

**THE UNITED REPUBLIC OF TANZANIA**  
**(JUDICIARY)**  
**THE HIGH COURT**  
**(MUSOMA SUB REGISTRY)**  
**AT TARIME**  
**ORIGINAL JURISDICTION**  
**CRIMINAL SESSIONS CASE No. 122 OF 2022**  
**THE REPUBLIC v. GEORGE WAMBURA NYANGARE @ SURA**  
**JUDGMENT**

27.06.2023 & 06.07.2023

Mtulya, J.:

The present case was lodged in this court aiming at searching for a person who had caused grievous harm in the right-hand side ear of **Mr. Wambura Magori Wambura** (the victim) contrary to section 222 (a) of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code). According to the victim, who was summoned as prosecution witness number one (PW1) in the case, it was **George Wambura Nyangare @ Sura** (the accused), whereas the accused had testified that the victim was attacked by **Suzana Edward** (DW2) during a rape incident that had occurred on 6<sup>th</sup> January 2021 at **Kisumwa Village within Rorya District in Mara Region**.

In support of their statements, the dual witnesses had called two (2) further witnesses to testify before this court to persuade the court to decide on each one's favor. In short, the evidence produced by PW1 shows that on 7<sup>th</sup> January 2021, he was

dropped at Nyanjage area by the accused on their way towards **Komaswa Police Station** for allegation of rape against DW2, and the accused took out his razor blade and did cut his right-hand side ear in the presence of *bodaboda*, who had driven them, called **Mr. Werema Juma** (PW3). PW1 had testified further that he was injured during night time around 20:00 hours on 7<sup>th</sup> January 2021 and attended hospital for examination on 14<sup>th</sup> February 2022.

PW3 was summoned to testify on what he had witnessed on the night hours of 7<sup>th</sup> January 2021. According to him, he was cell-phoned by the accused on the fateful day to take passengers from **Kisumwa Village** to **Gachuma Police Station** and had picked the accused, the victim and **Mr. Gerald Ochumo** towards **Gachuma Police Station**. However, on their way towards **Gachuma Police Station**, the accused did cut the victim's right hand side ear with the support of utterances that he will not take the victim to the police station without injuries.

The Republic had also marshalled **Dr. Mary Laison** (PW2) to testify and tender **Police Form No. 3** (PF.3) recorded at **Kinesi Health Centre within Rorya District in Mara Region** (the health centre) on 14<sup>th</sup> February 2021 in order to corroborate the

victim's testimony, that he was injured on his right-hand side ear and eye. According to PW2, he attended the victim on 14<sup>th</sup> February 2021 and found him to have been injured by sharp object on right hand side ear and eye. Finally, PW2 tendered the PF.3 which was admitted as exhibit P.1. The exhibit shows that: *physically sustained RT ear cut wound [sized] ¼ of the ear. Also have hematoma per RT eye have healing laceration per medical RT harm.*

In replying the allegation against the accused, the defence had brought a total of three (3) witnesses, namely the accused (DW1), DW2 and **Mr. Sylvester Chacha** (DW3). According to DW1, he had received a cell-phone call from DW3 on rape instance against his wife DW2 committed by the victim during night period around 23:00 hours of 6<sup>th</sup> January 2021, and could not rush to the scene of the crime, but ordered DW2 to be given first aid at the house of **Mr. Wambura Mwita Nyagare**. On 7<sup>th</sup> January 2021, DW1, testified to have informed **Kisumwa Village Chairman**, who had ordered patrol of the village and arrest of the victim. Following the order, **Mr. Wambura Mwita Nchana** had spotted the victim at the centre and whistled *Mwano* which led to the arrest of the victim.

DW1 testified further that the Mwano People had intended to attack the victim as they were aware of the rape incident, but he saved him by calling two *bodaboda* of PW3 and **Mr. Mwita Juma** to ride the victim to **Komaswa Police Station**. According to DW1, he took PW3's *bodaboda* with his wife and the other one had taken the victim and village *peoples' militia* towards the police station and that there was no any attacks or injuries to the victim's ear and eye. In explaining the complained the injuries to the victim, DW1 testified that they were caused by tooth bite of DW2 during the rape incident on 6<sup>th</sup> January 2021. Finally, DW2 testified that the victim was prosecuted for rape against DW2 and found guilty of rape in **Criminal Case No. 39 of 2021** (the case) resolved at **Tarime District Court of Tarime** (the district court), which was overturned by this court based in Musoma.

However, DW1 had testified that he declined to report the rape incident to the appropriate authority of the police from 6<sup>th</sup> January 2021 at 23:00 hours to the next day of 7<sup>th</sup> January 2021 at 20:00 hours for two reasons, that: first, he initially reported the matter to the village authority; and second, the police station was far away from their village. In order to corroborated the testimony of DW1, DW2 was brought in the case and testified

that she was raped and beaten by the victim on night hours of 6<sup>th</sup> January 2021 and in her self-defence, she tooth bite the victim on his right-side ear. After the incident, according to DW2, he was sick suffering from body pains and stomach-ache of five (5) months pregnancy, but could not access the police authorities for reporting the matter and hospitals for medical examination, until when the victim was arrested on night hours of 7<sup>th</sup> January 2021. Finally, DW2 had testified that DW3 had witnessed the rape incident and informed his husband, DW1.

DW3 was marshalled and briefly testified that he witnessed the victim raping DW2 at night hours of 6<sup>th</sup> January 2021, when he was marching from **Kisumwa Centre** to his residence in company of **Mr. Magori Kilandola**. However, DW3 testified that he was not present when the victim was moved by the accused from **Kisumwa Centre** to **Komaswa Police Station** and unaware of what transpired along the way.

After registration of all relevant materials, the learned minds who participated in the case were invited to interpret the facts of the case. According to **Mr. Juma David Mwita**, learned Defence Attorney, the prosecution had failed to prove its case beyond reasonable doubt as per requirement of the law in precedents of

**William Ntubi v. D.P.P**, Criminal Appeal No. 320 of 2019 and **Magenda Paul & Another v. Republic** [1993] TLR 219.

In Mr. Mwita's opinion, this case has a lot of discrepancies and inconsistencies which cannot be used to render conviction to the accused. In citing the discrepancies, Mr. Mwita stated that: first, PW1 had testified that he was cut his ear by razor blade whereas in statement at the police station he recorded knife; second, PW1 had testified during examination in chief that they were in a single *bodaboda* with the accused and Jeri and he was pulled to the forest for the attacks, whereas during cross examination he cited aside the tarmac road; third, PW3 had testified to have carried three (3) persons during examination in chief, and mentioned himself, the accused and victim, whereas during cross examination he cited four (4) persons by adding the wife of the accused, DW2.

According to Mr. Mwita this case has two (2) eye witnesses who had witnessed the injury incident, namely PW1 and PW3, but each one has his own story of the case hence their credibility and reliability is questionable and the cited matters go to the root of the matter on where the event occurred, who did what, and type of weapon used. In the opinion of Mr, Mwita, reliability

of witnesses depends on the credibility and a witness who testify lies in one instance, may produce the same in another occasion. In order to substantiate his submission, Mr. Mwita cited the authorities of the Court of Appeal in **Nyakuboga Boniface v. Republic**, Criminal Appeal No. 434 of 2016; **Mohamed Said v. Republic**, Criminal Appeal No. 411 of 2018 and **Bernard Cosmas v. Republic**, Criminal Appeal No. 149 of 2021. Finally, Mr. Mwita complained that exhibit P.1 tendered in the present case had no patient number; file number; was recorded on 14<sup>th</sup> February 2021 whereas the victim was injured on 7<sup>th</sup> January 2021; and the victim had complained attacks of stones, *marungu* and *ubapa wa panga* whereas the exhibit shows attacks emanated from sharp weapon. In Mr. Mwita's opinion, all these facts on P.1, in brief, shows that the victim had never attended any examination in the health centre.

On the other hand, **Mr. Lusako Mwaiseke**, learned State Attorney, thinks that all the citations of Mr. Mwita are minor discrepancies which do not go to the root of the matter. In his opinion, facts and evidences cannot be picked out in isolation by single sentences. In order to support his move Mr. Mwaiseke had supplied this court with the precedent of **Dickson Elia Nsambi**

**Shapwata v. Republic**, Criminal Appeal No. 92 of 2007.

According to Mr. Mwaiseke, in the present case there are no material errors that go to the root of the issue whether the victim was injured, but normal errors which are justified by normal human behaviour of forgetting small issues on lapse of time.

Additionally, in support of the submission of Mr. Mwaiseke, Mr. Kishenyi submitted that the dispute in the instant case is whether the victim was injured; and if so, with blunt or sharp object; and if the questions are replied in affirmative, then the remaining question is whether the accused had attacked the victim with sharp object. In his opinion, PW1 had testified that he was injured by sharp object and P.1 shows the victim was injured on the right ear.

According to Mr. Kishenyi, issues related to minor discrepancies of facts or omission of some facts in P.1, cannot be material in resolving the present case. Mr. Kishenyi thinks that the defence failed to bring plausible explanation in this case on how they delayed to report the matter at the police station after all complained rape and attacks against DW2.



I have gone through the facts and P.1 registered in the present case. I will briefly start with credibility and reliability of witnesses, which had occupied a large part of the case. The law regulating credibility and reliability of witnesses is mostly cited in the case of **Goodluck Kyando v. Republic** [2006] TLR 363. The case had resolved that: *a witness who testifies consistencies statements and his demeanor is inviting may be believed and his testimony accepted, unless there are good and cogent reasons for not believing him*. The statement has been supported in a large bundle of precedents of the same Court and this court (see: **Sabato Thabiti & Benjamini Thabiti v. Republic**, Criminal Appeal No. 441 of 2018; **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007; **Republic v. Ryoba Mwita**, Criminal Sessions Case No. 149 of 2022; and **Republic v. Chacha Mwita Mohere**, Criminal Sessions Case No. 141 of 2022).

The key word in the indicated precedents, is consistencies in evidence of witnesses. In short, a witness who produces inconsistencies, his credibility is diminishing. However, when a witness produces inconsistencies and the same are detected to be major inconsistencies and move into the root of the matter,

his credibility and reliability is completely destroyed (see: **Kibwana Salehe v. Republic** (1968) HCD 391 and **Surdeyi v. Republic** (1971) HCD 316). In the precedent of **Sahoba Benjuda v. Republic**, Criminal Appeal No. 96 of 1989, the Court of Appeal had stated that:

*Contradiction in the evidence of a witness effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence.*

This text, in short, shows that the requirement of consistencies of evidence may be qualified as from the material produced in the inconsistencies. If inconsistencies of facts are produced, but minor to the case, the facts may be ignored, unless it is supported by some other evidence. The position had received the support of the precedent in **Dickson Elia Nsamba Shapwata & Another v. Republic** (supra). The reasoning in support of the move is found in the precedent of **Chrizant John v. Republic**, Criminal Appeal No. 313 of 2015, which had considered human brain and

time taken before production of evidence in court and held that contradictions in human life cannot be totally avoided.

In my opinion, the law as enacted in section 62 (1) (a) of the **Evidence Act** [Cap. 6 R.E. 2019] (the Evidence Act) requires oral evidences to be direct and if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. The law was amplified by the Court of Appeal in the decision of **Yohanis Msigwa v. Republic** [1990] TLR 148), *that a witness must show that he had the opportunity to see what he claimed to have seen.*

In the present case, PW1 claimed to have seen and actually mentioned the accused and his evidence was corroborated by the testimony of DW3. The evidence of razor blade cut of the victim's ear in P.1 was protested by Mr. Mwita. However, P.1 was tendered in the case to corroborate the testimonies of PW1 and PW3. I am aware of the discrepancies cited by Mr. Mwita in the instant case. However, the indicated discrepancies and inconsistencies do not move into the root of the matter on: *whether the victim was physically sustained right ear cut wound of ¼ of the ear, and whether the accused caused loss of ¼ of*

*the victim's right ear to amount to grievous harm contrary to section 222 (a) of the Penal Code.*

I have considered the instant case, and perused the decision of **Sahoba Benjuda v. Republic** (supra) with regard to discrepancies and support of other evidence and precedent in **Enock Kipela v. Republic** (supra) on consideration of totality of evidences produced in trials, and think that the Republic has proved its case. I am aware that the Republic is required to prove its case beyond any reasonable doubt as it was stated in the precedents of **Said Ahmed v. Republic** [1987] TLR 117 and establish nexus between the attacks leading loss of ¼ of the victim's right ear and the accused as stated in **Mohamedi Saidi Matula v. Republic** [1995] TLR 3. In the present case, I am convinced that the Republic has established its case and nexus between the attacks against the victim and accused.

I am quietly conversant with the defence case and allegation of tooth bite of the victim by DW2. However, the defence had failed to produce evidence on record to corroborate DW2's statement that she tooth bite the victim on 6<sup>th</sup> January 2021. That would have any merit if DW2 had reported the rape incident, attacks against her and tooth bite to the victim before

night hours of 7<sup>th</sup> January 2021. It would have been plainly that the loss of ¼ victim's right ear was prior to the arrest and complained incident that had occurred at Nyanjage area on 7<sup>th</sup> January 2021.

In the circumstances of the present case, I am satisfied that the prosecution had proved its case and move to hold the accused responsible for the complained offence. In the result, I convict the accused with the crime of causing grievous harm in the right-hand side ear of the victim contrary to section 222 (a) of the **Penal Code**.

Ordered accordingly.



  
F.H. Mtulya

**Judge**

06.07.2023

This conviction order was pronounced in open court in the presence of the accused, **Mr. George Wambura Nyangare @ Sura** and his learned Defence Attorney, **Mr. Juma David Mwita** and in the presence of **Ms Damary Nyange**, learned State Attorney for the Republic.

F.H. Mtulya

**Judge**

06.07.2023

## **ANTECEDENTS**

**Nyange:** My Lord, we have no previous record of the accused, but pray for serious sentence. My Lord, the accused intended to cause permanent disfigure of the victim. My Lord, the sentence should send a lesson for those who take law into their own hands. That is all My Lord.

F. H. Mtulya

**Judge**

06.07.2023

## **MITIGATION**

**Mwita:** If it pleases you My Lord, this court may consider the following: first, the accused is the first offender; second, the accused is aged 31 years and has contribution to this nation; third, the accused has a wife and five (5) children. My Lord, long sentence to the father will affect children in their growth and right to education. My Lord, it is open that the rape incident has caused all this. My Lord, the victim was disfigured, but had failed to access early treatment. My Lord, we pray for a lenient sentence. That is all from the Defence.

F. H. Mtulya

**Judge**

06.07.2023

## SENTENCE

The law in section 222 (a) of the **Penal Code [Cap. 16 R.E 2019]** provides up to life imprisonment in cases like the present one. Practice available in this court shows that eight (8) years imprisonment is reasonable. However, currently there is publication of the **Tanzania Sentencing Guidelines, 2023** which at page 39, shows that causing a permanent disability or deformity is a high-level category of grievous harm and attracts imprisonment from five (5) to seven (7) years.

However, in the current case, there was an allegation of rape which had necessitated or motivated the present case. This court has to resolve the sentence against the accused person depending on the circumstances of the present case. Having said so, I am moved to sentence the accused person to six (6) months imprisonment from today to send a lesson to those persons who take laws into their own hands.

It is so ordered.



F. H. Mtulya

**Judge**

06.07.2023

This sentencing order was pronounced in open court in the presence of the accused, **Mr. George Wambura Nyangare @ Sura** and his learned Defence Attorney, **Mr. Juma David Mwita** and in the presence of **Ms. Damary Nyange**, learned State Attorney for the Republic.



A handwritten signature in blue ink, which appears to be "F. H. Mtulya". The signature is written in a cursive style with a long horizontal stroke extending to the right.

F. H. Mtulya

**Judge**

06.07.2023