IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 179 OF 2020

1. ERICK MASWI ..... 1ST APPELLANT

2. CHARLES MASIKE ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from Judgment of the High Court of Tanzania at Musoma)

(Kisanya, J.)

dated the 23rd day of March, 2020
in
Criminal Appeal No. 141 of 2019

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JUDGMENT OF THE COURT

6th & 14th June, 2022

KOROSSO, J.A.:

The appellants, Erick Maswi and Charles Masike were convicted in the District Court of Musoma of the offence of Gang Rape contrary to section 131A (1) and (2) of the Penal Code, Cap 16 R.E 2002, now 2019 (the Penal Code). Each appellant was sentenced to life imprisonment. The particulars of the offence are that on 26/12/2018 at Mara Secondary School area within the District and Municipality of Musoma in Mara Region the appellants named above together (then the 1st and 3rd accused) with

one Joram Wanjara (who was acquitted by the trial court) had carnal knowledge of a girl aged 15 years [name withheld] who we shall henceforth refer to as "PW1". The appellants denied the allegations.

The prosecution case was constructed around the evidence of five witnesses including the victim (PW1) and her mother, Sikudhani Sinjo (PW3), Dr. Regina Benard Msonge (PW2), Barnabas Mashashu (PW4) and G. 9421 D/C Edwin (PW5). It was on 26/12/2018 when PW1 and her brother went to AICT Nyasho to collect clothes for the festivities but did not find the responsible teacher on arrival there. PW1 was left to wait for the teacher while her brother left. At around 18.00 hours, finding that the teacher failed to appear, PW1 left the place to find her brother so that they head home. She went towards Mara Secondary School, and on arrival found people watching a soccer game but she could not see her brother and moved to another football pitch.

On arrival there, she met people watching a soccer game, she looked for her brother to no avail. She met two girls unknown to her, and while conversing, two watchmen arrived and asked them what they were doing. PW1 responded that she was looking for her brother, but the watchmen ordered them to perform a frog jump exercise from that point to the classrooms where she was locked in. By that time, it was around

19.00 hours and darkness had set in. She stayed locked in the classroom for about one hour. Then the 2nd appellant came and asked her particulars and told her to wait while he negotiated with his colleagues so that she could be released. A short while later, the 2nd appellant returned and informed her that his colleagues had refused to release her alleging that she was found having sexual intercourse with a boy in the school compound and left. Soon after, the watchman who was not one of those charged approached her only to tie her on the office chair with a rope, covered her mouth, undressed himself and her, took his male organ, and had sexual intercourse with her, and when he finished, he left.

Subsequently, the 1st appellant entered the classroom and had sexual intercourse with her, and when he finished, he left telling her about soldiers being in their line of duty and that they were teaching her a lesson. Thereafter, the 2nd appellant appeared undressed and had sexual intercourse with her, and when he completed, he left. Afterward, PW1 was released and taken to the watchman who was acquitted (2nd accused) who ordered her to sign a written statement that she had been arrested in the school compound while having sexual intercourse. At this juncture, she was very tired and complained so and she was then taken to Nyasho football pitch and abandoned there and lost consciousness.

When she regained consciousness there was a woman around and she narrated her ordeal to the woman which led to a gathering of people which included PW4 her brother's friend, and Kurwa Teja. PW4 phoned her brother Ibrahim Bakari who came and took her back home. PW1 narrated to PW3 what had befallen her and slept. The next morning, PW1, PW3, and her brother went to Mara Secondary School saw the appellants and reported the incident to the police, given a PF3 form, and went to the hospital for examination and treatment.

PW2's evidence supported by the admitted Exhibit P1 was that PW1 was examined on 27/12/2018 and found bruises in her private parts and that she was limping when walking, which can be caused by forced sexual intercourse, and that she had no hymen. PW5 who was the investigator followed up on the information on the incident which led to the arrest of the 1st appellant on 31/12/2018 and 2nd appellant on 3/1/2019 and one Joram Wanjara on 5/1/2019.

On the part of the appellants, they denied the charges. The 1st appellant (then, the 1st accused) testified that on 26/12/2018 he reported at his duty station Mara Secondary School where he was a watchman and found the 2nd appellant and another watchman who had two young people, and he was told that the young people were arrested for having

sexual intercourse in the school compound. They took the statements of those apprehended and released them, and they reported the matter at their office. For the 2nd appellant (then the 3rd accused) he stated that on the material day of the alleged incident he reported for duty in the morning at 6.00 hours up to 18.00 hours when he handed guard to the 1st appellant and two others and went home.

Upon a full trial, the appellants were convicted and each sentenced to serve life imprisonment together with an order to compensate the victim Tshs. 5,000,000/-. The 2nd accused was acquitted. The appellants were aggrieved and appealed to the High Court where it was dismissed.

When this appeal came up for hearing on 6/6/2022, the appellants were unrepresented and appeared in person whereas, the respondent Republic was represented by Mr. Isihaka Ibrahim and Ms. Agma Haule, learned State Attorneys.

In urging us to allow the appeal, the appellants relied on a joint memorandum of appeal containing seven grounds of appeal. In the first ground of appeal, they fault the first appellate court for upholding their convictions disregarding the fact that the charge was defective. In the second ground of appeal, the complaint is against the first appellate court for not addressing the procedural irregularities of the trial court including

failing to prepare the memorandum of agreed or undisputed facts. The third ground of appeal faults the first appellate court for not nullifying the proceedings of the trial court for failure to comply with section 210 (3) of the Criminal Procedure Act, R.E 2002, now 2019 (the CPA).

In the fourth ground of appeal, the appellants fault the first appellate court for relying on the evidence of PW1 without providing reasons for believing her. The fifth ground of appeal faults the two courts below in not drawing adverse inference to the prosecution side for failure to summon crucial and material witnesses to testify without any plausible explanation. The sixth ground of appeal faults the first appellate court for overlooking the appellants' defence. In their seventh ground of appeal, the appellants fault the first appellate court for failing to reassess circumstances under which the identifying witnesses recognized the appellants.

When we invited the appellants to address us on their grounds of appeal, the 1st appellant adopted the grounds of appeal as lodged and showed preference to hear the response the learned State Attorney had on the grounds of appeal and rejoin afterward, a position which was supported by the 2nd appellant.

Ms. Haule steered the respondent Republic's submission and began by pronouncing that the appeal was resisted thus supporting the conviction and sentence meted. She alluded that her response to the grounds of appeal will be seriatim. The learned State Attorney conceded to the first ground of appeal that section 130 (1) of the Penal Code which establishes the offence of Rape was not included in the statement of the offence of the charge. She contended that the anomaly was amply dealt with by the first appellate court which upon considering its legal implication and obtaining circumstances found that it was curable under section 388 of the CPA. She urged the Court to be further inspired by the holding in its decision in the case of **Ally Ramadhani Shekindo and Another Vs Republic**, Criminal Appeal No. 532 of 2016 (unreported), on pages 10-12.

The 1st appellant's rejoinder cemented his argument that the charges against them were defective and that this should be considered together with the fact that the charge is the foundation of a case. The 2nd appellant supported the submissions by his fellow appellant.

Having heard the rival submissions, clearly, both sides are at one that the charge against the appellants is defective. What is in contention is the effect of the undisputed infraction. We thus find it apposite to display the relevant parts of the charge for ease of reference hereunder:

"STATEMENT OF OFFENCE

***GANG RAPE**: contrary to section 131A (1) and (2) of the Penal Code [CAP 16 R.E. 2002].*

***PARTICULARS OF OFFENCE**:*

***ERICK S/O MASWI, JORAM S/O WANJARA** and **CHARLES S/O MASIKE** on 26th day of December, 2018 at Mara Secondary School area within the District and Municipality of Musoma in Mara Region, had carnal knowledge of one **[name withheld]** a girl aged 15 years old."*

When pondering on this complaint, the High Court judge acknowledged the fact that the provisions cited in the statement of offence only provide for the penalty of gang rape and stated that:

> *"Therefore, the provision for rape provided for under section 130(1) and (2) of the Penal Code was required to be cited in the charge sheet."*

We concur with the finding above, certainly, the provision creating an offence must be cited in a charge together with the punishment section as provided under section 132 of the CPA. Section 135 (a)(i) and (ii) of the CPA is also relevant because it governs the format of charges and information and expressly states that a charge or information shall commence with a statement of offence charged that describes the offence

in short and that if the offence charged is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.

