

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA

HIGH COURT CRIMINAL APPEAL NO. 30 OF 2022

*(Originating from Criminal Case No. 289/2020 at the Resident Magistrate
Court of Mbeya Region at Mbeya)*

HENRY BOIMANDA-----APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

Date of last order: 29.08.2022

Date of Decision: 30.09.2022

Ebrahim, J.:

The Appellant herein stood charged and convicted for the offence of rape contrary to **section 130(1)(2)(a) and 131(1) of the Penal Code, Cap 16 RE 2019 (now 2022)**. The particulars of the offence read that on 14th day of November, 2020 at Uyole area, in Mbeya Region, the appellant had carnal knowledge with one AJK (identity concealed), a girl aged 16 years.

The background of the case discerned from the court records shows that the incident occurred on the evening of 14th November 2020 when the victim was heading to her friend's house to collect an exercise book. On the way, he met the Appellant with other people and the Appellant forced her inside the room. She tried to raise an alarm but the Appellant threatened to call his fellows. She stopped and the Appellant raped her. On getting home she told her sister and together they called their parents who came back the next morning. On being asked if she knew the Appellant she said she did not know her name but his face. Together with her parents, she went to show the house where she was raped and later they managed to apprehend the Appellant at his friend's house. Responding to cross examination question, she said she was raped around 04.00 in the evening (from the handwritten proceedings).

Prosecution called a total of 5 witnesses and tendered one exhibit – P1-(PF3). The Appellant adduced his own evidence.

After hearing the evidence from both sides, the trial magistrate found PW1 to be a credible witness and proceeded to convict the Appellant and sentenced him to 30 years' imprisonment.

Aggrieved by the conviction and sentence, the Appellant preferred the instant appeal raising eight grounds of appeal which can mainly be grouped into four grounds that prosecution failed to prove the case to the required standard; and that PW1 failed to give description of the person who raped her and no identification parade was conducted. Another complaint raised by the Appellant is that the court wrongly relied on the evidence of PW2 and PW5 who lied and their evidence was contradictory; and the defence evidence was not considered.

At the hearing of the case, the Appellant appeared in person, unrepresented. He prayed for the State Attorney to begin while reserving his right to respond.

The Republic was represented by Mr. Davis Msanga, learned State Attorney.

In total prosecution side called four witnesses and tendered one exhibit. Defence side called one witness, the Appellant himself.

Responding to the grounds of appeal, Mr. Msanga opted to respond to the 1st and 4th grounds of appeal together and also combine the 2nd and

5th grounds of appeal. He also responded to the 6th and 7th grounds of appeal together as they are interrelated.

Referring the court to the testimonies of PW1 (the victim – pg 6 of proceedings) and PW2 (father of the victim), he contended that prosecution case was proved beyond reasonable doubt. He submitted that the Appellant apologised when he was arrested and he referred to the testimony of PW3 that he said the victim was penetrated as per exhibit P1- PF3.

Mr. Msanga invited the court to visit the principle illustrated by the Court of Appeal in the case of **Edward Nzabuga Vs Republic, Criminal Appeal No. 336/2018** that the best evidence in rape cases comes from the victim. He submitted also that the Appellant admitted the offence by apologizing before PW2 on his own volition. He also referred to **section 143 of the Evidence Act, Cap 6 RE 2022** on the position of the law that no number of witnesses is required to prove a fact at issue.

In responding to the 2nd and 5th grounds of appeal, he said that PW3 did not have to say that there were bruises but rather looked at the evidence

as a whole and found the victim with infection on her vagina. He dismissed the complaint by the Appellant that no street leaders were called because a person can confess to any person and that the Appellant confessed to PW2 and there was evidence of PW5 who was an investigator.

As to the complaint that the Appellant's defence was not considered, he said the Appellant's defence was considered at page 9 and 10 of the trial court's judgement. He however urged the court being the 1st appellate court to re-visit, re-evaluate and consider the whole evidence adduced at the trial court.

He prayed for the court to see that the case was proved beyond reasonable doubt.

In re-joining, the Appellant simply prayed to adopt his grounds of appeal and the same be considered by the court and he be set free.

I have carefully followed the rival submissions and the grounds of appeal as adopted by the Appellant. I am cognizant of the fact that this is the first appellate court hence I am obliged to step into the shoes of the trial court and make evaluation and analysis of evidence in observant of the

fact that I was not privileged to observe the demeanour of the witnesses being the province of the trial court as illustrated in the case of **Mzee Ally Mwinyimkuu@ Babu Seya Vs Republic**, Criminal Appeal No. 499 of 2017.

Going through the grounds of appeal, the appellant is mainly complaining that the case was not proved beyond reasonable doubt. I shall address the grounds of appeal generally as per the issues raised. It is therefore imperative that I re-visit the evidence adduced at the trial court.

In the beginning, I summarized the testimony of PW1, (the victim) where she testified on how she came about to be raped by the Appellant and that she informed her sister of the ordeal when she went home. She said she did not know the name of the Appellant but knew his face. She went on to show her parents the Appellant whom they found at the friend's house and later she was taken to the hospital. She identified the Appellant in court.

PW2's testimony was that he received a call from PW1 late on the evening of 14.11.2020 when he was at the funeral in the village telling

him that she has been raped. The next day they went to find the Appellant whom they found at the friend's house and they took him to the police and later they took PW1 to the hospital. He said the Appellant asked for forgiveness for what he had done to PW1. **PW3**, the doctor, examined PW1 on 15.11.2020 and her observations were that PW1 had no bruises or blood in her vagina and it was not found that there was a forced penetration and also she was not a virgin. Mostly the examination revealed that PW1 had infection on her vagina. She tendered PF3 which was admitted as **exhibit PE1**. Responding to cross examination and re-examination questions, PW3 told the court that PW1 said she was raped on the same date she was taken to the hospital. **PW4** was a police who investigated the matter. She said she only interrogated the Appellant and recorded the victim's statement. **PW5** gave his testimony that he was called by PW2 to assist in searching for the person who raped his child following the direction to be given by PW1. They went to the house and he realized that it was the Appellant following the identification done by PW1. Eventually, they found him at the house of his friend and PW1 confirmed that it was him. He said the Appellant kept on asking for forgiveness.

On his part, the Appellant testified as DW1. He denied to have committed the offence and said he was arrested on 15.11.2020 around 1100hrs when he was at his friend's house. When he was arrested, they beat him and he was taken to the police station. He picked on the contradictions from prosecution witnesses that PW4 said the doctor said PW1 was raped while exhibit PE1 did not indicate so.

Verily, in convicting the Appellant, the trial court was guided by the principle that in rape cases the best evidence comes from the victim; and that PW1 identified the Appellant.

In looking at the evidence before the trial court, there comes the pertinent question as to whether the testimony of PW1 conclusively determine that the Appellant was the person who raped her.

Before embarking on the journey of determining the above issue; as correctly stated by the learned State Attorney, the jurisprudential position in rape cases is that the best evidence comes from the victim. This is in accordance to **section 127 (6) of the Evidence Act**, CAP 6 RE 2022 and the Court of Appeal decisions in a number of cases including the case of **Edward Nzabuga v. Republic, Criminal Appeal**

No. 136 of 2008, Court of Appeal of Tanzania at Mbeya

(unreported). However, the victim's evidence cannot be taken whole sale, as the same must pass the truthfulness and credibility test as held by the Court of Appeal in the case of **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported). Therefore, it is upon this court to scrutinize the evidence adduced by the victim and compare with the testimonies of other witnesses in deciding as to whether it passes the truthfulness test or not.

In this case, PW1 told the court that the Appellant forced her to go inside and she went. She started raising an alarm but the Appellant threatened to call his fellows who were outside. The question that tasked my mind is whether PW1 was forced to go inside the house because from the very beginning there were people outside. Therefore if she forced to go in she could have resisted there and then. From her testimony it was shows that she raised an alarm when she was already inside the house and the Appellant's fellow youngsters were outside.

Again, it comes the question of identifying the Appellant. PW1 said in her testimony that she did not know the name of the Appellant but

could identify his face. This also shows that PW1 did not know the Appellant before as there was no such evidence on record. However, PW5 said in his testimony that it was PW2 who looked for him and asked him to assist in finding the Appellant. They went to the Appellant's house and he discovered that it was the Appellant who raped PW1 from **the identification described by PW1**. Again, there is no such description on record given by PW1 to lend assurance that indeed the person assumed by PW5 is the Appellant. Otherwise it calls for more speculation as the name of the Appellant was mentioned by PW5 as "Madawa" after guessing that it would be him as there is no any description given to match the Appellant that would have also been used by the police to apprehend the Appellant and if need be to conduct an identification parade. If at all, it was PW2 and PW5 in the company of PW1 that apprehended the Appellant. It is my position that the naming of the Appellant by PW5 that led to his arrest would have been plausible if PW1 described the Appellant as his rapist, and the description led to his arrest.

The Court of Appeal in plethora of cases has been giving guidance on the elements of positive identification of the accused and insisted that the

description of the accused person immediately after the offence has been committed lends credence to the identification done by the victim. In the case of **Yohana Chibwingu vs Republic**, Criminal Appeal No. 117 of 2015 CAT at Dodoma (unreported) the Court quoted with approval the case of **R. vs Mohamed B. Allui** (1942) 9 EACA where it was observed that:

*"that in every case in which there is a **question as to the identity of the accused, the fact of there having been given a description and the terms of the description are matters of the highest important** of which ought always to be given first of all, of course by the person who gave description, or purports to identify the accused and then by person whom the description was given."*

Fitting the above principle to our instant case, since PW1 said that she did not know the name of the Appellant and also that there is no evidence to at least show that she had seen him and knew him before, then identification is an issue. Therefore, failure by the prosecution to lead evidence showing that PW1 described the Appellant; the discovery by PW5 of the Appellant that led PW1 to identify the Appellant is not sufficient and looks more apparent than real.

Another issue that caught the attention of this court is the testimony of PW3 saying in cross examination and re-examination that PW1 said she

was raped on the same date she was taken to the hospital for examination whilst PW1's testimony and that of PW2 reveals that she was raped a day before.

Of course, I would not totally dismiss the findings of PW3 at the trial court that the examination did not show that PW1 was penetrated. She was only found with vaginal infection.

Counsel for the Respondent told the court in his submission that PW3 said PW1 was raped. With respect, it is clear that he did not either read the proceedings or he geared into misleading the court. PW3 being an exparte witness, coherently explained what she observed from examining PW1 that there was no proof of penetration. Much as I did not have the privilege to observe her demeanour, there is no material evidence to suggest that she is not credible witness. I am therefore highly persuaded by her evidence and I find that it does not corroborate the statement by PW1 that she was penetrated.

Thus, I would not say with certain that PW1 was credible in her testimony in considering that she did not tell the truth on the exact date

it was purported that she was raped. Obviously, there is more than meet the eye!!!

Another issue that I find apt to address is the oral admission of the offence by the Appellant before PW2 and PW5. According to PW2 and PW5, the Appellant asked for forgiveness for what he did to PW1 while they were in a car taking him to the police station at Uyole. In essence, they said that the Appellant orally admitted the commission of the offence.

The Appellant testified that on 15.11.2020 while at his friend's house, he was mobbed with three people and took him in a car to Uyole police station. On the way they beat him and told him that he was the rapist. He denied to have committed the offence.

It is a settled position of the law that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be the civilian or not, maybe sufficient by itself to ground conviction against the suspect. See; **Rashid Roman Nyerere vs R.** (supra). **The Director of Public Prosecutions vs Nuru Mohamed Gulamrasul**, [1988] T.L.R. 82. Also, **Mohamed Manguku vs Republic**, Criminal Appeal No. 194

of 2004, (unreported) quoted in **Chamuriho Kirenge @ Chamuriho Julias vs Republic**, Criminal Appeal No. 597 of 2017 CAT at Mwanza (unreported). The Court of Appeal insisted that such oral confession would be valid as long as the suspect was a free agent when he said the words imputed on him. It means therefore that for an oral confession to base a conviction, the same should be made voluntary. What amounts to an involuntary confession is provided for under **subsection (3) of section 27 of the Evidence Act, Cap 6 R.E 2022** which states:

"(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat; promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority."

The question at this juncture therefore is whether the appellant was a free agent when he admitted the offence in the presence of PW2 and PW5. The evidence by the Appellant shows that when he was apprehended by PW2 and PW5 he was taken in a car and they beat him. This piece of evidence was not controverted by the Counsel for the prosecution. It is therefore clear that one would not term the environment that the Appellant was placed by PW2 and PW5 as being a

free agent. In the circumstances therefore, I cannot say that the said oral confession was not free of blemishes.

From the above background therefore, it is obvious that the testimony of PW1 (the victim) does not pass the truthfulness test. More-so, there are a lot of doubts from the way the Appellant was identified hence from his arrest to the contradicting dates of the commission of the offence offered by PW1 to PW3, and adding the testimony of PW3 that there is no proof of penetration; I am of the firm stance that prosecution evidence raises doubts which as the law requires should benefit the Appellant.

That being said, I accordingly find that prosecution case failed to prove its case beyond reasonable doubt. Therefore, I allow the appeal and order the immediate release of the Appellant from prison unless otherwise held for other lawful cause.

Accordingly ordered.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", is written over a circular stamp.

R.A. Ebrahim

JUDGE

MBEYA

30.09.2022