

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MURUKE, J.A.)

CRIMINAL APPEAL NO. 73 OF 2021

GERSON GETENI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mongella, J.)

dated the 28th day of February, 2022

in

Criminal Appeal No. 02 of 2022

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JUDGMENT OF THE COURT

13th & 19th February, 2024

MURUKE, J.A.:

The appellant, Gerson Geteni, was convicted of raping a nine years old girl, a student of Usongwe Primary School whom we shall refer to as the victim or PW2 so as to hide her identity. It was alleged that on 27th day of January of 2018 at Magenzi area, within district and Region of Mbeya, the appellant had carnal knowledge of the victim (PW2). The background facts of the case were fully and clearly set out by the trial magistrate, but we feel that it is necessary to recap them, very briefly, so far as they are relevant to this appeal.

On the 27th day of January, 2018, the victim while playing around their house, the appellant came and took the victim to one of the rooms of an unfinished house (pagalla) and then raped her. The appellant threatened the victim not to shout otherwise he would slaughter her, to which the victim obeyed.

After finishing, the appellant gave the victim TZS.200, while warning her not to tell anyone. However, the victim informed Tabia Simon Mbilinyi (PW1) their neighbour, who took trouble and asked the appellant if he had raped the victim. The appellant admitted to have raped the victim and asked for forgiveness while promising to give PW1 money which she refused. She thus informed Yustina Mahenge PW3, the victim's grandmother.

PW1 and PW3 together went straight and asked appellant, who admitted to have raped the victim together with one girl, Stela and again asked for forgiveness. PW3 reported the incident to Vailet Enock PW4 who phoned Hamlet Chairperson. Again, the appellant confessed, in the presence of both PW1, PW3, PW4, the Hamlet chairperson and other villagers, to have raped the victim. The incident was reported to Mbalizi Police Station by PW3. Upon interrogation, the appellant admitted to have raped the victim.

After full trial, the appellant was convicted and sentenced to serve life imprisonment. His appeal to the High Court was also dismissed, thus the present appeal with two sets of memoranda of appeal, each containing five grounds.

The first memorandum filed on 14/12/2022 contained five grounds namely:

1. That, the first appellate court erred in law when dismissed the appellant appeal without taking into account the submission filed by the appellant.
2. That, the trial court and the first appellate both erred in law when convicted and dismissed the appellant appeal without considering that no any doctor examined the victim, thus no any PF3 tendered to prove the offence of rape.
3. That, the trial court and the first appellate court erred both in law when convicted and dismissed the appellant appeal's while evidence of PW1 was improperly recorded and relied.
4. That, the trial court and the first appellate court erred in law when convicted and dismissed the appellant appeal without considering that PW1, PW2, PW3, PW4 and PW5 their testimonies were tale of

stories, as there was no any documentary evidence from police on confession.

5. That, the first appellate court erred in law when dismissed the appellant appeal while prosecution failed to prove the offence charged.

The second set named supplementary grounds of appeal filed on the date of the hearing on 13/02/2024 contains also five grounds namely:

1. That the High Court judge erred in law and fact to dismiss the appellant's appeal relying on the weakness of the defense evidence instead of strength of the prosecution case.
2. That the High Court judge erred in law and fact to dismiss the appellants appeal despite contradiction of prosecution witness.
3. That the High Court erred in law and fact to uphold the decision of the trial court by relying on evidence of (PF3) which was not produced before the trial court.
4. That the learned judge of the High Court erred in law and fact by dismissing the appellants appeal relying on the testimony adduced by PW1, PW2, PW3 and PW4 while their evidence was not documented.

5. That the High Court judge misdirected herself to dismiss the appellant's appeal without taking into consideration that the prosecution side failed to prove the charge against the appellant when failed to summon chairperson of hamlet to corroborate the evidence that the appellant confessed to commit the offence charged.

At the hearing of the appeal, the appellant appeared in person not represented, whereas the respondent/Republic was represented by Mr. Deusdedit Rwegira, learned Senior State Attorney, assisted by Ms. Zena James, learned State Attorney.

When the appellant was invited to address the Court, he sought first to address on the supplementary grounds of appeal. On ground **one**, he complained that, the High Court dismissed his appeal relying on his weak defence case rather than on the strength of prosecution witnesses. As regards ground **two**, the appellant complained that the High Court upheld conviction and sentence relying on the contradictory evidence of PW2 and other prosecution witnesses. Regarding ground **three**, the appellant submitted that the High Court failed to consider that, he was convicted on evidence of PF3 that was not tendered. So far as ground **four** is concerned, on the issue of confession, he denied to

have made it, because there was no any documentary tendered to prove that he admitted to commit the offence. The appellant submitted on ground **five** that, all the prosecution witnesses were not credible and reliable by failure to call Hamlet Chairperson of their area. On the main grounds of appeal filed on **14/12/2022**, the appellant submitted on ground one only that the prosecution did not prove their case beyond reasonable doubt and abandoned the rest.

In response to supplementary grounds of appeal, Mr. Rwegira learned State Attorney, submitted on ground one that, the appellant pleaded orally to PW1, PW3 and PW4 that he raped the victim and another girl named Eliza, as found at pages 9 – 10 of the record of appeal. The appellant's oral account Mr Rwegira asserted, is very valid evidence on following reasons. **One;** the appellant was a free person not under arrest. **Two,** he confessed before PW1, PW3 and PW4 who were persons with no authority at all. **Three,** the words spoken by the appellant meant what he did and not otherwise. **Four,** all persons to whom the appellant confessed, testified at the trial court to what they heard from appellant. To the respondent counsel, oral account of PW1, PW3 and PW4 was enough, there was no need of documentary

evidence, referring the Court to the case of **Ally Mohamed Mwaya v. Republic**, Criminal Appeal No. 214/2011 (unreported).

With regard to ground two that prosecution witnesses were not credible in that their evidence contradict each other, learned State Attorney submitted that, PW1, PW3 and PW4 evidence did not contradict each other at all. They both said the appellant admitted to have raped the victim and Eliza, then asked for forgiveness. The only contradiction is on the evidence of PW2 on the date of the commission of the offence, which evidence was expunged by the High Court on first appeal.

Responding to ground three, on reference to PF3 that was not tendered at trial court, the respondent counsel briefly and clearly argued that, at page 23 of the record, the High Court Judge expunged PF3 and the evidence of PW2, thus PF3 is a none issue at this stage.

On ground four, that the prosecution evidence is full of lies, learned State Attorney replied that, evidence of PW1, PW3 and PW4 on oral account of the appellant proved prosecution case. There was no any lie. If any, Mr Rwegera argued, appellant ought to have cross examined the prosecution witness to discount their evidence. Failure to do so, amounted to acceptance of what they said to be the truth and not otherwise.

Responding to complaint on ground five on failure to call the Hamlet Chairman of the area to testify, learned State Attorney submitted that, the prosecution called witnesses that they intended for their case to be proved as what matters is the value of witness evidence not number of witnesses in proving prosecution case.

On the main grounds of appeal, filed on 14/12/2022 the respondent's counsel insisted that, it is the evidence of PW1, PW3 and PW4 that grounded conviction, because the evidence of PW2 the victim and PF3 were expunged from the court records by the High Court. In totality, learned State Attorney requested Court to dismiss appellant's appeal for lack of merits.

In rejoinder, the appellant insisted that the High Court relied on PF3 not tendered to uphold his conviction and sentence thus pressed for his appeal to be allowed.

Having heard both sides on this appeal, and gone through two sets of the memorandum of appeal filed earlier on 14/12/2021 and supplementary memorandum filed on 13/02/2024 on the date of the hearing, combined together raise following complaints:

1. The High Court wrongly acted on PF3 not tendered to uphold the conviction and sentence.
2. The First appellate court wrongly upheld conviction basing on contradictory evidence of PW1, PW2, PW3 and PW4.
3. The First appellate court wrongly upheld the conviction and sentence in the absence of the evidence of Hamlet chairperson.

We wish to start with issue of PF3 first. Complaint on PF3 is not true as argued by the appellant. The High Court Judge at page 62 of the record from lines 14 to 17, expunged the PF3 on the reason that it was wrongly relied because it was not tendered at the trial court. For clarity it held that:

"With regard to the issue on reliance on PF3 advanced on the 2nd ground, I agree with Mr. Zephaniah that the trial Court wrongly relied on the PF3 which was not tendered in the evidence. Its finding based on the said PF3 is therefore expunged from the records".

With the above finding by the High Court, issue of PF3 as raised by the appellant is a misconception, thus dismissed.

On the issue of not calling the Hamlet Chairperson, to prove prosecution case, this should not detain us. The law on proof of a certain

fact is clear, as rightly argued by Mr. Rwegira, that truth of certain information is not measured by numbers but by credibility of those relaying the information. We entirely agree with him. Certainly, the law is clear. In terms of section 143 of the Evidence Act, Cap 6 R. E. 2002, there is no specific number of witnesses required for the prosecution to prove any fact. (See **Yohanes Msigwa v. R** (1990) TLR 148). What is important is the quality of the evidence and not numerical value. As rightly argued by the learned State Attorney there is ample evidence given by PW1, PW3 and PW4, on the admission by the appellant raping the victim. On the same principle and reasoning, we agree with learned Senior State Attorney that the Hamlet Chairperson was not a crucial witness. There was, therefore, nothing material that would have been added by him apart from what was said by PW1, PW3, and PW4. Failure to call particular witness can only be fatal if the said witness is material to the case. See, **Aziz Abdalah v. Republic** [1991] T.L.R 71 and **Hemed Said v. Mohamed Mbilu** [1983] T.L.R 113. In the case at hand, Hamlet Chairman was not material as he did not witness the incident of rape while PW1, PW3 and PW4 testified on oral confession. Equally so, if the appellant thought that Hamlet Chairperson was necessary he should have called him as his witness. This complaint is without merits.

The last complaint is on inconsistency and contradiction of evidence of PW1, PW2, PW3 and PW4. The complaint on evidence of PW2 contradicting other witness should not waste much of our time, because the same was dealt with by the High Court Judge and expunged from the record at page 62 of the records line 12 – 13, where it was resolved that: -

"As matters stand at this point, the testimony of PW2 lacks evidential value and is hereby expunged from the record."

From the self-spoken records, issue of evidence of PW2 cannot be brought now to be said it contradicted other witness. We have remained with evidence of PW1, PW3 and PW4 that the appellant complained that, the witnesses contradict in their evidence. It is worth noting that, PW1, PW3 and PW4 gave oral account of what appellant confessed to them.

Section 3 (1) (a), (b) and (c) of the Evidence Act provides to the effect that oral confessions are recognized, and in reality an accused may be convicted based solely on such evidence see, the case of **DPP v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82. On the same aspect, this Court in **Posolo Wilson Mwalyego v. R**, Criminal Appeal No. 613 of 2015 (unreported), stated that:

"It is settled law that an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect."

Equally so in **Bujigwa John @ John Kijiko v. R**, Criminal Appeal No. 427 of 2018; Court held that:

"As correctly found by the trial court, the prosecution witnesses who heard the appellants' oral confession were reliable and there is no reason whatsoever to doubt their credibility."

Similarly the Court in the case of **Twaha Ali and Five Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported) held that:

"The very best of witness is an accused who confesses his guilt provided that the confession is above and free from the remotest taint of suspicious."

The evidence of PW1, PW3 and PW4 is credible because, **one**, the appellant confessed to PW1, PW3 and PW4 who are normal civilians with no authority at all to influence him. **Two**, at the time of the confession to PW1, PW3 and PW4, appellant was a free person. **Three**, what the appellant confessed to PW1, PW3 and PW4 proved what he did to the victim. **Four**, more important is that, PW1, PW3 and PW4, to whom

appellant confessed testified before the trial Court on what the appellant confessed, before them, without any contradictions.

Through their testimonies, **PW1** at pages 11 to 12 of the records, **PW3** from page 14 to 15 of the record and **PW4** from page 15 to 16 of the records, were both consistent and coherent. There is no any contradiction in their evidence. Equally so, the evidence of PW1, PW3 and PW4 was not shaken even during cross examination by the appellant on the confession he made before them. This Court in the case of **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (unreported), relying on the case of **Cyprian A. Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992 (unreported) held that;

"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."

The evidence of PW1, PW3 and PW4 did not contradict each other, rather, the witnesses testified what exactly the appellant confessed to them, and it is that grounded conviction. Hence, the two courts below properly relied on the appellant's confession too to found a conviction.

The appellant's failure to contradict upon cross-examination of the witnesses, their evidence remains credible and uncontroverted, thus this complaint lacks merit. In totality the appeal is without merits, and it stands dismissed.

DATED at **MBEYA** this 17th day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

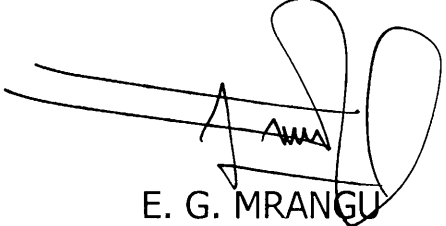
S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE.
JUSTICE OF APPEAL

The Judgment delivered this 19th day of February, 2024 in the presence of the Appellant in person and Ms. Zena James, learned State

Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL