IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KWARIKO, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 128 OF 2019

SALUM SEIF MKANDAMBULI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, District Registry at Dar es Salaam)

(Madeha,J.)

dated 25th day of March, 2019

in

(DC) Criminal Appeal No. 2 of 2019

JUDGMENT OF THE COURT

28th May & 9th June, 2021

KWARIKO, J.A.:

Salum Seif Mkandambuli, the appellant, was arraigned before the District Court of Mkuranga at Mkuranga with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019] (henceforth "the Penal Code"). It was alleged by the prosecution that on unknown date in April, 2018 about noon hours at Lupondo Village within Mkuranga District in Coast Region, the appellant had carnal knowledge of a school girl aged seven years and for the

purpose of hiding her identity, we shall refer to her initials "WM", the victim or PW3. The appellant denied the charge but at the end of the trial, he was convicted and sentenced to thirty years imprisonment.

Aggrieved by that decision, the appellant unsuccessfully appealed to the High Court of Tanzania sitting at Dar es Salaam. He is therefore before the Court on a second appeal.

Before we determine the merit or demerit of the appeal, we find it proper to state brief facts of the case which led to the appellant's conviction. On 12th April, 2018 at 20:00 hours while Rukia Said Bendera (PW1) was at home, her grandchild, the victim, came from taking bath when she felt her stinking. Upon inquiry, the victim told her that Rama, used to take her to the bush and rape her. PW1 went to inquire from Rama who said that it was the appellant who used to ask him to take the victim to him. However, when PW1 inquired further from the victim; she told her the appellant was involved. PW1 inspected the victim and found pus in her private parts and the vagina was not normal. The matter was reported to police station where a PF3 was issued and the victim was sent to hospital. PW1 tendered the PF3 which was admitted as exhibit PE1.

At the hospital, the victim (PW3) was examined by Dr. Grace Fabian Ng'home (PW5). She explained that the laboratory examination which was conducted on the victim showed her vagina with infection, had no hymen, had signs of penetration, old scratches and it was smelly. Thereafter, she prescribed drugs and posted the findings in the PF3 (exhibit PEI) which she identified in court.

For his part, Ramadhani Athumani (PW2) aged ten years testified that the appellant asked him to bring "WM' to his home. The three went to a cassava farm where the appellant asked the two to undress and 'WM' was asked to lie down on her back while himself (PW2) lay on top. Thereafter, PW2 went away leaving behind PW3 and the appellant and thus he did not know what happened next.

The victim was called on the witness box on 29th August, 2018. On that date she started her evidence by saying that one day, Rama took her to a cassava farm. At that point, the prosecutor asked for adjournment because the victim was not responding to the questions. The hearing was adjourned to 5th September, 2018 where on that date, PW3 adduced that the appellant used to put his *"babu"* into her *"bibi"* several times in the

farm which belonged to PW1. She added that, as the appellant used to threaten her, she did not tell anybody about the incident until PW1 discovered that she had been sexually assaulted.

In his defence, the appellant denied the allegations and raised a defence of *alibi*. He explained that he left on 5th January, 2018 to Kisarawe to work in the farms and returned on 24th April, 2018. On his return, his wife told him that during his absence, three children had raped each other but instead he was arrested on 26th April, 2018 for this offence.

The appellant's defence of *alibi* was supported by his friend Mtebe Elias Nambaya (DW2) who said he was together with the appellant in the farms and his wife Hadija Abdallah Maimu Mwangu (DW3).

In its decision, the trial court found that the prosecution had proved that it was the appellant who raped the victim. The court also found that although PW2 was mentioned as the perpetrator, being a boy aged below twelve years was incapable of engaging in a sexual act. Further, that court found that the appellant's defence of *alibi* was not proved as he did not

tender any travelling documents. On its part, the High Court upheld the trial court's decision and dismissed the appellant's appeal.

Before this Court, the appellant has raised ten and three grounds in the memorandum of appeal and supplementary memorandum of appeal, respectively. Pursuant to Rule 74 (1) of the Tanzania Court of Appeal Rules, 2009, the appellant also filed his written statement of his arguments in support of the grounds of appeal. We have paraphrased the grounds of appeal and found the same raising the following five points of complaint:

1. That, the charge was at variance with the prosecution evidence;
2. That, the evidence of PW2 and PW3 contravened the provisions of section 127 (2) of the Evidence Act [CAP 6 R.E. 2019] as amended by Act No. 4 of 2016;
3. That, failure by the victim to name the appellant as the perpetrator of the offence at an earliest opportunity created doubt on her evidence;
4. That, penetration of the male organ into the victim's private parts was not proved; and
5. That, the appellant's defence of *alibi* was not considered.

At the hearing of the appeal, the appellant appeared in person, unrepresented; whilst the respondent Republic was represented by Mses. Violeth David and Aziza Mhina, learned State Attorneys.

When he was called upon to argue his appeal, the appellant only adopted his grounds of appeal and the written statement of arguments.

The appellant's first ground of appeal raised three complaints which he explained in his submissions. First, he argued that the age of the victim was not proved. He explained that, while the charge and PW1 showed that the victim of the offence was aged seven years, PW3 and the PF3 indicated that the victim was aged eight years. He contended that in the absence of amendment of the charge, the age of the victim was not established. In the second aspect, the appellant argued that while PW3 said she was raped repeatedly, this was not reflected in the particulars of the offence. And in the third aspect, appellant argued that the prosecution erred as it did not indicate the name of the trial court in the charge sheet.

In respect of the second ground of appeal, appellant argued that PW2 and PW3 who were children of tender age, their evidence ought to

have been taken in accordance with the provisions of section 127 (2) of the Evidence Act [CAP 6 R.E. 2019] as amended by Act no. 4 of 2016 (the Evidence Act). He explained that while the law required a witness of tender age to promise to tell the truth and not lies, PW2 and PW3 only promised to tell the truth without promising not to tell lies. To fortify this argument, the appellant referred us to the case of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported). The appellant argued further in respect of this ground that, PW3 was not reminded to promise to tell the truth and not lies in the resumed hearing on 5th September, 2018.

Arguing the third ground, the appellant submitted that the prosecution evidence was doubtful because PW3 did not mention him to be her rapist at an earliest opportunity. This is because, at first, PW3 informed PW1 that it was Rama Ekram who was used to rape her in the bush and it was only when PW1 confronted PW2 that is when the appellant was mentioned. He argued further that when PW3 testified she hesitated to mention her assailant which led to adjournment of hearing to the future date that is when she mentioned him. He argued that this state of affairs shows clearly that PW3 knew that he was not her rapist.

In the fourth ground, the appellant argued that penetration was not proved for the following reasons; One, the PF3 was tendered by incompetent person and was not read over after admission hence it could not be relied upon to prove penetration. Two, PW5 did not state her qualification and did not explain whether old scratches in the victim's vagina was proof of penetration. Three, if PW3 had infection, tests should have been done to ascertain if he also had infectious diseases. Four, there was delay to examine PW3 because while the PF3 was issued on 13th April, 2018 the examination was conducted on 20th April, 2018. Five, PW2 contradicted on the place the incident took place between the cassava farm and his home. Six, there was contradictions in the evidence of PW1, PW2 and PW3 concerning the manner in which the rape was committed.

The appellant argued in the fifth ground that once he had relied on the defence of *alibi,* he was not obliged to prove it which is consistent with the decision in the case of **Jane Wanjiru Kinyua v. R** [2006] eKLR which stated that once an accused raises a defence of *alibi,* the burden to prove it shifts to the prosecution. He thus contended that the two courts below erred to hold that he was supposed to prove his defence of *alibi.* Moreover,

he argued, his defence raised doubt in the prosecution case which ought to be resolved in his favour.

In response to the foregoing Ms. David first made her stance known that she was not supporting the appeal. As regards the first ground of appeal the learned State Attorney argued first that although the charge did not indicate the name of the trial court, the appellant was arraigned before a competent District Court of Mkuranga, he understood and pleaded to the charge and accordingly gave his defence. She argued that the defect was curable under section 388 of the Criminal Procedure Act [CAP 20 R.E. 2019] (henceforth "the CPA"). The learned counsel supported her argument with the decision in the case of **Ridhiwani Nassoro Gendo v. R,** Criminal Appeal No. 201 of 2018 (unreported).

Further, in respect of the variance between the charge and evidence, the learned State Attorney argued that because PW3 said the rape incident occurred several times that is why the charge did not specify a particular date, but indicated it was April, 2018. As to the age of the victim, she submitted that it was proved by her guardian, PW1, citing the case of

Mzee Ally Mwinyimkuu v. R, Criminal Appeal No. 499 of 2017 (unreported) to fortify her contention.

Ms. David's argument in respect of the second ground was that the trial court complied with the provisions of section 127 (2) of the Evidence Act in respect of PW2 and PW3 since they promised to tell the truth before they gave their evidence.

Arguing the third ground of appeal the learned State Attorney submitted that PW3 said Rama used to take her to the appellant in the farms. However, she submitted that, even if the victim mentioned Rama as the rapist but upon further inquiry she brought in the appellant. She contended that the said Rama being a child of ten years could not have engaged in a sexual act pursuant to section 15 of the Penal Code. She argued that, this elimination, left the appellant as the perpetrator of the rape.

As to whether penetration was proved which forms complaint in the fourth ground of appeal, Ms. David argued as follows: One, the contradictions between PW1, PW2 and PW3 were minor because PW1

explained what PW3 told her and PW2 evidenced what he saw about the incident. Two, the PF3 was tendered by PW1 as she was the custodian and it was read over by PW5 as it is shown at page 16 of the record of appeal. And three, the three days' delay to examine the victim was not long, so long as she was examined.

As regards the fifth ground of appeal, at first the learned State Attorney argued that the appellant did not comply with the provisions of section 194 of the CPA concerning his defence of *alibi*. However, upon reflection she conceded that the two courts below shifted the burden to the appellant to prove his defence of *alibi*. With the foregoing submissions, Ms. David argued that the conviction against the appellant was properly grounded.

As regards sentence, Ms. David submitted that thirty years imprisonment was illegal because under section 131 (1) of the Penal Code, the appellant ought to have been sentenced to life imprisonment because the victim of the offence was aged below ten years. She urged us to dismiss the appeal.

We have considered the grounds of appeal and the submissions of the parties. We would like first to state that, unless there has been a misdirection or non-direction of the evidence occasioning a miscarriage of justice, the second appellate court as in this case, is not entitled to interfere with concurrent finding of the two courts below. Some of the Court's decisions in respect of this principle include; **Osward Mokiwa @ Sudi v. R,** Criminal Appeal No. 190 of 2014, **Mbaga Julius v. R,** Criminal Appeal No. 131 of 2015, **The Director of Public Prosecutions v. Simon Mashauri,** Criminal Appeal No. 394 of 2017 and **Paul Juma Daniel v. R,** Criminal Appeal No. 200 of 2017 (all unreported).

With the foregoing, we are now poised to decide whether the courts below correctly appreciated the evidence on record by considering the appellant's grounds of complaints. We have found it appropriate to begin our determination with the third ground of appeal where the complaint relates to the delay to name the appellant as the perpetrator of rape. However, before we decide this ground, we wish to state that the evidence from the victim, PW5 and PW1 proves that the victim was sexually

assaulted. The question which beckons for an answer was who is the perpetrator of the offence. This is the gist of the third ground of appeal.

The evidence given by PW1 is that at first the victim mentioned Rama (PW2) as the one who used to rape her in the bush. When PW2 denied the allegations and upon further inquiry that is when, according to PW1, the victim opened up and said the appellant was also involved. Moreover, during hearing, at first the victim mentioned PW2 whereupon the prosecutor prayed for adjournment and at a resumed hearing that is when the victim named the appellant as the rapist and explained that PW2 only used to take her to him. The learned State Attorney contended that PW2 only took the victim to the appellant who raped her. We have considered this evidence and we are in agreement with the appellant that the victim delayed to name her assailant at the earliest possible opportunity which creates doubt as to whether the appellant was really the perpetrator of the rape. In the case of **Marwa Wangiti & Another v. R** [2002] TLR 39 where there was delay to name a suspect, the Court held thus:

> *"The ability of a witness to name a suspect at earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

See also the cases of **Jaribu Abdallah v. R** [2003] TLR 271. Others include, **Minani Evarist v. R.** Criminal Appeal No. 124 of 2007, **John Nicomed Geay v. R,** Criminal Appeal No. 73 of 2020, **Phinias Alexander & Two Others v. R,** Criminal Appeal No. 276 of 2019 and **Issa Mfaume v. R,** Criminal Appeal No. 128 of 2017 (all unreported). For instance, in the case of **Phinias Alexander & Two Others** (supra), the Court stated that:

> *"In the light of the reproduced victim's evidence at the trial, the earliest opportune time was her encounter with the neighbours."*

Applying the above principle, the earliest opportunity for the victim in our case to name her assailant was when she was asked about her state by her grandmother, PW1. She mentioned PW2 as the perpetrator and not the appellant. As regards the involvement of PW2 in the rape, we

appreciate the learned State Attorney's concern that being a male child who was aged ten years he is presumed to be incapable of having sexual intercourse as per section 15 (3) of the Penal Code. However, the fact that the victim mentioned him as the perpetrator creates doubt as to the truth in relation to the appellant's involvement in the alleged rape. In a criminal trial, the burden of proof lies on the prosecution and it never shifts to the accused. This principle of law has been pronounced in various decisions of the Court, including the case of **Ahmad Omari v. R,** Criminal Appeal No. 154 of 2005 (unreported), where it was stated thus:

> *"In a criminal case the burden of proof is on the prosecution to prove the case against the appellant beyond reasonable doubt. The burden never shifts (section 3 (2) of the Evidence Act)."*

[See also **Mohamed Haji Ali v. R,** Criminal Appeal No. 225 of 2018 (unreported)].

The foregoing analysis leads us to hold that the prosecution has failed to prove beyond reasonable doubt that the appellant is responsible with the rape of the victim. The third ground of appeal is thus meritorious.

In view of the decision in the third ground of appeal, we find no pressing need to deliberate on the remaining grounds. In the event, we find merit in the appeal and accordingly allow it, quash the conviction and set aside the sentence meted out against the appellant. We order that the appellant be released from prison unless he is detained there for other lawful cause.

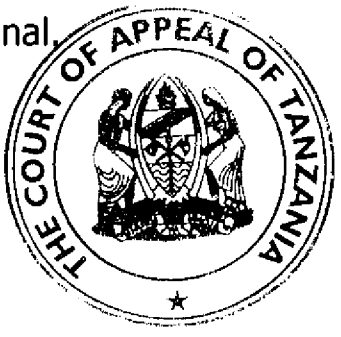
DATED at **DAR ES SALAAM** this 7th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 9th day of June, 2021 in the presence of the appellant in person and Ms. Mwasiti Athuman Ally, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL