

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 67 OF 2021

(C/O Criminal Case No. 47 of 2020 Mpanda District Court)

(J.S. Musaroche, SRM)

IGNATUS S/O WILLIAM @ MJESHI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

04 & 30/11/2021

JUDGMENT

Nkwabi, J.:

This case underscores, and would remind everyone, that no one is above the law. The appellant, an army officer, was arraigned, prosecuted, convicted and sentenced to life imprisonment by Mpanda District Court in Katavi region. He was alleged to have raped four underage girls, the subject of counts 1, 2, 3 and 4 of the charge sheet. He was charged for rape contrary to section 130 (1) and (2)(e) of the Penal Code Cap 16 R.E. 2002 on those counts.



The offences were claimed to have happened on diverse dates between November 2019 and February, 2020. In order, not to disclose the identity of the disputed victims of the offence, I will refer to them as per their numbering in giving evidence, thus, PW1, PW2, PW3 and PW4.

I would refer, to PW1 as the ring leader, as described in the evidence as she had something to do with the rape offences against the other victims of the rape and that she encountered herself. This is because she had a mobile phone which the appellant used to call her in order to get his sexual gratification on the girls. She would also at diverse times, call the other girls one at a time and tell them the appellant wanted them. At times, she was with victims at the time the other victims went and encountered the molestation by the appellant at Samarasi lodge or at the appellant's home.

Irritated with the convictions and sentences, the appellant lodged a petition of appeal to this court to protest that he is impeccable. The essence of the justification of the petition of appeal is that the appellant was convicted and sentenced on a charge that was not proved beyond reasonable doubt since the testimony of PW12 who was truthful was discredited on pretext

of being declared hostile witness, poor identification and the evidence used to convict him was similar with that used to acquit him with the 1st count.

In this appeal, the appellant implores upon this court to believe his defence. He is a retired army officer. He was serving as a Reserve Army adviser in Mpanda district. When he was arrested for the offences, he stayed in police custody for about 5 days. He denied committing the offences and wondered why they fabricated the rape case against him. He opined that it could be persons who he arrested for trespassing in certain military plots in several streets in Mpanda municipality. He criticized the delay in reporting the offences. He wondered how he could take a girl to his home while he was living with his wife and other family members there (full of people). He criticized the failure of the prosecution to bring the security guard or guest attendant where he is allegedly committed rape offences to come to testify. That the phone was not brought in evidence leave alone the pistol which he even did not possess.

It is based on those reasons, yet, Mr. Mwakyusa, learned counsel for the appellant, entreated this court to allow the appeal and quash the conviction

and set aside the sentences of life imprisonment imposed upon the appellant.

The rival submissions in opposition of the appeal by Mr. Kabengula, learned Senior State Attorney for the respondent, were inherently contradictory. He admitted they did not prove penetration, the victims did not report at the earliest time and contradicted themselves, though he claimed that the contradictions did not go to the root of the matter. He however, said their witnesses are credible hence appeal is wanting in basis. He prayed the decision (convictions and sentences) of the trial court be upheld.

I agree with the argument of the counsel for the appellant that since this is the first appellate court, the same is entitled to reevaluate the evidence and come to its own conclusion, I am fortified by **Emmanuel Lyabonga V Republic Criminal Appeal No. 257 of 2019** (CAT) Iringa (Unreported) and per **C. 6237 P.C. Edwin and Another v R. [1985] TLR 31** (HC) Mushi, J.

On my own evaluation of the evidence in the record, I am inclined to agree with the appellant that the prosecution failed to prove the case against the

appellant on all counts for the following reasons. 1st, the contradictions in the prosecution evidence that go to the root of the matter. The contradictions could be seen on the alleged transport which was used at times for going to the scene of the rape or getting away from the scene (Samaransa lodge) and on when and what caused the rape incidences go viral.

2nd, the evidence of the PW1 was rejected by the trial court as unreliable, and properly so, as she was the purported procurer of the other victims through her phone (mother's phone) it is inconceivable for the rest of the victims to be found credible, as rightly submitted by Mr. Mwakyusa. In my view on this witness, I am fortified by **Mathias Timoth v. R. [1984] TLR 86** HC Lugakingira, J.

Held: (1) In testimony of a witness, where the issue is one of false evidence, the falsehood has to be considered in weighing the evidence as a whole; and where the falsehood is glaring and fundamental its effect is utterly to destroy confidence in the witness altogether, unless there is other independent evidence to corroborate the witness.

In this case, there is no other cogent evidence to corroborate PW1's evidence.

3rd, Material witnesses were not brought to testify without sufficient reason given (the Guest attendant namely Anastazia, Helen (the relative of PW1) and the investigator of this case. On this, the respondent acted in total disregard of **R v. Gokaldas Kanji and another (1949) EACA 116**.

No obligation rests upon the prosecution to call every witness whose name appears on the back of the information and although it is the duty of the crown to see that every such witness attends the trial so that any not called by the prosecution are available to the defence nevertheless it is a matter in the discretion of the prosecution to tender such witnesses for cross-examination by the defence and not one that can be claimed by the defence as of right.

Not only that but also **Aziz Abdalla v. Republic [1991] TLR 71 (CAT)**

"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution.

If the investigator had turned up to give evidence, he would have clarified the failure to tender the alleged pistol. He would have clarified too on the claim that the house of the appellant was full of people at the material time and the offence could not be committed therein. This failure justifies this court to have adverse inference against the respondent.

4th, A material exhibit was not brought without any sufficient reason assigned (the guest house register book). This was underscored in **Emmanuel Senyagwa v R. Crm appeal no 22/2004 (CAT) at Dar-es-Salaam (Unreported):**

We think we are entitled to make an adverse inference from the failure to produce PF3 even after it was said that it was going to be tendered. That raises the question whether or not there was really sexual intercourse. If no, then there was no rape.

By failure to tender the guest register book, then the court was entitled to draw an adverse inference that the rape offences did not happen in the guest house or at all.

5th, the defence of the appellant in respect of grudges in respect of his responsibility of protecting against trespass of army plots was not given adequate consideration. On this, the claim by the appellant that he was framed due to what he used to do as the army officer. He even tendered exhibit D1 to substantiate his defence. In the circumstance, the trial magistrate ought to put into play the case of **Michael Haishi vs. R. [1992] TLR 92 (CA)**:

The trial magistrate correctly pointed out that all the six prosecution witnesses hail from Gongali Village while the appellant was the chairman of Bossodowish village. So, a high degree of consistency than the one displayed is essential to dispel fears of bias.

It is trite law that the accused person is not duty bound to prove his defence, rather it is for the prosecution to prove their case beyond reasonable doubt. see **Elias Kigadye and Others v R. [1981] TLR 355 (C.A)**:

Mr. Lakha criticised this proposition. We agree it is a misdirection; it is for the prosecution to exclude the possibility

of death by natural causes. The defence has no onus placed on it.

The appellant too cannot be convicted on the weaknesses of his defence as clearly stated in **Christian s/o Kale and Rwekaza s/o Bernard v R. [1992] TLR 302** (CA) Omar JJA, Ramadhani JJA, Mnzavas JJA:

Although second appellant's defence, like that of his co-accused, was a cock-and-bull story of what happened on the material day; and it must be conceded that he obviously has a talent for fiction; an accused ought not to be convicted on the weakness of his defence but on the strength of the prosecution case.

It is not for the court to fill the gaps in the prosecution case. For instance, in this case the appellant said he would have not committed the offence at his home as his home is full of people and his wife had an infant child. When it was alleged that the offence had been committed there, it was for the investigator of the case to investigate and come to the conclusion that indeed the circumstances would allow for the offence to be committed therein. Else, it is deciding a criminal case on precluded guesswork and

speculation per **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006 (C.A.T.)**.

Since there were allegations that the appellant was calling the victims through the mobile phone of PW1, such communications were relevant, and the phone itself was relevant. The prosecution cannot hide behind that the evidence of the victim is sufficient. Neither could the prosecution rely on **Seleman Mkumba V.R. [2006] TLR 384**. This is because stories of victims have at times been found not to prove rape cases.

The appellant has complained that the prosecution case is fabricated and one of the proofs of the claim is the respondent's failure to bring material witnesses and material exhibits (the mobile phone or communication extract)

The evidence in the tendered PF3s and that of PW6 is expert evidence and it is not binding to the court in proper circumstances just like in this case as the testimony of PW1 is found to be unreliable. See for instance **Agness Liundi v. Republic [1980] TLR 46 CAT**

"The court is not bound to accept medical testimony if there is good reason for not doing so. At the end of the day, it remains the duty of the trial court to make a finding and in so doing, it is incumbent upon it to look at and assess, the totality of the evidence before it including that of medical experts."

If the evidence of PW1 were to be believed, then it would prove that there is a grave failure by parents to not only to protect their children against sexual assaults but also failure by parents to teach their children moral conducts. How could a juvenile girl possess a mobile phone and communicate and procure other girls for sexual encounters with elderly men, just like that? Where was her father or grown up relative to look for her when her mother was away for farming?

Finally, having deliberate this appeal as I have shown above, I do not see the need to discuss the rest of grounds of appeal. I endorse the appeal preferred to this court by the appellant. Convictions on the three counts the appellant was convicted with are therefore quashed and sentences thereto are set aside. The appellant is to be set free from prison unless held there for other lawful cause(s).

It is so ordered.



DATED at SUMBAWANGA this 30th day of November, 2021.



J. F. Nkwabi

Judge

Court: Judgment is delivered in open court this 30th day of November, 2021 in the presence of Ms. Safi Kashindi, learned State Attorney for the respondent and Mr. Baltazar Chambi learned counsel holding brief for Mr. Patrick Mwakyusa, learned counsel for appellant and the appellant present in person.



J. F. Nkwabi

Judge

Court: Right of appeal is explained.

J. F. Nkwabi

Judge

30/11/2021

