IN THE HIGH COURT OF TANZANIA

(DODOMA SUB REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 144 OF 2023

(Arising from the decision of the District Court of Kondoa at Kondoa dated 07/09/2023 in Criminal Case No. 15 of 2023 before Hon. F.A. Kahamba, SRM)

JOHN MARTIN JOHN @CHUGAA.....1ST APPELLANT

MWINYIJUMA SAIDI MWINJUMA @ MBANJO.....2ND APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 20th May, 2024.

Date of Judgment: 31st May, 2024.

E.E. KAKOLAKI, J.

Before this Court two appellants above named are seeking to displace the decision of the District Court of Kondoa dated 07/09/2023 that found them guilty of the offence of Gang Rape; contrary to sections 130(1)(2)(a) and 131A(1) and (2) of the Penal Code, [Cap. 16 R.E 2022], convicted and sentenced them to life imprisonment. The appellants have demonstrated their grievances in four grounds of appeal as reduced hereunder:

1. That, the trial court erred in law and fact to convict and sentence the appellants as did not exercise care and close scrutiny when admitting the charge sheet which was incurable defective ab initio as it reads as

follows: Gang Rape, Contrary to section 130(1)(2)(a) of the Penal Code, [Cap. 16 R.E 2022] instead of 130(1)(2)(c) of the Penal Code.

2. That, the trial court erred in law and fact to rely on the evidence of PW1 as it was not credible. That, on testimonial PW1(Victim) did not divulge to what extent the said intensity light of the electricity bulbs, Motorcycle light and torch used as visual identification to the appellants and its distance, bearing in mind that the offence is alleged to be committed at midnight (2:00 pm).
3. That, the trial court erred in law and fact in holding that the appellants did commit the offence of Gang Rape whilst on testimonial PW4 (Medical practitioner) who conducted medical examination to the victim revealed that neither bruises nor sperms were found in PW1's vagina (victim) since penetration however slight it might be, is the most important ingredient to establish an offence of Gang Rape.
4. That, the trial court erred in law and fact for not satisfying itself as to whether the Appellants are capable of having sexual intercourse.

In view of the above stated grounds of appeal this Court is invited to allow the appeal, quash appellants' conviction and set aside the sentence imposed on them by the trial court.

It was prosecution case that on 30/06/2023 at Kichangani street along Tumbelo road, within Kondoa District in Dodoma Region, the two appellants who stood as 1st and 3rd accused during the trial together with one Hussein Ayubu, not party to this appeal, did jointly have sexual intercourse with one woman whom for the purposes of judgment and in order to preserve her identity shall be referred as victim or PW1, without her consent. The appellants and their colleague denied the accusations when called to plead to the charge of Gang Rape as cited above, the result of which the Respondent paraded a total number of seven (7) witnesses and relied on three exhibits namely victim's PF3 exhibit P1, Extra judicial statements of the 1st appellant and one Hussein Ayubu (2nd accused before the trial court) as exhibits P2 and P3 respectively. The prosecution witnesses were the victim herself (PW1), motorcycle driver (bodaboda) as PW2, victim's friend Aisha (PW3), the doctor who examined the victim and tendered the PF3 exhibit P1 (PW4), Justice of Peace who tendered exhibits P2 and P3 respectively, victim's young brother (PW6) and investigator of the case (PW7). On their side the 2nd appellant testified as DW1 and the 1st appellant as DW2 while Hussein Ayubu himself as DW3, all without any documentary exhibits to tender.

In order to appreciate what allegedly befell the victim, it is incumbent to narrate the background story of the matter as deduced from the evidence in record which goes thus. On 29/06/2023 which was also Eid al hajj, the victim (PW1), her friend (PW3) and young brother (PW6) had set out to Home village club within Kondoa township for the purposes of celebrating their day where they hanged up until 02.00 hours when PW1 and PW3 decided to retire back home using the motorcycle transport (bodaboda) operated by PW2. It appears as they had reached at Babu Pharmacy were encountered by three persons who were also using motorcycle and who wanted to knock them before they managed to do so at Sinza area where they pushed their motorcycle down. It was in that fracas when PW3 managed to flee from that area while leaving PW1 in the hands of the said three men who allegedly beat her and later on managed to remove her from that place heading to Tumbelo road using one motorcycle while pursued by PW2 until when they decided to switch off the light and took the direction to bushes after reaching Kondoa girls school area. It is in the said bushes area where the 1st appellant, Hussein Ayubu (2nd accused before the trial court) and one Aroo (not charged) started raping her in turn before they later on called their fellows whereby the 2nd appellant in company of Hussein Gumul and Abdulrazaki

appeared and forceful had sex with her too save for Abdulrazaki who formed the intention of rescuing PW1 after several discussion with her but his mission failed due to resistance from his colleagues before he disappeared from the scene miserably. PW1 maintained that, she managed to identify the appellants by aid of electricity bulbs at Babu Pharmacy and Sinza area, accused's motorcycle light as well as phone torch lights and moonlight. According to PW1 on the way to the scene of crime she stumbled in thorns and asked her assailants to switch on their two mobile phone torches which she used its light to identify them.

After the said five men had satisfied their sexual lust PW1 stated, they carried her back to the township area where she managed to reach home and later on in the morning called at Police Station, issued with PF3 (exhibit P1) and medically examined by PW4 some few hours after the said gang rape. It was in PW4's examination where it was observed that, neither bruises nor sperms in the victim's vagina, despite the explanation that it was so possible especially when the victim has already taken birth during examination. On their part all appellants denied to have committed the said offence while also repudiating the tendered extra judicial statements (exhibits P2 and P3_.

Upon full trial the trial court relying on the evidence of PW1 and extra judicial statements allegedly containing confession of the 1st appellant and Hussein Ayub, was satisfied that the respondent had proved its case beyond reasonable doubt against all appellants, convicted and sentence both appellants to life imprisonment while awarding Hussein Ayub, a corporal punishment of 12 strokes after satisfying itself that he was below 18 years old when committed the offence. It is from that, decision that disgruntled them this appeal has been preferred on the four above stated grounds of appeal.

At the hearing of this appeal both parties were heard viva voce as the appellants appeared unrepresented while the respondent enjoying the services of Ms. Rachel Cosmas, learned State Attorney. In their address to the court both parties urged the court to consider their grounds of appeal and appreciate merit of the appeal, hence proceed to allow it by quashing their conviction, set aside the sentence meted on them and restore their liberty. In addition the 2nd appellant submitted that, the case against them was fabricated since the victim could not have been raped by a mob of people and still found without any sign of penetration in her vagina as well stated in their 3rd ground of appeal.

In response Ms. Cosmas informed the Court that, the Respondent was resisting the appeal as both appellant's conviction was properly entered and correctly sentenced since their case was proved beyond reasonable doubt. To start with the 1st ground of appeal on the complaint of defectiveness of the charge she said, the same was not defective considering the circumstances of the case since the charge against them was preferred under section 130(1),(2)(a) of the Penal Code which prohibits engagement in sexual intercourse with a woman who is not someone's wife without consent read together with section 131A(1) and (2) of the Penal Code, defining what constitutes the offence of Gang Rape and its sentence. She therefore prayed the Court to find the ground wanting in merit.

On the 2nd ground she argued, it is not true that PW1 was not a credible witness to be relied on by the trial court to base appellants' conviction as claimed since she properly identified them as seen at pages 12,14, 16, 17 and 18 of the typed proceedings. That, PW1 explained how she identified both appellants when attempted to knock them at Babu Pharmacy with aid of electric bulbs and at Sinza area by using motorcycle light when they pushed down the motorcycle she was on board. And that, upon falling down she managed to run away before she was put under their custody and led

to the place where they executed their evil intention as on the way to that place she stepped over thorns and asked for phone torch to illuminate the way which was given to her hence used that phone torch light to identify them clearly. Additionally she claimed, PW1 identified them with the aid of moonlight as it was 02.00 am when the moon light is so bright. Ms. Cosmas prayed the Court to invoke the provisions of section 59 of the Evidence Act, [Cap. 6 R.E 2022] and take judicial notice of the fact that at those hours the moon light is bright hence appreciate that by aid of motorcycle light, phone torch light and moonlight the victim (PW1) managed to identify them properly. Further to that she submitted on the proximity between the victim and her rapists that the distance between the appellants and victim when raping her was so close to enable her make unmistaken identification, hence strong evidence of visual identification.

On the 3rd ground of appeal while confessing that, as per the testimony of PW4 Dr. Kyaruzi as found at page 29-30 of the proceedings, when examined PW1 was not found with bruises and or sperms in her vagina, she was quick to argue that, explanation was given by the same witness that, PW1 was used to sexual intercourse bearing in mind that she is an adult and if she had taken bath it was impossible for him to find seamen in her vagina. Ms.

Cosmas insisted that, since examination was conducted in the morning at 11.00 am, it was possible the victim had already taken bath hence doctor's findings did not dent prosecution case at all. She therefore invited the Court to find no merit in this ground.

On the last ground of appeal she countered that, looking at pages 42 and 46 of the typed proceedings the 2nd and 1st appellants told the court to have 33 years and 19 years old who cannot be considered as **doli incapax** as provided under section 15(3) of the Penal Code that, it is only a child under the age of 12 years who is presumed to be unable to perform sexual intercourse. She said, the trial court could not have presumed that appellants had erectile dysfunction and order them to undergo medical test without them first raising that concern. With that submission the Court was invited to find the prosecution had managed to prove its case beyond reasonable doubt as it was also held in the case of **Issa Salum Nambaluka Vs. R**, Criminal Appeal No. 272 of 2018 (CAT-unreported) at page 8, that true evidence in sexual offences such as rape has to come from the victim, who if an adult then penetration and absence of consent must be proved. Finally she prayed the Court to dismiss this appeal for want of merit.

In rejoinder the 1st appellant had nothing material to add apart for citing to the Court the case of **Antidius Augustine Vs. R**, Criminal Appeal No. 89 of 2017 (CAT-unreported) so that the Court is guided when considering their appeal. As to the 2nd appellant regarding the 2nd ground of appeal he stressed that, PW1 ought to have disclosed to the trial court intensity of the torch light as visual identification is the weakest kind of identification especially when is made during night as the victim had to tell the court the distance between her and her assailants and the direction in which both motorcycle and torch lights were aimed at so as to enable her properly identify them since she could not have been in possession of two phone lights and yet manage to identify both appellants. To cement his argument the Court was referred to the case of **Kakila John Vs. R**, Criminal Appeal No. 607 of 2020 (CAT-unreported) where the Court stressed on disclosure of the intensity of the source of light during identification.

As to the 3rd ground he countered that, PW1's medical examination was conducted few hours after the incident in which it was impossible for the woman not to be found with bruises and sperms more particularly when raped by more than one man. Further to that he voiced, the victim did not disclose to the court whether she took birth and/or short call before

undergoing examination so as to cement doctor's opinion. With all those doubts he pray that this court to find the appeal is meritorious and proceed to allow the same.

I have closely followed up the contending submission by the parties and took enough time to revisit the evidence adduced by both sides as well as the impugned judgment in a bid to answer the main issue in this appeal, whether the offence of Gang Rape in which the appellant stood charged with was proved against them to the required standard. It is trite law under section 3(2)(a), 110(1) and (2) and 111 of the Evidence Act, [Cap. 06 R.E 2022] that, the one who alleges has a duty of proving existence such alleged fact, which in criminal matter the onus of so proving rests on the prosecution side and it never shifts. And in addition that, the standard of proof is that beyond reasonable doubt. See also the cases of **Mohamed Said Matula Vs. R** [1995] T.L.R. 3 (CA) and **Nathaniel Alphonce Mapunda and Benjamin Mapunda Vs. R** [2006] TLR 395. It is so as the accused has no duty of establishing his innocence but rather create some doubts denting prosecution case as he can only be convicted on the strength of the prosecution evidence and not on the basis of the weakness of his defence. See the cases of **Aburaham Daniel v. R**, Criminal Appeal No. 6 of 2007

and **Mohamed Haruna @ Mtopeni and Another Vs. R**, Criminal Appeal No. 259 of 2007, (both CAT-unreported).

Having revisited the guiding principles in proving criminal matters, I now move to consider the 1st ground of appeal in which the complaint is that, the charge of Gang Rape was wrongly preferred under section 130(1)(2)(a) instead of section 130(1)(2)(c) of the Penal Code, [Cap. 16 R.E 2022]. Having reviewed the contents of the charge sheet visa viz the evidence in record, I do not find merit in this ground and therefore embrace Ms. Cosmas' submission that the charge against the appellant was correctly preferred against them given the fact that, the offence is alleged to have committed by more than one person to the victim who was not their wife as provided under section 130(1) (2)(a) read together with section 131A(1)(2) both of the Penal Code, which was revised in 2022 before the alleged offence was committed. Section 130(1)(2)(a) of the Penal Code reads:

> *130.(1) It is an offence for a male person to rape a girl or a woman.*
>
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*

(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

And section 131A(1) and (2) of the Penal Code provides:

131A.(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.
(2) Subject to provision of subsection (3), every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.

From the above exposition of the law, subsection (1) of section 131 of the Penal Code, creates an offence of rape when it is committed to a girl or woman. And subsection (2) thereto provides for circumstances under which the said rape can be committed, one of them provided under subsection 2(a) where the person who is raped is either not accused's wife or if she is her wife not with her consent particularly when the two are separated. And when the said offence is committed to one or more than one person by a group of accused person then it turns out to be Gang Rape as defined under section 131A(1) of the Penal Code in which its punishment is provided under subsection 2 to be life imprisonment regardless of the part played by the

accused in commission of an offence. In the present case the appellants who were charged under section 131(1)(2)(a) and 131A(1) and (2) of the Penal Code, were more than one person and allegedly raped one woman who according to the evidence in the record was not their wife and such intercourse was not consented to. I therefore do not agree with the appellants that they ought to be charged under 130(1)(2)(c) of the Penal Code, the subsection referring to a victim of rape who is of unsound mind or intoxicated by drugs, which is not the case in the present matter. with at interpretation of the law, I am satisfied that this ground is wanting in merit hence dismiss it.

Next in determination is credibility of PW1's evidence which is challenged in the 2nd ground of appeal in that, the witness failed to explain to the Court the intensity of the bulbs at Babu Pharmacy, motorcycle light and phone torch light that enabled her to identify the appellants. It is the 2nd appellant's argument that, PW1 failed to tell the Court the directions of the two mobile phones' light which she allegedly used to render unmistaken identity of appellants and colleagues. His argument is strenuously challenged by Ms. Cosmas in that they were all clearly identified as well explained by PW1 at pages 12, 14, 16, 17 and 18 of the typed proceedings.

Having glanced at the evidence of PW1 in relation to identification of appellants there is no dispute that the alleged offence of Gang Rape took place in the mid night in between 2:00 am and 4:00 am when it was still dark. It is settled law that, visual identification is the weakest type of evidence and most unreliable one in which the Court is called to approach it with great circumspection. It has to satisfy itself that, all possibilities of unmistaken identity are eliminated and that the evidence is watertight before acting on it. See the cases of **Waziri Aman Vs. R,** (1980) TLR 250, **Gerald Lucas v. R,** Criminal Appeal No. 220 of 2005 (CAT-unreported)**; Raymond Francis Vs. R** (1994) TLR 100; **Chokera Mwita Vs. R**, Criminal Appeal No. 17 of 2010 and **Felician Joseph Vs. R**, Criminal Appeal No. 152 of 2011 and **Oscar Mkondya and 2 others Vs. DPP**, Criminal Appeal No. 505 of 2017 (both CAT-unreported). It was held in the case of **Said Chally Scania Vs. R,** Criminal Appeal No. 69 of 2005 (CAT-unreported) that, to eliminate all possibilities of unmistaken identity the identifying person *need to mention all aids to unmistaken identification like proximity to the person being identified, **the source of light, its intensity,** the length of time the person being identified was within view and also whether the person is familiar or a stranger.*

In this case PW1 is on record stating that, she managed to identify them with aid of motorcycle light of the motorcycle used by the appellants, electricity bulbs at the residential area when their motorcycle was knocked down by appellants' motorcycle, two phones' light in which she lighted them up using one of them and the moonlight, as they were all familiar to her hence evidence of recognition. However in all sources of light intensity of light that enabled her identify them is not mentioned, thus leaving unattended the issue of likelihood of mistaken identity. Disclosure of source of light and its intensity was overemphasized by the Court of Appeal to be of paramount importance for free mistaken identity whereby in the case of **Issa Mgara@ Shuka Vs.** Criminal Appeal No. 37 of 2005 (unreported), where the Court was confronted with akin situation whereby witnesses claimed to have identified the appellant as he was not stranger to them. Having relied on the case of **Said Chally Scania Vs. R**, Criminal Appeal No. 69 of 2005 the Court of Appeal said:

> *"We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence* ***on sources of light and its intensity*** *is of paramount importance. This is because as occasionally held, even when the witness is purporting to*

recognize someone whom he knows as was the case here mistakes in recognition of close relatives and friends are often made." [Emphasis supplied].

It is also rule of law that, evidence of visual identification during night to perpetrators of an offence made by a single witness is unsafe to be acted upon unless there is other corroborative account. See the cases of **Hassan Kanenyera and Others Vs. R** [1992] T.L.R 100 and **Shamir John Vs. R,** Criminal Appeal No.166 of 2004 and **Baya Lusana Vs. R**, Criminal Appeal No. 593 of 2017 (both CAT-unreported).

In this case there is no doubt that, PW1 apart from mere disclosure of the sources of light that enabled him to identify the appellant without any explanation as to its intensity under the circumstances that would require her to disclose it, renders her evidence unreliable unless corroborated with any other independent evidence. Her evidence on visual identification or recognition of appellants in my humble view would have been corroborated by one Abdrazaki in company of other rapists whom she mentioned to have conversation with at the scene of crime and intended to rescue her from that captivity. To this court's dismay such important witness was not called by the prosecution to testify apparently for undisclosed reason.

Unfortunately again there is no any such other evidence apart from the extra judicial statement of 1st appellant and Hussein Ayubu which were also relied on by the trial Court to base its conviction as corroborative evidence, the evidence which I will soon discuss its legality hereunder. In absence of any other corroborative evidence to back up PW1's evidence, I have no difficulties in drawing a conclusion that, there is no proof that evidence of PW1 was watertight, implicating the appellants given the fact that the intensity of the light was not established the fact which also affects evidence of recognition if any. I so hold as evidence of recognition if any, is considered to be more reliable than identification of a stranger, but the Court has in several occasions warned itself of the possibilities that mistakes in recognition of even close relatives and friends may sometimes occur. In **Shamir John Vs. R,** Criminal Appeal No. 166 of 2004 (unreported) on occurrence of such mistaken identity on evidence of recognition the Court of Appeal observed that:-

> "...*recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should*

always be aware that mistakes in recognition of close relatives and friends are sometimes made."

I now move to consider legality of the extra judicial statement of 1st appellants and Hussein Ayubu who is not party to this appeal as exhibits P2 and P3 respectively, to see whether they have any probative value in proving the offence of Gang Rape in which the appellants were convicted with and sentenced accordingly or corroborative value. As alluded to above it is evidenced that, the trial court in its judgment relied on them when found at page 21 that, they contain nothing but the truth. It is also evident that, during their admission save for exhibit P3, admission of exhibit P2 was subjected to objection by the 1st appellant (1st accused) for two reasons. **One**, that the same was recorded in the presence of 2nd accused and **secondly** that, it was obtained under promise after the police had told him to confess so that he could be discharged, the grounds no doubts suggesting that, its voluntariness was brought to question. Under such situation the trial magistrate out to conduct an inquiry to establish its voluntariness. However, the records discloses that he never discharged such mandatory duty instead having invited the prosecution to respond to the raised objections proceeded to hold in the ruling dated 23/04/2023 at page 35 of the proceedings that, the statement was obtained voluntarily. It was mandatory for the trial Court

to conduct inquiry as the settled law is that, the prosecution must prove that a confession was made by the accused and was so done voluntarily as always confession should be free from the blemishes of compulsion, inducements, promises or even self-hallucinations. See the case of **Paul Maduka and 4 Others Vs. R**, Criminal Appeal No. 110 of 2007 and **Twaha Ally and 5 Others Vs. R**, Criminal Appeal No. 78 of 2004 (both CAT-unreported). Thus once an objection is taken against admission of any confession statement, then an inquiry or trial within trial has to be conducted to establish its voluntariness as it was correctly observed in **Paul Maduka** (supra). In this matter since exhibit P2 was not subjected to such mandatory procedure before its admission, I hold the same was illegally admitted, hence proceed to expunge it from the record.

The above notwithstanding it is also noted that, there is clear indication that even exhibit P3 illegally found itself in the court record. When seeking to tender it in court PW5 prayed to tender both exhibits P2 and P3 at the same time. However, glancing at the response of Hussein Ayubu when called by the Court to respond to PW5's prayer to tender both statements, it is not clear as to which statement amongst the two he was not objecting it admission. In my profound view the learned trial magistrate ought to have

invited the 2nd accused Hussein Ayub to respond to each and every statement that was sought to be tendered or his statement separately, failure of which I hold rendered its admission questionable. Again there is another defect as to the compliance of Chief Justice's instructions to justice of peace when recoding confession statements of suspect under custody of police as clearly spelt in the case of **Japhet Thadei Msigwa Vs. R**, Criminal Appeal No. 367 of 2008 (CAT-unreported). The instructions as enumerated in the above cited case are:

(i) The time and date of his arrest

(ii) The place he was arrested

(iii) The place he slept before the date he was brought to him

(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement.

(v) Whether he really wishes to make the statement on his own free will.

(vi) That if he make a statement, the same may be used as evidence against him.

It is one of the requirement that, before starting to record the statement justice of peace shall inspect the suspect to satisfy him/herself whether he/she had any wound or injury before coming to him/her suggesting that he/she might have undergone torture compelling him to confess before him.

In this case it was in PW5's testimony at page 31 of the typed proceedings that, he observed the suspects before him and realized that they had no any mark/bruises suggesting that were forced to give evidence before him before he started recording their confession statements. However, what appears in the recorded statement of Hussein Ayubu in item No. 6, is that when inspected him was found to have from scratches and bruises, the fact which is inconsistent to his oral testimony and suggestive that, he underwent torture when arrested as testified in his defence. This glaring inconsistence in PW5's evidence coupled with its unprocedural admission in my humble opinion dents its probative value in as far at 2nd accused's confession to commission of an offence is concerned. As the same was unprocedurally admitted the only remedy is to expunge it from the record the course which I hereby take and order accordingly. It is from that course taken of expunging both extra judicial statement of 1st appellant and Hussein Ayubu, I found herein above that, there is nothing to corroborate PW1's evidence of visual identification.

In view of the above I am satisfied that, the complaint by the appellant in the 2nd ground has merit. Since the appellants were not properly identified, that ground only would suffice to dispose of this appeal. However, I feel

owed to consider the 3rd ground of appeal in which the appellants' grievance is whether there was penetration constituting an offence of Gang Rape in this case given the evidence of PW4 who examined PW1 to the effect that, neither bruises nor sperms were found in her vagina visa viz PW1's evidence that was raped by five men repeatedly, appellants inclusive. In response Ms. Cosmas argued that, explanation on such findings was given by the doctor that, it could be that the victim had taken bath or responded to a call of nature prior to examination. In determining this vital element of penetration in any rape case, the trial court in the impugned judgment at page 15 relying on the case of **Hilda Abel Vs. R** [1993] TLR 246, where it was held courts are not bound to accept experts' evidence if there are good reasons for so doing, disregarded evidence of PW4 and exhibit P1 on the ground that it could have accepted it if the appellant had not raped PW1 repeatedly instead believed PW1's evidence guided with the settled principle that, in sexual offences the best evidence comes from the victim as held in the cases of **Julius Josephat Vs. R**, Criminal Appeal No. 03 of 2017, **Yusuph Molo Vs. R**, Criminal Appeal No. 343 of 2017 and **Wambura Kiginga Vs. R**, Criminal Appeal No. 301 0f 2018 (All CAT-unreported). To paint the colour on the wall the learned trial magistrate at page 15 reasoned that:

"During the hearing of this matter the victim's testified that she was raped by five people and repeated that act. If they has not repeated, I could have accepted the medical expert opinion that the victim had no bruises in her vagina. This is obvious that the second round always takes long, so I can imagine such situation happened to five people, unless there was a consent which is not the case in this matter."

From the above cited excerpt of the impugned judgment there is no dispute that, as per the victim's testimony (PW1) she was raped by five men repeatedly. And as correctly observed by the learned trial magistrate from experience the second round in sex takes longer than the first round, hence elimination of possibilities that, the victim might have not sustained bruises and or possibly remained with no good volume of sperms. In my humble view that obvious fact to the trial magistrate would have triggered his suspicion to PW1's evidence whose demenour was remarked by the court as impeccable, as it is beyond human comprehension or any reasonable human being as to how could she be raped repeatedly by five men and still be found without any bruises or sperms in her vagina. There is no indication or evidence establishing that, PW4 when examining her acted under any influence or bias or examined her without following the procedure to entitled the Court disbelieve his findings hence disregard or depart from it. It is true

the law allows the court to disregard expert opinion but that is subject to assignment of good reasons for so doing. In this case the mere fact that, PW4's findings did not support PW1's version hence unworthy of being believed or relied on, with due respect does not and did not amount to good reason to entitle the trial Court depart from such vital medical evidence. Since there was no any other medical evidence to contradict PW4's findings in respect of the examination conducted to PW1 or any other evidence constituting good reasons, it is the findings of this Court that, the trial Court was not justified to disregard expert opinion that created doubts to PW1's evidence. It is settled law that credibility of a witness is usually binding on the appeal Court unless there are special circumstances calling reassessment. See the case of **Rashid Issa Vs. R,** Criminal Appeal No. 280 of 2010 (CAT-unreported). In this case as alluded to above PW1's evidence that she was raped by five men repeatedly in absence of good reasons to displace PW4's testimony which corroborates exhibit P1 (victim's PF3), I find dents her credibility whether really she was penetrated by a ground of five men and yet remained without bruises and or sperms in vagina in less than eight (8) hour from the time of commission of an offence. In view of such glaring doubts on whether PW1 was really penetrated by five men, I agree

with the appellants' contention that, the trial court was in error to hold that they committed the offence of Gang rape, hence this ground of appeal has merit too.

Lastly is the 4th ground which after consideration of both parties submission I hold is devoid of merits for one good reason that, without appellants themselves disclosing to the Court that, were sexually inactive there is no way the trial court could have gone in sleep and dream of the need of satisfying itself whether they were sexually functioning or not, as correctly submitted by Ms. Cosmas. This ground is lacking in merit and I disregard it.

In view of the findings made in the 2nd and 3rd grounds of appeal this Court is satisfied that, the case against both appellants on the offence of Gang Rape as charged was not proved by the respondent to the hilt. It is from those reasons I hold that this appeal has merit and is hereby allowed. Consequently appellants' conviction is quashed and the sentence meted on them set aside. It is hereby ordered that, they should be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

Dated at Dodoma this 31st May, 2024.

E. E. KAKOLAKI
JUGDE
31/05/2024.

Court: The Judgment has been delivered at Dodoma today on 31st day of May, 2024, in the presence of the 1st and 2nd appellants in person, Ms. Rachel Cosmas, State Attorney for the respondent and Ms. Veradina Matikila, Court clerk.

Right of appeal explained.

E. E. KAKOLAKI
JUGDE
31/05/2024.