by the prosecution side was not rooted on the offence which appellant was charged with, So according to the foregone reasons this court finds out that prosecution failed to prove its case beyond reasonable doubt in all offences as it is common criminal jurisprudence that ;

**"in criminal matters the burden of proof always lies on the prosecution and it should be beyond reasonable doubt" the said principle is to be found in the case of Nathaniel Aphonc Mapunda and Benjamin Alphonc Mapunda vs Republic (2006)TLR 395.**

Conclusively there being no evidence on the ingredients of the offence of rape brought by the victim who testified general evidence, she said nothing concerning the penetration as the important ingredient of rape offence. Also there was a lot of contradictory evidence on who raped the victim.

In the side of the offence of gang robbery and robbery with violence this court finds out the prosecution side failed to brought the important witness to testify on the issue if there was money which robbed and how much was it, Also the witnesses brought, testified the contradictory evidence concerning the offences which appellants were charged with. According to above findings the appellants cannot have a case against them hence the trial court was wrong to have convicted them.

In view thereof the conviction and sentence imposed on the appellants on the said offences are set aside. Consequently, the appellants are released forth with from the prison. It follows the appeal is found to be meritorious and consequently upheld.

It is so ordered.

**DATED at SHINYANGA** this 20<sup>th</sup> day of February 2023



A handwritten signature in blue ink, appearing to read "R.B. Massam", is written over the printed name.

**R.B. Massam**  
**JUDGE**  
**20/02/2023**