The significance of applying sections 132 and 135 of the CPA has been underscored in various decisions of the Court, that it is mainly to enable the accused person to understand the nature of the offence he is facing and thereby prepare for his defence. (See, **Mussa Mwaikunda Vs Republic** [2006] TLR 377, **Isidori Patrice Vs Republic**, Criminal Appeal No. 224 of 2007 and **Abdul Mohamed Namwanga @Madodo Vs Republic**, Criminal Appeal No. 257 of 2020 (both unreported)).

Having found that in the instant case the charge is defective for not including essential provisions for a charge of gang rape, having excluded provisions creating the offence of rape, in determining the effect of the infraction we are guided by various decisions of this Court stating that such an infraction is not fatal unless it prejudices the rights of the appellants. In the case of **Ally Ramadhani Shekindo and Another** (supra) the Court found itself in a similar situation to the present one where essential provisions in the charge of the offence of gang rape, sections 130(1) and (2)(a) were not cited in the statement of offence. The Court decided that the omission is curable under section 388(1) of the

CPA where the particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he is being tried (see **Jamal Ally @Salum Vs Republic**, Criminal Appeal No. 52 of 2017 and **Festo Domician Vs Republic**, Criminal Appeal No. 447 of 2016 (both unreported).

In the instant case, the first appellate court upon finding the infraction in failing to cite the proper provisions as highlighted above discussed the effect of the said anomaly, and stated:

> "... *the said omission did not cause failure of justice as the particulars of offence and evidence informed the appellants of the offence and its gravity.*"

It suffices, that the above finding by the High Court judge exhibits that he considered the irregularity as opposed to the appellants' complaints that this was not considered.

We agree with the above findings of the High Court Judge for the following reasons: one, that the particulars of the offence as reproduced above informed the appellants of the nature of the offence, the fact that both are charged with having carnal knowledge of the girl 15 years of age, which in essence amounts to gang rape as defined under section 131A (1) of the Penal Code. Two, the evidence adduced in court especially that of PW1 alleged that all the appellants raped her which amounted to

allegations of gang rape. Three, the particulars and the evidence adduced enabled the appellants to set up their defence against the charge they faced. The first ground thus falls.

Regarding the second ground on irregularities in the proceedings of the Preliminary Hearing in that the trial court did not record the memorandum of agreed facts, the learned State Attorney conceded that the record of appeal does not reveal that the memorandum of facts not disputed was drawn, however, she argued that this anomaly was dealt with by the first appellate court and that is curable as found in the case of **Kanisius Mwita Marwa Vs Republic**, Criminal Appeal No. 306 of 2013 (unreported). The 1st and 2nd appellants had nothing much to expound on this complaint urging us to consider the relevant ground and find that this anomaly occasioned by the trial court prejudiced their rights.

Having heard the submissions by the contending parties and gone through the record of appeal, we are of the view that this should not take much of our time. Admittedly, in the conduct of the Preliminary Hearing, the trial court failed to draw a memorandum of matters not disputed, then read it to the accused in a language understood by them, and ensure all the parties including the accused signed on it in compliance with section 192(3) of the CPA. Considering that the provision is couched in mandatory terms, this complaint has substance.

The first appellate court had the opportunity to deliberate on the anomaly and found that considering the essence of conducting a preliminary hearing is to expedite the hearing of the case, the omission did not prejudice the appellants and is curable under section 388 of the CPA.

We have reflected on the record of appeal and considered the submissions before us related to the complaint and agree with the High Court Judge. This Court has had occasion to address this issue and in the case of **Brayson Katawa Vs Republic**, Criminal Appeal No. 259 of 2011 (unreported), it was held that such an omission was a fundamental defect, upon considering the consequence of non-compliance of section 192 (3) of the CPA, was of the view that the procedural irregularities in a trial as what was before it, vitiates the preliminary hearing proceedings only resulting in the nullification of the same and not the rest. (See also, M.T 7479 **Sgt Benjamin Holela Vs Republic** [1992] TLR 121 and **Athumani Ndagala @Mikingamo Vs Republic**, Criminal Appeal No. 63 of 2007 (unreported) and **Kanisius Mwita Marwa** (supra)). We are thus guided so, and hereby nullify the proceedings of the preliminary hearing in the instant case and for the avoidance of doubt, proceedings of 21/5/2019. Suffice to say, nullification of the preliminary hearing proceedings herein will not vitiate the trial proceedings since the

appellants denied all the alleged facts except for their personal particulars and is not prejudicial to the rights of the appellants.

The third ground of appeal on the trial court's failure to comply with section 210(3) of the CPA, Ms. Haule conceded that the evidence of PW1 and PW2 shows the Court failed to comply with section 210(3) of the CPA, but argued that this did not prejudice the rights of the appellants since it is a witness who is given an opportunity to seek the trial court to read the record of his/her evidence after completing to testify. She asserted that in the instant case there was no such request from any witness, and thus the omission was not prejudicial to their rights. She urged the Court to find the infraction curable under section 388 of the CPA as held in the case of **Amour Mbaruck @Aljeb Vs Republic**, Criminal Appeal No. 226 of 2019 (unreported). The appellants reiterated the complaint as found in the third ground of appeal.

Our deliberations on this complaint will start by recapitulating section 210 (3) of the CPA, stating:

> *"210(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."*

Indeed, section 210 (1) of CPA regulates the mode of taking evidence in the subordinate courts and essentially alludes that it is of utmost importance that the testimony of the witness should be recorded as accurately as possible and in the exact words used and be clearly shown in the record of proceedings.

In the present case, undoubtedly, the evidence of PW1 and PW2 was not read over as per section 210(3) and this fact was not disputed by the learned State Attorney. Having revisited the record of appeal, we find this to be evident. Notwithstanding the fact that section 210(3) of the CPA provides quality assurance in evidence recording, and thus its adherence should be emphasized, we agree with the learned State Attorney that failure by the appellants to establish how they were prejudiced for noncompliance of section 210(3) of CPA, renders the infraction curable under section 388(1) of the CPA as stated in the case of **Alphonce Masalu @Singu and 4 Others Vs Republic,** Criminal Appeal No. 84 of 2013 (unreported) (see also **Emmanuel Denis Mosha and 2 Others Vs Republic**, Criminal Appeal No. 188 of 2018 (unreported) and **Amour Mbaruk @ Aljeb** (supra). Thus, the complaint although conceded to, we find to be inconsequential.

Confronting the fourth ground of appeal, on the trial court's reliance on PW1's evidence without providing reasons for believing her, the

learned State Attorney urged the Court to disregard this complaint arguing that it is misconceived since the record of appeal shows that the trial court considered PW1's evidence on pages 44 to 46 of the record of appeal whilst the first appellate court analysed the evidence thoroughly on pages 69-71. She asserted that both lower courts summarized and considered the said evidence, found it to be sufficient, and provided reasons for finding her evidence credible and reliable.

The 1st appellant expounded his complaint faulting the courts below for relying on PW1's evidence even though it was inconsistent and contradicted itself on material facts such as whilst earlier on she adduced that she had been arrested by two girls later she said it was the watchmen. The other concern was the time of incidents alluded to by PW1, he argued that they were inconsistent and unbelievable, he contended that while PW1 stated the time she left the place where she was to 18.00 hours which was the same time, she stated she arrived at the football pitch and that is unimaginable in view of the distance from where she was. He thus implored the Court to find her evidence to be lies. The 2nd appellant apart from supporting the submissions by the 1st appellant had nothing to add.

When determining the fourth ground of appeal we are alive to the principle that our mandate to interfere with concurrent findings of the two

lower courts on the credence of PW1 is limited. However, a second appellate Court is entitled to interfere with the concurrent finding of fact of lower Courts and make its own finding if it is shown that there is misdirection, non-direction, or misapprehension of evidence (see **Peter Vs Sunday Post** [1958] EA 424, **DPP Vs Jaffari Mfaume Kawawa** [1981] TLR 149 and **Braniam Lyela and Another Vs Republic**, Criminal Appeal No. 27 of 2010 (unreported)).

Our scrutiny of the record of appeal shows that the trial court discussed the evidence of PW1 extensively from page 45 of the record of appeal. The trial court's mode of analysis of the evidence of PW1 was in the course of summarizing the evidence. The trial court on page 46 of the record summarized the evidence of PW1. With respect to the first appellate court, at page 69 of the record of appeal, it warned itself on relying on PW1's evidence for identification in unfavorable conditions for identification as it was in the present case since the offence occurred at night but was of the view that since material facts in the evidence were not cross-examined by the appellants there was nothing to challenge her evidence. He then considered the evidence upon which he found her a credible witness especially relating to what transpired outside and, in the classroom, the proximity to her assailants, the times she spent with them, and the discussions with the attackers before and after the incident and

the adequacy of light. On her credibility, he addressed at page 71 of the record of appeal stating:

> *"...PW1, a girl aged 15 years, testified how the appellants had sexual intercourse with her by force. The trial court was convinced that PW1 is credible witness. Hence, evidence of PW1 was sufficient to convict the appellants even if not corroborated."*

Evidently, both the trial and first appellate court did provide reasons for finding credence in PW1's evidence. We thus find the complaint to be misconceived since the trial and first appellate court gave reasons for finding PW1 credible having analyzed her evidence.

The issue before us is whether there are any reasons for this Court to interfere in the concurrent findings of the lower courts on the credibility of PW1 as a witness. We find nothing to lead us to find that PW1 was not credible in her evidence on the identification of the appellants. We agree with the findings of the trial and first appellate court for the following reasons: First, she was apprehended before darkness set in, when there was still light at around 18.00 hours. Second, the 2nd appellant had spoken to her in and out convincing her that he was liaising with her colleagues for her release. Three, each of the appellants had come to her and raped her one after the other. Four, the appellants used light from their mobile phones when the atrocious act was ongoing, and five, she stayed with

them for a long time between 18.00 hours to 21.00 hours at intervals. Sixth, her narration was consistent with the way she was found. She stated when she complained of tiredness, the assailants took and left her at Nyasho football pitch, PW4 testified that he found PW1 lying at Nyasho pitch in a semi-conscious state and that he was told she had been raped and thus had to carry her home. PW3 testified on the condition PW1 was in when she arrived home supported by PW4, Ibrahim, and another young man while PW2 stated that when PW1 arrived for medical examination the next day she limped which was consistent with someone who has been raped.

We thus agree with the first appellate court and the learned State Attorney that the evidence of PW1 cannot be faulted, and so are the reasons advanced by the trial and first appellate court for the finding on her credibility and reliability as a witness. This grievance lacks merit.

On the fifth ground of appeal, the appellants decried the fact that no adverse inference was drawn to the prosecution side for failure to call material witnesses without plausible explanation. The appellants contended that since material witnesses were not called to testify it dented the prosecution case since there was no evidence to establish the place the incident took place. It was their argument that the prosecution having listed several witnesses during the Preliminary Hearing projected

to be called to testify, reasons should have been given for those who did not testify. They implored the Court to draw adverse interest for those witnesses not testifying.

The Learned State Attorney argued that the ground lacks substance because the appellants failed to state the names of the important witnesses who did not testify. She further argued that the prosecution side's paramount consideration was to prove their case and thus called witnesses necessary for that purpose only. She argued that the provision of section 143 of the Evidence Act, Cap 6 R.E 2002, now 2019 (Evidence Act) articulates of there being no particular number of witnesses required to prove a fact. She urged us to find the ground to lack merit.

Indeed, as stated by the learned State Attorney, section 143 of the Evidence Act declares that there is no number of witnesses required to prove any fact. The Court in the case of **Mwita Kigumbe Mwita and Magige Nyakiha Marwa vs Republic,** Criminal Appeal No. 63 of 2015 (unreported), held that a court looks for quality and not the quantity of evidence and that the best test for the quality of any evidence is credibility. In the circumstances, it was for the prosecution to determine the witnesses they wanted requisite to prove their case against the appellant beyond a reasonable doubt. Accordingly, we cannot fault the trial or first appellate court for not drawing adverse inference on the

prosecution side for not calling witnesses who did not testify, since the evidence they adduced was sufficient to prove the case against the appellants to the standard required. In the premises, the ground lacks merit.

With respect to the sixth ground of appeal that the defence of the appellants was not considered, the appellants argued that the lower courts failed to properly analyze their defence and especially the obtaining circumstances alleged to have been at the scene of the crime. Ms. Haule submitted that the complaint is misconceived since the trial court did consider and analyze the defence evidence on pages 43-47 of the record of appeal and the first appellate court considered and analyzed the defence evidence on pages 63-72 of the record of appeal.

We have revisited the record of appeal and agree with the learned State Attorney that the trial court summarized and analyzed the defence and so did the first appellate court. In rejecting the defence evidence, the first appellate court stated:

> *"Further, in his evidence, the second appellant testified to have handed over the guard on 26/12/2018 at 18.00 hours. However, I have shown herein how the second appellant was identified by PW1... the first appellant was identified by PW1 and named by the co-accused,*

and exhibit that he was at the scene of crime cannot hold water."

As can be discerned from the above excerpt, undoubtedly, the defence of the appellants was considered and analyzed by the first appellate court and found to be wanting, hence being rejected. We subscribe to the holding of the first appellate court since we have not discerned any misapprehension of evidence or misdirection in the analysis. Even when exhibit D1 is considered and we were to assume claims that PW1 was found having sex with a boy, the question which will consume our mind will be why arrest her and rape her? This is because it is a fact that she was raped. PW2's evidence stated that PW1's private parts were bruised, and she was limping when she went for medical attention which led her to deduce that the sexual intercourse she had was forceful. PW2's testimony and the semi-unconscious state in which PW4 found PW1 at the Nyasho pitch according to PW4, in essence, preclude the possibility that PW1 had consensual sexual intercourse as suggested by the appellants. PW4's testimony on how he found PW1 on 26/12/2018 around 22.00 hours was that she found PW1 surrounded by people, and she was lying on the ground and when they asked why this was the case since they knew her, a woman told them that the girl has been raped, they called her brother and took her home.

The evidence of PW3 further supports PW4 on the state of PW1, she stated that on 26/12/2018 at 19.00 hours while home and discerning that PW1 was not home she tried to trace her to no avail, and later at around 22.00 hours, she was brought by PW4 and Ibrahim who held her and she was crying and unable to speak, PW3 was told by the three boys who came with her that they found her in an unconscious condition having been raped.

PW3 and PW4's evidence reveals the condition PW1 had which is inconsistent with any evidence that she had consensual sex and supports PW2's evidence on the state she saw PW1 the next morning when she examined her. Therefore, taking all the above facts into consideration, indeed, the trial and first appellate courts did consider and analyze the defence and properly directed themselves to lead them to decide that the defence did not raise any doubt on the prosecution's evidence. The ground thus lacks merit.

The seventh ground alleges that the first appellate court failed to reassess circumstances under which the identifying witnesses recognized the appellants. Clearly, when determining this ground, the fourth, fifth and sixth grounds are also relevant here. The learned State Attorney argued that both lower courts did analyse the evidence related to the unfavorable conditions for identification pertaining to the scene of the

crime and were satisfied that in view of the available evidence visual identification of the appellants by PW1 cannot be faulted. The appellants fault the trial and first appellate courts for failing to consider that PW1 testified that the raping by all the three assailants took place when it was already dark, and she managed to identify the culprits from the light from their mobile phones. They argued that this was insufficient for PW1 to have identified them.

The record of appeal reveals that the High Court judge did consider the challenging circumstances obtained at the scene of the crime when he was considering the credibility of PW1 and whether the appellants were identified having warned himself of the danger of relying on visual identification evidence in unfavorable conditions and that of a single witness. The first appellate court cautioned itself on the importance of taking into account the factors to consider in determining whether the conditions were favorable for identification as pronounced in various decisions that is; whether or not it was daylight or at night, the type of intensity of light, the closeness of the encounter at the scene of crime, whether there was an obstruction to a clear vision, and whether the suspect was known to the identifier previously and the description of the subject as propounded in cases such as **Mussa Hassan Barie and Albert Peter @John Vs Republic**, Criminal Appeal No. 292 of 2011

(unreported) and the celebrated case of **Waziri Amani Vs Republic** [1980] TLR 250.

The High Court judge was of the view that the identification of the appellants relied on the evidence of PW1 who narrated what transpired at the scene of the crime on a material day, her intervals, and proximity with the appellants. He also considered the fact that the appellants did not cross-examine her on her incriminating evidence against them. He concluded:

> *"One; PW1 identified the first appellant when he arrested her at 6.00 pm before detaining her in the classroom at 7.00 pm. Thus, she had ample time of identifying him from 6.00 p.m. when there was light. Second; PW1 stated that the second appellant entered the classroom after one hour to take her personal particulars. That implies that the second appellant was closer to the victim. Third; PW1 explained how the first appellant and second appellant raped her after Paulo Patrick. Fourth; PW1 was taken by the appellants to the second accused where she was told to sign a statement that the appellants had found her making love in the school compound. This shows there was enough light which enabled the second accused to record the statements before requiring the victim to sign that statement. Fifth; it is the appellants and Paulo Patrick who took the victim from the class where she recorded*

her statement on the football pitch. Sixth; the incident took about three hours. The victim had ample time of observing the appellants. Seventh; on the next day, the first appellant ran away upon seeing the victim and her mother."

We cannot fault the reasoning and findings of the first appellate court above and we subscribe to it. Clearly, the unfavorable conditions and circumstances were amply considered by the first appellate court. We find this ground to lack merit.

Taking all the circumstances into consideration together with the evidence concerned with proof of the offence charged against the appellants we are of the view that: One, the evidence of PW1 proved that three people, a gang had sexual intercourse with her and according to **Selemani Makumba Vs Republic** [2006] T.L.R 379, her evidence as a victim is the best evidence to prove the same. PW1's evidence also proved that there was penetration, evidence which is corroborated by the evidence of PW2 and exhibit P1.

Two, PW1's age of fifteen years was proved by her own evidence, corroborated by the evidence of PW2 and PW3 and Exhibit P1. Three, it was the appellants who committed the offence established by our findings above in determining the sixth ground of appeal, that PW1 properly

identified the appellants as the culprits together with the circumstantial evidence related to the conditions she was in after being abandoned and found at a football pitch in a semi-conscious state, evidence which was corroborated by PW4 and PW3 and PW2 on her conditions in the aftermath of the incident.

In the end, the appeal is devoid of merit. It is accordingly dismissed in its entirety.

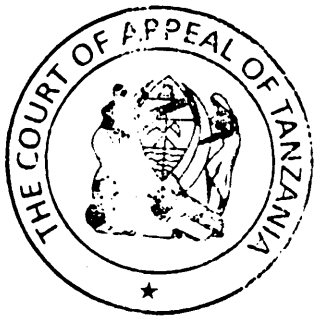
DATED at **MUSOMA** this 13th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2022 in the presence of the Appellants in person and Mr. Isihaka Ibrahim, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL