

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 15 OF 2022

(Originating from the Court of Resident Magistrate of Mbeya in Criminal Case No. 173 of 2019- R. W. Chaungu- SRM)

Between

EVARISTO SILVESTERAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of last order: 6th June, 2022

Date of judgment: 28th June, 2022

NGUNYALE, J.

The appellant, Evaristo Silvester together with Steven Glazard Kamasho @ Mnene who is not subject to this appeal former 1st accused, were charged and convicted with one count of gang rape contrary to sections 130 (1) (2) (e) and 131 A (1) (2) of the Penal Code Cap 16 R: E 2002 now R: E 2019. It was alleged by the prosecution that the appellant and another on diverse dates of 8th and 9th July, 2019 while at Ilomba Area within the City and Region of Mbeya jointly and together did have carnal

knowledge of PW1 a girl of 14 years old. Both denied committing the offence. To prove the case, the prosecution called seven (7) witnesses and tendered six (6) documentary exhibits; birth certificate of PW1 (Exhibit PE1), cautioned statement of the appellant (Exhibit PE2) seizure note of the cellular phone (Exhibit PE3), a cellular phone (Exhibit PE4), PF3 (Exhibit PE5 and cautioned statement of 1st accused (Exhibit PE6). The appellant testified on oath as DW2 and called one witness in support. The prosecution case was that on 7/7/2019 PW1 was sent by her mother Rahel Jeckonia Sanga (PW2) to buy tomatoes. She did not go to buy tomatoes as send by her mother, instead she went to Prisca. At around 20:00 hrs when retuning home she met Vicent @ God who asked where she was going, she replied. The said Vincent convinced her to go to sleep to his home and could return home next day as it was night. PW1 agreed and they slept on different beds. On 8/7/2017 Steve and Evaristo went there and took her to Steve's home where she found more than nine boys. At around 09:00 hrs Steve demanded to have sexual intercourse, he took his penis and inserted into her vagina and lavished her while others were outside. Thereafter, the appellant also entered and had sexual intercourse with her after Steven had left, he took off his clothes and inserted his penis into the vagina of PW1. At 18:00 hrs the other boy called God went

to pick her like other he too forced to her sex intercourse on which she agreed. It has to be noted that God was not arraigned before the trial court, but next day at 19:00 hrs she was arrested by police while with Steven.

PW2 (Rahel Jackonia Sanga) the mother of PW1 testified that on 7/7/2019 she did sent PW1 to buy tomatoes but never returned home. At 11:00hrs the matter was reported to PW1's step father and they started to find her but they ended in vain. Then, the matter was reported to Ilomba police post and Meta Secondary School where PW1 was schooling. They continued with search, on 9/7/2019 they received a message from unknown number that to have a daughter is valuable than to have a son. The message instigated them to go to RCO office Mbeya Central Police for further inquiry. At 1930 hrs the appellant was found with the victim PW1. PW1 narrated the whole story that she was raped by three boys.

PW4 (F6652 D/C Elibariki) is the police officer who recorded cautioned statement of the appellant which was admitted as exhibit PE2. PW5 (G4712 P/C Hamis) was assigned to trace a phone number which sent message to PW2, upon follow up managed to trace the number and arrest the appellant. Certificate of seizure was admitted as exhibit PE3.

PW6 (Dr. Adili Mzirai) is a Medical Doctor who on 10/7/2019 examined PW1 and observed that she had difficulty in walking caused by pain of her right leg. Her vagina had no bruises, blood or hymen, had white fluid with bad smell and there were no sperms. The findings were filled in PF3 which was produced and admitted as PE5. PW7 (H5911 D/C Daud) recorded cautioned statements of Steven.

In defence the appellant testified on oath as DW2. He testified that on 8/7/2019 he saw Steven with PW1 but he continued with his activities. At 18:00 hrs he went again there and found Steven with six others and PW1 naked on the bed. The next day at 13:00hrs PW1 took the phone and sent SMS. At 15:00hrs he was called by unknown person and met them at Ilomba where he was arrested and told them that PW1 was with Steven. DW4 (Tumain Erius Mwamtowe) his evidence was in relation to what he was told after the appellant being arrested.

Upon a full trial, the appellant was convicted and sentenced to serve life imprisonment together with an order to compensate the victim Tshs. 1,000,000/-. The 1st accused was sentenced to suffer ten (10) strokes of the cane. The appellant was aggrieved with the sentence hence he preferred the present appeal prefaced on eleven (11) grounds which will not be reproduced herein.

When this appeal came up for hearing, the appellant was unrepresented and appeared in person whereas, the respondent Republic was represented by Ms. Rosemary Mgenyi, learned State Attorney. When the appellant was called to elaborate his grounds of appeal, he opted the State Attorney who appeared for the respondent to submit first while reserving a right to rejoin if a need will arise.

Ms. Mgenyi submitted generally on all grounds of appeal that the prosecution proved the offence of gang rape against the appellant. It was her submission that to prove gang rape the act must have been done more than one person assisting each other in commission of the offence. She further submitted that PW1 gave detailed testimony on how rape was done to her by each one and they penetrated their penis which caused her bleed from her vagina. PW1 did not raise alarm because there were other young men outside.

It was further submission that in rape cases best evidence comes from the victim as was stated in the case of **Seleman Makumba v R** [2006] TLR 379. She added that evidence of PW1 was supported by that of PW2, PW3 and PW5 and cautioned statement of the appellant exhibit PE2. She stated further that evidence of PW6 proved penetration.

Ms. Mgenyi continued to submit that evidence of both sides was considered by the trial court. Such evidence raised no doubts to the prosecution case, she quickly added that this court may re-evaluate evidence. She cited the case of **Prince Charles Junour v R**, Criminal Appel No. 250 of 2015 to strengthen his point that the first appellate court has mandate to re evaluate evidence if a need arises.

The appellant had nothing to add apart from praying the court to allow his appeal.

I have considered the grounds of appeal and submission made by the State Attorney which attracts the court to resolve the following issues; -

- 1. That the appellant was convicted and sentenced based on evidence contained in PF3 which shows that there was no bruises, blood, sperm and penetration*
- 2. That the cautioned statement of the appellant was recorded contrary to section 57 of the Criminal Procedure Act cap 20 R: E 2019. Ground 8 in petition of appeal.*
- 3. That the appellant was convicted on his weak defence evidence;*
- 4. That the prosecution did not prove the case beyond reasonable doubts. Gist of grounds No. 2, 3, 4, 6, 7, 9, 10 and 11 in the petition of appeal.*

Starting with the first ground on proof of rape by bruises, blood and sperm. In this appeal the appellant was charged with gang rape which is the specie of the offence of rape. Ingredients of rape in whatever category

under section 130 (2) of the Penal Code [Cap 16 R: E 2019] are penetration and consent. Penetration however slight amounts to rape and lack of consent to victim above the age of eighteen. It is not the requirement of the law that rape should be proved by bruises, blood and sperms. Similar complaint was raised in the case of **Manyinyi Gabriel @ Gerisa v The Republic**, Criminal Appeal No. 594 of 2017, CAT at Mwanza (Unreported) and the Court held that;

'We entirely share the same view for if bruises are to be the natural and probable consequences of sexual intercourse women would better opt to completely abstain from it. Crucial in cases of this nature is penetration however slight it may be and the person better placed to tell is the one on whom it is practiced which is in line with the Swahili saying "maumivu ya kukanyagwa anayajua aliyekanyagwa".'

Based on the dictates of the law, rape is proved by penetration however slight as provided under section 13(4) of the Penal Code and not presence of Bruises, blood or sperm. This ground is dismissed for devoid of merit.

On the second ground of appeal on the complaint that the cautioned statement was recorded contrary to section 57 of CPA, I do not intend to dwell on this issue longer. I agree with the appellant that cautioned statement was not properly admitted in court. It is evidence that the cautioned statement was not read in court after it was admitted in

evidence. It is a settled law that whenever a document is admitted in evidence it must be read over in court. See **Joseph Maganga & Another v Republic**, Criminal Appeal No. 536 of 2015 and **Miraji Idd Waziri @ Simwana and Another v Republic**, Criminal Appeal No. 14 of 2018 (both unreported). Thus, I expunge exhibit PE2 from the record of appeal.

The last and crucial question is the complaint about failure of the prosecution to prove the case beyond reasonable doubt. I have considered submission of the State Attorney, the starting point is the very section creating the offence of gang rape, it reads;

131A.-(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.

(2) Subject to provision of subsection

(3), every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.

(3) Where the commission or abetting the commission of a gang rape involves a person of or under the age of eighteen years the court shall, in lieu of sentence of imprisonment, impose a sentence of corporal punishment based on the actual role he played in the rape.

The concept of the law above is that gang rape is committed where one or more person in a group, each one committing or abetting the commission of the rape. In gang rape, evidence must prove the role of another person or other persons abetting or assisting in the commission

of the offence of rape. Again, the prosecution need not prove that each member of the group achieved any penetration for the offence to be committed. Penetration by one member of the group, facilitated by another or others, will be sufficient to ground a conviction.

In her evidence PW1 testifies how he was taken by Vicent to his home where they slept on different beds. On the next day she was taken to Steve' home where she found many boys. While other boys were outside Steve forcefully removed her clothes and had sex intercourse. Upon Steve finishing lavishing her he left and the appellant also penetrated his penis for sexual pleasure. At 18:30 hrs Vincent @ God went to pick her but he demanded to have sex too. This piece of evidence demonstrated that PW1 had sexual intercourse by three persons.

In defence the appellant and first accused were pointing finger at each other. The appellant defence that he went at 18:00 hrs and found PW1 with another boy tally with evidence of PW1 that at 18:30 hrs the appellant had sexual intercourse with her.

Akin environment happened in the case of **Erick Maswi and Charles Masike v Republic** Criminal Appeal No. 179 Of 2020, CAT at Musoma (Unreported). In this case the victim was raped by three person each one

after having sex with the victim left the scene of crime. The court held that;

'Taking all the circumstances into consideration together with the evidence concerned with proof of the offence charged against the appellants we are of the view that: One, the evidence of PW1 proved that three people, a gang had sexual intercourse with her and according to Selemani Makumba Republic [2006] TLR 379, her evidence as a victim is the best evidence to prove the same...'

In this case PW2 stated that a message from unknown number was sent to her informing her that "mtoto kwa kike ana thamani kuliko wa kiume" the said number was traced and the appellant was arrested in connection with the said number, he led the other witnesses to where PW1 was. This evidence was also testified by the appellant. Upon being found, PW1 told PW2 and PW4 that she was raped by three people. On the circumstance of this case, I find that the prosecution proved that PW1 was raped at least by two people. The evidence of PW1 proved penetration, her evidence that her vagina was bleeding corroborates evidence of PW6 on penetration.

The trial court gave equal weight to the defence evidence and found it to contain material contradictions. I have also considered the appellant's evidence and I find it to support the prosecution case as stated above. It is settled principles of law that if an accused person in the course of his

defence gives evidence which carries the prosecution case, the court will be entitled to take into account such evidence of the accused in deciding on the question of his guilt. See the case of **David Gamata & Another v Republic**, Criminal Appeal No. 216 of 2014, CAT at Mwanza (Unreported).

In the end result, I find the prosecution proved the offence of gang rape against the appellant beyond reasonable doubts. The appeal is devoid of merit. It is accordingly dismissed in its entirety.

DATED at MBEYA this 24th day of June, 2022.




D.P. NGUNYALE
JUDGE
24/06/2022