IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 402 OF 2020

ADAMU ANGETILE .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of High Court of Tanzania at Mbeya)

(Mongella J.)

dated 9th day of September, 2021

in

Criminal Appeal No. 39 of 2021

JUDGMENT OF THE COURT

8th & 15th February, 2023

MASHAKA, J.A.:

The appellant, Adam Angetile appeals against the judgment of the High Court of Tanzania sitting at Mbeya (Mongella, J.) affirming his conviction and sentence for rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019). During trial before the Resident Magistrate Court of Mbeya, it was the prosecution case that on diverse dates between 2015 and 19th April, 2018 at Mwala village, within the District and Region of Mbeya, the appellant had carnal

knowledge of one girl (name withheld) aged thirteen years. For the purpose of protecting the girl's identity, we shall refer to her as the victim or PW1.

The appellant denied the charge and the case proceeded to a full trial in which, the prosecution paraded three witnesses namely, the victim (PW1), Sophia Daimon (PW2) and F8695 D/C Gervas (PW3); and the cautioned statement (exhibit P1) tendered in evidence. In his defence, the appellant was the sole witness. Upon conclusion of the trial, the trial court found the appellant guilty as charged and was sentenced to serve thirty years imprisonment, to pay compensation of TZS 2,000,000.00 and undergo 12 strokes of cane. His appeal to the High Court was unsuccessful save for sentence of the 12 strokes of the cane.

The record of evidence shows that on the fateful day 19th April, 2018 around 16:00hrs, PW1 was at home with the appellant her step father while her mother (PW2) had gone to a pombe shop. While inside their house, the appellant entered and pushed her into his bedroom. PW1 testified that the appellant removed her underwear, as well as his shorts and started to rape her by taking his male organ and inserting it in her female organ; having sexual intercourse. PW1 cried for help and heard PW2 calling her. The appellant pushed her telling her that her mother was coming. When PW2

opened the bedroom door she saw PW1 standing aside crying while the appellant was sleeping on the bed covering himself with a blanket. PW2 inquired from her what was wrong and she explained that the appellant was raping her, that he inserted his male organ in her private parts and had sexual intercourse. At the time when PW1 was explaining, PW2 removed the blanket and PW1 saw the shorts of the appellant was half pulled down to his knees. She testified further that the appellant had been raping her since 2015 on diverse dates that she could not recall the exact number of times. PW1 was taken to the local leaders and later to the hospital. At the hospital, PW1 was examined and found to have been raped.

In her testimony, PW2 mother of the victim and wife of the appellant stated that on the fateful day at 16:00 hrs she returned home after passing at a Pombe shop and found the kitchen door was closed. She called out for PW1. She heard someone crying and went to her bedroom and opened the door to find PW1 was standing crying while the appellant was sleeping on the bed covered with a blanket. PW2 inquired from PW1 why she was crying and PW1 narrated on what had befallen her. PW1 told her that the appellant raped her and she could not shout for help because the appellant had covered her mouth by his hand. PW2 removed the blanket from the appellant and saw his male organ erected. Thus, PW2 closed the door screaming for

help. When a neighbour came and the door of the bedroom was opened, the appellant escaped. The upsetting incident was reported to the local leaders and the appellant was eventually apprehended and taken to the police. At the police station, PW3 recorded the cautioned statement of the appellant who confessed to having raped PW1. To support its case, the prosecution, through PW3 tendered exhibit P1.

In his sworn defence, the appellant denied the charge. He testified that he was living with PW2 as his wife who came with her four children to live with him. He further stated that he took care of PW2's children and paid their school fees. He claimed that the trumped-up charge was framed against him and the evidence of PW1 was untrue, though he had no spite with PW1. He was arraigned for the offence and convicted in the manner stated above.

The trial court (Hon. R. W. Chaungu, SRM) was impressed by PW1's evidence, which it found credible and reliable that the appellant had sexual intercourse with the victim. That evidence was sufficiently corroborated by PW2, who found the appellant with the victim in their bedroom with an erected male organ having interrupted the act of rape. Additionally, the trial court considered the appellant's defence but rejected it.

On first appeal, Hon. Mongella, J. expunged exhibit Pl on account of a procedural infraction. Nonetheless, she upheld the finding that on the basis of the testimonies of PW1 and PW2 the charged offence was proved beyond reasonable doubt.

Still undaunted, he has preferred this appeal premised on four (4) grounds in the memorandum of appeal raising the following complaints; **one**, that his appeal was dismissed without regard to the petition of appeal; **two**, the hamlet chairperson, VEO and village chairman were not called as witnesses to corroborate the evidence of PW1 and PW2, hence the charge was not proved; **three**, the evidence by the prosecution witnesses and the defence was not evaluated and considered; and **four**, the cautioned statement was recorded in contravention of the law.

The appellant who fended for himself appeared in person during the hearing of the appeal urged the Court to determine the appeal in his favour on the strength of the grounds of appeal contending that he did not commit the offence. We invited Ms. Mwajabu Tengeneza, learned Senior State Attorney assisted by Ms. Hannarose Kasambala, learned State Attorney to take the floor on behalf of the respondent Republic who resisted the appeal.

In reply to ground one, Ms. Tengeneza's argument was that the petition of appeal raised seven grounds which were all revaluated and considered by the first appellate Judge, hence the ground is baseless and deserves to be dismissed. We respectfully agree that the first appellate Judge definitely considered grounds three, four and five as gleaned at pages 49 to 52 of the record of appeal where each ground was reconsidered and eventually a decision was reached to dismiss the appeal. The first appellate Judge performed her part dutifully as required by the law. The complaint is misconceived and baseless, thus we dismiss it.

With regard to ground two, the complaint was that there were crucial witnesses who ought to have been called to corroborate the evidence of PW1 and PW2 such as the hamlet chairperson, Village Executive Officer (VEO) and other local leaders, hence the charge was not proved. Ms. Tengeneza argued that it is upon the prosecution to decide on the number of witnesses to call to prove an offence. However, she argued that according to section 143 of the Evidence Act [Cap 6 R.E. 2019] there is no particular number of witnesses which is required for the proof of any fact in any case. Bolstering her stance, she referred us to **Selemani Makumba v. Republic** [2006] TLR 384 where the Court held that in a rape offence, the best evidence

comes from the victim who proves that there was penetration and in case of a child consent is immaterial. Hence in this appeal, she submitted that as prescribed under section 127 (6) of Cap 6, the stated witnesses were not relevant to prove the offence because the crucial witnesses PW1 and PW2 testified and conviction was duly entered. In essence, the trial and first appellate courts found the evidence of PW1 and PW2 reliable and credible to convict and uphold conviction of the appellant. She prayed to the Court to dismiss ground two.

Suffice it to say, that the decision of the first appellate court concluded on this issue that failure to call such witnesses is not fatal since the offence was satisfactorily proved by PW1 and PW2 and corroborated by PW3. As accurately submitted by Ms. Tengeneza that section 143 of Cap 6 does not set a requirement on the number of witnesses to prove the offence as long as the witness is competent in terms of section 127 of Cap 6 and entitled to be believed. Also, the witness is credible and reliable unless there are reasons to challenge this as held in the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 367 that:-

> *"It is trite law 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 a witness. The prosecution called three witnesses, PW1, PW2, and PW3 to prove its case. Their testimony was not challenged. What is important is the credibility and reliability of the evidence and not the number of witnesses called on to testify."

Notwithstanding, that a failure to call a material witness attracts adverse inference on the part of the prosecution, the Court held in **Allan Duller v. Republic,** Criminal Appeal No. 367 of 2019 (unreported) that: -

"The principle of adverse inference finds its basis on an assumption that the evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it."

In the present appeal and the above excerpts, it is obvious that even if those witnesses were to be called to testify, they would not have given evidence that could have contradicted the evidence of PW1 and PW2 as they were not present at the home of the appellant where he raped the victim. We thus find the appellant's complaint lack merit and is dismissed.

We now come to ground three of appeal. The complaint was that the evidence of the prosecution and defence was not evaluated. Ms. Tengeneza urged us to dismiss this ground as baseless considering that the first

appellate Judge adequately reevaluated the evidence of the prosecution and the defence in her judgment. With respect, we agree with the learned Senior State Attorney, it is plain from the judgment of the first appellate court that the trial court did indeed consider the evidence of the prosecution witnesses and appellant's defence.

As we perused the impugned judgment, the first appellate court dutifully re-evaluated the prosecution evidence of PW1 and PW2 when addressing the complaints raised in each ground of appeal from pages 46 to 53 of the record. It reached the conclusion that it was the appellant who raped PW1 and agreed with the analysis and evaluation of the prosecution evidence by the trial court concerning the strong evidence by PW1 which was corroborated by PW2 who found the appellant pretending to be sleeping in their bedroom while PW1 was crying and not showing any concerns. Further, when PW2 removed the blanket covering the appellant, she saw the appellant half naked with his male organ erected indicating that he had just been having sexual intercourse before PW2 arrived and the only person in the bedroom was PW1.

Additionally, playing its role of reassessing the evidence on record at page 47, the first appellate court came to the conclusion that the defence

was duly considered by the trial court and proceeded to make a finding that evidence from PW1 and PW2 was enough to establish the appellant's commission of the offence. It further found that the defence was too weak to raise any reasonable doubt to shake the prosecution evidence, assigning reason why it departed from his evidence and dismissed his complaint as gathered at page 48 of the record. It is worthy to note that the first appellate court agreed with the finding of the trial court that in his defence the appellant stated that he had no spite with PW1 and PW2 or them with him. We find no valid reason to fault the findings of the first appellate court as it re-evaluated the defence case, in which the evidence of the prosecution proved the offence against the appellant beyond reasonable doubt. Without much ado we find no merit in this ground and dismiss it.

Lastly, on ground four the appellant's complaint is that the first appellate Judge dismissed his appeal without taking into account that exhibit P1 was recorded in contravention of the law. Ms. Tengeneza agreed that exhibit P1 failed to comply with the law which led the first appellate Judge to expunge it from the record. Thus, the appellant should not raise it in the second appeal. She further emphasized that the conviction of the appellant was grounded on the evidence of PW1 and PW2. We need not spend much

time on this complaint, as exhibit P1 was expunged as correctly stated by Ms. Tengeneza. Therefore, without doubt this complaint is baseless.

We find no justification for interfering with the concurrent finding of guilt by the two lower courts that PW1 was raped and the person who committed the act was the appellant.

In fine, we find no merit in the appeal and dismiss it in its entirety.

DATED at **MBEYA** this 14th day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of February, 2023 in the presence of the Appellant in person, Mr. Edgar Luoga, learned Senior State Attorney and Mr. Davice Msanga, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.

THE COURT OF APPEAL OF TANZANIA

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL