

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 53 OF 2021

(Arising from Criminal Case No. 93 of 2021 Kigoma District Court Before Hon E.B.
Mushi, RM)

PHILIPO ANDREW-----APPELLANT

VERSUS

THE REPUBLIC-----RESPONDENT

JUDGMENT

22/6/2022 & 27/7/2022

MANYANDA, J

Philipo Andrew, the Appellant, was arraigned before the District Court of Kigoma in Criminal Case No. 93 of 2021 charged with an offence of rape contrary to sections 130(1), (2)(a) and 131(1) of the Penal Code, [Cap. 16 R. E. 2019].

It was averred in the particular of offence that on 27/4/2021 at Mto Sulehi area in Ruchugu village within Uvinza District in Kigoma Region did have

carnal knowledge of an adult woman without her consent. The name of that woman is withheld in order to protect her identity per the Chief Justice's Circular No. 2 of 2018. In this judgment she will simply be referred to as "the victim".

The appellant pleaded not guilty to the charge. After full trial the appellant was convicted and a sentence of imprisonment for a period of 30 years was pronounced against him, been a minimum sentence for the offence he was charged with. He is aggrieved; hence the instant appeal.

At hearing the appellant prosecuted his appeal personally unrepresented while Mr. Shaban Juma Masanja, Senior State Attorney, represented the Respondent, the Republic.

Before I dwell into the nitty-gritty of the appeal let me narrate the background facts, albeit in a nutshell.

On 27/4/2021 the victim while walking back to her home from their farm met a male person who was grazing cattle. She went to a river which was adjacent to the road she was passing for drinking water. While there, suddenly, she was ambushed by that male person who was grazing cattle, he took hold of her and fell her down.

He undressed himself and her, then he inserted his male member into her private part. The victim raised an alarm and two men came to her rescue. To avoid red handed arrest, the man took to his heels. She reported the incident to the village authorities and later on to police. A PF-3 was issued and she was medically examined and found to have been penetrated. On 28/4/2021 the appellant was arrested on allegation of raping the victim. An identification parade was mounted on 3/5/2021 at which the victim identified the appellant as been man who raped her. In his defence the appellant simply denied raping the victim.

He has raised four grounds of appeal which read as follows;-

1. *That the trial Resident Magistrate erred in law and facts on failure to consider that the alleged offence was not proved on the standard as required by the law that is beyond reasonable doubt;*
2. *That the presiding Magistrate erred in law and facts on convicting the appellant without any exhibit (PF-3) tendered before the Court of law to establish the allegation. Also, the doctor who alleged to attend the victim was not called to justify the allegation;*



3. *That the trial Magistrate erred in law and facts on convicting the appellant relying solemnly on he hearsay evidence as no eye witness witnessed or was present at the crime scene;*

4. *That the trial Court erred in law in convicting the appellant without any cogent evidence as the key witness, the two men who alleged to assist the victim were not called to justify the allegation.*

The appellant been a lay person had nothing to say other than adopting his grounds of appeal and leave it to the Senior State Attorney to respond.

Opposing the appeal, the Senior State Attorney, supported the conviction and sentence. Submitted starting with the second ground where the complaint is general that the offence of rape was not proved beyond reasonable doubt.

He conceded on the fact that neither the PF3 was tendered nor the doctor who is alleged to have medically examined the victim testified. However, he relied on the authority in the case of **Selemani Makumba vs. Republic** [2006] 384 where it was held by the Court of Appeal of Tanzania that true evidence of rape comes from the victim where if is a woman that there was penetration and no consent.

Then, the Senior State Attorney went on to narrate the testimony of the victim who testified as PW4. That she explained clearly that the rapist inserted his male organ into her female organ without her consent.

The Senior State Attorney pointed out that at page 10 of the typed judgment, the ingredients of the offence of rape were well analyzed versus the adduced evidence and found the offence to have been fully proved.

In respect of ground three where the complaint is about hearsay evidence, the Senior State Attorney submitted that there was one eye witness who is PW4. He was of the view that PW4 is a credible witness whose evidence is worth of belief. The Senior State Attorney submitted that PW4 reported immediately after the incident and that she described the appearance of the man who raped her by facial and stature appearance. That she identified the marks impressions on the herd of cattle which the man was grazing. The mark read "3&6". Later on the man who was grazing the cattle came to be identified as the appellant which was 376. He bore the facial and stature described by PW4. Moreover, PW4 identified the appellant at the identification parade mounted. The Senior State Attorney was of the view that the pieces of evidence suffices to prove the offence of rape.

In respect of ground four, the Senior State Attorney, submitted conceding that the persons whom PW4 alleged to rescued her did not testify in Court.



That even if they testified, yet their evidence could not have been of any help because according to PW4's testimony, the rapist ran away before her rescuers reached at the crime scene.

The Senior State Attorney submitted opposing the complaint in ground one of the appeal arguing that the offence of rape was not proved. He narrated the evidence connecting the appellant with commission of the offence as follows.

One, the appellant was named by PW4 immediately after the incident describing him by facial and statue appearance.

Two, PW4 identified the cattle the appellant was looking after by their marks "3&6" to be his cattle.

Three, the owner of the cattle admitted that the appellant was the one who was looking after his cattle bearing the marks "3&6" on the material time of commission of rape

Four, that the cattle owner admitted the facial and statue appearance given by PW4 to be those of the appellant's appearance and it was the one who was looking after his cattle.

Five, the appellant was positively identified by PW4 at the identification parade.

Six, the appellant ran away immediately after seeing the militiamen who went to arrest him.

Seven, the defence of the appellant didn't raise any reasonable doubt since it was mere denial. Hence the offence of rape was proved.

The Senior State Attorney prayed the appeal to be dismissed in its entirety.

In rejoinder the appellant submitted that the case was framed up by his boss Emmanuel he didn't commit any offence nor rape the victim.

From the submissions by the parties and the evidence on record I find the issue to be resolved in this appeal is whether or not the appeal is meritorious.

The Senior State Attorney submission is that the appeal is not meritorious.

The appellant's view is that it is meritorious.

I will examine the grounds of appeal in the same sequence as the Senior State Attorney has done.

In ground two, the complaint is that it was an error for the trial Court to convict the appellant in absence of documentary evidence namely, PF3 and a doctor who purportedly medically examined the victim.

On these facts, the Senior State Attorney conceded that neither a PF-3 nor a doctor who is purported to examine the victim testified in Court. However, the Senior State Attorney quickly pointed out that there were other pieces



of evidence which sufficiently proved the offence of rape. The Senior State Attorney mentioned such evidence as includes the victim her self who testified that she was raped by a man on 27/4/2021. That she identified that man by facial appearance and stature which she described as having a scar on his face, black in complexion and tall a bit in height, not short.

The Senior State Attorney argued that it is through the description given by the victim when coupled with a fact that the rapist was looking after cattle marked "3&6" led to arrest of the appellant whom the victim identified at the identification paraded to be the one who raped her.

I have gone through the trial Courts judgment and found that the trial Court did not convict the appellant basing on PF-3 nor a doctor's evidence. This is because there was no adduction of such evidence by the prosecution. The complaint by the appellant is that it was wrong for the trial Court to convict him with, rape in absence of these pieces of evidence.

My understanding of the law of evidence as far as the crimes of rape and the like are concerned, the evidence of a PF-3 or of a doctor is to corroborate the evidence of the victim that there was rape or that other sexual offence.

I am fortified by a holding of the Court of Appeal of Tanzania in a case of **Godi Kasenegela vs Republic**, Criminal Appeal No. 10 of 2008 (unreported) where it stated as follows;

"It is now settled law that proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident such as doctors may give corroborative evidence".

In this case however, there are no such "other witness" who came to give corroborative evidence. Can mere absence of such "other witness" make the victim unbelievable? In my views the answer is in negative. I say so because in this case I didn't find reasons for disbelieving her.

It is trite law that every witness is entitled to credence of his or her evidence unless there are grounds to disbelieve him or her. In the case of **Goodluck Kyando vs. Republic** [2006] TLR 363, and later on, in many other cases without a number, the Court of Appeal of Tanzania has insisted as it stated in **Goodluck Kyando's case (supra)** that: -

"..it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

In her testimony, the victim who testified as PW4 explained clearly how she mate her assailant. It was broad day when she arrived at river Suleki where she found a man looking after herd of cattle with a marked "3&6". She chose to quinch her thirst by drinking water in the river nearby.



The man followed her grabbed her, lay her on the ground and after undressed her he undressed himself. Then, he forcefully inserted his virile penis into her vagina. She didn't consent; hence, she raised an alarm to which two passerby men responded. However, before they arrived at the crime scene the assailant ran away. PW4 described the man by his attire he put on, facial and statue appearance.

PW4 described the attire as been a blue T-shirt and black trouser. That he was black in complexion moderate in height and had a scar on his face. That PW4 had ample time of observing the man because she came close before the assault that led to her been raped. The confrontation and sexual intercourse took a considerable time of about five minutes before rescuers arrived. She concentrated looking at him while he was busy executing his evil deedsy.

I have examined the evidence of PW4 together with testimonies of other witnesses and found that it is coherent.

PW7, Emmanuel Bahati Mvunji, the cattle owner testified that he recognized his cattle herder who was looking after his cattle which are marked with "3&6" on 27/4/2021 as having black complexion with a scar on his face. PW7 had two cowboys one with light complexion who was called Matokeo and

another of black complexion with a scar on his face called Philipo, whom PW7 sayd he is the appellant.

In his defence the appellant admitted that he was looking after PW7 herd of cattle with the marks "3&6" but denied raping PW4 (the victim) contending that PW7 framed up the case because he claimed his salary and that he knew the victim to be the PW7's wife.

As it can be seen, although the evidence of the PF-3 and that of the doctor who examined the victim was not adduced by the prosecution, still there is evidence of PW4, the victim, which was not challenged by the appellant. Cross examination between the appellant and the victim is recorded reading as follows: -

"I recognized you as my rapist, you raped me without my consent. You tore my clothes and I went home naked.

The doctor observed that I was raped but no medical examination shows that you are the rapist. I met with you well, also while raping me I did look at your face that is why at the parade I managed to identify you well".

As it can be seen, there was no any question from the appellant about framing up of a case nor on the contention by the appellant that PW4 (the victim) was a wife of PW7.



In law, failure to cross examine on a crucial implicating fact is taken to be admission of that fact. Courts in Tanzania has said in many cases that failure to cross examine a witness by an adverse party on crucial fact is taken that the concerned party has admitted that fact to be true.

In the case of **Sebastian Michael and Another vs Republic**, Criminal Appeal No. 145 of 2018 the Court of Appeal stated as follows: -

"It is trite law that failure to cross examine a witness on a material evidence amounts to acceptance of it"

See also the cases of **Bakari Abdallh Masudi vs Republic**, Criminal Appeal No. 126 of 2017 cited in **Karim Seif @ Islam vs Republic**, Criminal Appeal No. 161 of 2017 and in **Nyerere Nyegue vs Republic**, Criminal Appeal No. 67 of 2010 (all unreported).

In this matter the appellant failed to cross examine PW4 on the identification features she mentioned, hence he is taken to have accepted them.

It follows therefore PW4 is a credible witness and she is entitled to credence of her testimony as there are no reasons to disbelieve as was said in the case of **Goodluck Kyando vs Republic (supra)** by the Court of Appeal of Tanzania. Ground two has no merit.

In respect of ground three, the Senior State Attorney opposed the complaint that the prosecution evidence was hearsay. He argued that the victim's evidence is direct as she testified that the appellant is the man who raped her, she personally saw and felt when she was being raped, she identified the rapist by the features she described, identified the cattle by marks "376" and ultimately identified him at the identification parade.

I think the Senior State Attorney is correct. The word "hearsay" is defined in the law dictionary called **Black's Law Dictionary**; 8th Edition by Bryant A. Garner as follows;

"testimony that is given by a witness who relates not what he or she knows personally, but what others have said and that is therefore dependent on the credibility of some one other than the witness".

In Tanzania the term was judiciously defined in the case of **Medson s/o Manga vs Republic**, Criminal Appeal No. 259 of 2019 where the Court of Appeal of Tanzania stated as follows;

"According to section 62(1) (a) of the Evidence Act, [CAP. 6. R.E 2019], oral evidence must be direct in all cases and if it refers to a fact which could be seen, the relevant evidence must be of a witness who saw it".



In the case at hand as explained above, PW4 testified that he saw the appellant and recognized him as a male person who raped her. Her testimony therefore is direct, not hearsay. This ground has no merit.

In ground four the complaint is about absence of evidence from two men whom PW4, the victim, contended came to her rescue at the incident. This fact was conceded to by the Senior State Attorney. However, he quickly pointed out that the evidence of these two men had no value because they found the assailant of PW4 escaping away. PW4 testimony is that the assailant took to his heels upon seeing the rescuers approaching them.

I agree with the Senior State Attorney that the evidence of these two men is of no evidential value because they didn't apprehend the assailant red handed at the crime scene.

Moreover, the issue of the appellant looking after PW7 herd of cattle at the material time and place which were marked with "3&6" was not disputed. This ground has no merit.

In respect of the complaint in ground one, the Senior State Attorney argued in opposition that the offence of rape on the victim by the appellant was proved beyond all reasonable doubt hence the conviction was correctly found by the trial Court.

Without need of repeating my analysis of the complaint in ground two, I agree with the Senior State Attorney.

This case is based on visual identification evidence. It is trite law that visual identification is the weakest evidence and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely water tight. This was the holding in the case of **Waziri Amani vs Republic**, [1980] TLR 250.

As to what amounts to water tight identification, the Court of Appeal stated in the case of **Sostenes Myazagiro @ Nyarushashi vs. Republic**, Criminal Appeal No. 276 of 2014 (unreported) as follows;-

"Water tight identification in our considered view entails among other the following;-

- i. How long the witness had the accused under observation;*
- ii. What was the estimated distance between the two;*
- iii. If the offence occurred at night, which kind of light existed and what was its intensity;*
- iv. Whether the accused was known to the witness before the incident; and*
- v. Whether the witness had ample time to observe and take note of the accused without obstruction such as fear of attack, threat and the like which may have interrupted the latter's concentration."*



In the current case, gauging the conditions listed in the case above it can be seen that the victim had ample time enough to identify the features she described on her assailant who came to be the appellant. They were in encounter facing each other while the appellant was sexing her, she kept an eye on the appellant face while the appellant, as said above, was busy executing his evil act, it was broad day. There were no threats or blockage of sight. As a result, from the water tight identity, PW4, the victim, gave description of her assailant immediately after the assault to the village leaders.

In law early naming or as in this case, describing the assailant is taken to add credence on the identifying witness.

In a recent case of **Bernard Thobias Joseph and Another versus Republic**, Criminal Appeal No. 414 of 2018 decided on 14/4/2021 the Court of Appeal made reference to the case of **DPP vs Mohamed Said and Another vs Republic**, Criminal Appeal No. 432 of 2018 where it reiterated its observation in the case of **Omari Iddi Mbezi and 2 others vs Republic**, Criminal Appeal No. 227 of 2009 (all unreported) where it stated as follows;-

"the witness must make full disclosure of the source of light and its intensity, explanation of the proximity to the culprit

" the witness must make full disclosure of the source of light and its intensity, explanation of the proximity to the culprit and the witness and the time he spent on the concener description of the culprit's in terms of body build. Complexion, size and attire. Additionally, the witness must mention any peculiar features to the next person that person comes across which should be repeated at his first report to the police on the crime who, would in turn testify to that effect to lend credence to such witness's evidence of identification of the suspect at the identification parade and during the trial to test the witnesses' memory".

Demonstretably, PW4's evidence meets the conditions set up in the case above. That the description by special features including the scar on the face was repeatedly told to PW1, PW5 and PW6. the same body features enabled her to identify the appellant not only at the identification parade but also in Court during trial, showing that memory was strong all the time. PW5 and PW6, Police officers corroborated her evidence.

The identification evidence elaborated above when coupled by the evidence from PW7, the cattle owner which were marked 3 7 6 a fact not disputed by the appellant makes it corroboration to PW4 (victim) evidence and carrying further here credence.

From that evidence I have analyzed at length, I am satisfied, just as the trial Court did that the offence of rape against the appellant was proved



beyond all reasonable doubts. The conviction of the appellant is sound in law. Ground one has no merit as well. The sentence is the minimum one, hence lawful.

I find that the appeal is void of merit.

Consequently, I do hereby dismiss this appeal in its entirety. Order accordingly.

Dated at Kigoma this 27th day of July, 2022




MANYANDA

JUDGE