

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

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**CRIMINAL APPEAL NO. 54 OF 2022**

*(Arising from the judgment of Muleba District Court Criminal Case No.99/2021)*

**ANTIDIUS BUCHARD..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*27/4/2023 & 18/5/2023*

**E.L. NGIGWANA, J**

This is an appeal which originates from the District Court of Muleba at Muleba (henceforth the trial Court). At the said trial court, the appellant herein was charged with two counts namely; 1<sup>st</sup>, Rape contrary to section 130 (1) and (2) (a) and section 131 (1) of the Penal Code Cap 16 (R.E 2019 now 2022, 2<sup>nd</sup>, Common assault contrary to section 240 of the Penal Code Cap 16 R.E 2019 now R.E 2022.

The trial court conducted a full trial and ultimately was convinced that the evidence on the first charge proved the lesser offence of attempted rape instead of rape while on the second charge, it was convinced that the offence of common assault was proved. The appellant was finally sentenced to serve 30 years imprisonment on the first offence and 12 months imprisonment on the second offence. The appellant was aggrieved and thus appealed against both conviction and sentence in this court.

To appreciate the context upon which this appeal was brought, it is imperative to narrate the facts underlying this matter. On the fateful night of 05.08.2022 the victim was sleeping in her house with her Kids. At midnight around 2:00hrs, she was awakened after feeling something strange and abnormal to wit; weight on her stomach. She therefore realized that someone sat on her stomach. She tried to raise an alarm but that person told her that "*Tulia nataka kukutomba*" meaning that calm down I want to sex with you. Through such voice, she managed to identify the person to be the appellant one Antidius. The said person alleged to be identified by the victim, started to beat her on her face and on the neck which led her to lose her energy of retaliating such force and thereby, that person sexed her and after finishing such a nasty business, he left. The victim went to notify the

neighbors. The first neighbor to be notified was Restituta who eventually went to call other neighbors.

The neighbors who were PW2 and PW3 told the court that upon arrival at the scene of crime (outside the victim's house), they heard the victim still crying and they heard someone running through the back door, they followed him until they arrested him (Appellant) at his home place trying to open the door and took the victim to police station before he was channeled and subjected to face the trial in which finally, he was convicted and sentenced hence this appeal.

It suffices to state at the outset that the registered petition of appeal has five grounds which can be conveniently summarized into one major ground, without reproducing them, which is that: *"At the trial court the prosecution case was not proved beyond reasonable doubt, a standard required in Criminal Cases"*.

At the hearing date, the appellant was unrepresented while Aman Kilua, a state attorney stood for the Republic respondent. It was the appellant argument that he neither committed the offence of rape which was charged

with nor committed the lesser offence of attempt to rape which he was convicted.

He added that the evidence that he was identified by voice on the fateful night was unreliable evidence. He was to the effect that the prosecution did not prove the case beyond reasonable doubt.

In reply, the learned state counsel for the respondent outrightly supported the appeal hinging on the point that the case at the trial court was not proved beyond reasonable doubt. He substantiated that, identification ought to have been water tight since the offence took place at night and that the evidence that the appellant was identified via voice is a weak identification because there is a possibility of another person to imitate the voice of another.

He finalized his submission that since the appellant was not properly identified, he could not have been convicted to the lesser offence of attempt to rape nor the rape and thus even the offence of assault cannot stand too.

I have considered the petition of appeal; unanimous arguments and I have also painstakingly perused the available record from the trial court. The main issue now to be answered by this court is whether this appeal has merit.

Since I am discharging the duty of the first appellate court in this first appeal, I have keenly warned myself that I should re-evaluate the entire evidence of the trial court to see whether there was misdirection of facts and misapplication of law. As a takeoff point, this case mainly resonates on the legal issue of identification by voice. The appellant and the republic respondent's counsel are at one that the appellant was not properly identified by the victim at the fateful night, thus two offences he was convicted were not prove beyond reasonable doubt.

This court will therefore confine itself to determine whether the appellant was properly identified or not?

In **Waziri Amani versus Republic** [1980] TLR 250 the Court of appeal had this to say on issues of identification:

*"It is now settled that the evidence of identification is the weakest kind of evidence and that courts of law should not rely on it unless it is satisfied that it is water tight. Particularly, one must consider conditions such as the time spent in observation; distance between the assailants and the identifier, source and brightness of light as well as whether there were impediments at the scene of crime or not".*

In another relevant case of **Seleman versus Republic** [1984] TLR No.93 the court held that:

*"Identification by voice perse cannot form a basis for conviction."*

Now, coming to re-evaluate the evidence which was available at the trial court; the accused person denied to have committed the offence as he was at his home sleeping owing to the reason that he was sick. In his argument, he has maintained what he testified at the trial court that he did neither commit rape nor attempt rape. The respondent's state attorney has supported this appeal that identification by voice at night was weak hence the offence was not proved.

I totally agree with both the appellant and Mr. Kilua that identification by voice is the weakest evidence. I will state my reasons: PW1 did not testify to have seen the victim but only to have identified his voice. PW1 stated that when the appellant finished sexing her, he left. Seeing that the appellant had left the place is when she went outside her house to call neighbors. That the first neighbor to be identified was Restituta who called other neighbors; unfortunately, and surprisingly, the said Restituta was not called by the prosecution to testify and reasons for not calling her were never stated.

Furthermore, it is not clear what was the interval of time used by Restituta to call PW2 and PW3 who alleged to have seen the appellant walking outside from the victim's house. It is also not clear whether PW2 and PW3 reside in the same house for this court to grasp that it was true they arrived together at the victim's house and they really found the appellant at the victim's house so as to identify him given the fact that PW1 (the victim) told the court that the appellant had left. It also leaves doubt if the victim had testified that the appellant left the place, how comes PW2 and PW3 found him at the victim's premises and how did they identify him while it was night hours.

Furthermore, this court is not satisfied whether someone whom the witnesses PW2 and PW3 alleged to have seen at the victim's house at night was the one whom they arrested at the appellant's house as the prosecution did not tell the trial court whether there were conditions favorable to identify the appellant as per the above **Waziri Aman's case** (supra). The trial court was not told whether there was light and the intensity of it, the distance they had from the appellant and whether there was any impediment to hinder identification. Even if they arrested the appellant at his home trying to open the door, still this court finds hardship to conclude that he was the one whose voice was identified by PW1.

To show that even PW1 was not sure the person who she identified by voice to be the appellant, when she was cross – examined by the accused at page 7 of the typed proceedings she replied that "*..... Restituta was the one who saw you*" This piece of evidence confirms that she did not see him and no any other witness to wit; PW2 and PW3 saw the appellant save Restituta who the trial court as hinted already had no opportunity to see her testifying as she was not among the witnesses hence that remains as hearsay evidence which ought not be admissible before the trial court.

In the premises, it is my humble view that the case at the trial court was not proved beyond reasonable doubt. I therefore find merit in this appeal.

I hereby quash the conviction entered against the appellant and set aside the sentence meted out to both counts. I consequently order that the appellant be released from the prison unless withheld by another lawful cause. It is so ordered.



  
E.L. NGIGWANA

JUDGE

05/5/2023



Date: 18/05/2023

Coram: W. Yona – Ag, Dr

Appellant: Present

Respondent: Absent

B/Clerck – George Fabian

**Court:** For Judgment today Judgment is delivered today on 18.05.2023 in the presence of the Appellant and in the absence of the Respondent.

Sdg: E.W. Yona- Ag.Dr

18.05.2023

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ORIGINAL



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) Deputy Registrar  
Bukoba

26/5/2023