

TANZANIA / JUDGMENT

HASSAN MABELEEE V

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI CRIMINAL APPEAL NO. 69 OF 2023 (Originating from Moshi District Court in Criminal
Case No. 286 of 2022) HASSAN MABELEEE RAJABU @ MABELEEE APPELLANT
VERSUS REPUBLIC RESPONDENT

JUDGMENT

27/03/2024 & 05/04/2024 SIMFUKWE, J Before the District Court of Moshi at Moshi (the trial court), the appellant Hassan Mabelee Rajabu @ Mabelee was charged with two offences: Armed robbery contrary to section 287A of the Penal Code, (Cap. 16 R.E 2022) and Rape contrary to section 130 (1) (2) (b) of the Penal Code (supra). During the trial, it was alleged against the appellant that on 22nd July, 2022 at Ushirika University compound within Moshi Municipality in Kilimanjaro 1 Region, the appellant did steal from the victim cash money TZS 100,000/=, one mobile phone make Samsung A13 worth TZS 400,000/= and earphone worth TZS 15,000/= the properties of the victim; and immediately before or after the stealing the appellant did use a knife to threaten the victim in order to retain the said properties. The prosecution alleged further that, after the incident of robbery the appellant had carnal knowledge of the victim without her consent. For the purpose of protecting her identity, in this judgment, I will refer the victim as the "victim" or "PW4" In a quest to substantiate the allegation laid against the appellant, the prosecution marshalled eight witnesses and produced eight exhibits. Briefly, the prosecution evidence before the trial court was to the effect that on the fateful day at about 00:00hrs, the victim who was the student of Ushirika University wanted to go home at Rau. Thus, the victim communicated with PW2 a bodaboda driver, to pick her at the University. While waiting for PW2 at the Kiosk of the University, the appellant who introduced himself to the victim as a watchman at the upper gate of the University went there. It was alleged that, suddenly, the appellant opened 2 his t-shirt and took out a knife and spanner and threatened the victim. That, after threatening her, the appellant managed to take the victim's cellphone make Samsung A13, earphones and cash money Tshs 100,000/=. It was alleged further by the prosecution that the appellant took the victim by force towards the gate, forced her to take off her clothes and the appellant also took off his clothes and raped the victim. After that, the appellant took the victim out of the gate under threat and proceeded to the banana farm where he continued to rape her for the second time. The victim testified further that during the intercourse, the appellant set the knife at her neck. After he had finished and left, the victim ran towards the lecturers' houses while raising an alarm

whereby one lecturer and PW2 responded to the alarm. The victim explained her ordeal to them and she was taken to the University Dispensary where she was given first aid. Then, she was taken to Majengo Police station where the victim was issued with a PF3. The victim was then taken to Mawenzi Hospital for medical examination where it was confirmed by PW6, the doctor that the victim was raped. The investigation was conducted by PW7 who narrated before the trial court that the victim explained what happened to her and described the appellant's physical appearance that he had wound below his left eye. While continuing 3 with investigation, on 26/7/2022 PW7 was informed that the appellant was arrested. It was alleged by PW7 that upon interrogation, the appellant confessed to have committed the offence and led the police officers to his homestead at Chekereni Mabogini. He was searched and found with the victim's phone which was stolen on the fateful date, two knives, one arrow and sharpener of knives. All the seized items were tendered before the trial court as exhibits. In his defence which was given on oath, the appellant totally denied the allegations levelled against him and testified on how he was arrested. Upon full trial, the appellant was convicted on both counts and sentenced to serve 30 years imprisonment on each count. The sentences were ordered to run concurrently. Aggrieved with both conviction and sentence imposed by the trial Court, the appellant lodged the instant appeal on seven grounds:

1. That, the learned trial Magistrate grossly erred both in law and fact in finding and holding that, the Appellant was positively identified at the scene of the alleged crime by the 4 victim (PW4) despite the condition and circumstances being not conducive for proper and correct identification.
2. That, the learned trial Magistrate grossly erred both in law and fact in failing to note that, the victim of the alleged incidence (PW4) failed to mention all factors which aided her in identifying her invader. Further, she (PW4) failed to fully describe her invader so as to enable the court of law to determine whether she real (sic) managed to properly identify the suspect.
3. That, the learned trial Magistrate grossly erred both in law and fact in failing to note that, failure by the victim of the alleged offences (PW4) to give the descriptions of the suspect to the person who she came-across at the first earliest possible opportunity (PW1 and PW2) and repeat the same to the police when making the report of the alleged incidence cannot attract the confidence of her testimony before the court of law and it is doubtful as to whether PW4 really identified the invader. 5
4. That, the learned trial Magistrate grossly erred both in law and fact in relying upon the evidence of PW7 pertaining oral confession allegedly given by the appellant, but failed to note that, PW7 flouted the mandatory provisions of section 57
- (1) and (2) of the Criminal Procedures Act, Cap 20 R.E 2019).
5. That, the learned trial Magistrate grossly misdirected himself and erred in law in invoking the doctrine of recent possession in convicting and sentencing the appellant.

6. That, the learned trial Magistrate grossly erred both in law and fact in using weak, tenuous, contradictory and incredible evidence from the prosecution witnesses as a basis of the Appellant's conviction.
7. That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law. 6 On account of the above grounds of appeal, the appellant prayed this court to allow the appeal, quash the conviction, set aside the sentence meted on him and set him free. When the appeal was called for hearing, the appellant was not represented while the Respondent Republic was represented by Ms. Bora Mfinanga, learned State Attorney. The hearing of this appeal was conducted through filing written submissions. Supporting the appeal, the appellant submitted that when the trial magistrate was composing his judgment, he set down three types of evidence which according to him the prosecution had managed to prove the charge against the appellant. The three types of evidence which were listed by the trial Magistrate were: Direct evidence, confession and circumstantial evidence. Submitting in respect of the first noted type of evidence, the appellant contended that the trial magistrate grossly misdirected himself and consequently erred in law and fact in finding and holding that the appellant was positively identified by the victim (PW4) at the scene of the incidence and at the police station to be the perpetrator of the alleged offences. The appellant asserted that the conditions and circumstances of the scene of the 7 alleged crime were not at all conducive to allow proper, correct and unmistakable identification. That, the victim (PW4) testified that an ordeal befell her at night times (00:00hrs) but she managed to see and identify the perpetrator whom among other things she said that had put on a cap on his head. He referred to page 16, 2nd line of the typed trial court proceedings and argued that PW4 went ahead and testified what aided her to identify her invader, was an electricity light from the buildings near the scene of the alleged crime. The appellant was of the opinion that, night times are among circumstances which are not conducive for unmistakable identification. That, the trial court never at all eliminated all possibilities of mistaken identification as PW4 never mentioned the intensity of the light she relied upon to identify her invader, nor mentioned the size of the area illuminated by such light, never mentioned the distance from the alleged light up to where the said offences were committed. Moreover, the trial magistrate failed to note that PW4 gave a very suspicious and improbable evidence as it is highly improbable to identify a person who has put on a cap to hide his face. Concerning evidence of PW4 that she saw a wound near a left eye of her invader, the appellant questioned how could that be possible to see a wound 8 on a face of a person who had put on a cap. It was the appellant's suggestion that if the trial court would have looked on these factors, he could have not reached to the findings that PW4 managed to identify the appellant herein as her invader who robbed and raped her. The appellant supported his submission with the case of James Kisabo @ Mirango and Another vs Republic, Criminal Appeal No. 216 of 2006 (unreported) in which the Court of Appeal held that: "... The two courts below should therefore have been more cautious and not wholesomely accept PW1's

evidence as credible especially on the question of identification because, even in most favorable conditions there is no guarantee against untruthful evidence or mistaken identity... On our part we are not prepared to accept that in the circumstances, the evidence of visual identification of the appellants was watertight.” On the issue of confession as the second type of evidence, the appellant submitted that the trial magistrate termed it as the confession leading to discovery. That, the trial magistrate relied on evidence of PW7 (G.2002 Cpl Mchunguzi, the investigator of the case who among other things testified 9 that he interrogated the appellant who confessed before him to have committed the charged offence. However, PW7 never produced or tendered the cautioned statement or any document showing the confession by the appellant on a charged offence as stipulated under section 57(1) and (2) of the Criminal Procedure Act, Cap 20, R.E 2022. The appellant cited the case of *Mussa Mustapha Kusa and Another vs Republic*, Criminal Appeal No. 51 of 2010 (unreported) in which the Court of Appeal held that: “...We should quickly point out that these elaborated provisions were not superfluously added to the Act. They had a specific purpose. Having been enacted after the inclusion of the basic right of equality before the law, in our Constitution, they were purposely added as procedural guarantees to this right. For this reason, therefore, Police Officers recording such interviews or recording suspects’ caution statements under both sections 57 and 58 of the Act, have an avoidable statutory duty to comply with these provisions. They cannot, at the risk of rendering the statement invalid, pick and choose which requirement to comply with and which ones to disregard. The conditions stipulated in 10 these two sections are cumulative and the duty imposed is mandatory.” On the third type of evidence which is circumstantial evidence, it was the appellant’s submission that the trial magistrate relied its conviction on circumstantial evidence. In using this type of evidence, he applied a doctrine of recent possession by wrongly finding and holding that the same was positively proved by the prosecution against him. That, the trial magistrate in his judgment quoted the case of *Johnson Ashirafu vs Republic*, Criminal Appeal No. 523 of 2015 which mentioned four elements of doctrine of recent possession. Among other things the 2nd element requires the prosecution to positively prove that the purported stolen property is the complainant’s property. That, in this case in proving such element, the prosecution relied on the pictures of PW4 saved on Exhibit P2 (the cell phone) to prove that the same was owned by PW4. The appellant believed that that was too weak, suspicious, tenuous and wholly unreliable evidence to be relied upon to prove the ownership of exhibit P2 due to the reason that the said exhibit was in the prosecution’s hands throughout the case. Therefore, there was possibility to snap the said pictures and save them in exhibit P2 and displaying the same before the court as they did purposely in 11 order to implicate the appellant herein with the charged offence. The appellant was of the view that the prosecution ought to have presented before the trial court strong and valid evidence to prove the second principle of doctrine of recent possession as was held in the case of *Joseph Mkumbwa and Samson Mwakagenda vs Republic*, Criminal Appeal No. 94 of 2007. In his conclusion, the appellant prayed this court to find that the prosecution failed to prove the charged offences against the appellant beyond reasonable doubts as required by the law. That, the court should find merit in this appeal, allow the

same by quashing the conviction, set aside the sentences and set him at liberty. Opposing this appeal Ms. Bora argued the first and second grounds collectively by submitting that, the identification of the Appellant was watertight and there was no any possibility of mistake of identity. The learned State Attorney continued to aver that, she is aware that evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of mistaken identity has been eliminated. She established her contention with the decision in the famous cases of *Waziri Amani V R*. 12

[1980] TLR 250 and *Chacha Jeremiah Murimi and 3 Others Versus Republic* Criminal Appeal No. 551 OF 2015 (Tanzlii) at page 18 and 19 where the Court held that: "To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness, name or describe the accused to the next person he 13 saw? Did that/those other person/s give evidence to confirm it..." (Emphasis added) In our case, Ms. Bora explained that, at page 15, 16, 17 and 18 of the trial court typed proceedings, PW4 stated that she was able to identify the appellant; first with the aid of bright electricity light illuminating from various buildings at the college campus; secondly, through the wound below the appellant's left eye; thirdly, PW4 identified the silver knife which the appellant used to threaten her by placing it on her limbs and neck. Moreover, the victim described the appellant's physical appearance that, he was not tall, he had cheek bones on his face and that on the date of incident he wore black coat with zip, cap and had t-shirt inside a coat. Ms Bora replied further that, the victim managed to identify the appellant as her attacker on the material date and there was no any mistake of identity that were done. She asserted that, the appellant's argument that, how PW4 was able to identify him while he was wearing a cap is without merit since on her statement at page 15 and 16 of the typed trial court proceedings, she stated that the appellant talked to her and introduced himself as a watchman of Ushirika University at the upper gate and that the incident took almost 30 minutes. 14 Ms. Bora made reference to the case of *Cosmas Chaula v. Republic*, Criminal Appeal No. 6 of 2010 (Tanzlii) which held that: "... it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such a person is arrested. The description should be on attire worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect..." (Emphasis added) Based on the above authority, Ms Bora averred that, looking

at the evidence on the record vis a vis the stated principles regulating identification, it can be safely vouched that the appellant was positively identified. Responding to the third ground of appeal Ms. Bora submitted that, the victim (PW4) named the appellant at the earliest possible opportunity to PW1 soon after the incident had occurred. She subscribed to the case of *Festo Mawata v. Republic*, Criminal Appeal No. 299 of 2007 (Tanzlii) in which the Court observed that: 15 “...Delay in naming a suspect without a reasonable explanation by a witness has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted...”

Distinguishing the mentioned authority herein above, Ms Bora stated that, in this case the facts are different since after the occurrence of the incident PW4 the victim met with PW1 while seeking help and explained to him that she was attacked, robbed and raped with a person whom she identified his appearance that he had a wound near his left eye. That the same was testified by PW1 before the trial court as reflected at page 8 of the typed proceedings of the trial court. The same was supported by PW2, PW5 and PW7. In her response to the fourth ground of the appeal, Ms Bora strongly opposed this ground on the reason that there were no discrepancies on prosecution evidence or breach of section 57 (1) and (2) of the CPA (supra). She referred section 3(1) (a), (b) and (c) of the Evidence Act (CAP 6 R.E 2022) which provides that: Oral confessions are recognizable, and in actual fact a suspect may be convicted based solely on such evidence. She cemented her assertion by citing the case of *Posolo Wilson @ 16 Mwalyego v. R*, Criminal Appeal No. 613 of 2015, in which the Court observed that: “.. It is settled that an oral confession made by a suspect before or in the presence of reliable witnesses, be the civilian or not; may be sufficient by itself to found conviction against the suspect.” From the above observation, Ms Bora submitted that, it is a trait of law that the oral admissions or confessions are admissible in certain circumstances if extreme care is taken before taking them on their face value. She further noted that, oral confession may be valid if at the time when the suspect stated such words or made such confession imputed to him, he was a free agent. She said, in this case according to page 27 and 28 of the typed proceedings of the trial court, PW7 testified that the appellant confessed to him to have raped the victim and stole her properties on 22nd July 2022 at night and that he had hidden the said properties at his house at Chekereni Mabogini area. That, the appellant even led them up to his house where they found all the stolen properties of the victim and seized them. She opined that, the confession made by the Appellant to PW7 is material and credible. She cemented her argument with the case of *Safari Anthony @ Mtelemko 17 and Another Versus Republic*, Criminal Appeal No. 404 of 2021 (Tanzlii) at page 52, where the Court of Appeal held that: "The confessions in this case were made by the first appellant to reliable witnesses. We have no doubt in our mind that the evidence constituted the truth and reflected what actually happened and show that the appellant made the confession as a free agent. We acknowledge too, that the evidence in this case was wholly circumstantial, but we are satisfied that, the evidence passed the test set by this Court in *Bahati Makeja* (supra)" On the fifth ground of appeal, Ms. Bora submitted that, the doctrine of recent possession was applicable against the appellant to prove his guilt and sustain the conviction and sentence meted by the trial

court as it reflects at page 21, 22 and 23 of the trial court judgment. The learned State Attorney submitted further that, before the trial court applied the doctrine of recent possession, it started by analyzing the evidence on whether the prosecution did prove all the ingredients of recent possession and through the evidence of PW7 who testified that the appellant made oral confession which led into the discovery of the cellphone of the 18 victim on 26th July 2022 which was stolen on 22nd July, 2022, four days (4) after the incident. She was of the opinion that in that regard, it was right for the doctrine of recent possession to be applied. To strengthen her assertion, she cited the case of Mustapha Darajani Vs Republic, Criminal Appeal No. 242 of 2008, (Tanzlii) in which the Court held that: "For the doctrine of recent possession to apply, it must be established; firstly, that the property was found with the suspect or there should be a nexus between the property stolen and the person found in possession of the property; secondly, the property is positively the property of the complainant; thirdly that the property was recently stolen from the complainant; and lastly the stolen property in possession of the accused must have a reference to the charge laid against him..." Guided with the above authority, Ms Bora contended that, in this case all elements of recent possession were proved since the victim PW4 testified at page 18 of the typed proceedings of the trial court that she identified her phone make Samsung Galax A13 with Black cover and she even mentioned 19 the password of the phone that is 090102. Also, she opened the cellphone with her finger print. She further stated that since the appellant failed to offer reasonable explanations on how he come into possession of the stolen property, the fifth ground of appeal is not meritorious. Submitting on the 6th ground of appeal, Ms Bora strongly opposed this ground by submitting that, the prosecution evidence was credible and reliable in convicting the appellant on both counts. She continued to elaborate that, there are several principles that govern testimony of witnesses which contain inconsistencies and contradictions. One, the court has a duty to address the inconsistencies and try to resolve them where possible. Moreover, the court has to decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter. Two, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. She averred that, in this case the appellant failed to point out the alleged contradictions and inconsistencies. Ms Bora went on to submit that, it is a peremptory principle of law that the best evidence of sexual offence comes from the victim. That, in this case the prosecution was able to prove all ingredients of the offence of Rape including Penetration and consent through evidence of PW4. That, evidence of PW4 20 was supported by the testimony of PW6, the medical doctor who examined the victim as reflected at page 24 and 25 of the typed trial court proceedings. Moreover, PW4 testified on how she was robbed by the appellant who threatened her with a knife and a spanner. She further testified that the appellant stole her money and cellphone which she identified before the trial court. Ms Bora insisted that the prosecution evidence was strong, consistent and reliable. Responding to the 7th ground of appeal, Ms. Bora submitted that, the prosecution side was able to prove both offences beyond reasonable doubts. She explained that, to establish the accusation of armed robbery, the prosecution was enjoined

to establish three ingredients; one, there must be proof of stealing; two, there must be proof of the use of or threat to use a dangerous or offensive weapon or instrument at or immediately before or after such stealing; three, it must be proven that the use of or threat to use violence was directed against a person for the purpose of obtaining or retaining the stolen property. She observed that, all ingredients were proved by the prosecution before the trial court through the testimony of PW4 who testified before the trial court on how the appellant stole her properties while 21 threatening her with a knife and spanner for the purpose of facilitating the obtaining of those properties from the victim. Concerning the second offence of Rape, Ms. Bora reiterated that, the best evidence of sexual offence comes from the victim and the prosecution through PW4's testimony, was able to prove all ingredients of the offence of Rape including Penetration and consent. Evidence of PW4 was corroborated by PW6 the medical doctor at page 24 and 25 of the typed trial court proceedings. In conclusion the learned State Attorney explained that, it is a cardinal principle that who alleges must prove and that it's a duty of the prosecution side to prove a case beyond reasonable doubts. She stated that, in this case the prosecution was able to prove both offences of Armed Robbery and rape beyond reasonable doubts. I have taken into consideration the available records, the raised grounds of appeal and the rival submissions of both parties. I will resolve the grounds of appeal by adopting the method used by the appellant in his written submission in which he submitted collectively on issues of identification, oral confession and circumstantial evidence. 22 Starting with the issue of identification, the appellant faulted the trial court judgment that the condition and circumstances at the scene of the alleged crime were not conducive at all. The appellant questioned on how the victim managed to identify him while she alleged that the culprit wore a cap. Also, the appellant lamented that the victim failed to explain the intensity of the light which enabled her to identify the appellant, the distance from the alleged light to where the said offence was committed. The learned State Attorney contended that the prosecution side managed to prove the issue of identification through the testimony of PW4 at page 15 and 16 of the typed trial court proceedings. That, the appellant introduced himself to the victim as a watchman of Ushirika University and the incident took almost 30 minutes. From the foregoing submissions, venturing into whether the appellant was properly identified, it is long-established principle of law that, visual identification is one of the weakest and unreliable evidence as established in the landmark case of *Waziri Aman vs Republic* [1980] TLR 250. In the cited case, the conditions to be taken into consideration in determining whether the accused person was properly identified were outlined. The Court held that: 23 "The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, 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 or not." Emphasis added In another case of *Raymond Francis v. R* [1994] TLR 100 the Court of Appeal held that: "It is elementary that in the criminal case whose identification depends essentially on identification, evidence on conditions favoring a correct identification is of utmost importance." In this case, it is undisputed fact that the incident occurred during the night

time. Therefore, the question to be addressed is whether at the scene of crime the conditions were conducive to facilitate positive identification of the appellant. I have carefully scanned the testimonies of all prosecution witnesses who testified before the trial court. For ease reference I will partly reproduce the 24 testimony of PW4 as reflected at page 15, 16 and 17 of the typed proceedings of the trial court: "... I was waiting him at Kiosk of University. There came one boy who introduced as watchman of the university at upper gate. Then he opened his t-shirt where he took a knife and spanner. Thereafter, he started threatening me that in case I made voice he would stab with a knife he had. The place had road solar energy light also there were light from buildings around the University College. There was enough light from those sources. The road had buildings both sides, one side there are business frames and another side Lecturers houses. All the buildings have electricity light. From such source I managed to see and I identify the person. The person had a coat (black with zip, cap and had t-shirt inside the coat). Also, the person had wound near left eye. Also had jeans and black shoes. He was not tall and had cheek bones in his face. (sic) 25 Having took the items, he took me by force to the gate. There he forced me to take off my clothes, I had jeans. Having took off my clothes he also undressed. Having completed sex, the boy took me out of gate. When I tried to resist, he beat me with spanner. Then I heard bodaboda coming. I tried to ask him let me go he denied. All such time I was half necked. We proceeded with the journey to bananas. There he took off all my clothes. There he proceeded with sex against me. All the time of sex his knife was set at my neck....." (sic) Emphasis added The foregoing evidence, reveals that the incident had three parts: First, PW4 alleged to have been threatened with a knife and robbed by the appellant; secondly, the victim alleged to have been raped by the appellant for the first time at the gate and thirdly, the victim alleged to have been raped by the appellant for the second time out of the gate at the banana farm. On the outset, I have no doubt with the visual identification of the appellant due to the following reasons: Firstly, PW4 testified that, the place had sufficient light illuminating from buildings around the University, that, the road had buildings on both sides. On one side there were business frames 26 while the other side had lecturers' houses. Also, there were solar lights from the road. Secondly, PW4 testified that, the appellant approached her and introduced himself as a watchman of the University, then, he suddenly showed her his true colour by threatening her with a knife and robbed her. Moreover, the appellant raped the victim at the gate of the University and at the banana farm outside the University compound. I am of settled opinion that identification of the appellant is doubtless due to continuation of events and the appellant stayed with the victim for quite a long time. Despite the fact that the appellant wore a cap, the time which the appellant spent with PW4 eliminates all possibilities of mistaken identity. Furthermore, the victim managed to describe the physical appearance of the appellant as quoted herein above, to the extent that any reasonable person could identify the appellant basing on the victim's description. The same description was narrated to PW7 by PW4 as reflected at page 27 of the typed proceedings of the trial court. In addition, the victim described the knife that was used by the appellant to threaten her to be silver in colour. The knife was found at the homestead

of the appellant after his oral confession to PW7 which led the seizure of some stolen items. The knife was admitted before the trial court as Exhibit P3. 27 Evidence of the victim was corroborated by the evidence of PW1, PW2 as well as PW7 the investigator. PW1 and PW2 were present at scene of crime after the incident, thus, they corroborated the presence of enough light at the scene of crime. PW7 the investigator, testified to have visited the scene of crime and confirmed the presence of enough light for a person to see and identify another person. In the circumstances, having exercised my duty of re-evaluating evidence as the first appellate court, I am satisfied that, the appellant was recognized by PW4 very well. Also, the fact that the victim described the appellant on the fateful day, adds credence to reliability and assurance of PW4's testimony. In the premises, I hesitate to agree with the appellant's assertion that PW4 failed to identify him properly. Therefore, I find the 1st, 2nd and 3rd grounds of appeal which concern the issue of identification, without merit. On the issue of confession as lamented by the appellant on his 4th ground of appeal; that, the trial magistrate relied on evidence of PW7 who testified that the appellant confessed orally before him during interrogation. The appellant argued that PW7 never produced or tendered the cautioned statement or any document showing the alleged confession by the appellant which was contrary to section 57(1) and (2) of the Criminal Procedure 28 Act (supra). To the contrary, Ms. Bora submitted that under section 3(1)

- (a) (b) and (c) of the Evidence Act (supra), oral confession is recognizable and the suspect can be convicted based solely on oral confession. I am alive with the settled principle of law that, oral confession made by a suspect before or in the presence of reliable witnesses, be they civilians or not, may be sufficient by itself to find conviction against the suspect. See; *Posolo Wilson @ Mwalengo v. Republic*, (supra) (unreported). Also, in the case of *Chamuriho Kirenge @ Chamuriho Julius vs Republic* (Criminal Appeal 597 of 2017) [2022] TZCA 98 at page 21 while discussing the oral confession made by the accused in relation to his guiltiness, the Court of Appeal had this to say: "It is settled that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be they civilians or not, maybe sufficient by itself to ground conviction against the suspect. See: *The Director of Public Prosecutions vs Nuru Mohamed Gulamrasul*, [1988] T.L.R. 82. In *Mohamed Manguku vs Republic*, Criminal Appeal No. 194 of 2004, quoted in *Posolo Wilson @ Mwalyego vs Republic*, Criminal Appeal No. 613 of 2015 and *29 Tumaini Daudi Ikera vs Republic*, Criminal Appeal No. 158 of 2009 (all unreported), the Court insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him." [Emphasis added] Guided by the above authorities, there are two things to take into account in considering oral confession: First, reliability of the witness to whom the oral confession was made. Second, the suspect making an oral confession must be a free agent. In the present matter, there is evidence of PW7 to whom the appellant confessed orally that he robbed and raped the victim on 22nd July, 2022 at night. According to the testimony of PW7, the appellant confessed to him that he had hidden the victim's stolen items in his house at Chekereni, Mabogini area. He led them to his house where they found the victim's

cellphone make Samsung A13 and the silver knife which he used to threaten the victim. The items were admitted before the trial court as exhibit P2, P3 and P4 respectively. Up to this juncture, I am of strong opinion that evidence of PW7 is credible and reliable as the appellant's confession led to the recovery of the stolen 30 cellphone which was admitted in court. Apart from the oral confession, there was corroborating evidence which shows that the appellant made the confession voluntarily as a free agent. He led the police officers to his homestead where the stolen cellphone was recovered and he never objected the admission of the said cellphone as exhibit. Therefore, I am satisfied that evidence of PW7 passed the test set by the Court of Appeal in *Chamuriho Kirenge @ Chamuriho Julius* (supra). On the issue of the doctrine of recent possession; the appellant argued that the trial court relied on the doctrine of recent possession and wrongly found that the prosecution case was proved to the standard required by the law. He further contended that the prosecution relied on the pictures of PW4 saved in the cellphone to prove that the cellphone belonged to her while the cellphone was in the hands of the prosecution throughout the case. On the other side, Ms Bora for the respondent strongly opposed the appellant's assertion and submitted that the prosecution proved all ingredients of recent possession through the evidence of PW7 who testified that the appellant made an oral confession which led into the recovery of the cell phone of the victim on 26th July, 2022. 31 For the doctrine of recent possession to apply, there are issues which must be established. In the case of *Mkumbwa Samson Mwakagenda Joseph vs Republic*, Criminal Appeal No. 94 of 2007 (unreported) the Court held that: "Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved, first, that the property was found with the suspect, second, that the property is positively proved to be the property of the complainant, third, the property was recently stolen from the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements...." Emphasis added In the instant matter, it is not disputed that the cellphone (exhibit P2) which was subject of the charge against the appellant was found in 32 the appellant's possession after he himself led PW7 to his homestead. The same was tendered before the trial court without objection. In his defense, the appellant did not explain how the said cell phone come into his possession. With due respect to the appellant, the allegation that the victim failed to prove ownership of exhibit P2 is baseless as the same was proved beyond doubts. PW4 managed to identify the said phone through its colour, type and she managed to unlock the said phone by using a password. Also, the cell phone contained pictures of the victim. On that basis, I am satisfied that the outlined requirements of the doctrine of recent possession were met in this case. Concerning the assertion that the said phone was in the prosecution's hands throughout the case, thus easily tempered with; with due respect to the appellant, the said exhibit was tendered by PW3 a Police Officer who was the custodian and exhibit keeper. Thus, the allegation that it was easy to temper with it, has no merit. In the circumstances, I find the

conviction against the appellant as well as the meted sentences as justifiable. Hence, this appeal is devoid of merit. It is accordingly dismissed in its entirety. 33 It is so ordered. Dated and delivered at Moshi this 5th day April, 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 05/04/2024 34

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Prepared on 14 October 2026 · Esheria