IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 47 OF 2022

(Original Criminal Case No. 13/2022 of the District Court of Wanging'ombe before Hon. J.E. Muhoni, SRM.)

MAJIDI MBANGA ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

JUDGMENT

24th May & 7th August, 2023

I.C. MUGETA, J:

The appellant was found guilty of rape and was punished with the mandatory minimum sentence of 30 years imprisonment. Aggrieved by the trial court's decision, he has appealed on nine grounds. The 5th ground is partly similar to the 1st and 6th grounds, therefore, it shall be combined with those grounds of appeal. This makes the appeal to constitute the following complaints:

1. *That the appellant was not given an opportunity to defend himself.*

2. *That the victim being of tender age was not tested whether she could understand questions put to her and the meaning of telling the truth.*
3. *That the trial court erred in relying on the evidence of PW2 in the absence of independent witnesses to support.*
4. *That the appellant was not properly identified at the crime scene.*
5. *That no relative or advocate of the appellant was called to testify in court to ascertain the voluntariness of the confession and the magistrate did not warn himself before convicting on it.*
6. *That PW4 is unreliable for failure to call material witnesses to support him who are the village chairman, kitongoji and village militia men.*
7. *That the doctor who examined the victim was not well experienced.*
8. *That the charge was not proved beyond reasonable doubt.*

The facts leading to the appellant's arrest and arraignment are that on the fateful day the victim was on her way back home from the shop.

The appellant who followed her from behind grabbed and dragged her into the nearby millet farm where he had carnal knowledge of her. The victim yelled for help which attracted her grandmother (PW2) together with other neighbours. They found the victim crying and she informed them that the appellant had raped her. The appellant was no longer there. The matter was reported to the village office (PW4). The Village Executive Office who (PW4) got the information from the *"Kitongoji"* chairperson instructed the search for the appellant to commence. Militia men arrested him the next day (13/4/2022). Upon interrogation the appellant confessed to the VEO (PW4) that he had raped the victim. The PF3 (exhibit P2) which was tendered by the clinical officer (PW5) shows that the victim's vagina had bruises.

When the prosecution closed its case, the trial court ruled that there is a case to answer. When the accused was required to enter defence he said:

> *"Your Honor, I will not give my defence, I am just leaving for the court to decide".*

At the hearing of the appeal, the appellant appeared in person. The republic was represented by Simon Masinga, learned State Attorney. The

appellant gave the respondent the right to begin and reserved his right of rejoinder.

The learned State Attorney resisted the appeal. On the 1st ground he argued that the appellant was addressed of his rights in terms of section 231(1) of the Criminal Procedure Act [Cap. 20 R.E 2022] but he chose to keep quiet, therefore, his complaint lacks merit. He cited the case of **Twalib Musa v. Republic**, Criminal Appeal No. 93/2020, High Court – Bukoba (unreported) where it was held that where the accused opts to say nothing, the court shall draw an adverse inference against him.

The learned State Attorney argued the 3rd, 5th and 6th grounds jointly. He submitted that there is no particular number of witnesses required to prove a fact. That this is the law under section 143 of the Evidence Act [Cap. 6 R.E 2022] and the holding in **Nkanga D. Nkanga v. Republic**, Criminal Appeal No. 316/2013, Court of Appeal – Mwanza (unreported). On the 2nd ground, the learned State Attorney submitted that the age of the victim while testifying was 16 years old, therefore, she is not a child of tender age as per section 127(4) of the Evidence Act.

On the complaint that the appellant was not identified, the learned State Attorney stated that the offence was committed in the evening,

therefore, there was enough sunlight which enabled the victim to identify the appellant. Regarding the caution statement he argued that the appellant did not object admission of his caution statement.

On the complaint in the 7th ground that PW5 had no experience and credentials as a clinical officer, the learned State Attorney submitted that PW5 explained that he had 9 months of experience as reflected at page 13 of the typed proceedings. Lastly, the learned State Attorney submitted that the charge was proved beyond reasonable doubts as the ingredients of the offence were proved by the victim and the PF3 tendered. He argued further that the appellant admitted in his cautioned statement to have committed the offence. That PW2 corroborated the evidence of the victim as she heard her yelling for help and found the appellant in the act. Further, that appellant chose to stay mute in his defence, therefore, the trial court was correct in drawing adverse inference against him.

In rejoinder, the appellant, being a lay man, just urged the court to accept his grounds of appeal.

In the 1st ground, the appellant's complaint is that he was not given an opportunity to defend himself. However, the record shows the appellant opted to not give his defence and left it to the court to decide. He cannot,

therefore, be justifiably heard on a complaint that he was denied his right to defend himself. I see nothing on record upon which I can fault the trial court based on this ground. This ground, is an afterthought it must fail.

The complaint in the 2nd ground is that the victim being of tender age was not tested so as to ascertain her capacity of understanding the questions put to her and the meaning of telling the truth. According to the record, the victim testified as PW1. At that time she was aged 16 years. Section 127(4) defines a child of tender age to mean a child whose apparent age is not more than fourteen years. Therefore, the victim was not a child of tender age. The complaint has no merits.

The complaint in the 3rd ground is that the trial court erred in relying on the evidence of PW2 in the absence of other independent witnesses. PW2 is the grandmother of the victim who responded to the victim's yell for help. Indeed, she said she responded with other neighbours who did not testify. However, she said they did not find the culprit, therefore, their evidence is irrelevant except on the fact that on examining the victim she saw some blood in her vagina. This evidence does not need corroboration.

The trial court's judgment shows that the court relied on the evidence of PW1, PW2 and PW5 to prove that there was penetration. The

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evidence of PW2 was not used by the trial court to conclude that it was the appellant who committed the charged offence. Therefore, the appellant's complaint does not hold water.

The complaint in the 4th ground is that the appellant was not properly identified at the crime scene. The evidence on identification of the appellant as the culprit is that of visual identification by PW1. Such evidence is regarded as the weakest form of evidence. For it to found a conviction, it must be watertight eliminating any possibility of a mistaken identity.

In the case of **Waziri Amani v. Republic** [1980] TLR 250 the Court set guidelines which the court should consider so as to satisfy itself that such evidence is watertight. They include; the time the offender was under the witness's observation, witness's proximity to the offender when the observation was made, the duration the offence was committed, if the offence was committed in the night time, sufficiency of the lighting to facilitate positive identification, whether the witness knew or had seen the culprit before the incident and description of the culprit.

In the present case, the incident took place at the evening which means it was day time. Reasonably, as argued by the learned State

Attorney, there was sunlight. The victim did not say she was familiar with the appellant. However, looking at the evidence generally, the conclusion that she was familiar with the appellant is inevitable. In her evidence she is recorded saying:

> *"When I went home Majid (pointing to the accused) followed me at the back. He then dragged to the millet farm; he undressed my clothes and then raped me".*

Her grandmother (PW2) testified:

> *"... we heard an alarm, I run ... at the area where the alarm came from ... we find my granddaughter crying. She told us that Majid, accused has raped her".*

It is my view that if the victim was unfamiliar with the appellant she would not have mentioned his name. The victim named the culprit to the first person she met immediately after the incident which is an assurance of her reliability per the holding in **Marwa Wangiti & Another v. Republic** [2002] TLR 39. The victim testified that the culprit followed her from behind, dragged her into the millet farm and had had carnal knowledge of her. This process, even if the victim did not state how long it

took, definitely took some time. For familiar people, that duration offered the victim an opportunity to unmistakenly identify the culprit as the appellant.

Further, the victim's grandmother (PW2) testified that on being informed the wrong doer is Majid, she informed the victim's father who reported to the village office. Nuru Mhamilawa (PW4) is the Village Executive Officer (VEO) of the area. She testified that on 12/4/2022 was informed through phone by "Kitongoji" Chairperson that Majid had raped a girl and ran away. On that account, she assigned militia men to look for him. This means, by all necessary implication, that there is one Majid at the area.

According to the VEO (PW4), Majid was arrested the next day (13/4/2022). When he was brought at her office, the VEO testified, the appellant confessed to have raped the victim. I find the VEO's evidence credible as there is nothing on record to suggest that she can lie against the appellant. She is an independent witness with no interest to serve. The VEO's evidence was unchallenged by the appellant on cross examination which makes facts stated proved.

In **Chamuriho Kirenge @ Chamuriho Julias v. Republic**, Criminal Appeal No. 597 of 2017, Court of Appeal – Mwanza (unreported) (at page 20) it was held that oral confession of an accused person made before a credible witness is good evidence against him. I hold that this confession corroborates the victim that she correctly identified the appellant. Consequently, I find the complaint that the appellant was not identified lacking in merits.

As the first part of the fifth ground has been disposed of through ground No. 1, I move to the 6th ground.

On the 6th ground, the appellant's complaint is that no relatives or advocate were summoned to ascertain the confession made by the appellant was voluntary and that the trial magistrate did not warn himself before convicting on the confession. According to the appellant's cautioned statement which was admitted as exhibit P1, the appellant opted to give his statement in absence of an advocate or relative. Therefore, indeed, no relative or advocate was present when his statement was recorded. However, when the said statement was tendered in court, the appellant objected to its admission as follows:

Accused: *"I have no objection though I was tortured during the interrogation."*

By this statement the appellant was questioning the voluntariness of the statement. The trial court ought to have conducted an inquiry to ascertain the truthfulness of the appellant's torture allegations. In **Yohana Kulwa @ Mwigulu & 3 Others**, Consolidated Criminal Appeal No. 192/2015 and 397/2016, Court of Appeal – Tabora (unreported) the Court echoed the requirement to hold an inquiry or trial within a trial once voluntariness of the cautioned statement is challenged. Since this was not done by the trial court, I hold that the caution statement was illegally admitted. I expunge it from the record. This renders nugatory the complaint that the trial magistrate convicted on it without warning himself of the associated dangers.

In the 7th ground of appeal, the complaint is that the evidence of PW4 is not corroborated by the *"kitongoji"* chairperson, Village Chairperson and the militia men who arrested him. In my view, the relevant testimony of PW4 (VEO) is that he instructed the arresting of the appellant who after being arrested confessed to have raped the victim.

It is my view that the evidence of the VEO on arresting or hearing the appellant confessing does not need corroboration. **Firstly**, because there is no dispute that the appellant was arrested and the appellant did not challenge it on cross examination. **Secondly**, under section 143 of the Evidence Act [Cap. 6 R.E 2022] there is no particular number of witnesses required to prove a certain fact. A witness testifying on a particular fact just need to be credible. I have already held that the VEO is credible on his testimony that the appellant confessed.

The appellant's 8th ground is that PW5 was not experienced to examine the victim. The record shows that PW5 is a clinical officer with diploma in medicine and 9 months experience at the time of the incident. Therefore, as long as she is a qualified clinical officer, experience is immaterial. Even if it was material, 9 months experience is enough experience. A clinical officer is a qualified and authorized medical practitioner to conduct medical examinations. This was the holding in **Ridhiwani Nassoro Gendo v. Republic**, Criminal Appeal No. 201 of 2018, Court of Appeal – Dar es Salaam (unreported).

The appellant's last general complaint is that the charge against him was not proved beyond reasonable doubts. It is my view that for what I

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have endeavored to demonstrate, hereinabove, the offence was proved. The victim said she was raped by the appellant. The use of the word rape means the appellant inserted his penis into her vagina. Further, PW2 found the victim's vagina bleeding and according to the clinical officer (PW4) she found the victim's vagina bruised. This evidence proved penetration.

Further, the appellant, as I have held, was properly identified. He never entered defence as he chose to stay mute which entitles the court to draw an adverse inference against him in terms of section 231(3) of the Criminal Procedure Act. This provision of the law requires the court and the prosecutor to comment on the failure of the accused to give evidence. The section uses the word "shall" when referring to the requirement of the comments. However, neither the trial magistrate nor the prosecutor made any comment. When given an opportunity to address the court, the prosecutor just prayed for a judgment date. It is my view that this omission did not occasion failure of justice, therefore, it is saved by section 388 of the CPA. In **Bahati Mkeja v. Republic**, Criminal Appeal No. 118/2006, Court of Appeal – Dar es Salaam (unreported) it was held that the use of the word shall in the CPA does not make the stated function

imperative. In case of omission of the function it is subject to the test whether injustice has been occasioned.

In the event, I find the appeal without merits. I dismiss it. The conviction and sentence are confirmed.

I.C. MUGETA

JUDGE

07/08/2023

Court: Judgment delivered in chambers in the presence of the appellant and Muzzna Mfinanga, State Attorney for the Respondent.

Sgd. I.C. MUGETA

JUDGE

07/08/2023