

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CRIMINAL APPEAL NO. 56 OF 2021

(Originating from Criminal Case No. 144 of 2019 of Bukoba District Court)

MAJID BOSCO.....1ST APPELLANT
JOHANES MERICHEDES.....2ND APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

09th June & 24th June 2022

Kilekamajenga, J.

The accused persons were jointly charged with the offence of gang rape contrary to **section 131A (1)(2) and 131(1) of the Penal Code, Cap. 16 RE 2002.**

It was alleged that, on 1st June 2019, at Rwazi within Mtukula area in Misenyi District, the accused persons did have carnal knowledge with the victim (name withheld) without her consent. During the trial, the prosecution summoned five witnesses to prove the case to the required standard. PW1 (E.9533 D/C Masele), the police officer who investigated the case testified that, through his investigation, he was satisfied that the accused persons raped the victim.

PW2 (victim) testified that, on 01/06/2019, at 1:00 am, while going home from the grocery, she was grabbed, pushed down and compelled to surrender whatever she had to the attackers. She identified the attackers through the tube lights that illuminated from the nearby house. She was also familiar with the attackers even before the incident. While being raped, PW4 passed by and the



second appellant (DW1) escaped leaving behind the first appellant (DW2). The victim immediately narrated what happened to PW4. Furthermore, as the victim was screaming, mama Byera responded to the alarm. Thereafter, the victim went home and narrated the incident to her brother (PW3) who advised her to report the matter to the police and the appellants were arrested the next day. The evidence of PW2 was supported with the testimony of PW3 who was the second person to hear the narration of rape from the victim.

PW4 (H.9322 P/C William) testified that, as he was riding his motorcycle towards Happiness Hotel, he found two persons near the house of Robert. Before going further, he heard the victim calling for help. The victim told PW4 that she was raped by the appellants. PW4 stated that, he found the first appellant still with the victim at the scene and that, the first appellant ran away after realising that PW4 was a police officer. PW5 received and examined the victim and filled-in the PF3 which was tendered as exhibit 1. PW5 also confirmed that the victim was raped.

In the defence, the first appellant informed the court that, on 01/06/2019 while at home at around 9:00 am washing clothes, a police together with the victim came and ordered him to accompany him to the police station. At the police station, he was informed about the offence of raping the victim. He stayed in the police lock-up until on 26/6/2019 when he was taken to court. The second appellant stated that, on 01/06/2019 while at home, he saw PW2 together with



other two women looking for him. Later, he saw one person called Masigiri together with a police officer and he was arrested. He was told that he raped the victim though he denied. He further alleged that the case was doctored by Masigiri because they had a conflict in March 2019.

Thereafter, the trial court was convinced that the prosecution proved its case. The appellants were convicted and sentenced to serve 30 years in prison. Aggrieved with the decision of the trial court, the appellants appealed to this court armed with thirteen (13) grounds of appeal. They later lodged an additional petition of appeal containing five grounds of appeal. When the case was ready for hearing, the first appellant appeared in person and the second appellant also appeared in person via virtual court from Kwitanga Prison in Kigoma. The second appellant, being a lay person, urged the court to adopt the grounds of appeal. On his part, the first appellant, apart from urging the court to consider the grounds of appeal, he further insisted that, they did not rape the victim. On the other hand, the learned State Attorney supported the conviction and sentence meted against the appellants. He further invited the court to evaluate the evidence adduced during the trial. When rejoining, the appellants did not raise any substantial argument worthy noting.

I have considered the copious grounds of appeal advanced by the appellants. In total, the appellants coined eighteen (18) grounds of appeal touching different

areas of the case. I have carefully considered them and find no reason to consider all the grounds one by one. However, the most relevant issue for determination is whether the prosecution evidence was sufficient to sustain a conviction of the appellants. I am aware, this being a criminal case, its proof must meet the minimum standard of proof beyond reasonable that the appellants committed the offence.

In this case, the charge shows that the appellants were charged with gang rape contrary to **section 131A(1)(2) and 131(1) of the Penal Code**. For clarity and quick reference, I wish to reproduce the sections thus:

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.

131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

As earlier, the appellants were accused of raping the victim. The victim's evidence shows that, the appellants grabbed her when she was coming from the grocery to her home at night. They demanded for the properties that the victim had and later raped her until she excreted. PW4 passed near the crime scene and the second appellant ran away while leaving behind the 1st appellant. The victim called for help and PW4 found the victim naked near the crime scene. Also, PW4 witnessed the 1st appellant running away though he might have not identified him. PW4 went to see the place where the victim was raped and, indeed, he found the place with faeces and the victim had faeces around her. While still at the crime scene, the victim told PW4 about the persons who raped her. PW4, being a police officer, informed the OCS and later advised the victim to report to the police station. I am aware, in our criminal jurisprudence, the best evidence of rape always comes from the victim. See, the cases of **Yusufu Buruani v. The Republic, Criminal Appeal No. 4 of 2010**, CAT at Tanga (unreported); **Mohamed Said v. The Republic, Criminal Appeal No. 145 of 2017**, CAT at Iringa (unreported).

In fact, the sole evidence of the victim of rape may be sufficient to ground a conviction provided the court is satisfied that the victim only speaks the truth. I understand, the offence of rape may easily be doctored and its proof is sometimes difficult because the court is sometimes forced to believe the testimony of the victim. In the case of **Mohamed Said** (*supra*) the Court of Appeal of Tanzania was persuaded with the decision of the Supreme Court of

Philippines in the case of **People of the Philippines v. Benjamin A. Elmancil, G.R. No. 234951 of 2019** which stated that:

In reviewing rape cases, this court has constantly been guided by three principles, to wit: (1) on accusation of rape can be made with facility; difficult to prove but more difficult for the person accused though innocent, to disprove; (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof.'

Despite all the complications involved in proving rape cases, there is still a need to believe the evidence of a person who was the victim of the circumstance. In rape cases, if court reaches a point of not trusting the victim's testimony, then rapists will walk far from the criminal justice. Rape incidents are always committed in secret and in most cases, the witnesses may only be the victim and the rapist. Therefore, the evidence of the victim, if not mixed with lies, should be given the priority of credence even if there is no further evidence to corroborate the same. For instance, in the case of **Yusufu Buruani** (*supra*) the Court of Appeal of Tanzania stressed that:

'First, we wish to point out that ordinarily the best evidence of rape comes from the victim of rape. However, that does not mean that that is the only

evidence to establish the offence of rape. Depending on the circumstances of each case, there are times where the evidence may not necessarily come from the victim of rape and yet the same may as well be sufficient to ground a conviction.'

In the case at hand, the victim's evidence was not the only piece of evidence to prove the offence. The evidence of PW4, who was a male police officer, supported the testimony of the victim. The victim called help from PW4 who was just passing by; PW4 found the victim still naked and the victim's torn clothes were still at the crime scene. In my view, the evidence of these two witnesses does not leave any doubt that the victim was raped.

Furthermore, the victim immediately went home and narrated the incident to her brother. Under an established principle of the law, the ability to name the suspect at an earliest possible time adds to the credibility of the witness. This principle was stated in the case of **Marwa Wangiti Mwita and another v. Republic 2002 TLR 39** thus:

'The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry.'

The most pertinent issue is whether the appellants were responsible for the rape. In resolving this issue, I wish, again, to revisit the victim's evidence; the victim stated that, she knew the appellants even before this incident. She found the

appellants on the way and she offered a greeting as she knew them. The appellants thereafter grabbed her. At that night, she identified them due to the tube lights illuminating from the nearby house. I have no reason to doubt the identity of the appellants who did not object whether they were not known to the victim. The victim, who was raped, had an ample time to identify the appellants because the incident which was done by two appellants, definitely, took some couple of minutes sufficient to have a closer look. The victim was closer to the appellants and therefore their identity could not be mistaken.

I have also noted the trifling discrepancies between the evidence of the victim and that of PW4. While the victim stated that, she grabbed and held the 1st appellant until PW4 came, this information is missing in the testimony of PW4. In his testimony PW4 stated that, as he was passing by, he spotted some people. Later, he heard a person calling for help and he immediately returned back and found the victim naked. The victim complained that she was raped. In my view, the discrepancy in the evidence does not affect the fact that the victim was raped and she named the appellants in the presence of PW4.

In conclusion, the evidence of the victim which was coupled with the testimony of PW4 and other prosecution witnesses proves that the victim was raped by the appellants. The appellants on their part failed to discharge their duty of shading doubts on the prosecution case. I find no merit in the grounds advanced by the appellants. I hereby dismiss the appeal. It is so ordered.

Dated at Bukoba this 24th Day of June 2022.



Ntemi N. Kilekamajenga.
JUDGE
24/06/2022

Court:

Judgment delivered this 24th June 2022 in the presence of the 1st appellant but in the absence of the 2nd appellant. The learned State Attorney, Mr. Joseph Mwakasege was present for the respondent. Right of appeal explained.



Ntemi N. Kilekamajenga.
JUDGE
24/06/2022