IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUGASHA, J.A., MWANGESI, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 398 OF 2018

IBRAHIM HAULE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Banzi, J.)

dated the 5th day of September, 2018
in
DC Criminal Appeal No. 11 of 2018

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JUDGMENT OF THE COURT

11th & 17th August, 2020.

MWANGESI, J.A.:

In the District court of Kilolo at Kilolo, the appellant herein going by the name of IBRAHIM s/o HAULE, was tried for the offence of rape contrary to the provisions of sections 130 (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2002 (**the Code**). The particulars of the offence were that on the 26th day of February, 2017 at about 19:00 hours at Nyawegete village within Kilolo District in the Region of Iringa, the appellant raped a girl aged 14 years whom for the sake of hiding her identity we will refer to her as FJ, who was a schoolchild.

When the charge was read over to the appellant, he protested his innocence and thereby necessitating the prosecution to summon four witnesses to establish his guilt. The witnesses paraded by the prosecution included the victim of the incident FJ, who gave her testimony as PW1, Ang'ombwe d/o Mponzi (PW2), Fida Selemani Samatta (PW3) and Eloyi s/o Joseph (PW4). The prosecution also tendered one exhibit which was the medical examination report of the victim contained in a PF3 (exhibit P1). On his part in defence, the appellant relied on his own sworn testimony which was supplemented by the testimonies of two defence witnesses that is, Antony Udamwa (DW2) and Zefania Kalenga (DW3).

The trial Resident Magistrate upon considering the evidence which was placed before hlm, was satisfied beyond doubt that the appellant had committed the charged offence. He therefore convicted him as charged and sentenced him to the mandatory term of thirty (30) years' imprisonment. Additionally, the appellant was ordered to pay compensation to the victim to the tune of TZS Five Million (5,000,000/=). Aggrieved, the appellant un-successfully challenged the finding of the trial court and the sentence meted out to the High Court of Tanzania sitting at Iringa sub-registry.

In this second appeal to the Court, the appellant's grievance against the findings of the first appellate Court, has been premised on eight grounds which read as hereunder: -

1. *That, Honourable Madam Judge, erred in law for holding that the testimony of PW4 corroborated that of PW1 without taking into account that his testimony was taken without promising to tell the truth as required under the law.*
2. *That, the High Court wrongly concluded that the evidence of PW3 proved penetration without drawing an adverse inference towards PW3's testimony that if exactly examined the victim on the 27th day of February, 2017 why the PF3 was signed and dated the 28th day of February, 2018.*
3. *That, Honourable Madam Judge, contradicted herself to rely on the time mentioned by the prosecution side to be sufficient proof of identification without taking into account that it was mere approximation and furthermore, she did not explain clearly the circumstance of Iringa region during the said month.*
4. *That, Honourable Madam Judge, wrongly dismissed the appellant's appeal without addressing her mind properly that the testimony of*

PW1 is not only contradictory but also fabricated and not credible to form the basis of conviction and sentence.

5. *That, Honourable Madam Judge, erred in law for holding that the findings of PW3 that he saw bruises and fluids are sufficient proof of penetration without taking into account that in the eyes of law are insufficient.*
6. *That, Honourable Madam Judge, erred in law for denying that the contents of the PF3 were explained before being admitted as exhibit without taking into account on the trial court's records that this issue is clearly open.*
7. *That, the High Court, erred in law for holding that the trial court was right to disregard the appellant's defence of alibi without addressing its mind properly that the said court was duty bound not to disregard the same.*
8. *That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt.*

On the date when the appeal was called on for hearing before us, the appellant who was present in Court, was represented by Mr. Jally Willy Mongo, learned counsel, whereas the respondent/Republic, had the services of Ms. Pienzia Nichombe, learned State Attorney.

Before we embark on considering the merits and/or demerits of the appeal, we think it apposite albeit in brief, to give the factual background leading to the decision which is being impugned. It is just straight forward that the appellant and the victim of the incident, were both during the occurrence of the incident, residing in the village of Nyawetege in Kilolo District. While the appellant was engaging in teaching at Nyawetege primary school, the victim (FJ) was a schoolchild studying in standard seven at that school.

On the 26th day of February, 2017 during evening hours, the mother of FJ (PW2) left her home and went to a shop to buy some necessities, leaving FJ and her brother (PW4) at home. At around 19:00 hours which was before PW2 returned back home; FJ and PW4 who were preparing supper inside their house, heard the voice of the appellant from outside, calling PW4 by his name. PW4 got out to respond to the call. When PW4 met the appellant outside, he was asked in regard to the whereabouts of his mother. Upon informing him that she had gone to the shop, he inquired about the whereabouts of his sister (PW1). PW4 told him that she was inside whereupon the appellant, rushed inside the house where he got hold of PW1's hand and dragged her outside to a nearby maize field, where he ravished her.

Nonetheless, before the appellant could accomplish his mission, PW2 returned back home from the shop only to find that FJ was not around. When she inquired from PW4 about her whereabouts, she was told that she had been taken by the appellant to the maize field. On moving around to check, she saw from afar two persons lying on the ground in the maize field. Her attempt to approach them made the appellant to flee away leaving PW1 lying on the ground naked. When she inquired from FJ as to what they had been doing, her response was that the appellant had been raping her. Indeed, on inspecting her private parts, she satisfied herself that her daughter (JF) had been raped. She instantly went to report the incident to the Village Executive Officer (VEO) first, then she went to report to the Police Station, where a PF3 was issued so that FJ could go and get examined at the Hospital.

Meanwhile in the same night, the VEO accompanied by the Hamlet chairman, mounted a search for the appellant whom they managed to find at his home. He was arrested and taken to the Police Station where he was eventually charged with the offence of rape the subject of this appeal.

On his part in defence, the appellant strongly resisted to the allegation that he had raped PW1. He complained to have been arrested by the VEO and the Hamlet chairman while sleeping at his home for no

apparent reasons and charged with the offence of rape against PW1, a thing which he knew nothing about it. Nevertheless, as alluded earlier, the trial Resident Magistrate convicted the appellant of the charged offence and hence, this second appeal.

When Mr. Mongo was invited by the Court to argue the grounds of appeal, he commenced by praying to the Court to abandon grounds number 2, 3, 4, 5 and 6 a prayer which granted un-objected, and thereby remaining with grounds number 1, 7 and 8. In his amplification of the first ground, Mr. Mongo submitted that the testimony of PW4, ought not to have been acted upon by the lower courts because it was improperly procured. He argued that the witness being of tender age, had to promise to tell truth to the court, before he could be permitted to testify. Since the said procedure was not complied with, the counsel argued that it offended the provisions of section 127 (2) of the Evidence Act, Cap 6 R.E. 2002 (**TEA**) as amended by Act No. 4 of 2016. To back up his submission, he referred us to the decision in **Godfrey Wilson Vs Republic,** Criminal Appeal No. 168 of 2018 (unreported). In that regard, he requested the Court to expunge the evidence of PW4 from the record.

In expounding the seventh ground of appeal, Mr. Mongo submitted that the defence of *alibi*, which was raised and relied upon by the appellant

and corroborated by the testimonies of the two witnesses who he summoned in his defence, was not considered by both the trial Court as well as the first appellate court. According to his submission, the said omission prejudiced the appellant's right. He thus humbly implored us to do the needful by noting such infraction and give the said defence of *alibi* of the appellant, the weight it deserved by allowing the appeal and setting the appellant at liberty.

With regard to the eighth ground in which the challenge is pegged on the evaluation which was made by the lower courts to the entire evidence on record, Mr. Mongo argued that once his prayer in respect of the first ground is granted by the Court that, the evidence of PW4 be expunged from the record, the remaining evidence from PW1, PW2 and PW3 falls short of establishing the commission of the offence by the appellant. According to his proposition, the identification purported to have been made to the appellant by PW1, was doubtful because the circumstances which enabled her to do so were not explained.

Submitting on the testimony of PW2, the counsel argued that even though the witness claimed to have inspected FJ and satisfied herself that she had been raped, the same had nothing to do with the appellant who

was not at the scene of the crime and hence, not concerned with whatever happened to FJ.

As regards to the testimony of PW3, Mr. Mongo discredited it arguing that, the outcome of the observation he made after examining PW1, had no impact to the appellant who was not concerned with whatever happened to her. He concluded his submission by urging us to allow the appeal and set the appellant at liberty.

In response, Ms. Nichombe sailed in the same boat with her learned friend in so far as the first ground of appeal was concerned. It was her submission that indeed, the testimony of PW4 had to be expunged because he gave it without promising to tell truth to the court and not lies as required by the law. She however hastened to add that, the removal of the testimony of PW4, did not in any way distract the cogency of the evidence from the other prosecution witnesses which sufficiently implicated the appellant to the charged offence. In so asserting, she sought refuge from the holding in **Joseph s/o Leko Vs Republic,** Criminal Appeal No. 124 of 2013 (unreported). She therefore asked the Court to sustain the first ground of appeal, which had no impact to the culpability of the appellant to the offence which he stood charged with.

Responding to ground number seven which concerned the defence of *alibi* which was relied upon by the appellant, the learned State Attorney submitted that apart from the fact that the appellant neither lodged any prior notice that he would rely on the defence of *alibi* as required by the law, nor testified in his defence that he was not at the scene of crime on the fateful date, the lower courts considered the defence of *alibi* which was raised on his behalf by the witnesses which he summoned in his defence. The consideration of such defence by the trial Resident Magistrate, is reflected on pages 24 and 25 of the record of appeal, while the consideration of the same by the learned Judge in the first appellate Court, is reflected on pages 46 and 47 of the record of appeal. In both instances, the alleged defence of *alibi* by the appellant was found to be of no help to the appellant. We were therefore, asked to dismiss this ground for having been raised without any basis.

Lastly, on the eighth ground wherein the complaint is on the evaluation of the entire evidence, Ms. Nichombe submitted that the case against the appellant, was established to the hilt. She referred us to the holding in **Joseph Leko's** case (*supra*), where it was stated that the best evidence of rape is that which comes from the victim. In the instant appeal according to her proposition, PW1 did clearly and coherently explain on

how the appellant, who had been her teacher for six years, arrived at her home, got hold of her hand and dragged her to the maize field where he ravished her. That fact was corroborated by PW2 who arrived at the scene of crime a short moment before the appellant escaped leaving FJ lying on ground in the maize field naked.

PW2 testified further to the effect that when she examined FJ, she found that there was fresh semen on her private parts a fact which was further corroborated by the testimony of PW3. The testimony by PW3, a doctor who examined the victim after being taken to her hospital on the same night, was that she discovered bruises on her vagina as well as fresh semen which was being discharged from her vagina. With such evidence, Ms. Nichombe requested us to find no merit in this appeal and that we be pleased to uphold the concurrent findings of the two lower courts, the sentence which was meted out against the appellant and the resultant order for compensation, she concluded.

The germane issue which stands for our determination in the light of the grounds of appeal raised by the appellant and the submission from either side above, is whether the appeal at hand is founded. We are going to resolve it by looking at the grounds raised that is, the first, seventh and

eighth grounds in the way they were argued by the counsel, by treating them as the first, second and third grounds respectively.

Starting with the first ground in which the testimony of PW4 was challenged, it is on record that at the time when this witness was giving his evidence in court, he was aged 12 years. By virtue of the stipulation under section 127 (2) of **TEA** as amended by Act No. 4 of 2016, the witness has before giving his testimony, to promise that he would tell truth to the court. The provision reads *verbatim* that: -

> *"A child of tender age may give evidence without taking oath or making an affirmation but* ***shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.***"
>
> [Emphasis supplied]

The expression of the phrase "a child of tender age" has been given under sub-section 4 of section 127 of **TEA** which reads that: -

> *"For the purposes of sub-sections 2 and 3, the expression "a child of tender age means a child whose apparent age is not more than fourteen years."*

Since as earlier indicated above, at the time when PW4 was giving his testimony he was aged twelve years, he squarely fell within the

expression of tender age and therefore, compliance with the requirement provided under section 127 (2) of **TEA** was imperative. Nevertheless, from what could be gathered on page 12 of the record of appeal where the witness gave his testimony, the requirement was not complied with. In the circumstances, we are constrained to agree with the concurrent views of the learned counsel of either side that, the evidence of this witness was improperly recorded and this ground has to sail through. We thus expunge the testimony of PW4 from the record.

The complaint in the second ground is that the defence of *alibi* which was relied upon by the appellant was not considered by the two lower courts. On our part, upon revisiting the record of appeal, we are inclined to side with Ms. Nichombe that this complaint is farfetched because the two lower courts considered the defence of *alibi* which was relied by the appellant. Starting with the trial court, it is reflected on pages 24 to 25 where the trial Resident Magistrate stated that: -

> *"The defence raised by the accused and supported by DW2 and DW3 although given without prior notice as per section 194 (4) of the Criminal Procedure Act and set-up after the close of the prosecution case yet I find that his defence of alibi cannot preclude the possibility of been (sic) at the house of PW1 then later be seen at the house of*

DW2, as stated by DW2 that from his house to PW1's house is not far away is walking distance of about 5 minutes, thus he could have had sexual intercourse with PW1 then later seen in the house of DW2. In this regard the purported defence of alibi in the circumstances is farfetched and an afterthought"

On the part of the first appellate Judge in the High Court, it is indicated that after having analyzed the procedure in regard to the reliance on the defence of *alibi* by accused persons, she stated on page 47 of the record of appeal that: -

"Looking at his evidence and if the appellant really wanted to raise the defence of alibi one would expect a clear statement from him stating categorically his whereabouts during the time of the incident. Surprisingly, the appellant didn't say anything concerning his whereabouts at the time of the incident but he brought two witnesses to plead the said defence on his behalf No wonder the trial magistrate concluded that his defence is an afterthought."

What is apparent in the light of the two excerpts quoted above, is the fact that the contention by the appellant that his defence of *alibi* was not considered by the two lower courts, is unfounded. The said defence was

considered and the reasons for rejecting it were given as shown herein above. That said, we find no merit in this ground which we dismiss.

Evaluation of the entire evidence which was placed before the trial court, is the gist of the third ground. While Mr. Mongo submitted that the evidence did fail to establish the guilt of the appellant beyond reasonable doubt, his learned friend on the other hand was of the firm view that, the evidence sufficiently established that the appellant was guilty as charged. After giving ourselves enough time to dispassionately go through the testimonies of PW1, PW2 and PW3 we are persuaded to side with the learned State Attorney.

As it was correctly submitted by Ms. Nichombe, in cases of rape the best evidence to prove its commission is that which comes from the victim. We held in **Selemani Makumba Vs Republic** [2006] TLR 379 that: -

> *"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant that there was penetration."*

See also: **Joseph Leko Vs Republic** (*supra*), **Alfeyo Valentino Vs Republic**, Criminal Appeal No. 92 of 2006 and **Shirimana Isaya and Another Vs Republic,** Criminal Appeal No. 494 (both unreported).

On the basis of the above authorities, what was imperative in the instant appeal, regard being had to the fact that during the alleged rape, the victim (PW1) was aged 14 years, was proof that there was penetration as consent was irrelevant. The proof of penetration according to the available evidence on record, came from PW1 herself who thoroughly told the court on what the appellant did to her on the material date. Part of her testimony as reflected on page 9 of the record of appeal was that: -

> "--- *he entered inside held my hand dragged me outside then he removed my pants and raped me."*

There was also the question of identification whereby, it was argued on behalf of the appellant that PW1 failed to clarify the circumstances which enabled her to identify the appellant as her assailant. On the basis of the testimony which was given by PW1, we find the contention lacking in merit. It was deposed by PW1 that the appellant was her Kiswahili teacher and that, he had taught her for seven years and that is why from the moment he called the name of PW4 from outside, she recognized his voice and that is why PW4 got out in response. That being the case, even if the only identification claimed by PW1 to the appellant could be that of recognition alone, it was still sustainable. Nonetheless, PW1 stated further that at the material time, there was still ample time which enabled her to

perfectly identify the appellant, as corroborated by her act of naming him to PW2 at the moment she saw them at the scene of crime. With that evidence, we are fully satisfied that the identification which was made by PW1 to the appellant was impeccable.

Even though in the light of the holding in **Selemani Makumba's** case (*supra*), the testimony of PW1 sufficed to put the case to rest, still there was corroborative evidence from PW2 who examined PW1 a short moment after the incident, whose testimony was that when she examined PW1, she found fresh semen oozing from her vagina. Furthermore, there was the testimony of PW3 the doctor who examined PW1 when she was sent by PW2 to the hospital for examination. Her testimony was that when she examined PW1, she discovered that she had bruises in her vagina and further that semen was being discharged from the vagina.

In view of what has been highlighted by the evidence above, we entertain no shred of doubt that, PW1 was raped on the fateful date and that, the one who raped her was the appellant. To that end, the third ground of appeal also fails.

Consequently, we dismiss the appeal before us by upholding the conviction, sentence and the compensation order which was made by the trial court.

Order accordingly.

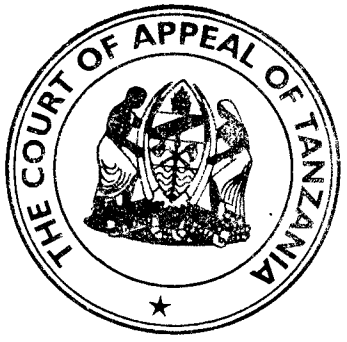
DATED at **IRINGA** this 14th day of August, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of August, 2020 in the presence of the Appellant in person and represented by Mr. Jally Willy Mongo, learned counsel and Ms. Blandina Manyanda assisted by Ms. Alice Thomas both learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL