IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 33 OF 2023

(C/F Criminal Case No.172 of 2022 in the District Court of Moshi at Moshi)

BENSON BRAYSON LYIMO……..……..……1ST APPELLANT

IBRAHIM HAMISI MGALA……..……2ND APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

JUDGEMENT

Date of Last Order: 30.10.2023
Date of Judgment: 11.12.2023

MONGELLA, J.

The appellants herein were charged as 1st, and 3rd accused persons in the district court of Moshi at Moshi (the trial court, hereinafter). Together with the 2nd accused in the trial court, they were charged for Burglary under section 294 (1) (a) and (2) of the Penal Code [Cap 16 R.E 2019]; Armed Robbery under Section 287A of the Penal Code and Gang Rape under Section 130 (1), (2) (b) and 131 A of the Penal Code. The 1st appellant was alone charged for possessing goods suspected of having being stolen or unlawfully acquired contrary to section 312 (1) of the Penal Code.

The particulars of the offence were that: on 06.03.2022 at night hours, at Pumuani Area within Moshi district in Kilimanjaro region, the three accused persons broke and entered into the house of the victim (PW1). Armed with a knife they threatened and stole from her cash T.shs. 50,000/-; two mobile phones make Itel valued at T.shs. 25,000/- and Uptel valued at T.sshs. 30,000/-. All items amounted to T.shs. 105,000/- properties belonging to the victim. The accused persons also had carnal knowledge of her with her consent obtained by force.

On 07.04.2022, the 1st appellant was found at Mungushi area in Hai district, Kilimanjaro region while in possession of a mobile phone make Itel valued at T.shs. 25,000/- which was suspected to have been stolen or unlawfully acquired.

The brief facts of the case as drawn from the prosecution case are that: on the fateful night of 06.03.2022 at around 02:00hrs, the victim, who was sleeping with her one-year and half-old son, heard a person knocking at the window. She got up and went into her maid's room, one Magret Issa Kimaro (PW3). PW3 was sleeping with her 6-year-old daughter. She inspected the windows in the said room as to whether they had been closed and observed other rooms as well, including the sitting room and one vacant bedroom. Then she went back to sleep.

Sometime later, she woke up to a person inside her net who suddenly jumped on her legs. She raised an alarm. The person

ordered her to keep quiet while he held a knife on her throat. She was then ordered to place her hands together and was tied with a rope so tightly that she could barely do anything. She was then commanded to give out money, So, she hardly walked to her closet and offered T.shs. 50,000/-. PW3, having heard what was going on, she walked to PW1's room only to be ordered by the assailant to go back to her room and sleep. The assailant had put on a mask whereby only his eyes were visible. The victim was then taken to the toilet and locked in as the assailant talked on the phone complaining that the job was hopeless as they only got T.shs. 50,000/- and that the woman had an infant so they could not injure her as she had small children.

When that was going on, the victim's son was already awake playing with the phone on the bed. Realizing so, the victim attempted to take the phone to call for help, but the assailant came into the bedroom and took the phone. He inquired on where her smart phone was and further asked if she had float cash in her mobile. The victim said she did not have. The assailant then required her to produce her cell mobile number and threatened to kill her if she found any money in the phone, but he found none. The assailant signaled his fellow assailants and they came into the house.

Eventually, the same assailant took her into the sitting room and ordered her to undress herself and eventually had intercourse with her. Amid such act, the assailant's mask fell off and as there was

light coming into the sitting room from a solar light on the veranda, she identified the assailant was the 1st appellant who had come to fix their home in December 2021.

After being raped, as she was ordered to move to the corridor, she found her son crying and thus breastfed him. At such time, the assailant went into the kitchen, switched the light on and served himself some food, she tried encroaching into the kitchen to properly identify the assailant but was not successful. The 2nd assailant came into her room and ordered her to get ought and while at the door step, the assailant pulled up her dress and raped her. As she went back to her room, the assailants fled. She raised and alarm and had neighbours call PW2, Deusdedit Sebastian Njau, her husband, who was in Arusha on the material day.

The incident was reported to the police and PW4, H. 3923 D/C Michael was assigned to investigate the case. The victim produced a receipt for purchasing her phone which was admitted as exhibit P1. PW1 was medically examined by PW5, one, Grace Saruni Mutet on 07.03.2022. She filled a PF3 which was admitted as exhibit P4. Following the report to the police, the 1st appellant was arrested on 07.04.2022 after an informant reported that the victim's mobile number was traced and found used on a different phone. The phone was seized and the seizure certificate admitted as exhibit P2. The phone was admitted as exhibit P3. Subsequently other appellants were arrested.

The appellants had nothing much to say. They only claimed to have been arrested without having any knowledge of the incident. They all denied to be involved in the offences.

After the trial, the 2nd accused was acquitted. The trial court found the 1st and 2nd appellants guilty and convicted them to the following sentences: 20 years imprisonment for the 1st count; 30 years imprisonment for the for the 2nd count; and 30 years imprisonment for the 3rd count. On the 4th count, the 1st appellant was sentenced to serve a term of three years in jail or pay fine of T.shs. 200,000/-. The sentences were set to run concurrently. Aggrieved, the appellants have thus filed this appeal on the following grounds:

1. *That, the trial court grossly erred in law and fact in basing its conviction and sentence on prosecution's unreliable, incoherent and contradictory evidence.*

2. *That, the trial court grossly erred in law and fact in construing reasonable doubts raised by the appellants (accused persons) and opted to rely on them in favour of the prosecution side.*

3. *That, the trial court grossly erred in law and fact in failing to consider the appellants' defence adduced at the trial, and erroneously held that the respondent proved their case against the appellants beyond reasonable doubt(s).*

4. *That the trial court grossly erred in law and fact in finding and holding that the appellants were positively identified by the alleged victim.*

5. *That, the trial court grossly erred in law and fact in finding and holding that the doctrine of recent possession was duly invoked by the respondent (precaution) beyond reasonable doubt.*

6. *That, the trial court grossly erred in law and fact in relying on the exhibits which were not read in court, hence falling to hold that the appellants' attention on their contents was not properly drawn thereto.*

7. *That, the trial court grossly erred in law and fact in failing to draw adverse inference against the respondent (Republic) upon their failure to call material witnesses.*

8. *That, the trial court grossly erred in law and fact in failing to properly evaluate the evidence adduced at the trial, instead it glossed over it to justify the conclusion reached.*

The appeal was argued by written submissions whereby the appellants were represented by Mr. Martin Kilasara, learned advocate, while the respondent was represented by Mr. Ramadhani Kajembe, learned state attorney.

In his submission in chief, Mr. Kilasara consolidated the 1st, 2nd, 4th and 8th grounds of appeal averring that the same were interrelated as they faulted the conviction and sentence of the appellants as the evidence was unreliable, incoherent, contradictory and not properly evaluated. Arguing on his stance, he averred that the evidence of PW1 and PW3, who alleged to be at the crime scene was incoherent and highly unreliable to secure the appellant's conviction. He found their testimonies contradicting with those of other witnesses, thus uncorroborated by such witnesses. He also complained that the appellants' evidence was not duly considered as it ought to have been.

Mr. Kilasara cited the case of **Yassin Maulid Kipanta and Others vs. Republic** [1987] TLR 183 arguing that the evidence against the accused is on identification and as such, the evidence must be watertight to justify the conviction. He contended that the evidence of PW1 who was the victim was that the incident took place on 06.03.2022 while she was in her room whereby it was already dark. That, the victim also stated that her assailant was covered and she could not identify him, and that, PW3, her maid, was also ordered by the assailant to vacate the room when she entered therein.

Examining further the victim's evidence, which he considered incoherent, Mr. Kilasara further argued that PW1 stated that she was tied up by a rope and could hardly move. That, she again stated that she was ordered to undress herself. That, on

identification, she alleged that the mask of one of the assailants fell off during the forced intercourse and so she could identify him due to the solar light coming from the veranda out of the sitting room where she was being held. However, he argued, still on examination in chief, the victim alleged that the 1st assailant would not let her see his face. He further challenged that the number of solar or lights, the intensity of the lights and distance was never mentioned by the victim nor the colour or type of the mask and clothes worn by the assailants. Finding all that faulty, he referred the case of **Joel Watson vs. Republic,** Criminal Appeal No. 143 of 2010 (unreported).

He argued further that PW3, who was also present at the scene on that fateful night, admitted during examination in chief and in cross examination that she could not identify any of the assailants and how many they were because the incident took place at night, the assailants wore black clothes and masks, and it was also dark. That, PW3 further testified that even PW1, never identified the assailants who entered their house that night. In the premises, Mr. Kilasara had the firm view that the appellants were never positively identified beyond doubt as the assailants. Thus, he said, the trial court erred in law and fact in finding and holding that the appellants were positively identified by the alleged victim. He further challenged that there was never an identification parade held at the police station for PW1 and PW2 to identify the appellants.

Arguing further on the inconsistency in the prosecution evidence, Mr. Kilasara contended that PW1 stated that the 1st appellant begged for clemency from PW2 upon his arrest, but PW2 never testified on such matter. He added that PW1 also alleged that she was raped by two people, but on cross examination she admitted that she never identified the 2nd appellant at the crime scene. In that respect, he was of the considered view that PW1 mentioned the appellants at trial because she was informed by PW4 that they had confessed to have committed the crime. However, he said, no confession was admitted at trial. He contended further that PW4 alleged that the 2nd accused had mentioned the 1st appellant and stated that the two of them committed the offences of robbery and rape. However, PW1 alleged that it was the 1st and 2nd appellants who committed the offences. Regarding such evidence, Mr. Kilasara had the stance that raised reasonable doubts. He cited the case of **Jeremiah Shemweta vs. Republic** (1985) TLR 228 in support of his stance.

Mr. Kilasara further averred that the alleged stolen phones make Itel and Uptel which are alleged to have been found in possession of the 1st appellant were neither tendered in court as exhibits nor identified at trial by either PW1, PW2 and or PW3. He argued that even the description of the alleged phones was not provided, save for the mere hand written receipt, Exhibit P1, which was produced a month later after the incident and arrest of the 1st appellant though it was alleged to have been in possession of PW1 sooner

before then. Further, he argued that Exhibit P3, the itel phone, has no connection with the alleged crime.

Referring the testimony of PW4, Mr. Kilasara further averred that PW4, admitted on cross examination that no stolen item was found in possession of the 1st appellant. In that respect, he had the stance that, the properties were not properly identified as required. A stance he supported with the case of **Henry Gervas vs. Republic** [1968] HCD 129 and that of **Nassoro Mohamed vs. Republic** [1968] HCD 446.

Concerning the knife used to threaten the victim during commission of the offences, he challenged that the purported knife (panga) was neither tendered at the trial nor at all identified and described by PW1 and PW3. That, its location was also never disclosed.

He continued by challenging the testimony of PW2, PW1's husband, on the ground that he was never at the crime scene thus his testimony was based on what he was told by PW1. He considered the evidence of PW2 being hearsay and inadmissible in terms of **section 62 (1) (a) of the Evidence Act** [Cap 6 RE 2019]. Mr. Kilasara further argued that PW2 testified to have been told by PW1 that she was raped by three people, whereas, PW1 said it was two (2) people. He added that on cross examination by 1st appellant, PW2 stated that PW1 never knew her assailants who raped her and he did not know the 1st appellant before the incident. He considered that testimony contradicting with that of PW 1 who stated to have

identified the 1st appellant at the scene and that she knew him before as a technician. Considering the discrepancies in the evidence of the prosecution witnesses, he averred that the same raise reasonable doubts and it was unsafe for the appellants to be convicted based on such evidence. He supported his arguments with the case of **Jeremiah Shemweta vs. Republic** (supra) and **Fredwind Martin Minja vs. Republic**, Criminal. Appeal No. 237 of 2008 (CAT at Arusha).

Challenging the findings of the trial court, Mr. Kilasara further contended that the trial court in its impugned judgement held that there was positive identification and sufficient proof that the respondent's evidence was reliable and watertight. He challenged the trial court for not making any attempt to explain the contradictions raised above and or duly considered them and instead, opted to rely on the prosecution's evidence, which caused injustice to the appellant.

He argued further that PW1 clearly did not identify the 1st appellant at the crime scene since if she had, she would have informed PW2 and PW3 or the local authority or the police in the morning of the said day as she was free of any threats of being killed or assaulted. Faulting PW1's identification of the 1st appellant, he contended that it was after months that she identified the 1st appellant at the police station. In the premises, he argued that the failure to name the suspect at earliest possible opportunity renders her testimony unreliable and the court should draw an adverse inference from

the same. He supported his averment with the case of **Ahmed Said vs. Republic** (Criminal Appeal 291 of 2015) [2016] TZCA 192 TANZLII.

Addressing the conviction on the charge of gang rape, Mr. Kilasara argued that the appellants were all charged with gang rape but it was uncertain as to the number of the assailants and their identity. That, PW5 who medically examined the appellant in less than 12 hours after the incident and tendered Exhibit P4, did not show any signs of rape or forceful intercourse on PW1. He considered that raising serious doubts on the truthfulness of occurrence of the alleged offence. He argued that gangrape, armed robbery and burglary are all serious offences which attract grave punishments, thus the trial court should have warned itself and assured itself that the evidence of the respondents was coherent, credible and watertight prior to convicting the appellants. He cited the case of **Nelson George @ Mandela and 4 Others vs. Republic**, Criminal Appeal No. 31 of 2010 averring that the trial court should have assessed the credibility of witnesses and consider all the evidence in record. He was of further view that this court is entitled to look at the evidence and make its own findings of fact as held in **Deemay Daati and 2 Others vs. Republic** [2005] TLR 13.

Addressing the 3rd ground, Mr. Kilasara averred that it is a settled principle that the standard of proof in criminal cases is beyond reasonable doubt and when the onus shifts to the accused, it is on a balance of probabilities. He referred the case of **Said Hemed vs Republic** [1987] TLR 117 by the Court of Appeal, in support of his

argument. Explaining further, he contended that the appellants denied committing the alleged offences and testified on how they had been arrested, but their testimony was not accorded any weight or considered in line with the evidence of the respondent which was weak, incoherent and unreliable. He maintained his view that the appellant's evidence raised doubts on the respondent's evidence. He supported his averment with the case of **Fanuel Kiula vs. Republic** [1967] HCD 369 and **Ahmed Said vs. Republic** (supra). He concluded on this ground arguing that the trial court ought to have considered the evidence of the appellant, which raised serious doubts that should have been resolved in their favour.

With regard to the 5th ground, Mr. Kilasara kind of reiterated the arguments he advanced hereinabove. He averred that the appellants were not identified at the crime scene and phones make uptel and Itel, allegedly stolen from PW1's house were never properly described by PW1, PW2 and PW3 and also not tendered. Further, he claimed that according to the evidence of PW4, the money, knife and phones were never found in possession of the appellants as to connect them to the offence of burglary, armed robbery and recent possession.

He further argued that the seizure certificate and itel phone were never cleared for identification prior to being tendered. That the phone was not properly described, that is, by the make, year and serial number. That the phone was never shown and /or identified

by PW1 or PW3 prior to being tendered by PW4 while the 1st appellant did state that he was the owner of the said phone. In support of his arguments, he cited the case of **Joel Watson vs. Republic** (supra), which laid down the criteria to be met for the doctrine of recent possession to be applied. He further cited the case of **Abdul Salumu vs. Republic [1967] HCD 107** averring that the appellants' explanation on how he came to possess the stolen goods does not have to be reasonable and convincing. That, it suffices that it is just reasonably true. He thus contended that the trial court erred in finding that the doctrine of recent possession was well invoked by the respondent.

As to the 6th ground he averred that the seizure certificate and phones which were then admitted as Exhibit P2 and P3, respectively, were not cleared for admission. That, the prosecution only showed them to PW4 without him testifying on how he would identify the same. He also challenged that exhibit P2 was not read aloud at the trial court to enable the appellants understand the contents thereof, instead, PW4's examination in chief was closed. Averring that reading of the exhibit is important and the omission thereof is fatal, he cited the case of **Geophrey Isidory Nyasio vs. Republic** (Criminal Appeal 270 of 2017) [2020] TZCA 21 TANZLII and that of **Jumanne Mohamed and 2 Others vs. Republic**, Criminal Appeal No. 534 of 2015 (unreported). He had the stance that since the document was not read out loud, it was without value, thus should be expunged from the record.

Submitting on the 7th ground, Mr. Kilasara challenged the prosecution for failure to call persons he considered material witnesses. He argued that while PW4 argued that the stolen mobile phone Uptel was registered in the name of Happy Samwel Neema, the said person was never traced and or summoned by the respondent as a witness. He added that no any document tendered in connection to the purported offence of recent possession of stolen properties. He argued that the said Happy Samwel Neema was a crucial/material prosecution witness to connect and or corroborate the evidence of PW1, PW2, PW3 and PW4. However, that, she was never called to testify and no reason was ever advanced at the trial.

In the premises, he considered her absence as raising further serious doubts on the prosecution case to the effect that had she been called, she would have given testimony unfavourable to the respondent. In that regard he had the stance that the court ought to draw an adverse inference as instructed under **section 122 of the Evidence Act**. He cemented his arguments with the case of **Hemedi Said vs. Mohamedi Mbilu** [1984] TLR 113 and **Azizi Abdalah vs. Republic** [1991] TLR 71.

Mr. Kilasara finalized his submissions by praying for the appeal to be allowed, the decision of the trial court quashed and conviction and sentence set side.

In reply to the consolidated grounds, Mr. Kajembe conceded that indeed PW1 did not positively identify the 2nd appellant at the crime scene. He submitted that the same is vivid on the proceedings whereby she testified that she was informed by PW4 that the 2nd appellant had confessed on committing the crimes. He added that PW4 also stated that the 1st appellant and the 2nd accused admitted to have raped PW1.He also found the testimony contradictory to what PW1 testified. He argued further that there were no any caution statements which were tendered in court to prove on the said confessions and to clear the said doubts as to whether the 2nd appellant was the one present at the crime scene and raped PW1.

Cting the case of **Kisandu Mboje vs. Republic** (Criminal Appeal No. 353 of 2018) [2022] TZCA 425 TANZLII he averred that for the offence of armed robbery to be proved under **section 287A of the Penal Code**, the prosecution must prove , **one**, there was an act of stealing; **two**, that immediately after stealing the assailant was armed with a dangerous or offensive weapon or robbery instrument; and **three**, the assailant used or threatened to use actual violence in order to obtain or retain the stolen property. Considering the testimony of PW1, he averred that the three elements were well proven by PW1 who testified that the 1st appellant put a knife around her neck, threatened her and took T.shs. 50,000/- and a mobile phone make Up-tel.

He was of the considered view that the 1st appellant was properly identified by PW1 who stated in her testimony that he was not a stranger to her as she had initially employed him to fix her house; kitchen, bedroom and outer part of the house. That, she was capable of identifying him with the light on the veranda because his mask fell off. PW1 saw that he was tall in height, black in colour and stammered as he spoke. Further, that, PW1 stated that she saw the person serving himself food. In the circumstances, he was of the view that PW1 was capable of describing the 1st appellant and how she identified him as instructed in **Majaliwa Chiza vs. Republic** (Criminal Appeal 526 of 2020) [2022] TZCA 360 TANZLII and **Fadhii Gumbo @ Maota and Three Others vs. The Republic** [2006] T.L.R 5.

On the offence of Burglary, he made reference to the case of **Marwa Chacha @ Robare vs. Republic** (Criminal Appeal 133 of 2020) [2022] TZCA 325 TANZLII in which the elements of burglary were mentioned. That is, breaking and entering into any building, tent or vessel used for human dwelling at night. He argued that it was evident that the incidence took place on 06.03.2022 at night in PW1's home as evident from the testimony of PW1 and PW3. That, the two testified that two assailants invaded their home. PW1 also testified that the 1st appellant used a knife to threaten her, ordered her to shut up, tied her with a rope so that she could not at all move and then the appellant ordered her to produce money. That, the acts of the 1st appellant show that he had an intention to commit an offence thus manifesting that the offence of burglary was proved against the 1st appellant.

As for the offence of gang rape, Mr. Kajembe averred that the best evidence in sexual offences comes from the victim. In that stance he referred the case of **Essau Samwel vs. Republic** (Criminal Appeal 227 of 2021) [2022] TZCA 358 TANZLII and that of **Godi Kasenegala vs. Republic** (Criminal Appeal 10 of 2008) [2010] TZCA 5 TANZLII. Further, he cited the case of **Selamani Makumba vs. Republic** [2006] T.L.R 379 arguing that the court emphasized that penetration must be proved. Further, citing the case of **Majaliwa Chiza vs. Republic** (supra) whereby the ingredients of rape were provided in reference to **Section 131 A (1) of the Penal Code**, he was of the view that this offence was not proved. He submitted that subject to **Section 22 of the Penal Code**, gang rape is rape of one person by a group of people, but PW1 testified that she was sorely raped by the 1st appellant in the absence of the 2nd offender and that later on the 2nd offender came and raped her. In the premises, he concluded that the two incidents happened at different periods thus do not qualify as gang rape. Making reference to the case of **Majaliwa Chiza vs. Republic** (supra) he asked this court to invoke its revisional powers to substitute the offence of gang rape with that of rape.

Mr. Kajembe averred that the 2nd appellant was not identified by PW1 and even if an identification parade was conducted, she still would not be able to identify him. He further argued that there is no any concrete evidence connecting the 2nd appellant to the crimes. That, PW4 testified that it was the 2nd accused, who was acquitted that mentioned the 2nd appellant averring that they had

committed the offence together. However, he said, the cautioned statement was not tendered to prove the alleged facts. That, the 2nd accused was also acquitted of all charges; hence his evidence holds no value even if it was true that the 2nd accused mentioned the 2nd appellant.

Regarding the two phones stolen at the crime scene, he contended that PW4 stated that the phones, make Itel and Uptel were found in possession of the 1st appellant. However, he said, PW4 tendered exhibit P2 and P3, certificate of seizure and Itel mobile phone with IMEI number 358720582445244, respectively. Remarking on the exhibits, he submitted that there is however, no evidence showing the connection of exhibits with the offences charged. He faulted the testimony of PW4 who said that he traced mobile phone make UPTEL IMEI No 356297116861669, but tendered a phone with a different IMEI No. He also found Exhibit P2 lacking evidential value on the ground that it was never read over to the accused persons after admission.

In the circumstances, he had the view that reliance on the exhibit was unlawful. To buttress his point, he referred the case of **Masanyiwa Masolwa vs. Republic**, (Criminal Appeal No. 280 of 2018) [2022] TZCA 456 TANZLII and asked for the exhibit to be expunged from the record. Considering the observation, he concluded on this issue that the 2nd appellant was not found in possession of goods suspected to be stolen since there was no any stolen property which was found in possession of the 2nd appellant.

Mr. Kajembe further noted that even if the said mobile phone was properly tendered in court, the owners were never recalled for identification. He contended that in order to prove ownership and description that the item was the one stolen in the crime scene the same has to be identified. He thus asked this court to find that this appeal partly has merit with regard to 2nd appellant as all four counts were not proved against him. With regard to the 1st appellant, he conceded the 4th count was not proved against him. He thus prayed for this court to quash the conviction and sentence of the trial court as per the respective offences. However, with regard to the 1st, 2nd, and 3rd counts for the 1st appellant, he prayed for the court to uphold the conviction and sentence of the trial court arguing that the said counts were proved beyond reasonable doubt.

Rejoining, Mr. Kilasara averred that as rightly conceded by the Mr. Kajembe there are serious doubts as to the identification of the appellants in relation to the alleged crimes due to the contradictory evidence of PW1 and PW4 on record. That, indeed, no caution statement was ever tendered at the trial to substantiate the purported allegations that the 2nd accused confessed to commit those serious crimes with the 2nd appellant. Further, that, Exhibits P2 and P3 were not only improperly acted on, but also irrelevant as they had no connection to the alleged crimes, especially the offence of possession of stolen property.

However, contrary to Mr. Kajembe's observations regarding the 1st appellant, he insisted on his point that even the 1st appellant was not positively identified by PW1. He maintained that the incident took place at mid night on 06.03.2022 and there was no electricity. That, the victim did not testify as to the intensity of the light or the distance while she said that the assailant had covered his face with mask. In what I find misleading, Mr. Kilasara contended that PW2 stated that she was asleep and dreaming and as she woke up, she had been tied by a rope.

Further, he said that, the victim admitted that the 1st appellant did not let her see his face even as he went to the kitchen and toilet. That even the colour, type of mask and clothes worn by the 1st appellant were never identified to eliminate the possibility of mistaken identity. He reiterated that if at all PW1 had identified the 1st appellant at the crime scene, she would have disclosed such details to PW2, PW3 and the police, the morning after the said incident, but that was not done until a month later when she identified him at the police station. In the premises, he reiterated his stance that the failure of PW1 to name the 1st appellant at the earliest opportunity, raises doubts as to her credibility, a fact not addressed by Mr. Kajembe. He thus asked for this court to be guided by the case of **Ahmed Said vs. Republic** (supra) and be pleased to resolve the doubts in favour of the appellants.

With regard to the charge of gang rape by the 1st appellant, he contended that as conceded by Mr. Kajembe, the offence of

gang rape was never proved at the trial court even with the evidence of PW5 who examined PW1 and the PF3, exhibit P4. Insisting that the prosecution evidence was doubtful, he maintained his argument faulting the trial court for not according any weight to the appellant's evidence or even compared to that of the prosecution which was weak, incoherent and unreliable. He thus asked the court to be guided by the case of **Fanuel Kiula vs. Republic** (supra) and **Ahmed Said vs. Republic** (supra) and be pleased to consider the appellants' defence as whole in relation to the alleged crimes and further be pleased to resolve the doubts raised in the appellants' favour. Mr. Kilasara reiterated his prayer for the conviction of the appellants to be quashed and set aside.

I have considered the grounds of appeal, the submissions of both parties' counsels and gone through the trial court record. In the course of doing that I find there are two major issues to be observed herein; **one,** whether the case was proved against the appellants beyond reasonable doubt and **two,** whether the trial court did not consider the appellants' defence. In resolving the 1st issue; I shall address the following issues; one, whether the appellants were properly identified at the crime scene; two, whether the process of admission of exhibits was complied with and three, whether the evidence of the prosecution was contradictory.

With regard to the question of identification of the appellants. It is well settled that courts, while acting on evidence of visual identification should be duly warned for it being the weakest form

of evidence. To guard courts as to approach such evidence with caution, the Court of Appeal in **Waziri Amani vs. Republic** [1980] TLR 250 established the primary factors that should be taken into consideration prior to relying on evidence of visual identification so as to eliminate the possibility of mistaken identity. The apex Court stated:

> "Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems dear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: **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 lighting at the scene; and further whether the witness knew or had seen the accused before or not.** These matters are, but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."

In this case, it is undisputed that the alleged incident that bred three offences; that is, burglary, armed robbery and gang rape took place at night hours around 02:00hrs as testified by PW1 or at 00:00hrs as testified by PW3. PW1's testimony was to the effect that he did identify the 1st appellant at the crime scene. She said she identified him through solar light that showered from the verandah

to the sitting room where the incident of rape occurred. That, she was able to see his face when his mask fell down. She further alleged to have seen him through the kitchen electrical light. According to her, she recognized the 1st appellant at the crime scene. Her testimony is found at page 13-14 of the typed proceedings whereby she testified:

> *"As he was fucking me and carry me so that he could penetrate me, his face mask got off from his face as such I had manage now to identify him from the solar light that was on at the veranda outside immediate after the sitting room where the light came through the windows from the sitting room. I had managed to see that person and knew him to be a person who came at my home December, 2021."* (sic)

While it is settled that recognition is more assuring and reliable than the identification of a stranger, this can only be possible where there are favourable circumstances that make the recognition of such suspect clear. See; **Masali Lukanya & Another vs. Republic** (Criminal Appeal No. 625 of 2021) [2023] TZCA 17745 TANZLII. In this vase, I find that PW1 did not properly recognize the 1st appellant as she alleged due to the following reasons:

First, PW1 never described the intensity of the solar light at the veranda and the electrical light at the kitchen. She only mentioned the lights, but never mentioned the intensity of the same and how the same illuminated light to the effect that she was capable of

seeing the 1st appellant by its aid. In **Waryoba Elias vs. Republic** (Criminal Appeal No.112 of 2020) [2023] TZCA 17314 TANZLII, the Court of Appeal stated:

> "It is trite that except where identification is by voice, in visual and recognition identification, light is a critical prerequisite. Accordingly, the Court has been resolute regarding its source and intensity stressing their proof beyond reasonable doubt that such light is bright enough to see and positively identify the assailant"

In **Issa s/o Mgara @ Shuka vs. Republic**, Criminal Appeal No. 37 of 2005 (unreported), the Court of Appeal emphasized on the importance of identifying witness to give details as to the source of light and the intensity of the same. The Court stated:

> "It is 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 sufficient details on the intensity of the light and the size of the area illuminated."

Addressing a similar circumstance in **Kurubone Bagirigwa & Others vs. Republic** (Criminal Appeal 132 of 2015) [2016] TZCA 272 TANZLII,

whereby the appellants had been recognized, but details as to intensity of the light lacked, the Court of Appeal held:

> "In the light of what the Court said in CHOKERA MWITA vs. REPUBLIC (supra) and ISSA s/o MGARA @ SHUKA vs REPUBLIC (supra) in the case at hand, since the intensity of solar light was not explained, the possibilities of mistaken identity were not eliminated. It was not enough for the witnesses to merely say that, they knew the appellants who are residents of Buserere, without stating as to how they managed to identify the appellants at the scene of the crime. This is because it is trite law, even in recognition cases, mistaken identity is possible. (See, ISSA s/o MGARA @ SHUKA VS REPUBLIC (supra)."

See also; **Said Chaly Scania vs. Republic** (Criminal Appeal 69 of 2005) [2007] TZCA 180 TANZLII; **Deo Amos vs. Republic** (Criminal Appeal 286 of 2007) [2010] TZCA 152 TANZLII; **Hando Hau @ Hau Petro vs. Republic** (Criminal Appeal 453 of 2018) [2022] TZCA 13 TANZLII and; **Khalid Rafii Mohamed vs. Republic** (Civil Appeal No. 398 of 2021) [2023] TZCA 17753 TANZLII.

Second, there are contradictions on PW1's evidence as to the identification of the 1st appellant. This is seen at page 14 of the typed proceedings whereby PW1 mentioned that she attempted to further identify PW1 as he switched on the kitchen light and served himself some food. She testified that:

> *"I tried to come to the corridor so that I could further identify him, as he heard me coming to*

> *the corridor as he was drinking water in the glass in my kitchen he then come to the corridor aiding to the toilet I had to go back to the room."* (sic)

PW1 testified to have surely identified the 1st appellant when raping her by aid of a solar light that was outside the house at the verandah. She then said that she went to the corridor to the kitchen to identify the assailant properly when he was serving himself food in the kitchen. However, though she said that she was aided by electric light, she said that at this second time, she did not manage to identify him well. I find this raising doubts as to whether the light illuminated by the solar light from the verandah was enough for her to identify the 1st appellant. Further, PW3 alleged that there was no light in the house which is why she could not identify the thieves that broke into the house. PW3's statement in fact contradicts the victim's testimony.

Third, as it is well settled, the ability of an eye witness to name the suspect at the earliest possible opportunity assures the reliability of such witness. See, **Mwita Marwa Wangiti vs. Republic** [2002] T.L.R 39; **Director of Public Prosecutions vs. Chibago s/o Mazengo & Others** (Criminal Appeal 109 of 2019) [2020] TZCA 315 TANZLII and; **Mohamed Hamisi @ Bilali vs. Republic** (Criminal Appeal 300 of 2021) [2023] TZCA 195 TANZLII.

In this case, while PW1 alleged to have recognized the 1st appellant, she did not name him to any person. PW3, clearly had no idea as to PW1 recognizing the 1st appellant. Likewise, PW2, her husband, clearly stated in his testimony that PW1 did not recognize any of the assailants. This is seen at page 23 of the typed proceedings when the 1st appellant was cross examining him. He stated:

> "I know you when I saw you, I did not know you before, I was informed by the victim that she did not know the person raped her. At police my wife got RB which is not present before this court, the statement of complainant at police central was given by the victim who is my wife." (sic)

Even PW4, who was allegedly investigating the case, seemed to have no idea on PW1 identifying any of the assailants at the crime scene. It was only when he was being cross examined that he disclosed that PW1 said to have identified one person. Clearly, his testimony shows that he did not know who among the accused persons, was exactly identified. There was also no any evidence tendered by him showing that the victim mentioned to him earlier the 1st appellant as the assailant. It seems that even the appellant's arrest was due to allegedly tracing of PW1's mobile phone, which happened on 07.04.2022, a month later.

In **Hassan Hussein vs. Republic** (Criminal Appeal No. 41 of 2022) [2023] TZCA 17304 TANZLII, addressing a similar issue whereby eye

witnesses claimed to have recognized the assailant, but did not name them, the Court of Appeal reasoned that:

> "Guided by the above principles, we have revisited the relevant evidence given by PW1, PW2 and PW3 who claimed to have recognized the appellant at the scene of crime because they used to know him well and also as the scene of crime was illuminated by electricity light from the neighbouring shops. Our observation is that though the said three witnesses claimed to have recognized the appellant, they completely failed to name him to any person. The witnesses never named the appellant to PW5, the police officer who collected the co-accused from the civilians who had arrested him while attempting to flee from the scene of crime. There is also no evidence that PW1 named the appellant to the police when his statement was being recorded at the police station. Further, the delay in arresting the appellant leaves a lot to be desired. If the appellant was well known to PW1, PW2 and PW3 and if he was recognized at the scene of crime, how comes it took almost a month to arrest him."

In the foregoing circumstances, it seems PW1's identification of the 1st appellant at the police station which seemed to have not been held under an identification parade was rather an afterthought, likely streaming from the fact that they had been informed that the assailants had been arrested and they confessed to have committed the offences. The record does not indicate that there was initial description of the 1st appellant or any of the assailants to which the alleged identification was conducted.

Now going to the alleged identification of the 2nd appellant. foremost, as I have initially stated, it is clear that PW1 never disclosed details as to the description of the assailants prior to the arrest. In any case, in her testimony, she stated that the other assailant who also raped her was her height and at the court she averred that he was more built by then that he was. That he had lost weight. This is found at page 16 of the typed proceedings.

Since the 2nd appellant was a stranger to her, he ought to have been identified vide an identification parade which appears to have not being done. In **Ngaru Joseph & Another vs. Republic** (Criminal Appeal 172 of 2019) [2022] TZCA 73 TANZLII, the essence of an identification parade was provided. The Court stated:

> "In particular, the purpose of an identification parade is to enable a witness identify his/her assailant whom he/she has not seen or known before the incident (See, **Joel Watson @ Ras v, Republic**, Criminal Appeal No. 143 of 2010 (unreported))"

Still, even for an identification parade to be possible, there must have been prior descriptions of the assailant(s) such that the eye witness would be able to identify the assailant. Since no prior description of the 2nd appellant was made, it appears that the prosecution relied on the mere fact that the 1st appellant allegedly named the other assailants. The same information was also supplied to PW1 and PW2 who relied on it.

Now I shall address the only link that allegedly led to the appellants' arrest including the 2nd accused who was acquitted. It seems it all begun with the 1st appellant who was allegedly arrested following an informer who told PW4 that there was a person using the same line card on a mobile phone. This was different from the allegation that the phone belonged to PW1. Further, the phone sized had a different IMEI number from the one allegedly belonging to PW1. With regard to the sim card, it was stated that the same belonged to one Happy Samwel Neema. This sim card was never mentioned by PW1 and PW2 who allegedly knew the phone. So, the 1st appellant was apprehended with a different phone, holding a line number of a person who was stranger to the case. No one explained who Happy Samwel Neema was and why her phone number was involved in the case. This person was also never called before the trial court to testify.

It is well settled that in cases of recent possession the suspect must be found in possession of the item allegedly stolen and the same must be identified by the owner. This was well explained in **Dauson Athanaz vs. Republic** (Criminal Appeal 285 of 2015) [2016] TZCA 560 TANZLII, in which it was stated:

> "It is notorious that the essential ingredients of the doctrine of recent possession are that it must be proved beyond reasonable doubt that the accused person was truly found in possession of the allegedly stolen properties and that those properties should be positively identified by the owner."

It is thus clear that in this case, it was never proved that the phone and sim card in anyway belonged to PW1. This further takes me to the alleged involvement of the 2nd appellant who was never identified at the crime scene and seems to only be connected because he was allegedly named as the assailant by the 2nd accused who was acquitted.

The circumstances of the case have proven that the investigation of the case was lacking at great levels such that the whole case was merely based on unproved information rather than actual investigated facts. The prosecution evidently failed to prove their case against the appellants beyond reasonable doubt. In my view, this one issue on identification suffices to dispose the appeal at hand.

In the premises, I allow the appeal and quash the conviction and sentence against the appellants in respect of all charges. I order for the accused persons' immediate release from custody, unless held for some other lawful cause.
It is so ordered.

Dated and delivered at Moshi on this 11th day of December, 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA