

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**(CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)**

**CRIMINAL APPEAL NO. 258 OF 2021**

**ANDREW KANG'UNG'ARO.....APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Iringa)**

**(Matogolo, J.)**

**dated the 25<sup>th</sup> day of November, 2020  
in  
DC Criminal Appeal No. 26 of 2020**

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**JUDGMENT OF THE COURT**

16<sup>th</sup> & 23<sup>rd</sup> March, 2023

**MAIGE, J.A.:**

The appellant was convicted by the District Court of Mufindi ("the trial court") of an offence of rape contrary to section 130 (1) and (2) (e) and 131(1) of the Penal Code, Cap 16 of the Laws of Tanzania. He was sentenced to life imprisonment. On appeal to the High Court of Tanzania at Iringa ("the High Court"), both the conviction and sentence were upheld and henceforth the current appeal.

The allegation in the charge was that; on 12<sup>th</sup> day of September, 2018 (the material date), at Liyegeya village within Mufindi District in Iringa (the village), the appellant had carnal knowledge of the victim (PW2) (name withheld).

The evidence leading to the appellant's conviction can be summarized as follows. On the material date, PW2 was a girl of seven years. She was at home alone as her grandmother Tainina Mponzi (PW3) with whom she was living was attending a funeral ceremony of her close relative in the neighborhood. At that time, the appellant appeared and took PW2 to the bush near her home residence where he ordered her to lay down and take off her clothes. Eventually, he laid on her top and inserted his penis (kidudu) into her female organ. On finishing to commit the criminal wrong, the appellant gave PW2 a ripe banana and warned her not to disclose what had happened.

PW3 narrated that; when she returned at home a short while later, she found PW2 complaining that she was not feeling well in the course of attending a short call. When she asked her what happened, PW2 revealed that she had been raped by the appellant. Nimrodi Chang'a (PW1), the victim's father, having been informed by PW3 of the rape of the victim, on

the next day, he right away went to the offices of the village executive officer one Hussein James Ngongolo (PW4) and reported the incident.

PW4 testified that, on 13<sup>th</sup> day of September, 2018 as he was in his office, he was visited by PW1 along with two other persons whose names he did not mention together with PW2 and PW3. At the office, PW1 informed him that PW2 had been raped by the appellant. Under his direction, the appellant was arrested on the same day and produced to his office. On being interrogated, he orally confessed to him to have committed the offence. The appellant was thereafter produced to Mdabulo police station where he was interviewed by E. 4136 Detective Corporal Deus (PW6) and confessed to have committed the offence as per the cautioned statement in exhibit P2.

Laurent Ndenga (PW5), a clinical officer at Mdabulo dispensary, claimed to have medically examined PW2, on 13<sup>th</sup> September, 2018 and established as per the PF3 (exhibit P1) that she had been raped.

In his defense, the appellant denied committing the offence. He associated the accusation with the family conflict between him and PW3 in relation to his father's farm at the village wherein there were grown some bamboo trees. For security reasons, it is in his evidence, the village authority requested them to remove the trees from the farm, which they did. Later,

the appellant grew some bamboo trees in another side of the farm and allowed his mother to make use of them. When his mother passed away, he further testified, PW3 came complaining why the appellant was destroying the trees. The appellant testified further that, PW3 was threatening to frame up a case against him.

As to what transpired on the material date, the appellant testified that; he was attending a burial ceremony of his mother-in-law and had been there since a day before. That, at around 2:00 pm, he left the place with his friend one Olive Kanyika and went to the latter's farm to meet with a businessman who was desirous of buying his trees. Afterwards, he went back where the funeral ceremony was and spent his night thereat. On the next day in the morning, he went to hospital for treatment and while there, he met with PW4 and PW2 but they did not tell him anything. He then saw PW3 coming to the hospital. Again, as he was coming back from the hospital, he met with PW4 who told him to go to his office. At there, he found some women together with PW1 and PW2. When he asked what had he done, PW4 told him that he is being accused of raping PW2. Initially, when he was interrogated by PW4 if he committed the offence, he denied. Ultimately and after being severely beaten by a stick, he admitted, before PW4 to have

raped PW2. He was then taken to the police where he was interviewed and denied commission of the crime.

In his judgment, the trial magistrate believed the evidence of PW2 (the victim) as supported by the oral evidence of PW1, PW3 and PW5 together with the evidence in exhibit P1 that she was raped and it was the appellant who committed the offence. In addition, the trial magistrate relied on the appellant oral confession before PW4 and the cautioned statement in exhibit P2 as probable corroborative evidence.

The trial magistrate refused the appellant's association of the case with the family conflict in his defense as an afterthought. The reason being that it was raised for the first time during defense. In the opinion of the trial magistrate, if that was true, it should have, which is not, featured out in the cross examination to PW3. Besides, the trial magistrate refused the appellant defense that he was forced to confess before PW4 by torture for the reason of failure of the appellant to call a witness in proof of the assertion and to produce PF3 in proof of the injury.

On appeal, the High Court though agreed with the appellant that exhibit P2 was improperly admitted and therefore expunged it from the record, upheld the conviction and sentence of the trial court maintaining

that, there was sufficient evidence on the record to prove the case beyond reasonable doubt. The High Court confirmed that, the appellant's defense that the case was framed up due to family conflict was correctly rejected. In its view, as the trial court found the evidence of PW2 to be credible and probable and the appellant having not adduced probable evidence to support his claim, the case was proved beyond reasonable doubt notwithstanding the defense. On the issue of reliability of the evidence of PW4 on oral confession, the High Court observed as follows:

*"This ground has no merit, as it was correctly submitted by Mr. Mwita that, when PW4 testified the appellant did not cross-examine him or tender any document to prove that he was beaten up. Furthermore the conviction was not solely based on PW4 testimony; there is evidence from the victim of the offence, PW2 which was more considered by the trial court. It is therefore not true as alleged by the appellant that his conviction was based on testimony of PW4."*

In the memorandum of appeal, the appellant has enumerated six grounds which can be paraphrased hereunder:

1. *The two lower courts wrongly admitted and placed reliance on the evidence of the village executive officer (PW4) purporting to*

*establish oral confession by the appellant while the same was not substantiated by any written document.*

- 2. The two lower courts were wrong in rejecting the appellant's retraction of the oral confession in question for mere reason that no PF 3 was tendered.*
- 3. That the appellant was erroneously convicted based on hearsay evidence.*
- 4. That the two lower courts wrongly rejected the appellant's defense that, the case was fabricated due to family grudges between him and the grandmother of the victim.*
- 5. That the appellant was erroneously convicted basing on his failure to cross examine the prosecution witnesses and object to admissibility of the prosecution evidence.*
- 6. That the case against the appellant was not proved beyond reasonable doubt.*

When the appeal came up for hearing, the appellant appeared in person and was not represented. Lay man as he is, the appellant had nothing to comment on the merit or otherwise of the appeal aside from fully adopting his grounds of appeal and urged the Court to set him free.

On the other hand, the Respondent Republic was represented by Mr. Yahaya Misango, learned State Attorney. He started his submissions with the first two grounds which he dealt with them concurrently. He submitted that the complaint in the said grounds is unfounded because it is clear from

the record, that the conviction of the appellant was not based on the evidence of PW4 as to the appellant's oral confession but mainly on the evidence of the victim (PW2) as supported by that of PW3 and PW5.

On the third ground, Mr. Misango did not agree with the appellant's complaint that his conviction was based on hearsay. In his contention, the evidence of PW2, PW3 and PW5 on which the trial court based its conviction was direct to the fact in issue.

As to whether the appellant's defense that, the case was framed up due to family conflict was not considered as the fourth ground suggests, the learned State Attorney submitted that the complaint is baseless as the said defense was duly considered and correctly rejected on account that it was an afterthought in that, it was not raised, by way of cross examination, when PW3 was testifying.

In connection to the fifth ground, the learned State Attorney did not agree with the appellant's complaint that, he was convicted solely on his failure to cross examine the prosecution witnesses. Making reference to page 65 of the record, the counsel contended that, the conviction was based on concrete evidence on the record which proved the case beyond reasonable doubt and not the alleged appellant's failure.



Commenting on the last ground, it was Mr. Misango's submission that, contrary to the appellant's expression in the said ground, there was sufficient evidence from PW2, PW3 and PW5 which as correctly founded by the trial court, proved the case beyond reasonable doubt.

At the end, therefore, the counsel urged the Court to dismiss the appeal and confirm the concurrent finding of the two lower courts.

With the above account of the nature of the contention, it is appropriate to consider the substance of the appeal, of course without departing from the famous principle of law that, in a second appeal like this, the Court cannot disturb the concurrent factual findings of the lower courts unless it is satisfied that, there has been misapprehension of evidence, violation of some principles of law or miscarriage of justice. See for instance, **the Director of Public Prosecutions v. Jaffar Mfaume Kawawa**, [1981] T.L.R. 149.

We shall, in determining the appeal, start our discussion with the first two grounds as to reliability of the evidence of PW4. The substance of the said evidence was that, the appellant orally confessed before PW4 to have committed the offence. In his defence evidence, the appellant suggested that, his oral confession was procured by torture in so far as he was severally

beaten by PW4 before making the statement. Therefore, in the two first grounds of appeal, he is blaming the courts below in relying on such confession to sustain his conviction. In rebuttal, the learned State Attorney has refuted the claim and contended that the appellant's conviction was essentially based on the evidence of the victim (PW2) as supported by that of PW3 and PW5.

We have scanned the evidence on the record and carefully examined the judgments of both the trial court and the High Court. We are satisfied that, the main basis of the appellant's conviction was the evidence of the victim (PW2) which the trial court treated as the best evidence. The other pieces of evidence including the evidence of PW4 was merely corroborative. Therefore, even if we were, as we hereby do, to disregard the said evidence, still the evidence of PW2 remains corroborated by the evidence of PW3 and PW5 as rightly observed by the High Court. On that account and to that extent, we dismiss the first and second grounds of appeal.

We now pass to the third ground of appeal where the conviction of the appellant is faulted for being based on mere hearsay. Without wasting the precious time of the Court, we agree with the learned State Attorney that the complaint is misplaced. We have read the record of appeal between

lines and established, without any doubt that, the appellant was not convicted based on mere hearsay as alleged or at all. Instead, as we said when dealing with the first and second grounds of appeal, his conviction was based on the direct evidence of the victim as substantiated by the evidence of her grandmother (PW3) and the clinical officer (PW5) as well as the expert evidence in exhibit P1. The third ground is therefore, dismissed.

On the same token, the appellant's complaint in the fifth ground of appeal that his conviction was based on his failure to cross examine the prosecution witnesses or failure to object to the admissibility of the prosecution evidence is neither here nor there. For, the record of appeal apparently speaks at pages 39, 40, 68 and 69 thereof that, before reaching to a conclusion as to the guilt of the appellant, the courts below duly considered both the prosecution and defense evidence. Nowhere in the record of appeal and indeed the appellant could not show, did the courts below suggest that, it convicted the appellant because of the alleged failure. That is the reason why we dismiss the fifth ground of appeal as well.

We now turn to the fourth ground of appeal which raises an issue of whether the defense evidence that the case was framed up due to family conflict was considered. Our careful study of the record of appeal indicates

that, the courts below considered the said defense in line with the prosecution case and rejected it on account that, it was an afterthought in as much as it was not raised during cross examination. The position of law on failure of a party to cross examine a witness on a pertinent assertion against him or her was stated in the case of **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010 (unreported) in the following words:

*"As a matter of principle a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

On the record of appeal, the evidence of PW3 with whom the appellant claimed to have grudges, appears at pages 11-12. Her evidence on cross examination, appears at page 12. Apparently is the fact that; while the appellant asked her a number of questions, none of them sought to suggest of there being a conflict between the appellant and PW3 leading the latter framing up a case against the former or at all. We entertain no doubt in view of the questions raised by the appellant by way of cross examination to PW3 as referred above that, the appellant knew the logic behind cross examination.

It follows therefore that, as the trial court satisfied itself upon assessment of its credibility that, the evidence of the victim was credible, the appellant's evidence raised at the first-time during defense without being founded on cross examination could not shake the evidence of PW2 which in law is the best evidence.

In our judgment, therefore, the courts below correctly followed the principle in the authority just referred when they rejected the appellant's defense as an afterthought in as much as it was not initially raised by way of cross examination.

We shall, in view of our determination of the fourth ground, have no much to say on the last ground as to whether the case was proved beyond reasonable doubt. The conviction of the appellant was essentially based on the direct evidence of the victim (PW2). The offence was committed during day time and there is no dispute that, the appellant and the victim were known to each other as close relatives. More to the point, the evidence of PW3 suggests that the incident was disclosed to him on the same day and the appellant named as the suspect. Besides, the appellant was arrested, as a result of the disclosure of his identity just a day after the incident. In those circumstances, the issue of incorrect identity and/ or recognition does not

arise. Thus, as correctly held by the courts below, the evidence of PW2 as the best evidence was credible and probable such that, it could not be shaken by the evidence of the appellant raised at the first time during defense. The reason being that as held in the case of **Nyerere Nyague v. R** (*supra*) such kind of evidence cannot be used by the trial court to "disbelieve what the witness said."

It is for the foregoing reasons that we dismiss the sixth ground of appeal.

In the final result and for the foregoing reasons, therefore, the appeal is without merit. It is, accordingly, dismissed.

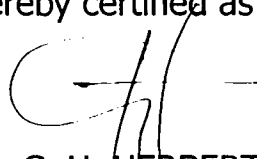
**DATED** at **IRINGA** this 22<sup>nd</sup> day of March, 2023.

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

The judgment delivered this 23<sup>rd</sup> day of March, 2023 in the presence of the appellant in person and Ms. Veneranda Masai 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**