

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 03 OF 2023

(Arising from the District Court of Bariadi in Criminal Case No. 18 of 2022)

**JOSHUA PHILEMON NYAMUHANGA.....1ST APPELLANT
EMMANUEL MWITA CHACHA.....2ND APPELLANT**

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 26.10.2023

Date of Judgment: 09.11.2023

MWAKAHESYA, J.:

In the District Court of Bariadi the appellants Joshua Philemon Nyamuhanga (1st appellant) and Emmanuel Mwita Chacha (2nd appellant) were jointly and together charged with the offence of gang rape contrary to sections 130(1)(2)(b) and 131A(1) and (2) of the Penal Code. The trial court convicted the appellants and sentenced them to life imprisonment.

It was the prosecutions case that on the night of 11.02.2022 at Dutwa area, Bariadi District, the appellants broke into the room of one Jenipha Juma, **PW1**, who was an attendant at Mwasinasi Guest House and forcefully took her to nearby Africa Raha Guest House where they

proceeded to take turns raping her. Eventually, some watchmen managed to apprehend the appellants. During the hearing the prosecution paraded a total of five (5) witnesses including the victim and tendered three exhibits: a PF3 report (exhibit P1) and cautioned statements of the appellants. The appellants were the only witnesses for the defence.

Aggrieved by the decision of the trial court, the appellants filed a joint petition of appeal which rests on four grounds:

1. That, the trial court erred in law and in fact when it did not properly evaluate the evidence and ignored the appellants' defence therefore arriving at a wrong decision;
2. That, the learned trial magistrate erred in law and fact to hold conviction on weak evidence without calling the attendant of Africa Raha Guest to testify before the court that the victim was raped in that guest house;
3. That, the prosecution side failed to prove the case while even the visitors book of Africa Raha Guest where the victim is said to had been taken was not brought before the court; and
4. That, the learned trial magistrate erred in law and in fact to pass sentence without any independent cell leader of that area.

At the hearing of the appeal the appellants appeared in person and fended for themselves, while Ms. Happy Chacha and Ms. Wampumbulya Shani, learned State Attorneys represented the respondent Republic. Both appellants elected to begin to address the court and the respondent to reply thereto.

Arguing their appeal, both appellants being laypersons did not advance any intelligible submissions apart from adopting and reiterating the grounds of appeal contained in their joint petition of appeal and urging the court to allow the appeal so that they can rejoin their families and serve the nation.

In reply Ms. Chacha submitted that, the respondent was resisting the appeal and therefore supported the conviction and sentence of the trial court. She submitted that, the trial magistrate evaluated the appellants' evidence as seen at pages 9 to 10 of the judgment, and was of the view that the appellants' defence did not shake the prosecution's case.

She submitted further that, the appellants relied on *alibi* but had not given prior notice on the reliance of it as a defence.

Regarding the second, third and fourth grounds of appeal, Ms. Chacha submitted that, the same lacks merit since the law does not impose on the prosecution what witness to bring to court in order to prove a charge. She cited section 143 of the Evidence Act which state that no particular number of witnesses is required to prove a fact. She submitted further that, the prosecution did not see the importance of bringing a witness from Africa Raha Guest House, since the charge the appellants were facing was one rape and in a charge of rape the best witness is the victim herself as it was held in the case of **Selemani Makumba vs Republic** [2006] TLR 379.

In rejoinder the appellants reiterated their stance that their appeal is meritorious and the second appellant reminded that at page 6 of the proceedings the victim stated that she did not know him.

Having gone through the records and the parties' submissions I will start by addressing the first ground of appeal which is to the effect that the trial court did not properly evaluate the evidence and ignored the appellants' defence. As submitted by the learned State Attorney, at pages 9-10 of the judgment the trial magistrate evaluated the appellants' testimonies and arrived at a conclusion that the court was satisfied with

the prosecution's version of events of that fateful day. Furthermore, **PW1**, the victim was able to testify in great details her ordeal on the night of 11.02.2022 until the morning of 12.02.2022. Although the trial court's evaluation of the appellants' evidence leaves a lot to be desired, this court, being an appellate court is in just as good a position as the trial court when it comes to evaluating the weight of any evidence properly on record, see **Nyerere Nyague vs Republic**, Criminal Appeal No. 67 of 2010 CAT (unreported) at page 14. Therefore, this court will proceed to evaluate the defence evidence and weight it against the prosecution's evidence.

PW1 being the victim of the sexual offence gave sworn evidence on how the appellants held her against her will and proceeded to rape her. In the absence of any good and cogent reasons for not believing her, her evidence is entitled to credence. Basing on what is on record I do not see any reason to doubt **PW1**. Her testimony as to how she was taken by the appellants is also partly corroborated by **PW2** who testified on how both appellants attacked and injured him which attack was the precursor to the appellants' mischief on the night in question. Also corroborating **PW1's** evidence was the evidence of **PW3** who took part in apprehending the appellants. This evidence not only shows the events prior and immediately

after the crime, but it also puts the appellants at the scene of crime and therefore makes their defence which is to the effect that they were not at the scene of the commission of the heinous act on **PW1** incredible.

The evidence of **PW1** and **PW3** regarding the arrest of the first appellant also tallies. **PW3** testified that the 1st appellant had a sword when he was apprehended, this evidence tallies with that of **PW1** who also stated that the 1st appellant had a sword with him when he went out of the room used for the commission of the rape and was subsequently apprehended.

There was also exhibit **P3** which is the second appellant's cautioned statement where he confessed to carrying out the offence. Exhibit P3 was admitted in evidence after an inquiry was conducted in order to determine its admissibility. The second appellant narrated in great details on how he participated in the rape of **PW1**.

Indeed, **PW1** is recorded to have responded that she did not know the second appellant when she was cross examined by him, but that must be taken within the context of the question put to her, unfortunately through the records of trial court's proceedings we are not privy to what was asked. But that should not detain us because some light is shed on

what **PW1** meant during re-examination at page 8 of the proceedings.

PW1 is recorded to have stated:

"I don't know you. I don't know his name, I only know him by face, they were together when they raped me..."

This clearly shows that, what **PW1** meant was that she was not acquainted enough with the second appellant as to know him by his name, but she was positive that he was with the first appellant when she was raped by them. In light of this, the first ground of appeal fails.

Since grounds two, three and four of appeal are intertwined I will proceed to deal with them jointly. As submitted by the learned State Attorney, the law does not impose on the prosecution the number of witnesses it's suppose to produce in order to prove a charge. Likewise, section 143 of the Evidence Act categorically states that:

"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."

The prosecution was at liberty to bring only those witnesses it deemed sufficient to prove the charge that was facing the appellants so long as adverse inference will not be drawn with regards to those

witnesses who it failed to bring. The question to ask here is that, can adverse inference be drawn for failure for the prosecution to bring an attendant of Africa Raha Guest, an "independent cell leader of the area" or even visitors book of Africa Raha Guest?

The answer can be found in the testimonies of the witnesses who testified during trial. **PW1**, as mentioned previously, is the victim and the position of the law is that in proceedings involving sexual offences, evidence of the victim alone, after assessing credibility, is enough to ground a conviction. Section 127(6) of the Evidence Act provides:

"(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

This highlights that, the evidence of **PW1** alone was enough to ground a conviction. As submitted by the learned State Attorney this position is also supported by the cited case of **Selemani Makumba vs Republic** (supra) where at page 384 the Court stated that:

"...true evidence of rape has to come from the victim..."

Moreover, as highlighted before there is also evidence of **PW2** who was attacked by the appellants when they were furthering their common intention as well as that of **PW3** who took part in the apprehension of the appellants. Their testimonies were enough for the prosecution to prove their case. A local ten cell leader, an attendant of Afrika Raha Guest House or the visitors' book would have certainly been superfluous, and in actual fact none of them were even mentioned to have witnessed the events of that night. Grounds two, three and four of appeal are hereby dismissed as well and in turn, this appeal is dismissed in its entirety.

DATED at SHINYANGA this 9th day of November, 2023




N.L. MWAKAHESYA

JUDGE

09/11/2023