IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 184 OF 2017

SILAS SENDAIYEBUYE MSAGABAGO .....APPELLANT

VERSUS

THE D.P.P. .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mbeya)

(Mgetta, J.)

dated 15th day of May, 2017

in
DC. Criminal Appeal No. 58/2015

JUDGMENT OF THE COURT

30th October, & 6th November, 2019

MKUYE, J.A.:

The appellant SILAS SENDAIYEBUYE @ MSAGABAGO was arraigned before the District Court of Mpanda at Mpanda for the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, Cap 16 RE 2002. He was convicted and sentenced to 30 years imprisonment. He appealed to the High Court (Mgetta, J.) but his appeal was dismissed in its entirety. This is now his second appeal.

It was alleged before the trial court that on October 2014 at Busongola village at Refugees area within Mpanda District in Katavi Region, the appellant did unlawfully have sexual intercourse with FT (name withheld) a girl of 16 years old. When the charge was read over to him he pleaded not guilty.

The prosecution marshaled four witnesses to prove its case and in defence, the appellant testified alone. FT (PW1), testified that sometimes in March, 2014 she was approached by the appellant that he wanted to marry her. FT declined the offer as she was still a student. Sometimes in August, 2014 when PW1 went to Busogola Village to sell cassava, the appellant seduced her, gave her Tshs 1,500/= for buying a vest then he managed to have sexual intercourse with her. PW1 testified further that on another Sunday of October 2014, when she went to the same village to sell cassava, the appellant again had sexual intercourse with her.

She further told the court that in September, 2014, PW2 who was her teacher was informed by a certain Fadhili Hosea John that she was pregnant. She was taken to the dispensary where upon examination she

was found to be six months' pregnant. On being tasked to mention the person who was responsible for her pregnancy she mentioned the appellant. PW1 testified further that on 3rd November 2014, she gave birth to twins but both died shortly thereafter.

Cornell Peter Mwanandenje (PW2), who was PW1's teacher testified to the effect that on 2/9/2014 he received information that FT was pregnant. On questioning her, she denied to be pregnant. The school staff resolved that she be taken to the dispensary and on being examined at the said dispensary she was found to be six months' pregnant and she mentioned the appellant to be responsible for her pregnancy. They caused the appellant to be arrested.

WP 7894 PC Huruma (PW3), testified to have on 8/ 9/2014 received the appellant who was brought by PW2 on allegation that he had impregnated a student. She recorded the statement of PW1 who told her that it was her first time to have sexual intercourse.

Buchumi Nikodemo (PW4), a Clinical Officer testified to have on 15/9/2014 at Mishamo Health Centre conducted pregnancy test on PW1 and that the result revealed that she was six months' pregnancy. He filled the PF3 which was admitted in evidence as exh. P1.

In defence, the appellant gave a very brief evidence. Essentially, he told the trial court that, as PW1 said in her evidence that she consented, the charge against him be dismissed and he be set free.

The trial court found that the evidence of PW1, PW2, PW4 and exh. P1 proved that PW1 was raped by the appellant. In the High Court the decision of the trial court was upheld.

Still aggrieved, the appellant filed this appeal on six (6) grounds of appeal challenging the decision of the High Court. However, it transpired that grounds Nos. 2 to 6 were new as they were not canvassed by the first appellate court. From that premise, Mr. Njoloyota Mwashubila, the learned Senior State Attorney who represented the respondent Republic, while relying on the case of **Godfrey Wilson v. Republic,** Criminal Appeal No.

168 of 2018 (unreported) urged the Court to refrain from dealing with such grounds for lack of jurisdiction.

On our part, we hasten to underscore that this Court has, times without number taken the position that it will not look at new grounds of appeal. For instance, in the case of **Godfrey Wilson** (supra) while quoting with approval the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015 (unreported) we stated among other things that:

> *"... It is now settled that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; and not on new matters which were not raised nor decided by neither trial court nor the High Court on appeal".*

See also **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006; and **Abeid Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 (both unreported).

In this regard, since grounds Nos. 2 to 6 are new as were not canvassed by the first appellate court, we shall not deal with them. Instead, we shall deal with the remaining first ground of appeal which is to the effect that:

> *"The prosecution failed to prove the charge against the appellant beyond reasonable doubt as mandatorily required by law".*

At the hearing of the appeal on 30th October, 2019, the appellant appeared in person, unrepresented; and the respondent Republic enjoyed the services of the said Mr. Njoloyota Mwashubila, learned Senior State Attorney.

When we called upon the appellant to elaborate the remaining ground of complaint, he basically, did not given us cooperation as he did not respond to some of our questions we had posed to him in view of paving the way for hearing the appeal. At most he asked the Court to set him free.

Nevertheless, on his part, Mr. Mwashubila declared his stance of supporting the appeal. He argued that the prosecution failed to prove its case beyond reasonable doubt as the evidence of PW1 who was the key witness was marred with material contradictions and inconsistencies which rendered it incredible. While conceding that the best evidence in a sexual offence case comes from the victim as was propounded in the case of **Selemani Makumba v. Republic** [2006] TLR 379, he pointed out to us areas which were contradictory. To begin with, the learned Senior State Attorney argued that the evidence of PW1 was at variance with the charge sheet. He said, while the charge sheet shows that the offence was committed in October 2014, the evidence of PW1 shows that she had sexual intercourse with appellant in August 2014; and that PW1 had told PW3 that, it was the first time to have sexual intercourse. Yet, Mr. Mwashubila argued, there is undisputed evidence that in September, 2014 after PW1 was subjected to pregnancy test was found to be six months' pregnant and she gave birth to twins on 3/11/2014. He was of the view that, under normal circumstances it was impossible for a person who had sexual intercourse in August for the first time to be 6 months pregnant in

September, 2014. He said, the courts below did not consider such contradictions and, had they done so, they would have found that the witness (PW1) was not truthful. In this regard, the learned Senior State Attorney contended that, PW1 was not a credible witness, and if her evidence is found to be incredible, there is no other evidence to support the charge.

On prompting by the Court whether the appellant had admitted involvement to the offence in his defence, Mr. Mwashubila quickly submitted he did not admit but rather he was referring to the evidence of PW1 who said that she consented and that if that was the case he be set free. In the end, the learned Senior State Attorney prayed to the Court to allow the appeal and release the appellant from custody.

The issue to be determined by the Court is whether the two courts below properly evaluated the evidence and credibility of PW1.

As we have alluded to earlier on, this is a second appeal. We take cognizance of the settled law that, this being a second appeal the Court should not interfere with the concurrent findings of facts unless the courts below have misapprehended the substance, nature and quality of such evidence which resulted into unfair conviction in the interest of justice. - See **Abdallahman Athuman v. Republic,** Criminal Appeal No. 149 of 2014, **Omari Mussa Juma v. Republic,** Criminal Appeal No. 73 of 2005; **Josephat Shango v. Republic,** Criminal Appeal No. 62 of 2012; and the **Director of Public Prosecution v. Simon Mashauri**, Criminal Appeal No. 394 of 2017 (all unreported).

There is no doubt that in this case that the trial court and the first appellate court basically found the appellant guilty of the offence on the basis of evidence of prosecution witnesses and particularly that of PW1 whom they found to be credible. Much as we appreciate, as was rightly contended by Mr. Mwashubila that, the best evidence in the sexual offence case comes from the victim - See **Selemani Makumba's case** (supra), we think that it does not mean that such evidence has to be taken

wholesome, believed and acted upon to mount a conviction against the accused without taking into account other prevailing circumstances - See **Pascal Sele v. Republic,** Criminal Appeal No 23 of 2017 (unreported).

At this juncture, we need to revisit the principles which guide credibility of witnesses in that the assessment of the credibility of witnesses particularly on the question of demeanour lies on the trial court. In the case of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported), this Court propounded the manner credibility of witnesses can be assessed/ determined. It stated as follows:

> *"Maybe we start by* ***acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned.*** *The credibility of a witness can also be determined in two other ways;* ***one, when assessing the coherence of the testimony of that witness.*** ***Two,*** *when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these occasions the* ***credibility of a***

witness can be determined even by a second appellate court when examining the findings of the first appellate court."

[Emphasis added]

Also in the unreported case of **Rashidi Shabani v. Republic**, Criminal Appeal No.310 of 2015, this Court in no uncertain terms stated as hereunder:

*"...But apart from demeanour, credibility of witnesses can also be determined in other ways. **One**, when assessing the coherence of the testimony of such witness. **Two**, when the testimony of that witness is considered in relation with other witnesses, including that of the accused person. In those ways, the credibility of witnesses may be determined even by a second appellate court when examining the findings of the first appellate court. (See **Shabani Daudi Vs. Republic**., Criminal Appeal No. 28 of 2001 (Unreported) followed in **Abdalla Mussa Mollel Banjor Vs. Republic**., Criminal Appeal No. 31 of 2008 (Unreported)."*

The Court went on to state that:

> *"In other words in evaluating the testimony of a witness* ***the Court may take into consideration all the circumstances of the case, such as whether the testimony is reasonable and consistent with other evidence, the witness's appearance, conduct, memory and knowledge of the facts, the witness's interest in the trial*** *and the witness's emotional and mental state."*
>
> [Emphasis added]

In the matter at hand, Mr. Mwashubila's argument is that PW1's evidence which was mainly relied in mounting a conviction against the appellant falls short of credibility in that it was at variance with the charge sheet and was coupled with contradictions and inconsistences. We think, we need to look closely at the evidence of PW1 as other witnesses gave a hearsay evidence.

We have considered the submission by the learned Senior State Attorney which has been supported by the appellant and the entire record of appeal. In this case it is without dispute that the appellant was

convicted mainly on the basis of the evidence of PW1 who was found to be credible that she was raped by none but appellant. The other evidence was that of PW2, her teacher, whose testimony was to the effect that after examination on 2/9/2014, PW1 was found to be six months' pregnant; PW3 who testified to have received PW1 and that after examination she was found to be six months' pregnant; and PW4 who examined PW1 and confirmed that she had a six months' old pregnancy. As it is, the only evidence as to when and who raped her is that of PW1.

The sequence of events as was explained by PW1 is that in March 2014 she was approached by the appellant to marry her but she refused. In August he seduced her and had sexual intercourse with him. PW1 told PW3 when recording her statement that it was her first time to have sexual intercourse meaning that she had never had any affair with a man before. At another stage of her testimony she said, after one month she missed her monthly menses. On 2/9/2014 her teacher (PW2) got informed of her pregnany and on being questioned about it, she denied. This led her to be examined at the dispensary and was found to be six months' pregnant. It

is also on record that on 2/9/2014, PW2 went to the police with PW1 and the appellant and PW1 was taken to the Health Centre for pregnancy test whereupon PW4 confirmed her six months pregnancy. In her testimony at another stage she told the court that to have had sexual intercourse with appellant in October 2014 and that she gave birth to twins on 3/11/2014 which died immediately thereafter.

On our keen scrutiny of PWI's evidence, we find that it falls short of cogency and coherence. It is not consistent as to when she was raped. We say so for several reasons. We shall explain. **One,** though the charge, believed to be extracted from the information availed to the police by PW1 shows that the offence was committed in October 2014, PW1 said she had an affair with appellant in August 2014. We wonder why the charge did not cover the period from August to October if PW1 was truthful on the period when the alleged offence was committed. Moreover, if it is taken that the appellant had carnal knowledge of PW1 in October as stated in the charge sheet, we fail to figure out as to how PW1 was found to be six months' pregnant before even the date of incident. We have cited such

discrepancy not to show that pregnancy cannot prove rape but just to show that her claim that in September 2014 she was six months' pregnant even before the date of the commission of the alleged offence is highly improbable in the circumstances of this case. **Two,** PW1's assertion that she had an affair with appellant for the first time is vague. This is so because, assuming she had an affair for the first time in October as shown in the charge, we find no plausible explanation as to how in September 2014, she was six months pregnant. Even if we take that she had such sexual intercourse with appellant in August 2014, still she would not have been six months pregnant in September 2014. At most she would have been hardly one month. But again, assuming further that she had sex with appellant in the period between August and October 2014 it would have been impossible to have given birth to twins on 3/11/2014 because her pregnancy would have been hardly three months old. **Three,** there is evidence by PW2 and PW3 that the appellant was taken to the police. If the appellant was handed over to the police in September, we ask ourselves as to how PW1 could have had sex with him because even the

record of appeal shows that he was in custody when trial of his case was going on.

Looking at the discrepancies we have pointed out, we think, they depict that PW1 was not sure on what she was testifying; or she was trying to hide some information which might have been detrimental to her; or she was exaggerating on something. All these contradictions show that she gave evidence which was a suspect. It is unfortunate that both the trial court and the first appellate court did not take those inconsistencies which were crucial under scrutiny. Had they considered such discrepancies, we think, they might have come to the conclusion that PW1 was not a truthful or rather credible witness worth believing.

We are aware that on contradictions of dates, the law is also well settled that not every inconsistency and or contradictions will make a prosecution's case to flop. This position was taken by the Court in the case of **Bakari Hamisi Ling'ambe v. Republic,** Criminal Appeal No. 161 of 201 which cited the case of **Said Ally Ismail v. Republic,** Criminal Appeal No. 214 of 2008 (both unreported) as hereunder:

> *"...however, it is not every discrepancy in prosecution witness that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecutions will be dismantled ..."*

See also **Ally Kinanda & Others v. Republic**, Criminal Appeal No. 206 of 2007; **Samson Matiga v. Republic**, Criminal Appeal No. 205 of 2007; **Omary Kasanga v. Republic,** Criminal Appeal No. 84 of 2011 (all unreported).

In the matter at hand, we agree with the learned Senior State Attorney that PW1's evidence had material inconsistencies and contradictions which went to the root of the matter. And if PW1's evidence which was crucial in this case is discredited for being incredible, the remaining evidence cannot stand because the other witnesses testified on what they were told by PW1. We thus, find the appellant's complaint that the charge was not proved beyond reasonable doubt to have merit and allow it.

With the foregoing, we find the appeal merited and hence, allow it, quash the judgment, and set aside the sentence meted out to the appellant. We order that the appellant **SILAS SENDAIYEBUYE MSAGABAGO** be released forthwith from custody unless otherwise held for other lawful reasons.

Order accordingly.

DATED at **MBEYA** this 6th day of November, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of November, 2019 in the presence of the Appellant in person and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL