

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 95 OF 2019

(Originating from Mlele District Court in Criminal Case No. 88 of 2018)

GEOFFREY MWANAKATWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last Order: 05/08/2020

Date of Judgment: 03/11/2020

JUDGMENT

C.P. MKEHA, J

Before the District Court of Mlele, the appellant was arraigned for an offence of rape c/ss 130 (1) (2) (a) and 131 (1) of the Penal Code it being alleged that, on 27th December 2017 at about 14.00hrs, at Kabunde village within Mlele District in Katavi Region, the appellant, did have carnal knowledge with one woman aged 83 years to be referred in this judgment as the victim, against her consent. When the charge was read over to the accused/appellant, he protested his innocence. However, at the end of trial the appellant was found guilty, convicted and imprisoned for 30 years. The appellant was also sentenced to suffer six strokes of a cane. The appellant was not satisfied with both, conviction and sentence. He therefore appealed to this court with the following grounds of appeal:

1. That, the trial court erred at law and fact by convicting and sentencing the appellant of the offence which was not proved beyond reasonable doubt;
2. That, the trial court erred at law and fact by convicting and sentencing the appellant by relying upon his confession which was due to threats made by sungusungu during his arrest and
3. That, the trial court misdirected itself by convicting and sentencing the appellant without considering that PW3 William Charles William examined PW2 and no male sperms fluids or bruises were found.

When the appellant was on the hearing day invited to argue his appeal, he merely adopted all the grounds of appeal in his Petition of Appeal.

Mr. Mwashubila learned Senior State Attorney opposed the appeal. In his view, the offence of rape was sufficiently proved against the appellant.

It was the learned Senior State Attorney's submission that the victim testified on how the appellant raped her during day time. The appellant was a person known to the victim even before the incident hence there was no mistake in the appellant's identification. The learned Senior State Attorney went on to submit that PW5 testified that the appellant had confessed before him to have committed the offence. The learned Senior State Attorney cited the decision in **DPP Vs. Nuru Mohamed Gulamrasuli (1988) TLR, 82** to insist the position that, oral confessions made before persons in authorities are admissible.

When the appellant rose to rejoin, he told the court that, the purported person in authority was the Sungusungu Commander.

Reading the trial court's judgment, it appears that, to a large extent the appellant's conviction was based on the testimony of the victim (PW2), PW1 and oral confession to PW5. An important question that arises is **whether the testimonies of PW1, PW2 and PW5 sufficiently proved the appellant's guilt before the trial court.**

The appellant's complaint in the first ground of appeal is to the effect that the appellant's case was not proved to the required standard. The appellant complained in the third ground of appeal that the Medical Officer testified before the trial court that he did not find sperms, fluid or blood in the victim's vagina and that, he neither found bruises.

The victim had testified that it was the appellant who raped her during day time and that the appellant was a person known to her even before the incident. The appellant does not dispute the fact that he was indeed a person known to the victim before the alleged incident.

It is true that, the ability of a witness to name a suspect at the earliest opportunity is an assurance of his reliability. **See: Marwa Wangiti Mwiata & Another Vs. Republic (2002) T.L.R, 39.** In the present case, the victim named the appellant immediately after the purported event. She did so to her own daughter ENELIKA d/o KISIA (PW1). It is the said early naming of the appellant which enabled his arrest the following day.

PW1 testified that when she met the victim on 27/12/2017 soon after 15.00hrs, she found her (victim) crying. According to PW1, the victim had a swollen neck and her vagina had male sperms and that, the victim named the appellant, GEOFFREY MWANAKATWE to be a person who

raped her. Report was thereafter made to the ten cell leader who sent people to look for the said GEOFREY. PW1 testified that, the following day, the appellant was arrested and that, before he was sent to the VEO , he was matched to the Chief of Sungusungu Group. Aftwards, the appellant was sent to the VEO and other village leaders before whom, he confessed to have raped the victim.

Neither PW1 nor PW2 testified on the aspect of the victim having taken shower before being medically examined. PW3 who medically examined the victim on 28/12/2017 testified that, despite the fact that the victim complained of having been raped, he did not see fluid, sperms bruises or blood into the victim's vagina. According to PW3, the victim told him that she had taken shower. It is important to note as I pointed out earlier that neither PW1 nor PW2 had testified on the aspect of the victim taking shower before being medically examined which was a vital part of evidence in the circumstances of the case. To that extent PW3's testimony did not support the prosecution's case. In view of the medical officer, it is as if the victim was not penetrated. **See** Exhibit P1 (PF.3). This puts reliability of PW1 and PW2 into question. And, as a matter of fact, when the two testimonies are weighed along the medical evidence which the prosecution opted to put on record one may be tempted to hold as I do that the two witnesses were not truthful regarding the testimonies on there being a swollen neck, sperms and bruises. **See:** Exhibit P1. For the foregoing reasons, I uphold the first and third grounds of appeal.

In the second ground of appeal, the appellant is challenging the trial court's decision for being based on a confession which was due to

threats made by Sungusungu during the appellant's arrest. It was the learned Senior State Attorney's submission that, the said confession, made to a person with authority in the appellant's village of residence, was admissible. I agree. There is a number of case laws interpreting section 3 (1) (a), (b) (c) and (d) of the Evidence Act to that effect. The list includes:

- 1. Director of Public Prosecutions Vs. Nuru Mohamed Gulamrasul (1988) T.L.R 82;**
- 2. Patrick Sanga Vs. Republic, Criminal Appeal No. 213 of 2008;**
- 3. Rashid Roman Nyerere Vs. Republic, Criminal Appeal No. 105 of 2014;**
- 4. Posolo Wilson @ Mwalyego Vs. Republic Criminal Appeal No. 613 of 2015;**
- 5. Martin Manguku Vs. Republic Criminal Appeal No. 194 of 2004;**
- 6. Melkiad Christopher Manumbu & 2 others Vs. Republic Criminal Appeal No. 355 of 2015;**
- 7. Alex Mendya Vs. Republic, Criminal Appeal No. 207 of 2018;**
- 8. Saganda Saganda Kasanzu Vs. Republic, Criminal Appeal No. 59 of 2019 and**
- 9. Jacob Mayani Vs. Republic, Criminal Appeal No. 558 of 2016.**

The above position of the law notwithstanding, the present case is distinguishable. The testimony of PW1 indicates that, upon the

appellant's arrest, even before he was taken to the VEO and other village leaders to whom he (the appellant) is alleged to have confessed, he was marched to the Chief of Sungusungu Group of the locality. After PW5 had testified in chief, the appellant cross examination him suggesting that PW5 had ordered the appellant's torture. PW5 renounced having ordered such a torture. Through the said cross examination, the purported oral confession if any, was repudiated. From that moment, there arose a duty on part of the prosecution to corroborate said testimony.

See: 1. Tuwamoi Vs. Uganda (1967) E.A 84;

2. Richard Lusiro and Mohamed Seleman Vs. Republic (2003) T.L.R 149;

3. Makame Jured Mwinyi Vs. SMZ (2000) T.L.R 455;

4. Dominic Mnyaroje & Another Vs. Republic (1995) T.L.R 97 and

5. Moris Agunda and Two others Vs. Republic, (2003) TLR 449.

The said corroboration is nowhere to be found in the prosecution's case.

The appellant defended himself by telling the trial court that he never confessed before the village authorities to have raped the victim. He added that, when he was taken to Majimoto Police Station, he was detained for about four days. After four days of his stay in the police remand, he was interrogated and denied the allegations. The learned Public Prosecutor did not dare to dispute these facts through cross

examining the appellant. For all these reasons, it can not be safely said that even if the appellant had confessed before the Village Authorities, he was by then a free agent in offering the purported confession. I also find merit in the second ground of appeal. The same is upheld.

Having upheld all the grounds of appeal, I proceed to quash the appellant's conviction. Sentences earlier imposed upon the appellant are both set aside that is, the custodial sentence and corporal punishment. I then order the appellant's immediate release from custody unless he is held therein for other lawful cause.

Dated at **SUMBAWANGA** this 3rd day of November, 2020.




C.P. MKEHA

JUDGE

03/11/2020

Court: Judgment is delivered in the presence of the appellant in person and Ms. Amani learned State Attorney for the respondent.




C.P. MKEHA

JUDGE

03/11/2020

Court: Right of Appeal to the Court of Appeal of Tanzania is fully explained.




C.P. MKEHA

JUDGE

03/11/2020