IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 526 OF 2020

MAJALIWA CHIZA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma

(Mugeta, J.)

Dated the 16th day of October, 2020
in
DC. Criminal Appeal No. 16 of 2020

.....

JUDGMENT OF THE COURT

1st & 16th June, 2022

KENTE, JA.:

Like many other people around the world, a lady whose name we shall withhold and simply hereinafter refer to her as the complainant or PW4 celebrated Christmas on 25th December, 2019 and in so doing she chose her own ways to make the holiday special. Believing that liquor was the only liquid that could actually give promotion to her enjoyment and happiness, she went to a nearby local brew bar at Kayonza village in Kakonko District, Kigoma Region to quench her thirst. After she had consumed liquor

to her satisfaction and when her husband delayed to pick her as the midnight drew near, she decided to go home on her own. A bit tipsy and reeling along the way, she came across six men who she said were with her at the bar allegedly including the appellant Majaliwa Chiza. The said six men intercepted and took her to the roadside where they raped her in succession. Upon hearing a yell made by the complainant, a passers-by one Justine Msafiri (PW1) went to the complainant's rescue and quickly got hold of the appellant who, according to PW1 was trying to dress in his trousers in a hurry and escape like his friends. Having arrested the appellant, PW1 phoned his friend one Fitina Kachira (PW2) who also phoned Tobias Gabriel (PW3) the village chairman who dutifully informed the police at Kakonko. The police went to the scene of the crime, took the appellant and booked him for gang rape. The complainant was referred to hospital where she was examined and confirmed to have been raped.

Detective Corporal Hamisi (PW5) who was assigned to investigate the case recounted how he formally arrested the appellant on 25th December, 2019 and interrogated him. In the course of interrogation, the appellant allegedly told him that he had

dropped his cell phone most probably at the crime scene and when PW5 went there, he came across and picked it. On the basis of the foregoing evidence, the appellant was charged with and convicted of gang rape contrary to sections 130(1) and (2)(a) and 131A (1) and (2) of the Penal Code (Cap 16 R.E 2019) at the District Court of Kibondo. He was subsequently sentenced to the statutory sentence of life imprisonment. His appeal to the High Court was dismissed and, still feeling aggrieved he has appealed to this Court citing three grounds of complaint. The appellant is faulting the learned judge of the first appellate court for:

i) *Sustaining the conviction and sentence without there being congent evidence proving the offence beyond reasonable doubt;*

ii) *Upholding the conviction and sentence while relying on a defective charge which did not disclose the ingredients of the offence; and*

iii) *Upholding the conviction and sentence without taking into account that the appellant was not properly identified.*

Before this Court the appellant appeared in person undefended whie the respondent Republic was represented by Messrs. Benedict Kivuma Kapela and Raymond Kimbe, learned State

Attorneys who firmly resisted the appeal. After we invited the appellant to expound on the grounds of appeal, he simply adopted them and let the respondent make a reply submission thereto after which he made a rejoinder submission essentially repeating his contention that the offence was not proved to the required threshold. For purposes of easy disposal of this appeal, we shall determine the appellant's grounds of complaint in the reverse order.

We need to say right from the outset that the appellant's rejoinder submissions in support of the appeal was too general almost completely out of focus. For instance he complained as to why the complainant was not the first witness to testify in support of the prosecution case; why the PF3 (exhibit P2) does not bear the police case file number and why the complainant did not tender torn inner clothes to prove that indeed she was raped. The appellant's approach made things look grim for him but all was not lost. There is one question which he posed in the course of his rejoinder submission which deserves our attention. To capture its legal dimensions, the question suggests albeit remotely that the appellant was in fact questioning the credibility of the complainant as the only eyewitness to the offence. The question goes thus:

"Did the complainant have a watch which she looked at every after sometime so as to determine that each of us spent about five minutes raping her?" We shall revert to that aspect of the evidence in the course of determining the main question whether the appellant was properly and correctly identified as the person or one of the persons who raped the complainant on the fateful night.

Submitting in opposition to the appeal, Mr. Kimbe maintained that the appellant was properly identified as he was caught red handed at the scene of the crime and therefore the question of a mistaken identity does not arise. Referring to the evidence of the complainant whose credibility was questioned by the appellant, the learned State Attorney relied on our decision in **Selemani Makumba v. The Republic** [2006] TLR 379, at 384 to underscore the point that true evidence of rape has to come from the victim and on **Goodluck Kyando v. The Republic** [2006] TLR 363 at 367 reminding us of the rebuttable principle that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing him. The learned State Attorney did not find it necessary to address us on the questions as to whether the conditions and

circumstances obtaining at the scene of the crime were favourable for an impeccable identification of the appellant presumably because the appellant is said to have been caught in the act of committing the offence.

We are alive to the various authorities of this Court to the effect that, in a fit case, it is important and indeed incumbent upon an identifying eyewitness to give the terms of the description of an accused person and to give the evidence describing how the witness identified the accused person. (see **Fadhii Gumbo @ Maota and Three Others v. The Republic** [2006] T.L.R 5). We are equally mindful of the factors that may impair the eyewitness' accuracy hence the need for, among other requirements, the courts to examine closely the circumstances in which the identification by each witness was made. (vide **Waziri Amani v. The Republic** [1980] T.L.R. 250 among other cases). However, given the facts and circumstances of this case together with the evidence on the record, we are settled in our minds that the above stated requirements of the law were not necessary. We say so because, as opposed to the normal cases of visual identification, in the case under scrutiny, the appellant was found and arrested with his

trousers down, to put it idiomatically. It follows in our opinion that, while one could have reasonably suspected the credibility of the evidence of the complainant for having been obtained in very unfavourable conditions and circumstances, taking also into account that the complainant was drunk, the evidence of PW1 who arrested the appellant with his pants down should be the final nail in the coffin for the appellant's case. We are saying so because of what we held in **Abdalah Ramadhani v. The Republic,** Criminal Appeal No. 141 of 2013 (unreported) where we pungently stated that, after the appellant was caught in flagrante raping the complainant, the evidence to prove the offence of rape was more than sufficient.

In the light of the above analysis of the evidence, like the learned first appellate judge, we are satisfied that the appellant was sufficiently identified as he was caught in the act of raping the complainant. We thus dismiss the third ground of appeal.

Moving back to the second ground of appeal which faults the learned first appellate judge for upholding the appellant's conviction and sentence by relying on a defective charge which did not disclose the elements of the offence of gang rape, it behoves us to

demystify by explaining what in law it means by gang-rape. Direct to the point is section 131 A (1) of the Penal Code which provides that:

> *"Where the offence of rape is committed by one or more person in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape."*

With the above-quoted provision of the law in mind, it follows that, simply defined, but subject to the provisions of section 22 of the Penal Code, gang rape is the rape of one person by a group of other people.

In the instant case, the evidence accepted by the trial court and subsequently upheld on appeal by the High Court was that, PW4 was raped by the appellant together with other five men who were not charged as they managed to escape. According to PW4, all six men had tightened her on the ground, as three of them took turns to insert their erected penises into her vagina. However, according to PW1 there were only two men at the scene of the crime one of them standing and another one bending and naked. When they saw him coming, the one who was standing took to the

woods while the one who was bending and naked who, as it turned out, was the present appellant tried to put on his trousers but PW1 moved quickly and managed to catch him. Going by the two versions of evidence given by the two witnesses viz PW1 and PW4, it appears that in arriving at the conclusion that the offence of gang rape had been proved, the two courts below relied mainly on the evidence of PW4.

We have already expressed our misgivings about the evidence of PW4 and we need not repeat ourselves. We can only say that in this case we are not in the least persuaded that the offence of gang rape was proved beyond reasonable doubt. The truth of the matter as attested to by PW1 is that, while the appellant was busy in the act of raping the complainant, another man was standing by his side and he was neither tightening nor holding the complainant as alleged in her testimony.

The position of the law is that, mere presence of the accused person at the scene of the crime is not enough to justify his conviction. (See **Jackson Mwakatoka and Two Others v. The Republic** [1990] T.L.R 17 at page 21 and **Damiano Petro and Jackson Abraham v. The Republic** [1980] T.L.R. 260. In

Damiano Petro (supra), the Court quoted with approval a passage by **Hawkins, J in The Republic v. Coney and Others** (1982) 8 QBD 534 at 557 that:

> *"...It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent it and had power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."*

The above-quoted is the position of the law regarding the accused person who was present at the scene of the crime but did not do anything to prevent it or discourage its commission if he had

power to do so. In the present case the trial court was reliably told by PW1 that there was another man who was standing by the appellant's side as he (the appellant) was bending apparently in the act of committing rape, and further that the said man ran away as he saw PW1 advancing towards them. Apart from standing by the appellant's side and running away when the said man saw PW1, there was no evidence to establish his actual participation in the commission of the charged offence. In the absence of such evidence it cannot be safely concluded that the offence of gang rape which requires commission by two or more persons on one woman was proved beyond doubt. For this reason the second ground of appeal is hereby sustained.

However as indicated before, in the light of the evidence on the record, we are of the considered view that it is the offence of rape which was proved beyond reasonable doubt. We therefore invoke the revisional powers of this Court under section 4(2) of The Appellate Jurisdiction Act (Cap 141 R.E 2019) ("the AJA") to quash the conviction for gang rape and substitute it with the conviction for rape contrary to section 130(2)(a) of the Penal Code. We also set aside the life imprisonment sentence imposed on the appellant and

substitute it with thirty years imprisonment under section 131(1) of the Penal Code reckoned from the day of the appellant's conviction and sentence by the trial court, that is the 20th May, 2020. Only to the extent of the variation of the conviction and sentence to which the appeal is allowed, otherwise the appeal stands dismissed.

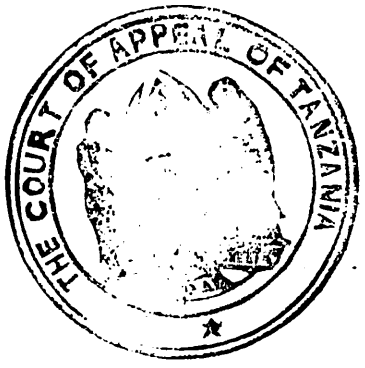
DATED at **KIGOMA** this 15th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2022 in the presence of the Appellant in person, unrepresented and Mr. Raymond Kimbe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL