

**IN THE COURT OF APPEAL OF TANZANIA  
AT IRINGA**

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

**CRIMINAL APPEAL NO. 396 OF 2018**

**FRANK DEULE @DAMAS..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Iringa)**

**(Banzi, J.)**

**dated the 19<sup>th</sup> day of October, 2018**

**in**

**HC. Criminal Appeal No. 52 of 2017**

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**JUDGMENT OF THE COURT**

10<sup>th</sup> & 18<sup>th</sup> August, 2020

**MUGASHA, J.A.:**

In the District Court of Mafinga, the appellant was charged with the offence of Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code [CAP 16 RE.2002]. It was alleged by the Prosecution that, on 8/8/2014, at Kilosa Mufindi village, in Mufindi District in Iringa Region, the appellant did unlawfully have sexual intercourse with one A.L, a girl aged ten (10) years. The appellant denied the charge and subsequently, to prove its case the prosecution called three witnesses namely: A.L, the victim and H.M the victim's mother who testified as PW1 and PW2 respectively, and Beatrice

Martin Masasi, a Clinical Officer (PW3). The prosecution also tendered Police Form No. 3 (PF3) which was admitted as Exhibit P1.

The background of the present appeal is briefly as follows: On the fateful day, the victim together with her mother went to a well to fetch water. Then, PW2 returned home leaving behind the victim who after fetching water, while proceeding home, was stopped by the appellant who took her bucket from her hand and placed it on the ground. Then, he dragged her into the bush and ravished her. Having realized that PW1 had delayed to return home, PW2 made a follow up and found PW1's bucket along the path and saw in the bush the appellant raping the victim. Having moved closer to the scene of crime, PW2 inquired on what was the appellant doing with the victim and no response came from the appellant who opted to take to his heels leaving behind the victim naked. On the same day, PW2 reported the incident to the ten cell leader and the appellant was arrested. PW2 also examined the private parts of the victim and found that she was raped. The victim was initially taken to Ibwanzi Dispensary where she was referred to Mafinga Government Hospital and upon examination it was established that she was actually raped. Subsequently, the appellant was arraigned in court.

In his defence, the appellant as earlier stated, denied to have committed the offence.

The trial court convicted the appellant on the strength of the credible account of the victim as corroborated by PW2 the victim's mother who found the appellant raping the victim and PW3 the Clinical Officer who examined the victim and established that she was raped.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed hence the present appeal. In the Memorandum of Appeal, he has raised six grounds as follows:

1. That, honorable Madam Judge wrongly held that the appellant was identified clearly by PW1 without addressing her mind properly that both the charge sheet and the prosecution witness did not mention the exact time when the alleged act of rape took place.
2. That, honorable Madam Judge erred in law to rely on the PF3 as corroborative evidence of penetration to that of PW1 without taking into account that the said PF3 was already expunged from records by the High Court.
3. That, the honorable Judge of the High Court misdirected herself from failure to "note" that the names of the victim of rape mention both

on the charge sheet and the PF3 is different from that which was mentioned by the victim (PW4) herself hence different persons.

4. That, the honorable Judge of the High Court wrongly upheld the decision of the trial court without taking into account that the testimony of PW1 was not corroborated as required under the law.
5. That, honorable Madam Judge wrongly held that on sexual offences that true evidence comes from the victim without addressing her mind properly that the said principle applies only where the said evidence is not fabricated and credible to form the basis of conviction.
6. That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt.

In a nutshell, the appellant faulted the first appellate court in sustaining the conviction despite the discrepant charge sheet which lacks the time of occurrence of the fateful incident and the proper name of the victim and the unreliable oral and documentary account of the prosecution which fell short of proving the charge against the appellant.

To prosecute the appeal, vide a virtual link to Iringa Prison where the appellant was serving jail term, the appellant appeared in person

unrepresented whereas the respondent Republic had the services of Mr. Alex Mwita, learned State Attorney.

The appellant adopted the grounds of appeal and urged the Court to consider them, allow the appeal and set him free.

The learned State Attorney did not support the appeal. He submitted that the conviction of the appellant was properly founded on the strength of the credible evidence of the victim, PW2 and PW3. In his submission, apart from conceding that the charge lacks time of occurrence of the charged offence, he argued the same not fatal being a matter to be addressed when evidence is adduced at the trial. In addition, he pointed out that, since PW2 is on record to have seen the appellant raping the victim in the forest, this presupposes that the fateful incident occurred during broad day light which enabled PW2 to identify the appellant who was a village mate and hence not a stranger. He added that, the credible account of PW2 is attributed to the prompt reporting of the matter to the ten cell leader which facilitated timely arrest of the appellant on the fateful day.

Pertaining to the complaint that the first appellate court sustained the conviction acting on the PF3 which was already expunged, the learned

State Attorney challenged the same to be baseless arguing that, having expunged the PF3, the first appellate court acted on the credible evidence of the victim who testified on how she was ravished by the appellant. In this regard, Mr. Mwita further argued that, the sole evidence of the victim which is true and the best is sufficient to sustain the appellant's conviction. To support the proposition, he cited to us the case of **SELEMANI MAKUMBA VS REPUBLIC** [2006] TLR 379. That apart, he argued that the victim's evidence was corroborated by the evidence of PW2 who found the appellant raping the victim in the bush.

The appellant had nothing useful in reply apart from maintaining his earlier prayer that the appeal be allowed and he be set at liberty.

Having carefully considered the grounds of appeal and the record of appeal, this being a second appeal, it is settled law that the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because apart from that being the domain of the trial court only in so far as the demeanour is concerned, the credibility of witness can be determined by the second appellate court when assessing the coherence of that witness in relation to the evidence of other witnesses including that of an accused person – See **SHABAN DAUDI VS REPUBLIC**,

Criminal Appeal No. 28 of 2001 and **SEIF MOHAMED E.L ABADAN VS REPUBLIC**, Criminal Appeal No. 320 of 2009 (both unreported). Moreover, it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent and good reasons for not believing the witness which include the fact that, the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See - **GOODLUCK KYANDO VS REPUBLIC** [2006] TLR 363 and **MATHIAS BUNDALA VS REPUBLIC**, Criminal Appeal No 62 of 2004 (unreported). Moreover, since it is settled law that medical evidence does not prove rape, the best evidence is the credible evidence of the victim who is better placed to explain how she was raped and who was the person responsible. See- **SELEMANI MAKUMBA VS REPUBLIC** [ 2006] TLR 379 and **EDSON SIMON MWOMBEKI VS REPUBLIC**, Criminal Appeal No. 94 of 2016 (unreported).

We shall be guided by among others, the above cited principles to determine the present appeal.

In the first, third and fifth grounds of appeal, the appellant faulted the conviction which was sustained by the High Court on account that, **One**, he was not identified at the scene of crime; **two**, that both the charge and prosecution evidence lack the proper name of the victim and

**three**, failure by the two courts below to consider what underlies the principle of credible evidence in sexual offences.

Before addressing the said grounds, we deem it crucial to revisit what was said by the victim and PW2. At page 19 of the record of PW1 testified as follows:

*"Last time I [met] with the accused at [the well] he put down from my head a [bucket] of water. At [the well] I was just alone, I was heading to our home, on the way I met the accused where he stopped me and took the [bucket] of water which was on my head and put it down. He took me to the bush where there was no person, he took off my clothes and he took off his trouser and remained [naked]. He put me down... while [naked], he put his penis into my vagina."*

When PW1 was cross-examined by the appellant she repeated what she earlier said during the examination in chief. Her account was corroborated by PW2 whose testimony is reflected at page 20 of the record as follows:



*"I was with my daughter at the [well]and left [her] ... and I heeded to home. The victim was late. I decided to call her, but she was [silent] ...I decided to go back to the [well], when I was on the way. I saw a [bucket] of water just on the path, but I didn't see the victim (daughter). I went on [searching] then I succeeded to see the accused and the victim far away in the forest. I went near then and asked accused what are you doing with my daughter? He remained [silent] and he left the place. Meanwhile the victim was cloth less her skirt was down. When I asked the victim she told us that the accused took his penis and inserted into her private parts."*

Chapter V Part 1 of the Evidence Act [CAP 6 R.E. 2019] regulates the competency, compellability and privilege of witnesses. When it comes to criminal proceedings relating to sexual offences involving children, section 127 (7) among other things, stipulates as follows:

*"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 reason 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”.*

The cited provision is among other things, in line with what we said in the case of See- **SELEMANI MAKUMBA VS REPUBLIC** (*supra*) where the Court held:

*“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 **EDSON SIMON MWOMBEKI VS REPUBLIC**, Criminal Appeal No. 94 of 2016 (unreported)].

In the case at hand, since the victim was ten years of relevance is if there was penetration. In that regard, having revisited the evidence of PW1 we are satisfied that, she was a credible witness who testified how she was raped by the appellant in the bush after being intercepted while she was proceeding home from the well to fetch water. This account was in addition, corroborated by PW2 who having found the appellant raping her daughter she recognized him to be a village mate and hence not a stranger. This fact was acknowledged by the appellant who testified to reside in the same village with the victim and PW2. That apart, PW2 took pains to examine the victim and found that she was raped which was further substantiated by PW3, Clinical Officer who examined the victim and confirmed that she was actually raped. In a nutshell, the evidence of both the victim and PW3, Clinical Officer proved without doubt that there was penetration. Also, PW2 acted promptly having on the very day reported the matter to the ten cell leader which facilitated the arrest of the appellant at the earliest moment.

We also agree with the learned State Attorney that, considering the circumstances surrounding the occurrence of the offence, it was indeed committed in broad day light and that is why PW2 managed to see the

appellant who was not a stranger raping the victim in the bush. On that account, in our considered view the impropriety if any, by the prosecution not to indicate the actual time when the victim was raped in the charge does not go to the root of the matter in the wake of the credible evidence of PW1 and PW2 which was not materially impeached. Therefore, in the absence of any cogent reasons to the contrary, we are satisfied that such account deserves credence See - **GOODLUCK KYANDO VS REPUBLIC** [2006] TLR 363. Thus, the first, third and fifth grounds are not merited.

In the 2<sup>nd</sup> ground of appeal the appellant faulted the first appellate court to have acted on the PF3 while it had earlier expunged it from the record. We found this complaint wanting in the light of the judgment of the High Court whereby having been satisfied that, the PF3 was not read out to the appellant following its admission, at page 50 of the record it concluded as follows:

*"Since PF3 was not read out after it was admitted, I hereby expunge it from the record, However, I am inclined to agree with Ms. Mahundi that, in the absence of PF3, the evidence of PW1 was enough to prove penetration. In that regard, there was no need of ten*

*cell leader or investigator to corroborate the evidence of PW1 and PW2. "*

We are inclined to agree with the course taken by the High Court in expunging the PF3 because of the shortcoming of not being read out to the appellant following its admission in the evidence. In addition, having perused the judgment of the High Court we did not find anything suggesting that after being expunged the PF3 was acted upon by the learned High Court Judge to sustain the conviction of the appellant. In that regard, we find the second ground of appeal unmerited.

Finally, in addressing the sixth ground of appeal whereby the appellant faults the conviction being based on unproved case, this need not detain us. As earlier stated, the conviction of the appellant was based on the victim's account which was as well corroborated by PW2 who found the appellant raping the victim and the evidence of the Clinical Officer (PW3) who upon medically examining the victim confirmed that she was actually raped. In this regard, the two courts below were justified to believe the accounts of PW1 and PW2 as being credible and we are equally satisfied that, those witnesses gave a coherent and consistent accounts on what had befallen PW1 in the shameful incident. The said evidence was

not materially contradicted by the appellant be it by way of cross-examination or when giving his defence evidence and as such, the charge was proved against the appellant beyond a shadow of doubt.

In view of what we have endeavoured to discuss we find the appeal not merited and it is hereby dismissed in its entirety.

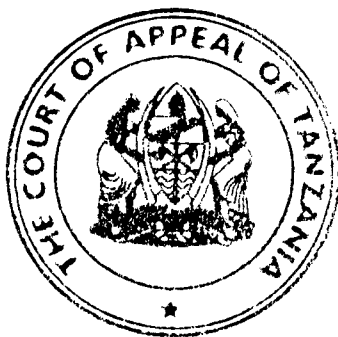
**DATED** at **IRINGA** this 17<sup>th</sup> day of August, 2020.


S. E. A MUGASHA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

The Judgment delivered this 18<sup>th</sup> day of August, 2020 in the presence of the Appellant in person and Mr. Alex Mwita, learned State Attorney for Respondent, is hereby certified as a true copy of the original.



  
H. P. NDESAMBURO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**