

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MBEYA**

**AT MBEYA**

**CRIMINAL APPEAL NO. 55 OF 2022**

(Originating from the Court of Resident Magistrate of Mbeya, at Mbeya, in Criminal Case No. 1 of 2017)

**RAMADHANI JABU SAAD @ ANKO TOGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

*Date of last Order: 29.08.2022*

*Date of Judgment: 13.10.2022*

**Ebrahim, J.**

In the Court of Resident Magistrate of Mbeya, at Mbeya (the trial Court) the appellant, **RAMADHANI JABU SAAD @ ANKO TOGA** was charged convicted and sentenced for the offence of rape contrary to **sections 130 (1) (2) (e) and 131(1) of the Penal Code, Cap. 16 R.E. 2002 (Now 2022)**. The particulars of the offence read that on 2<sup>nd</sup> day of December, 2016 at Soweto Mabuchani area within the City and Region of Mbeya, the Appellant had carnal knowledge of one KN (identity concealed), a girl of 15 years. The appellant pleaded not guilty to the Charge.

To prove the case, the prosecution lined up five witnesses and tendered one exhibit (P'A') a PF3 of the victim. Generally, the evidence culminated to the conviction of the Appellant was that, the victim (PW1) with her guardian (mother) (PW2), their neighbour (PW4) and the Appellant are tenants in the same house but each having her own room. That on the fateful date the victim while going to sleep to her friend's room i.e PW4 room, she has to pass by the Appellant's room. The Appellant while at his door steps dragged the victim inside his room, tied up her mouth with his shirt undresses all of his clothes and undressed the victim too and her pants then inserted his male organ to her vagina. According to her (PW1) she felt pain, after he completed the act he untied and pushed her out and throw her clothes.

The victim put on her clothes but held her pant went into the PW4's room crying, bleeding and the male sperms were discharging from her vagina. The victim informed PW4 that Anko Toga has raped her. Upon that information and seeing the victim bleeding, PW4 rushed to PW2 room and told her that PW1 has been raped by Anko Toga. Immediately, PW2 went to inspect PW1 private parts and found her bleeding and sperms on her thigh. Then PW1 told her that she has been raped by Anko Toga. At that time the Appellant entered his room, PW2

locked him from outside and started raising an alarm to the neighbour that Anko Toga has raped the Child.

Having heard the alarm, the Appellant broke his window and ran away. PW2 continued raising alarm while chasing him then with the aid of other people the Appellant was apprehended taken to police and afterwards charged as above.

On his defence the Appellant denied committing the offence, he fended that on the fateful date it was dark, that at their house there is a toilet used by many other people whom might have raped PW1. It was also his evidence that he got out through the window after he heard noises outside of which he thought they were invaded by bandits since he found his door closed from outside. The Appellant called his landlady as a witness who testified that she knows the victim with her mother, PW4 and the Appellant as her tenants.

After hearing the evidence of both sides, the trial Court found the prosecution's evidence satisfactory thus convicted and sentenced the Appellant to serve 30 years imprisonment. Aggrieved, he appealed to this court with a total of 10 grounds of appeal.

In essence the Appellant's complaints are based on the ground that the prosecution did not prove the case beyond reasonable doubt on the

reasons that; they failed to corroborate the PW1 evidence with DNA test or prove of finger prints, that PW1 was a liar witness as she did not raise an alarm when she was dragged in the Appellant's room, that PW1 did not identify her assailant as it was dark on the fateful day, that there was no evidence of a street chairman or neighbour tenants apart from PW2 and PW4 who are relatives, that PW2 did not report the incident to the hamlet chairperson, that his objection against the admission of exhibit PE1 was not considered, that the shirt alleged to cover the victim's mouth was not tendered as an exhibit, that the trial Magistrate cross-examined the prosecution and defence witnesses which is against the law, and that the defence evidence was not considered, that the case was fabricated against the Appellant due to the conflict between him and PW2.

At the hearing of the appeal, the Appellant appeared in person, unrepresented. Whereas Mr. Davis Msanga, learned State Attorney represented the Respondent/Republic. It was orally argued.

Submitting in support of the appeal, the Appellant generally recapitulated the contents of his grounds of appeal. He argued that the trial Court relied on the uncorroborated evidence of single witness as there was no DNA test or finger print. He also argued that PW1 did not

raise an alarm when she was dragged into the Appellant's room. Further that visual identification of PW1 was not conclusive as it was night time. That there was no another witness like street chairman as the witnesses were from the same family which is contrary to the decision in the case of Abraham **Saidmani v. Republic** (1971) TRL. That PW2 did not see him raping the victim but closed him from outside without calling the street chairman. That PW3 failed to mention the name of a person he examined. That no ruling was recorded on the objection he raised against the admission of the exhibit. That the case was not proved beyond reasonable doubt.

In reply, Mr. Msanga argued that the prosecution proved the case beyond reasonable doubt. That the victim was able to explain what befallen her as in rape cases good evidence comes from the victim as per the case of **Jamal Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 CAT at Mtwara. He also argued that there is no law which requires test of DNA in rape cases. Mr. Msanga further contended that none raising of an alarm by the victim did not mean that she was not raped since she explained that she was covered mouth with a cloth.

On the complaint by the Appellant that he was not identified, Mr. Msanga submitted that the Appellant and the victim knew each other as

they leaved in the same compound with PW2 and PW4 the Appellant was thus recognized. According to him, the victim immediately reported the incidence and the Appellant was arrested on the spot. He further argued that members of the same family are not barred by the law to give evidence what matters is the credibility of the witness. That in many sexual offences it rarely to have eye witness but in the instant matter the witnesses were the ones who immediately saw the victim.

As to the complaint that the trial court cross-examined the witnesses. Mr. Msanga stated that the Court is vested with powers to ask questions for clarification hence it was not wrong for the trial Court to do so. Regarding the complaint that the defence evidence was not considered, he referred this court to pages 3, 4 and 7 of the judgement that the defence evidence was considered. He however contended that the Appellant's evidence corroborated the prosecution evidence by saying that he was locked from outside and he got out through the window. Mr. Msanga backed up his argument by the case of **Joseph Mugata vs Republic**, Criminal Appeal No. 317 of 2009. He thus urged the Court to dismiss the appeal.

In his rejoinder the Appellant reiterated his submissions in chief.

I have considered the Appellant's grounds of appeal and the submission by the parties. The main issue for determination is whether the prosecution proved the case beyond reasonable doubt. In resolving the above issue, this court being the first appellate court is duty bound to re-evaluate and analyse the evidence in observant of the fact that it 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.

Having scrutinizing the evidence on record, I have found that the prosecution called the witnesses who testified what happened on the fateful date being PW1 (the victim), PW2 (the victim guardian) PW4 (the neighbour to the victim's room and the Appellant) PW3 (a doctor), and PW4 (an investigator). Be noted at the outset that there is no dispute as to whether the victim was raped. Exhibit P 'A' a PF3 and the evidence by PW3 proved that the victim was penetrated by an object suspected to be a male organ as it was found that the victim has discharge of male sperms from her vagina and has bleeding caused by bruises. The same was corroborated by the Appellant who said that the victim might have

been raped by a passer-by who might have come in using the toilets at their compound.

The question therefore, is whether the Appellant was the one who raped the victim. To answer this question the reliance can be placed at the victim's evidence. This is due to the jurisprudential position in rape cases 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 6 No. 136 of 2008, Court of Appeal of Tanzania at Mbeya (unreported).

Nonetheless, I am aware of the position that 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.

The victim's account of evidence was that, when she was going to sleep to the room of PW4 as her friend and residing in the same compound (same house) she had to pass through the Appellant's room which is



next to PW4's room. At that time the Appellant was standing on door steps of his room, he dragged her inside the room undressed all his clothes and those of the victim tied her with his shirt and raped her by inserting his male organ to her vagina. She testified further that she felt pain but she could not shout as her mouth was covered. That when the appellant completed raping her, he threw her out with her clothes. She wore them but held her pant in hands entered PW4's room crying. She told her what had befallen her and mention Anko Toga (the other name of the Appellant).

PW1's evidence was corroborated PW4 who said that when the victim went in to her room crying and holding pant in her hands, she asked what the problem was PW1 told her that Anko Toga has raped her. That she saw the victim bleeding in her private part. The same account was given by PW2 who inspected the victim after being told by PW4 that PW1 has been raped by Anko Toga. PW2 said that she found the victim bleeding and has some discharges in her private parts and on the thigh which was proved by PW3 to be male sperms.

The above evidence, in my concerted view reveals nothing than what happened to the victim. The victim's evidence was therefore true.

As to the defence evidence, the appellant stated that when he was asleep he heard some noises requesting for help. As he wanted to go outside he realized his door was locked from outside. Then decided to break the window and go outside it to rescue himself as he thought they were invaded by bandits. In my findings, this pertinent evidence has not raised any doubt to the strong evidence adduced by the prosecution. The appellant account was a mere lie for the sake of exonerating himself. With the appellant's defence, I concur with the learned State Attorney that the Appellant's statements corroborated the prosecution evidence on the account that he got out through the window and he run away before being chased and apprehended.

I am abreast of the position of the law that an accused is not required to prove his innocence, however at the same time, a lie of an accused person may corroborate the evidence of prosecution. I associate myself with the holding of the Court of Appeal in the case of **Nkanga Daudi Nkanga vs Republic**, Criminal Appeal No 316 of 2013, where it was said that:

*"Although lies and evasions on the part of an accused do not in themselves prove the facts alleged against him, they may if on material issues, be taken into account along with other matters and the evidence as a whole when considering his guilty."*

I am firm that the defence by the appellant has lend credence to prosecution witnesses in this case. I therefore, find that the Appellant was the one who raped the victim.

Additionally, there is a principle in criminal cases about the conduct of the accused before or after commission of the offence which inference would be drawn regarding the knowledge of the offence. Reference can be made to the decision of the CAT in **Elias Paul vs Republic**, Criminal Appeal No. 7 Of 2004, Cat Mwanza (unreported) where it was observed that:

*"The conduct of an accused person before or after committing an offence may also infer malice. ...It is also in evidence, and undisputed for that matter, that the appellant left the scene immediately after the killing. **If he was all that of an innocent person he would not have left the said scene.**"* (Emphasis added)

In the instant case, the prosecution evidence shows that the conduct of the Appellant when he saw PW4 going to inform PW2 about the incident he was trying to block her. Moreso, when PW2 came out from her room to PW4's room the Appellant kept telling her that she should not believe them (PW1 and PW4) as children are liars. Also, the conduct of breaking the window and get out through it and running from his place

make this Court to draw an inference regarding the Appellant's knowledge of what he did to PW1.

Having re-visited the prosecution evidence and considered the Appellant's defence, I find other complaints such as the trial Court to cross-examine witnesses, or the objection against the admission of exhibit have no leg to stand. This is because they are not shown in the record. As also argued by the learned State Attorney the court is allowed to put out questions to the witness for clarification; see **section 176 of the Evidence Act, Cap. 6 RE. 2022.**

At the end result, owing to the findings above, the Appellant's appeal lacks merit it is hereby dismissed in its entirety.

Ordered accordingly,



A handwritten signature in black ink, appearing to read "R.A. Ebrahim".

**R.A. Ebrahim**

**Judge**

**Mbeya**

**13.10.2022**