

IN THE HIGH COURT OF UNITED OF REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

(DC) CRIMINAL APPEAL. NO. 38 OF 2019

(C/F Criminal Case No. 174 of 2017 in the District Court of Same at Same)

YOWEN ELIEWAHA NTAMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Last order:10/08/2020

Date of delivery:16/10/2020

MWENEMPAZI, J.

The appellant is aggrieved with the decision of the District Court of Same (Hon. F.J. Kigingi-RM) dated 1st March, 2018 whereby the District Court convicted him with the offence of Rape contrary to section 130(1)(2) and 131 of the Penal Code, Cap. 16 R.E. 2002 and sentenced him to serve a term of thirty (30) years imprisonment. He is appealing against the said conviction and sentence and has raised the ground that the learned trial Magistrate erred when he convicted the appellant using confession statement of the appellant and the alleged confession made to PW1 without any corroborative evidence. He prayed the appeal to be allowed, quash the conviction, set aside the sentence and set him at liberty. He wished to be present during hearing of the appeal.

At the hearing the appellant was present in person and the respondent Republic was represented by Ms. Agatha Pima, learned State Attorney. The appellant in his submission stated that he was charged with the offence of rape. He submitted that on the date of event (21st September, 2019) had an agreement with the victim and then she turned against him. On the date he went to the liquor shop belonging to George. There, he found Athumani and Gray and the victim. They drunk together. Then they left. On the way, when he was going away from the Bar, he found the victim being raped and the two Athumani and Gray told him also to have sex with the woman or else they will beat him. He thus had sex with the victim. He prays to be assisted so that the appeal is allowed.

In reply to the submission by the appellant, Ms. Agatha Pima, the learned State Attorney submitted that the appellant has raised one ground of appeal. The Respondent who is being represented by her (Ms. Agatha Pima, State Attorney) is supporting conviction and sentence imposed.

The ground of appeal is based on the evidence. The appellant's point is that the testimony of PW1 has not been corroborated by any other evidence.

PW1 at Page 8 of the typed proceeding, is named Witness Allen, 50 years old. With that age, her evidence does not need corroboration. She does not fall under section 127(2) and (7) of the Tanzania evidence Act, Cap 6 RE 2002. That section requires that the testimony of a child of tender age must be corroborated. Tender age according to the law is

According to the age of PW1 the best evidence comes from her, as per **Seleman Makumba Vs. The Republic, [2006] TLR 25**. Where it was observed that: -

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. In the case under consideration the victim, Ayes, said the appellant inserted his male organ into her female organ. That was penetration and since she had not consented to the act, that was rape notwithstanding that no doctor gave evidence and no PF3 was put in evidence."

PW2: Hussein Ally Kadango, who is also acting W.E.O at Page 10 of the typed proceedings, is supporting evidence by PW1, that he went at the scene of crime and found the victim unconscious with underwear on the side, not wearing underwear and she had been raped. It is this witness who gave information to the police and took the victim to the hospital for treatment.

Another piece of evidence is the oral confession of the appellant before WEO. After interrogating the appellant, he said he found his colleagues raping the woman and he denied to join them. The evidence has been corroborated by PW5, the doctor who examined the victim and Exhibit P2 which is the PF3.

The accused himself in his defence has supported the evidence that truly he raped the victim.

With all such evidence we have a view, that the offence was prepared beyond reasonable doubt, the accused was rightly convicted and sentenced. His appeal has no merit should be dismissed.

I have read the record, and I agree to the submission by the learned state attorney that the appellant has nowhere to escape culpability that he is the one who raped the victim. The testimony by PW1 corroborate PW2: Hussein Ally Kadango's evidence. The latter is the one who took PW1 to hospital where she was treated and regained consciousness and named the appellant and his colleagues. As it was held in the referred case herein above, that of **Seleman Makumba Vs. The Republic**, the evidence by PW1 is the best evidence for penetration and lack of consent. Also, the accused's evidence by confession is the best evidence to be relied upon than any other evidence. One cannot fault the evidence on the argument that it was not corroborated. The trial Magistrate referred to the case of **SHIHOBE SENI AND ANOTHER v REPUBLIC** [1992] T.L.R 330 (CA) where it was held that: -

"A village chairman is a person in authority under section 27(3) of the Evidence Act and so a confession made to him is involuntary if the Court believes that it was induced by any threat, promise or other prejudice. There is not a thread of doubt that the confessions to the village chairman were not induced by threat, promise or other prejudice;"

Though in this case the confession was made before the Ward Executive officer, he is still a person in authority within the Ward.

It is a bit confusing but there is a solution to the contradictions. The appellant in his submission has stated that they had an agreement with the victim and then she turned against her. However, in the defence he testified that he was going back home and he found his colleague raping the victim and they forced him to rape the victim. Again, in another statement made during questioning by the court after testifying, he testified that he did not know the woman (the victim). I find the appellant is just trying to exonerate himself. He has no good argument against what he did to the woman(victim).

For the reasons the appeal has no merit and the same is dismissed. Conviction and sentence by the trial court is hereby upheld.

It is ordered accordingly.


T.M. MWENEMPAZI
JUDGE.
16/10/2020

Judgement delivered in court in the presence of the appellant and absence of the State Attorney for the Republic.


T.M. MWENEMPAZI
JUDGE.
16/10/2020

Court: Right of appeal fully explained to the appellant.


T.M. MWENEMPAZI
JUDGE.
16/10/2020