

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

AT MBEYA

HIGH COURT CRIMINAL APPEAL NO. 71 OF 2022

*(Originating from Criminal Case No. 10/2022 at the District Court of
Rungwe at Tukuyu)*

AUGUSTINO EPHRAIM MBONILE-----APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

Date of last order: 22.08.2022

Date of Decision: 23.09.2022

Ebrahim, J.:

Augustino Ephraim Mbonile, the Appellant herein was 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 7th February 2022 at about 2300hrs at Iponjola Village within Rungwe District in Mbeya Region, the appellant, unlawfully had sexual intercourse with one ES (identity concealed) a woman of 82 years without her consent.

As the records would reveal, on the incident night i.e. around 2300hrs of 07.02.2022, the victim (PW1) was sleeping at her home leaving the front door open for her granddaughter who had gone to attend the funeral ceremony at neighbours. Suddenly, a person hopped into her bed whom she thought it was her granddaughter who had gotten back from neighbours. To the contrary, a man whom she said was the Appellant held her and demanded money. She gave him Tshs. 30,000/- of which one note fell down. On looking for it, the Appellant lighted a torch and it was when PW1 said she recognised the Appellant. After collecting the money, PW1 told the court that the Appellant went back and raped her and then asked her to go outside so that she can kill her. When they went out, people appeared including her granddaughter and the Appellant ran away. PW1 narrated the ordeal to her granddaughter. The granddaughter called her father (PW3) who then went to report to the Street Chairperson and WEO who went to PW1's house. PW1 was taken to the police station the next morning and to the hospital.

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

After hearing the evidence from both sides, the trial Magistrate found the Appellant guilty of the charged offence and convicted him as per the law.

Aggrieved by both sentence and conviction, the Appellant preferred the instant appeal raising seven grounds of Appeal as follows:

1. That, he did not plead guilty because he did not commit the offence.
2. That he was not arrested committing the offence.
3. That prosecution witnesses (PW2 and PW3) adduced hearsay evidence.
4. That, there was contradiction on the between PW2 and PW3.
5. That, the trial court believed the evidence of PW4 (the doctor) while no sperm was found on the vagina of the victim.
6. The trial court did not consider the fact that the alleged crime was committed at 2300hrs but reported at 0900hrs.
7. That, the trial court did not consider that the alleged crime was planted due to family grudges that led the Appellant to leave the village.

When the case was called for hearing, the Appellant appeared in person whilst the Republic had the services of Mr. Rwegira, Senior State Attorney.

The Appellant briefly adopted his grounds of appeal and prayed for the court to consider them.

Responding to the grounds of appeal, Mr. Rwegira firstly prayed for leave to respond to the 1st, 2nd and 3rd grounds of appeal together. The prayer that was granted.

He submitted generally as to whether the charge against the Appellant was proved beyond reasonable doubt. He hurriedly began by saying that in sexual offences, the victim is the best witness. He recapitulated the series of events as narrated by the victim that, PW1 explained how the Appellant raped her and she knew him because he was her neighbour. He explained further that the victim recognised the Appellant by the torch light which he used to find the note that he robbed her. He stated also that the victim immediately reported the ordeal to PW2 and PW3 which shows that she identified him. He invited the court to refer to the case of **Marwa Wangiti Mwita V R**, [2002] TLR, pg 39.

Counsel for the Republic further referred to the testimony of PW3 who said that the Appellant apologized for what he did and he stressed that exhibit P1 (PF3) reveals that the victim was penetrated.

Responding on the issue of presence of sperms, he said the relevant fact in rape is penetration and not presence of sperms.

As for the family squabble, Counsel for the Respondent argued that the same is an afterthought as the Appellant did not raise it in his defence. He therefore prayed for the court to dismiss the appeal and find that the case was proved beyond reasonable doubt.

In brief rejoinder, the Appellant contended that it was not true that he was identified by the torch light because the torch lightened the money not the victim.

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

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. Like Counsel for the Respondent, I shall also address the 1st, 2nd and 3rd grounds of appeal together.

Appellant was arrested after PW1 mentioned him as the person who raped her. According to the testimony of PW1, she recognised the Appellant following a torch light that the Appellant used to look for the note that had fallen down after he robbed the victim.

The pertinent issue therefore is whether the Appellant was favourably identified/recognised by PW1 as 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 2019** 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 decide as to whether it passes the truthfulness test or not.

In this case, PW1 clearly testified before the court on how the Appellant after entering inside her house first asked for money. In giving him Tshs. 30,000/-, one note fell down and in searching for the said note, the Appellant lightened a torch. Thereafter, he went back to PW1, held up the skirt she was wearing and inserted his penis into her vagina and raped her. He then took her outside the house. She said when the Appellant had taken her outside, people appeared. The Appellant ran away but she could not shout for help as the Appellant had held her on the neck and she was in pain. She said among the people who appeared was her granddaughter whom she immediately told her that Augustino had raped her and stolen her money – Tshs 30,000/-. PW1 said she also told Uswege (PW3 – her son) what had befallen her and Uswege went to

report to the Street Chairperson and WEO. She was taken to the police and the next day to the hospital. Responding to cross examination questions, she said the Appellant asked for forgiveness and she was taken to hospital to receive treatment.

The testimony of PW1 is corroborated by PW2 who recognised the Appellant as their neighbour and told the court that at around 2300hrs of 07.02.2022 on coming back from the funeral ceremony from the neighbour; she found her grandmother whom they were living together crying and her clothes soaked. When she asked her, she told her that she was raped by Augustino and took her money – Tshs. 30,000/- and that she recognised him through a light from the torch.

The fact that the Appellant was a neighbour to the victim was also corroborated by PW3. He testified before the court that at around 2300hrs of the same night of 07.02.2022, he was also at the neighbour's funeral then he went home which is about 20 paces from PW1 home (his mother). His daughter (PW2) went to call him telling him that his mother has been raped by the Appellant and robbed her money. PW3, testified to have reported to the Street Chairperson who told him that the matter

will be discussed in the morning. The next morning, WEO, VEO and the chairperson went to their house and the Appellant was also called. He said the Appellant admitted to have committed the offence and asked for forgiveness. He then took his mother to the police and then hospital.

The fact that PW1 was penetrated was testified by PW4, a doctor who examined her in the morning of 08.02.2022. PW4 observed that the aged woman vagina was swollen, she had bruises and was in pain. He concluded that the woman was penetrated. He tendered PF3 which was admitted without objection as **exhibit P1**.

According to the testimony of the Appellant, he admitted to have gone to attend the funeral of his neighbour where there was about 7-8 people and he slept there until the next morning. In the morning he went to his farm and on coming back he was called at PW1's house and allegation that he raped PW1 and stole her money was levelled against him. He said he denied the offence and upon being searched he was not found with any money. When responding to cross examination questions he admitted knowing PW1 well as he had lived in the village but said that PW1 had grudges with him.

Beginning with the testimony of PW1, I have considered the coherence of the her evidence together with other witnesses, i.e., PW2 who relayed what she was directly told by PW1 and their story matches. Equally the same with PW3. The testimony of PW4 proves that PW1 was penetrated and there is no challenging evidence to prove to the contrary.

From the victim's evidence, though I could not observe her demeanour, but following the coherence of her testimony which is also corroborated by PW2 and PW3 and the observations made by PW4 who examined her, I have no flicker of doubt that PW1 was telling the truth.

Admittedly, when coming to the issue of identification/recognition prosecution case greatly relies on the evidence PW1, the victim. Court of Appeal said in the case of **Mengi Paulo Samweli Luhanga and Another V Republic**, Criminal Appeal No. 222 of 2006 (unreported) that:

"eye witnesses' testimony can be a very powerful tool in determining a person's guilt or innocence".

From that position of the law and on the basis of the powerful nature of eyewitness, Court of Appeal again in the case of **Salim S/O Adam**

@Kongo @ Magori V Republic, Criminal Appeal No. 199 of 2007 illustrated the salutary principles of law on eyewitness identification that among other principles that in a case where its determination depends on the identification **such evidence must be water tight even if it is evidence of recognition.**

PW1 testified before the trial court that the Appellant went into her room and ordered her to give him money or else he would kill her. She said she gave him Tshs. 30,000/- and one note fell down. In searching for the money, the Appellant lightened the torch and that was when she recognised him. She said he was her neighbour and that fact was admitted by the Appellant himself in his defence who said the victim could even recognise his voice. The Appellant in his rejoinder challenged that the victim could not have recognise him because the torch lightened the money and not the victim. Actually, his observation does not work on his favour because had the torch lightened the victim, then she would not be able to see him. However, since the torch was lightening where the Appellant was searching for the money, much as we have not been told the extent of the light, it was very easy for the

victim to clearly see the Appellant and recognise him as he knew him before as his neighbour.

Furthermore, the victim said that after searching the money, the Appellant went back to rape her. After raping her, the Appellant and the victim went outside and the Appellant escaped after seeing people coming.

The sequence of events explained by PW1 suffice to show that the Appellant stayed with PW1 for a reasonable amount of time easily to recognise a person you know. Court of Appeal had in the case of **Abdallah Rajab Waziri V R**, Criminal Appeal No. 116 of 2004 upheld the evidence on identification by a match box light following the fact that the witness knew the accused before. The same stance was also taken by the Court of Appeal in the case of **Fadhili Gumbo Malota and 3 Others V R**, Criminal Appeal No. 52 of 2003 where the witness knew the accused by name.

Another fact that lends more credence to the recognition of the Appellant by PW1 is her ability to mention the Appellant by name to both PW2 and PW3 immediately after the incident. The same position was correctly

observed by the trial court where the Court of Appeal case of **Marwa Wangati Mwita & Another Vs Republic** [2002] TLR No. 39 was quoted with approval where it was held that:

"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry". [emphasis is mine].

In the same spirit and in considering the fact that PW1 knew the Appellant before, the fact that was corroborated by the evidence of the Appellant himself and as I have already made my findings above on the truthfulness of PW1's testimony; I join hands with the trial court and firmly hold that the Appellant was positively recognised by PW1.

Apart from the truthfulness of PW1, as to the credibility of other witnesses, I agree with the contention by Mr. Rwegira that the prosecution witnesses were credible and truthful. This is because, their testimonies were coherent and cogent, thus reliable. See: **Athumani Hassani vs Republic**, Criminal Appeal No. 292 of 2017 (unreported). In considering their testimonies in relation with the evidence of PW1; and

when examining the coherence of those witnesses' testimonies, I see no contradictions between their statements and there is no any hearsay evidence as each witness i.e., PW2, PW3 and PW4 told the court what they saw, observed or heard from PW1- **Siza Patrice V R**, Criminal Appeal No. 19 of 2010- on the credibility of witness as observed by the appellate court.

As for the Appellant defence, I find no difficulty in giving no weight to his defence because his defence did not raise any reasonable doubt to the prosecution defence. I am saying so because, much as he had no duty to prove his innocence but since he said there were other 7-8 people at the funeral on the night of the ordeal, it would have been expected that he would have at least called those people or even mention their names to confirm that he was there and not at PW1's house. Moreover, the fact that there were about 6 youngsters in the village is not a defence that he could not have raped PW1. If at all, it gives weight to the prosecution's case as to why PW1 did not mention those other 6 youths but him?

As for his defence of family grudges, I find the defence as an afterthought because the Appellant did not raise the same on his

defence until he was cross examined; whilst PW1 had told the court that she had no bad blood with the Appellant. More-so, the Appellant did not even state the basis of the said family grudges to assist in raising the concern by the court.

As the complaint on the time and day the offence was committed and reported, the same has no any relevance because the evidence is clear that after PW3 has reported the matter to the Village authority, he was told that the issue would be dealt with in the morning and there is no any contradiction thereof. Therefore, this ground of appeal has no merits.

As for the ground of appeal that PW4 did not observe any sperm, I hasten to agree with the trial magistrate and counsel for the Respondent that the law i.e., **section 130(4) (a) of the Penal Code, Cap 16 RE 2019** provides clearly that *"for the purpose of proving the offence of rape penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*. Therefore, there is no requirement of the law that rape must be proved by presence of sperms.

Nevertheless, PW4 said he examined PW1's vagina and found that the vagina was swollen and had bruises which indicated that she was penetrated. The same observation was clearly indicated in exhibit P1. In line with the testimony of PW1 on how the Appellant raped her, I find no merits on the complaint and I dismiss it.

Again, I would further wish address the oral admission of the offence by the Appellant before PW3, VEO and WEO and PW1.

It is settled 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 an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to 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 admitting the offence in the presence of PW1 and PW3. There is no evidence whatsoever and the appellant is not saying in this appeal that when he was called by the VEO and asked if he committed the offence he was under any threat or coercion or inducement. PW1 said when the Appellant was called he asked for forgiveness. The same statement was said by PW3 that when the Appellant was called he agreed to have committed the offence and asked for forgiveness. Therefore, as rightly observed by Mr. Rwegira, the Appellant admitted to the commission of the offence. As I have already ruled out on the credibility of prosecution witnesses, I find the admission was free of any blemishes.

That being the position therefore, owing to the testimonies of PW1, PW2, PW3 and PW4, I join hands with the trial court and find that prosecution managed to prove their case beyond a shadow of doubts. That being said, I accordingly find the appeal to be unmeritorious and I dismiss it in its entirety.

Accordingly ordered.



R.A. Ebrahim

JUDGE

MBEYA

23.09.2022