THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 79 OF 2022

MARCO NZIKU @KAJANJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the District Court of Njombe at Njombe)

(Hon. M.J. Kayombo - RM)

dated the 05th day of October, 2022

in

Criminal Case No. 37 of 2019

JUDGMENT

Date of Last Order: 16/08/2023 &
Date of Judgment: 29/09/2023

S. M. Kalunde, J.:

Before the District Court of Njombe sitting at Njombe, in Criminal Case No. 37 of 2021, the Appellant, MARCO NZIKU @KAJANJA, was charged with the following counts:

> *"First Count: ROBERY: Contrary to section 285(1) and 286 of the Penal Code [Cap. 20. R.E. 2019]."*

The particulars of the offence of robbery were that:

> *"MARCO NZIKU @KAJANJA on 19th day of June, 2021 at Mtila Village – Uwemba within the District*

and Region of Njombe, stole Tshs. 1,200,000/=, One Mobile Phone make TECNO and Solar Light Torch both being the properties of one ADN and immediately before or immediately after that stealing used personal violence against ADN to threaten him in order to obtain the said property."

He was also charged with the offence of rape couched in the following terms:

"Second Count: RAPE: Contrary to section 130(1) & (2) and 131(1) of the Penal Code [Cap. 20. R.E. 2019]."

The particulars, in respect to the offence of rape, were as follows:

"MARCO NZIKU @KAJANJA on 19th day of June, 2021 at Mtila Village – Uwemba within the District and Region of Njombe, had carnal knowledge of one ADN, without her consent."

The name of the victim in the two counts has been withheld in accordance with the law to conceal her identity.

The appellant was arraigned before the trial court on 06th July, 2021. When the charges were read to him, he pleaded not guilty to all the charges. The prosecution was then tasked with a duty to prove the charges against him beyond reasonable doubt. To do so they called four witnesses.

The victim, a nurse at Mtila Health Centre, testified that on the night of 19th June, 2021 at around 02:00Hrs. she woke up and went to the toilet which was outside her house. On her returned, the accused grabbed her by the neck and ordered her to give him money. The victim showed him the money. After grabbing the money, the appellant proceeded to rape her. Before leaving the appellant grabbed a solar torch worthy Tshs. 70,000/= and disappeared into the night. The prosecution pleaded that the victim managed to identify the appellant through a solar light. After the departure of the appellant the victim went to her neighbor, a teacher and then to the Doctors home. The doctor then proceeded to report the matter to **Lino Mwalongo (Pw2)**. Thereafter, Pw2 prepared a letter so that the matter would be reported to the police. The victim, teacher and doctor proceeded to the police. at the police station the victim was given a Police Form No. 3 (PF3) (**Exhibit P1**) for medical examination. She was medically examined by **Dr. Stephano Chanangula (Pw3).** Owing to the bruises on her vagina, the medical expert concluded that the victim had been raped.

Meanwhile, Pw2 organized local militias to arrest the appellant. In company of the militia, Pw2 managed to arrest the appellant at around

05:00Hrs. He was then taken to the police. At the police station the appellant confession statement was recorded by **G. 8386 D/CPL Endrew (Pw4).** The witness stated that he recorded the statement from 13:00Hrs to around 13:40Hrs. on the 19th day of June, 2021. The appellant denied to have made the statement to the police let alone Pw4. After an enquiry, the confession statement was admitted as **Exhibit P2**.

The trial court was satisfied that the prosecution had mounted a prima facie case. The accused was put on his defence. He gave sworn evidence denying the involvement his in the alleged crimes. Ultimately, his defence did not save him. After full trial, the trial court was satisfied that the prosecution has proved the charges beyond reasonable doubt. He was sentenced to suffer imprisonment for fifteen years in respect of the fist count; and thirty years for the second count.

The Appellant was aggrieved by the conviction and sentence hence this appeal, which he initially filed vide a Petition of Appeal on 08th November, 2022 citing the following grounds: -

1. *That the trial court erred in convicting the appellant based on hearsay and circumstantial evidence of relatives who did not witness the incident;*
2. *That the learned trial magistrate erred in convicting the appellant based on the testimony*

of Pw5 whose testimony was not corroborated by Erick whom they were together;

3. *The trial court erred in convicting the appellant without an identification parade being done for Pw1, Pw3 and Pw5 to identify him;*
4. *The trial court erred in convicting the appellant without an identification parade being done for Pw1, Pw3 and Pw5 to identify him;*
5. *The trial court erred in convicting the appellant without an identification parade being done for Pw1, Pw3 and Pw5 to identify him;*
6. *The trial court erred in convicting the appellant without an identification parade being done for Pw1, Pw3 and Pw5 to identify him;*
7. *That the learned trial magistrate erred in convicting the appellant based on the weakness of the defence case; and*
8. *That the prosecution totally failed to prove the case against the appellant beyond reasonable doubt.*

Relying on the above grounds, the appellant prayed that the appeal be allowed, conviction be quashed and both sentences be set aside, and order for his immediate release be issued.

At the hearing, the appellant, a lay person appeared in person while the respondent republic was represented by [illegible] learned State Attorney.

The appellant had nothing of substance to add to his grounds of appeal. He prayed that the grounds be adopted and considered by the court. He urged the court to allow the appeal and set him lose. He

requested that the respondent make their submissions and he will respond thereafter.

In his oral submissions, Mr. Matitu intimated that the respondent was supporting the appeal. The learned counsel argued that, on the strength of the first, second, third and sixth grounds of appeal, the charges against the appellant could not be said to have been proved to the required standard. That is, beyond reasonable doubt.

In respect of the first count, Mr. Matitu argued that, there was no sufficient evidence in the prosecution case establishing whether the appellant was found in possession of Tshs. 1,200,000/=, one mobile phone make TECNO and a solar light torch as alleged in the charge sheet. The learned counsel added that besides mentioning the items, the victim did not offer any description of the items for purposes of identification.

Regarding rape, the learned state attorney argued that the evidence of visual identification of the appellant was wanting. The learned counsel submitted that the incident took place at night and besides mentioning that she recognized the appellant through torch light the victim did not provide a description of the available condition for identification. To support his argument, the learned state attorney

relied in the case of **Chacha Jeremiah Murimi & Others vs Republic** (Criminal Appeal 551 of 2015) [2019] TZCA 52 (4 April 2019) (TANZLII) where the Court of Appeal (Mziray, J.A) at page 18, stated:

> *"Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. 'The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other persons give evidence to confirm it"*

Still on identification, Mr. Matitu argued that, while the prosecution retained the right to summon the witness necessary to prove the case, the prosecution made a fatal error in failing to parade the teacher and the doctor, who met the victim immediately after the

incident. The counsel reasoned that the two witnesses were important in rendering credence to the prosecution case. For this, he cited the case of **Waziri Shabani Mizogi vs Republic** (Criminal Appeal No.476 of 2019) [2023] TZCA 17344 (16 June 2023) (TANZLII) where the Court of Appeal (Korosso, J.A), at page 23, stated:

> *"Suffice it to say that section 143 of the Evidence Act stipulates that there is no particular number of witnesses required to prove a fact as discussed in the case of* ***Yohannis Msigwa v. Republic*** *[1990] T.L.R 148. Similarly, we are alive to the settled position of the law that requires the prosecution to call material witness(s) to prove the case against an accused person, failure to which, without sufficient reason may lead the court to draw an adverse inference as stated in the case of* ***Azizi Abdallah v. Republic*** *[1991] T.L.R 71."*

In view of the above submissions, Mr. Matitu urged the court to allow the appeal thereby quash the conviction and set aside the sentences imposed on the appellant.

The appellant's rejoinder was brief. He supported the respondents' submissions and prayed that the appeal be allowed and an order setting him free from prison.

I have carefully considered the whole evidence presented before the trial court, the grounds of appeal and submissions by the parties. I

have also read the Judgment of the learned trial Magistrate. Having done so, I am of a decided view that, this case, primarily, hinges on the question whether the Appellant was positively identified.

It is trite in our jurisdiction that evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. There is a string of authorities to this end, they include: **Waziri Amani v Republic** (1980) TLR 250; **Raymond Francis v Republic** (1994) TLR. 100; **Augustino Mihayo v Republic** (1993) TLR. 117; **Marwa Wangai and Another vs Republic**, Criminal Appeal No.6 of 1995, and **Shamir S/O John v Republic**, Criminal Appeal No. 166 of 2004 (both unreported).

The position of the law is also settled that, even in cases of recognition where such evidence may be more reliable than identification of a stranger, clear evidence on the source of light, and its intensity is of paramount importance. This is because even in recognition cases mistakes are often made (see **Issa Mgara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005, and **Magwisha Mzee Shija Paulo v Republic**, Criminal Appeal No. 465 and 467 of 2007 (all unreported).

Equally, in **Kulwa S/o Mwakajape and Two Others v. R**, Criminal Appeal No. 35 of 2005 (unreported) the Court of Appeal emphasized that the evidence of identification by recognition of an accused person previously known to the witness should not derogate from the prerequisite requirement that conditions for the proper identification of the suspect were favourable.

Guided by the above authorities I shall now revert to the facts of the case under scrutiny. It is on record that, Pw1 testified that she was able to identify the appellant on the basis of the following circumstances; first because she knew him before the incident as he is a fellow villager; and secondly, that she was aided by light emitted from a solar bulb. However, the records show that Pw1 did not provide clear evidence to establish, beyond reasonable doubt, that the light relied on by her was reasonably bright to enable her to identify the appellant. The position of the law is that merely stating that there was electricity bulb or that there was sufficient light is not enough. There must be a clear description of the intensity of light and whether or not it was sufficient to enable the identification of an accused person. This view was stressed by the Court of Appeal in **Deo Amos vs Republic** (Criminal Appeal No. 286 of 2007) [2010] TZCA 152 (19 August 2010)

(TANZLII), where the Court (**Msofe, J.A**) having considered the case of **Magwisha Mzee and Another v. Republic,** Criminal Appeal Nos. 465 and 465 of 2007 (unreported) stated thus:

> *"What is more important, however, in this regard is that the witnesses did not say anything on the intensity or otherwise of the light in issue.* ***It was important for the witnesses to say whether the light was bright enough to allow for correct identification of the appellant.***"

After the prosecution has established that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. The prosecution must lead the witness to state exactly how she identified the appellant at the time of the incident. It is not enough for the witness to state that she knew the appellant before the incident. She must provide evidence of how she was able to recognize the appellant by either his physical appearance, distinctive clothing, height, voice or certain identifiable marks. (See **Anael Sambo v. Republic**, Criminal Appeal No. 274 of 2007 (unreported). Instant case, upon scanning through the evidence of Pw1 I have not seen anywhere where the witness stated how she managed to identify the appellant.

It is also common ground that in matters of identification it is not enough merely to look at the factors favouring accurate identification. Credibility is a critical factor in assessing the reliability of a witness's testimony, and early identification of a suspect can both positively and negatively affect it, depending on the circumstances. (See **Jaribu Abdallah v. Republic** (2003) TLR 271). The above principle is founded on the fact that the ability of a witness to name a suspect at the earliest opportunity may suggest; first that a witness has a strong and reliable recollection of the details of the alleged event; two that the witness was alert, responsive and aware of their surroundings at the time of the event; thirdly, a truthful witness is more likely to provide a consistent account of events, therefore, if a witness maintains the description of the identity of the offender to subsequent persons, including to the police officers or local authorities, that may also boost their credibility because it implies that they are telling the truth and not fabricating or altering their story.

On the other hand, delay of a witness in naming the accused may lower their credibility in the eyes of law as it might be influenced by subsequent suggestive or leading questions from other witnesses or at times law enforcement agencies. The outcome would definitely result

into a biased identification. In the end, when assessing a witness's credibility, a trial court must thoroughly evaluate the circumstances surrounding the identification of an accused person and consider it in the context of the entire case.

In the instant case, the records show that immediately after the incident Pw1 reported the matter to her neighbours. One of them was a teacher and the other was her fellow employee, a doctor. However, despite being the best witnesses to corroborate the victim's story, these witnesses were not called to render credence to the prosecution case. As correctly argued by Mr. Matitu, while the prosecution retains the prerogative to summon whichever number of material witnesses to prove a fact, a failure to do so without sufficient reasons may entitle a trial court to draw an adverse inference. (See **Azizi Abdallah v. Republic** [1991] T.L.R 71). In the present case, the failure to call the teacher and doctor who spoke to the victim after the incident inflicted a serious knock into the prosecution.

On the basis of the evidence adduced, I am of a firm view that there are doubts whether the appellant was properly identified. The failure of the witness to describe the conditions of identification and

how she managed to identify the appellant minimizes the probative value of her evidence.

In the result, I will allow the appeal. Thereby quashing the conviction and sentence against the appellant in respect of both counts. I also order, MARCO NZIKU @KAJANJA be immediately released from prison unless held therein for some lawful cause.

The appeal is accordingly disposed of.

DATED at **IRINGA** this **29th** day of **SEPTEMBER, 2023**.

S.M. KALUNDE

JUDGE