IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 144 OF 2017

MAGANGA S/O UDUGALI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(Mziray, J.)

dated the 28th day of March, 2007
in
DC. Criminal Appeal No. 104 of 2003

.....

JUDGMENT OF THE COURT

26th October & 3rd November, 2021

MWAMPASHI, J.A.:

The appellant, Maganga s/o Udugali was arraigned before the District Court of Nzega at Nzega facing two counts; to wit, rape and being found in possession of bhang. Upon full trial, he was convicted of both offences and was sentenced accordingly. He was aggrieved with the convictions and sentences, hence appealed to the High Court where his appeal partly succeeded to the extent that the conviction and sentence on the second count of being found in possession of bhang was quashed and set aside respectively.

We gathered the above background from the High Court judgment and from part of the trial court's judgment as the charge sheet was missing from the record of appeal. Missing too, from the record, was part of the trial court judgment. Efforts of the High Court Registrar in collaboration with other stakeholders to trace the missing record following the order of the Court dated 03.05. 2021, had been to no avail. We thus proceeded with the hearing of this appeal in the absence of the said record after having sought and obtained the views of both parties who consented that we should hear and determine the appeal basing on the available record. For the interest of justice we proceeded with the hearing and hence the current decision.

It is noteworthy that the statement of the offence of rape which the appellant was convicted of showed the offence to be contrary to section 131 of the Pena Code as amended and replaced by section 5 (e) and 6 of the Sexual Offences, Special Provisions Act No. 4/1998. As we have earlier stated, it was alleged in the particulars of the offence that on 24.07.2002 at about 20.00 hrs at Nindo village within the District of Nzega in Tabora Region, the appellant did unlawfully have sexual intercourse with a girl, who we shall refer to as "the Victim or PW1, who was not his wife and who did not consent to the act.

To prove the case against the appellant, the prosecution paraded four witnesses and tendered one documentary exhibit, to wit, a PF3. On his part, the appellant was a sole witness for defence.

According to PW1, who testified not under oath and who at the material time was staying with her grandfather (PW3), on the material night she went to the appellant's house where the appellant did not only spend the night with her but he also raped her. PW1 returned home in the following morning while bleeding from her private parts and reported the incident to her grandfather (PW3) who called PW1's sister one Lucia John (PW2) to come and examine PW1. According to PW2, she examined PW1 and observed that there was blood in her private part. Upon interrogation, PW1 who had on the previous night disappeared from home, told her that she had spent the night at the appellant's house. Thereafter PW2 reported the case to the Village Executive Officer (VEO) and the victim was rushed to the hospital. PW2 did also witness the appellant being arrested and she tendered a PF3 which was received in evidence as Exhibit P1 without objection from the appellant. It was lastly testified by PW2 that PW1 was 9 years old.

PW1's grandfather testified as PW3 telling the trial court that on the night of 24.07.2002, PW1 who was staying with him and who had gone to watch traditional dance (ngoma) did not return home. PW1 came back home

in the morning crying and when asked where she had spent the night, she said that she had been at the appellant's house and that the appellant had raped her. PW3 did also tell the trial court that he saw blood oozing from PW1's private parts and that the appellant who was arrested on the same day while watching ngoma is his neighbour. The evidence from the VEO (PW4) was to the effect that he had been looking for the appellant for another case of assaulting his wife when the instant case was reported to him by PW2. He later managed to arrest the appellant and handed him to the police.

In his affirmed defence the appellant did not deny that PW3 is his neighbour and that he was arrested while watching ngoma. He however denied to have raped PW1 and to have spent the night in his house on the material night. He told the trial court that he had left his house in the morning to Mwambiti village where he had gone to sell tomatoes and where he spent the night. The appellant wondered why he was accused of raping PW1 while there were no grudges between him and PW2 or PW3.

After a full trial, the trial court found it proved that the appellant did not only spend the night with PW1 but that he also raped her. The trial court did also find that PW1's evidence that she was raped by the appellant was corroborated by the evidence from the PF3 and also from PW2 and PW3 who

examined PW1 and saw the blood oozing from her private parts and to whom the appellant was named. The appellant was accordingly convicted and sentenced to life imprisonment with twelve strokes of corporal punishment.

As stated earlier, the appellant's appeal to the High Court against the conviction and sentence on the offence of rape was dismissed. The high Court upheld the trial court's findings on the offence of rape and found the appellant's defence that he did not spend the material night in his house not probable and that the same was not raised in accordance wit section 194 (4) of the Criminal Procedure Act (Cap. 20 R.E. 2002] (the CPA).

Aggrieved, the appellant has filed this second appeal raising a total of ten grounds contained in the memorandum of appeal and the supplementary memorandum filed on 21.11.2017 and 30.04.2021 respectively. Essentially, the grounds of appeal raise the following seven complaints:

1. *That the appellant was convicted on a fatally defective charge which did not enable him to understand the nature and seriousness of the offence he was charged with.*
2. *That the appellant was not informed and was denied the right to legal representation.*
3. *That the PF3 was not read out and that the failure to call the doctor who issued it denied the appellant his right to cross examination.*
4. *That the age of the victim was not proved.*

5. *That the appellant was not properly convicted in terms of section 312 (1) and (2) of the CPA.*
6. *That the identification evidence from PW1 was not watertight.*
7. *That the case against the appellant was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic was represented by Ms. Jane Mandago, learned Senior State Attorney.

When asked to argue his appeal, the appellant chose to let the learned Senior State Attorney respond to the grounds of appeal first. He however reserved his right of rejoinder in case the need to do so would arise. It should perhaps be observed at this very stage that after submissions against the appeal had been made, the appellant made a brief and general rejoinder reiterating his denial to have committed the offence. He also insisted that he did not spend the material night in his house but at the neighbouring village where he had gone to sell tomatoes. He also claimed that his wife and other relatives who were staying with him spent the material night in the house.

In her submission against the appeal, Ms. Mandago began by making it clear that she was not supporting the appeal. On the complaint that the charge sheet was fatally defective, while it was conceded by her that the relevant section 130 (1) (2) (e) of the Penal Code was omitted from the

statement of the offence, it was firmly argued by her that the omission was not fatal. She submitted that the appellant was made to clearly understand the nature and the seriousness of the offence of rape he was being charged with from the particulars of the offence and from the evidence that was led to prove the offence. Ms. Mandago insisted that the ailment did not prejudice the appellant and that it was curable under section 388 of the CPA. To cement her argument, Ms. Mandago cited our decision in the case of **Masalu Kayeye v. Republic**, Criminal Appeal No. 120 of 2017 (unreported).

On the complaint regarding the propriety or correctness of the charge, we observe, as also correctly argued by Ms. Mandago, that truly the charging provisions were not correctly and properly cited in the statement of the offence. As rightly submitted by Ms. Mandago, since 2002 when the offence in question was allegedly committed by the appellant, the amendments made by the SOSPA had already been incorporated in the Penal Code, thus citing the SOSPA in the statement of the offence was not only improper but it was also of no use. The more serious omission was however to cite section 131 which merely provides for punishment of rape without citing it alongside the provision creating and defining the relevant specie of rape the appellant was being accused committing. Since the rape in question was against a girl of tender age of below 10 years, the correct citation ought to have been sections 130 (1), (2) (e) and 131 (3) of the Penal Code.

The crucial issue arising from the above stated position is however whether the said above stated ailment regarding the charging provisions, prejudiced the appellant. Did the defect prevent the appellant from understanding the nature and the seriousness of the offence he was charged with?

To begin with, let it be stated that in terms of sections 132 and 135 (a) of the CPA, every charge must contain a statement of a specific offence or offences with which the accused is charged. It is also required that the statement of offence must make reference to the specific provision of the law creating such offence. Further, the charge must contain particulars of offence. The reason or aim of the charge to contain the statement and particulars of offence is to give an accused person reasonable information as to the nature and seriousness of the offence and to enable him prepare his defence.

The position where a charge sheet suffers some irregularities is settled. In the case of **Jamali Ally @ Salum v Republic**, Criminal Appeal No. 52 of 2017 (unreported) where the Court was faced with the similar scenario regarding the defective charge, it was held, among other things, that:

> *"Where particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the*

appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age and where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged and thus any irregularities over non-citations and citations of inapplicable provisions in the statement of offence, are curable under section 388 (1) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA)."

Similarly, in the case of **Jafar Salum @ Kikoti v Republic**, Criminal Appeal No. 370 of 2017 (unreported) the Court made the following observations:

"The position is that the failure in the charge sheet to cite the definition and punishment sections or to clarify the ingredients of the charge under which an accused person is charged, will be curable under section 388 (1) of the CPA if the witnesses remedy the ailment in their evidence."

Guided by the above settled position, we firstly had to examine the particulars of the charge laid before the trial court. The said particulars are in the following form:

"On the 24/7/2002 at about 20.00 hours at Nindo Village, Nzega District and Tabora region, the accused did have sexual intercourse with (the Victim) who was a girl, not his wife and who did not consent to the act."

It is our finding that, as it can be clearly observed from the above particulars of the offence, the appellant was not only informed the date, time and place where the offence was committed but he was also fully informed about the name of the victim and the nature of the offence charged. From the particulars, the appellant was given sufficient notice about the fact that the victim was a girl not married to him and that the sexual intercourse in question was without her consent. As on the age of the victim the evidence from the victim's sister PW2 found at page 10 of the record of appeal, fully informed the appellant that the victim was 9 years old. In addition, the victim herself stated in the presence of the appellant during the *voire dire* test at page 8 of the record of appeal that she was 9 years old.

It is from the above findings that we agree with Ms. Mandago and conclude that the ailments in the charge sheet did not prejudice the appellant because the same were cured by the particulars of the offence and the evidence. The appellant was made to fully understand the nature and seriousness of the offence he was charged with. The defects are curable

under section 388 (1) of the CPA and the ground on this complaint is thus accordingly dismissed.

Next is the applicant's complaint that he was not informed and was denied his right to legal representation. On this, it was the stand of Ms. Mandago that section 310 of the CPA merely gives the right for legal representation and that it does not require that an accused person mut be informed of the right. It was further contended by her that even the Legal Aid Act [Cap 21 R.E. 2019] does not mandatorily require that an accused persons must be informed of that right or that every accused person must be represented. She therefore prayed for the ground to be dismissed.

Section 310 of the CPA provides as follows:

> *"Any person, accused before any criminal court, other than a primary court,* ***may of right be defended by an advocate of the High Court*** *subject to the provisions of any other written law relating to the provisions of professional services by advocate."*
>
> [Emphasis added]

As it can be clearly seen from the above reproduced provisions, the law does not impose to the court the duty to inform an accused person that he has the right to be defended by an advocate. The law simply provides that it is a right of an accused person to be defended by an advocate. After all, every person is presumed to know the law. The appellant cannot therefore

be herd complaining that he was not informed of his right to legal representation. Likewise, he cannot complain that he was denied the right to legal representation where it is not in the record that he had expressed his wishes to have legal representation and that the trial court, in any way or manner, refused or hindered him from enjoying the right.

Further, under section 33(1) of the Legal Aid Act, it is only an eligible indigent person who after being certified by a presiding magistrate or judge that he really needs to have such legal aid, who can be entitled to such legal aid. The two conditions set under section 33 (1) for an accused person to be eligible to such legal aid are **first,** that it should be in the interests of justice for such an accused person to have legal aid in the preparation and conduct of his defence or appeal, as the case may be, and **second**, that his means are insufficient to enable him to obtain legal services. The appellant did not raise such a request before the trial court and it did not appear to the trial court that the appellant needed and was entitled to such services. The appellant cannot, therefore, be heard complaining that he was denied the right. For the above given reasons, this ground fails as well.

The third ground is on the complaint that the PF3 was not read out and that the failure by the prosecution to call the doctor who issued the PF3 denied the appellant his right to cross examine the doctor on that PF3. It was

argued by Ms. Mandago on this ground that on page 10 of the record of appeal, before the PF3 could be admitted in evidence, the appellant was asked if he had any objection and his answer was that he had no objection. She further argued that the appellant did also expressly tell the trial court that he did not wish the doctor who issued the PF3 to be called as a witness. It was thus argued by Ms. Mandago that the appellant forfeited his rights given under section 240 (3) of the CPA. Notwithstanding the above arguments, it was however conceded by Ms. Mandago that the contents of the PF3 were not read out and therefore that the PF3 should be expunged from the record. It was, nevertheless, contended by her that even after the expunction of the PF3, the evidence from PW1 supported by that of PW2 and PW3 sufficiently proved that rape was committed against PW1.

The complaint on the PF3 should not detain us. As also conceded by Ms. Mandago, after the PF3 had been admitted in evidence, its contents were not read out as it is required by the law. Once any document is cleared for admission and admitted in evidence, it must be readout in court by the witness tendering it. Failure to do so occasions a serious error amounting to miscarriage of justice and renders the document liable to expunction from the record- see **Said s/o Salum v. Republic,** Criminal Appeal No. 499 of 2016, **Sunni Amman Awenda v. Republic,** Criminal Appeal No. 393 of 2013, **Jumanne Mohamed and 2 Others v. Republic**, Criminal Appeal

No. 534 of 2015 and **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (all unreported).

Being guided by the above position of the law and since the records bears out in the instant case that the PF3 was not read out in court, the PF3 is accordingly expunged from the record. Having expunged the PF3 from the record, discussing other complaints by the appellant connected to the same PF3 becomes just an academic exercise, which we think, should wait for another opportune occasion. The third ground therefore succeeds to that extent.

Turning to the fourth ground of appeal regarding the complaint that PW1's age was not proved, it was submitted by Ms. Mandago that the age was proved by PW1's sister (PW2) who is on record at page 10 of the record of appeal, stating that PW1 was 9 years old. To buttress her argument that PW's age could be proved by her sister, Ms. Mandago referred us to the case of **Victory Mgenzi @ Mlowe v Republic,** Criminal Appeal No. 354 of 2019 (unreported) wherein the Court cited its earlier decision in **Issaya Renatus v Republic,** Criminal Appeal No. 542 of 2015 (unreported) where it was held, among other things, that that proof of age of a victim of a sexual offence may come from either the victim, or her relative, parent, medical

practitioner or by producing a birth certificate. She thus insisted that PW1's age was proved PW2 and therefore that the ground should be dismissed.

On our part, we entirely agree with Ms. Mandago that the age of PW1 was sufficiently proved by her sister (PW2) who is on record at page 10 of the record of appeal telling the trial court that her younger sister, PW1 was 9 years old. We have no flicker of doubt that from the evidence of PW2 the prosecution performed its duty of proving the age of the victim which is one of the elements required to be proved under section 130 (1) (2) (e) and 131 (3) of the Penal Code. The fourth ground of appeal is thus found not meritorious and it is accordingly dismissed.

As regards the complaint on the fifth ground of appeal that the appellant was not convicted in terms of section 312 (1) and (2) of the CPA, it was argued by Ms. Mandago that according to High Court judgment at page 35 of the record of appeal, the appellant was properly convicted by the trial court. She contended that the fact that the High Court is silent on that issue shows that the complaint was not raised before it and therefore that there was no such a problem. It was also argued by her that even the notice of appeal lodged in the High Court by the appellant show that the intended appeal was against the trial court's conviction and sentence. She therefore prayed for this ground to be dismissed as well.

Regarding the above complaint on the alleged failure by the trial court to comply with section 312 (1) and (2) of the CPA, it should firstly be pointed out that, the complaint is connected to the missing part of the trial court judgment. Secondly, as amply explained at the beginning of this judgment, it was after the parties, including the appellant, had agreed and urged the Court to determine the appeal on the basis of the available record and after we have satisfied ourselves that the appeal could be effectively determined on the basis of the available record, that we proceeded to hear and determine the appeal. Though, because of the missing part of the trial court judgment, we do not have the advantage of personally examining the said part of the judgment to satisfy ourselves if the requirements under section 312 (1) and (2) of the CPA were met by the trial court, we, as rightly argued by Ms. Mandago, can, under the circumstances of this case, justifiably rely on the available record and see whether the law was complied with or not.

Now, basing on the notice of appeal appearing at page 20 of the record of appeal, which was filed by the appellant in pursuing his appeal before the High Court, and also from the High Court judgment appearing at page 35 to 42 of the record, we are satisfied that the appellant was properly convicted and sentenced in accordance with section 312 (1) and (2) of the CPA. At page 35 of the record the learned High Court Judge is on record stating that the appellant was convicted of the offence of rape and that he was

sentenced to life imprisonment. This is also supported by the relevant notice of appeal. We also agree with Ms. Mandago that since the alleged complaint on the contravention of section 312 (1) and (2) of the CPA, was not raised in the High Court and as the learned High Court judge who we believe had the access to the complete trial court judgment, did not observe such an ailment in the said judgement, then the judgment was in compliance of the law. We thus dismiss this aground for being baseless.

The last two grounds of appeal on PW1's visual identification evidence and on the complaint that the case against the appellant was not proved beyond reasonable doubt, essentially raise issues which we think are crucial in determining the fate of the appeal. On these grounds it was strenuously argued by Ms. Mandago that the appellant was positively identified by PW1 who did also immediately name him to PW2 and PW3. She submitted that PW1 well knew the appellant who is her neighbour and that the two spent the night together. It was argued by Ms. Mandago that although the evidence on some factors for proper identification as laid down in the famous case of **Waziri Amani v Republic** [1980] T.R.L 250, that is, whether there was light in the house, the source of that light and its intensity, are wanting, the circumstances of the instant case, show that the appellant was positively identified by PW1. It was thus argued by her that the case against the

appellant was proved to the hilt and therefore that the appeal should be dismissed.

As we have alluded to above, the last two grounds of appeal raise the issue of visual identification. The issue raised is whether PW1 properly identified the person whom she spent the night with in the appellant's house and who eventually raped her. Was the evidence given by PW1 watertight to the extent of leaving no possibilities of mistaken identity? This is the question we now turn to determine.

Before venturing on the above posed question, we should also put it clear, at the outset, that we are mindful of the fact that the two lower courts concurrently found that the evidence from PW1 that it was the appellant who raped her was strong, credible and reliable. The general rule where there is concurrent findings of facts by two lower court is that a second appellate court can rarely interfere with such findings unless there are serious misdirection, non-direction or misapprehension of the evidence leading to miscarriage of justice- see **Musa Mwaikunda v Republic** [2006] T.L.R. 387, **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T.R.L. 297, **Rashid Ramadhani Hamis Mwenda v. Republic,** Criminal Appeal No. 116 of 2008 (unreported).

Equally important and relevant to the instant case, is a settled law on visual identification evidence that such evidence is of the weakest kind which in order to found conviction must be absolutely watertight - see **Waziri Amani** (supra). Factors that should be considered in determining whether visual identification evidence is water tight or not include; the time the witness had the accused under observation, the distance at which he observed the accused, the conditions on which such observation occurred, if it was day or night time, whether there was good or poor lighting at the scene, whether the witness knew or had seen the accused before.

It is also settled that although relevant and admissible, the eyewitness visual identification evidence is still of the weakest kind and most unreliable which should be acted upon with great caution. Before the court can act on such evidence, it must satisfy itself that the conditions were favourable for a proper identification. The evidence must be watertight and all possibilities of mistaken identity must be eliminated. It has to be insisted that the principle applies even in cases of visual identification by recognition as it is in the instant case - see **Issa s/ Ngara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005, **Magwisha Mzee Shija Paulo v Republic**, Criminal Appeal No. 467 of 2007 and **Shamir s/o John v Republic**, Criminal Appeal No. 166 of 2004 (all unreported). In **Shamir s/o John** (supra) the Court cited the case of **Philimon Jumanne Agala @ J4 v. Republic,** Criminal Appeal

No. 187 of 2015 (also unreported) in which it was observed, among other things, that:

> *"Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows,* ***the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*** (Emphasis added).

Guided by the above legal principles and pronouncements, we now turn to the evidence given by PW1 and on other witnesses relevant to the question of identification including the appellant. Our task is to objectively evaluate and scrutinise the evidence and satisfy ourselves if the said evidence is watertight to justify the lower courts concurrent finding that it was the appellant who raped PW1 or not. We should also let it be known that as it was found by the two lower courts, the fact that PW1 was raped was sufficiently proved. We find that the evidence from PW1 supported by that of PW2 and PW3 leaves no doubt that PW1 was ravished. The only issue which, as we have posed above, calls for our determination, is whether it was the appellant who ravished PW1.

Since the determination of the above posed issue to the greater extent depends on the evidence that was given by PW1, we find it apposite to

reproduce it *in extenso*. The relevant evidence appearing at page 9 of the record of appeal goes as follows:

> *"I know the accused person who resides near the house of my grandfather where I stay. One day I went to accused's house and the accused was there. Then at night the accused slept with me on one bed till morning and the accused put his penis in my private part I returned to my grandfather in the morning. I was bleeding from my private parts and my grandfather said it. The blood was caused by accused. That's all."*

The above is all what PW1 testified. We observe from that evidence that PW1 went to the appellant's house on her own. She was not taken there by the appellant as it was put by the learned High Court Judge in his judgment. At page 36 and 39 of the record of appeal the learned High Court Judge is on record to the effect that "*On 24/7/2002 at around 8.00 pm the victim and the appellant attended a traditional dance performed in the house of one of the neighbours in the village. When the traditional dance was going on, the appellant lured the victim and took the girl to his house*". With due respect to the learned High Court Judge, the above purported evidence did not feature in the evidence on record. It appears that the learned Judge was carried on astray by what was stated by the prosecutor during the

preliminary hearing at page 5 of the record where the prosecutor is on record stating thus:

> *"The accused is a resident of Nindo village, Nzega District. On the 24/7/2002 at about 8.00 pm the accused was watching Ngoma at the house of Luswaga and child (victim) aged 10 years was there. She was residing in the house of Dulu. The accused told (victim) that he would escort her to Dulu but he (accused) took her in his house where he had sexual intercourse with her, overnight up to 25/7/2002 in the morning released her."*

What was stated by the prosecutor as reproduced above, was not evidence and it did not come from any of the four prosecution witnesses. The importation of the same in the High Court judgment was therefore a clear misapprehension of the evidence on the part of the learned High Court Judge justifying our interference.

Although we agree with Ms. Mandago that from the evidence on record there is no dispute that PW1 and the appellant knew each other well and also that the appellant was named to PW2 and PW3 by PW1, still we find that when the guidelines on visual identification evidence as set in **Waziri Amani** (supra) are applied to the instant case, the evidence given by PW1 that it was the appellant who raped her is not watertight to the required

standard. From the evidence given by PW1 the possibilities of mistaken identity or of someone impersonating the appellant cannot be ruled out altogether.

First of all, the evidence from PW1 was too brief that it left out a lot of important issues of facts unexplained. Apart from PW1 not telling if when she got in the house there was any light let alone its source and intensity, PW1 did also not tell if when she got therein the appellant was alone or not. All what she said is that when she got at the house the appellant was there. It should be borne in mind that there is no evidence to the effect that the appellant was staying alone in the house. Again, PW1 did not tell how familiar the appellant was to her that she could have recognized him even in total darkness. It is also surprising why she could not cry out for help while being raped. The other unanswered question is, if there were other people in the house, was the house so big comprising many rooms that PW1 could have sneaked in and spent the night with the appellant and got out in the morning without being noticed by other occupants of the house? It is very unfortunate that there are so many crucial facts which needed to be explained and which signify that the case was poorly investigated, if there was any investigation, and poorly prosecuted. The above shortcomings in PW1's evidence demonstrate nothing but the laxity on part of the

investigators and the prosecutors. The shortcomings do also render the visual identification evidence from PW1 not watertight.

We have also observed that, under the circumstances of this case, though not properly raised, the lower courts ought to have considered the appellant's persistent defence that he did not spend the material night in his house. The appellant had stated during the preliminary hearing that he did not spend the material night in his house. We find that the said appellant's claim was supported by the evidence from PW4 whose evidence was to the effect that on the day the rape in question was reported to him by PW2, he had been looking for the appellant on another different case wherein the appellant had been accused of assaulting his wife. If PW4 who was the Village Executive Officer had, previously to the incident in question, been looking for the appellant, then the appellant's defence that he had not been around cannot be lightly ruled out. After all, all what an accused is required to do in his defence is to raise doubts on the evidence of the prosecution side. We think that the appellant managed to raise such doubts which ought to have gone to his benefit.

Still on the defence of alibi, section 194 (6) of the CPA requires that the court should consider the defence even where it is not properly raised, but that it is in the discretion of the court to accord no weight or disregard the

defence - see **Warwa Wangiti Mwita and Another v. Republic** [2002], **Charles Samson v. Republic** [1990] T. L.R. 39 and **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014 (unreported) where it was held that:

> *"The trial courts ought to have considered the defence of alibi but had the discretion, on the basis of the advanced explanations, to accord no weight or disregard the same."*

As alluded to earlier, the appellant's defence of alibi, which we find was plausible, was not considered by the two lower courts.

It is therefore our conclusion that there was a misdirection on the law obtaining to visual identification and misapprehension of the nature and substance of the prosecution evidence, particularly, on the evidence that it was the appellant who raped PW1 on the part of the two lower courts. We think that had the courts below properly directed their minds to the evidence and the relevant law, they would have not failed to see that there were possibilities of mistaken identity that PW1 might have been raped by someone else and not the appellant. Thus, the last two grounds of appeal have merits and are accordingly allowed.

In the upshot, for the above given reasons, we allow the appeal. We consequently quash the conviction and set aside the sentence imposed on the appellant. It is also ordered that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED at **TABORA** this 3rd day of November, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of November, 2021 in the presence of the Appellant in person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL