IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 33 OF 2018

ELISHA EDWARD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Shinyanga)

(Makani, J.)

Dated the 24th day of November, 2017
in
DC Criminal Appeal No. 48 of 2017

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JUDGMENT OF THE COURT

18th & 24th August, 2021

WAMBALI, J.A.:

The appellant, Elisha Edward was charged in the District Court of Maswa in Criminal Case No. 99 of 2016 with rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002] [now R.E. 2019] (the Penal Code). It was alleged in the particulars of the offence that on unknown date of April, 2016 at about 17:00 hours at Muhida Village within Maswa District, in Simiyu Region, the appellant did rape a girl of 14 years; who for the purpose of this judgment, to hide her identity, we will refer to her as the "victim" or "PW2".

To substantiate its case, the prosecution relied on four witnesses, namely; Jibaya Kaso (PW1), the victim (PW2), Richard Charles (PW3-the victim's teacher) and Ernest Sita (PW4) a doctor who also tendered the PF3 which was admitted as exhibit P1. Essentially, the substance of the prosecution case was that on an unknown date in April 2016 the appellant did have carnal knowledge of PW2 and as a result she became pregnant. The alleged pregnancy was discovered on 10th September, 2016 by PW4, the Assistant Medical Officer at Malampaka Health Centre who conducted medical examination and came to the conclusion that by that date PW2 was in her 14th week of pregnancy.

According to PW3, the Head teacher of Muhida Primary School, in the end of August, 2016 he was informed by one of the teachers, Beita Joja that she suspected PW2, a standard six pupil, to be pregnant as she was gaining weight. PW3 directed the said teacher to send her to Badi Dispensary for examination. Ultimately, after the examination, it was confirmed that she was four months pregnant. Notably, prior to the said direction, PW3 summoned PW2's father (PW1) to reveal his intention before she was taken to the said dispensary. It was after that confirmation by PW4 concerning pregnancy that PW2 revealed that it was the appellant who raped her in April 2016. PW3's story on what

transpired as regards the findings of PW2's pregnancy was supported by PW1 who emphasized that the victim told him that it was the appellant who was responsible for causing her pregnancy.

On her part, PW2 testified that on the fateful date, the appellant went to her home while her father (PW1) had gone to Maganzo and her mother had gone to wash clothes. She testified further that after the appellant noted the absence of her parents, he offered her TZS. 2000 which she refused, but suddenly he pulled her in the unfinished house, undressed her, removed the underpant, covered her eyes and mouth and then he inserted his penis in her vagina. Thereafter the appellant left the place warning her not to disclose the incident to anybody as he would beat her. PW2 testified that following the appellant's threat she did not inform anybody concerning the incident until she came to learn that she was four months pregnant after she was examined in September, 2016 at Muhida Dispensary in the presence of her teacher, one Georgia.

In his defence apart from acknowledging that PW2 was his village mate, the appellant denied to have gone to her home on the alleged unknown date of April, 2016 and to have involved in sexual intercourse with her.

Nevertheless, at the height of the trial, the learned trial Resident Magistrate was fully satisfied that the prosecution proved the case against the appellant to the hilt. Consequently, he convicted and sentenced him to imprisonment for thirty years.

Aggrieved, the appellant unsuccessfully appealed to the High Court as the trial court's finding was confirmed, hence the instant appeal. Initially, the appellant accessed the Court armed with a memorandum of appeal comprising eight grounds of appeal. However, before we commenced the hearing, after a brief dialogue between the Court and the parties, it became apparent that the major complaint in this appeal is whether the prosecution proved the case against the appellant beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, with no legal representation. On the adversary side, Ms. Salome Mbughuni learned Senior State Attorney assisted by Ms. Wampumbulya Shani, learned State Attorney appeared for the respondent Republic.

Before the appellant addressed the Court in support of the sole ground of appeal, Ms. Shani rose to inform the Court that the respondent supported the appeal. Elaborating, she submitted that the evidence of the prosecution casted doubts on the involvement of the

appellant in the commission of the offence because; firstly, the delay of PW2 to mention the appellant to anybody until she was discovered to be pregnant, almost after five months from the date of the alleged incident was not fully explained at the trial.

Secondly, PW2's testimony on the alleged disclosure of the involvement of the appellant was contradictory with the evidence of PW1 and PW3. In her submission, the contradiction went to the root of the case at the trial.

Thirdly, while PW4 who examined PW2 stated in his testimony that she was 14 weeks pregnant (that is almost 3 months and a half), on the contrary, PW2, PW1 and PW3 testified that she was 4 months pregnant. The learned State Attorney thus submitted that unfortunately, the PF3 which was admitted as exhibit P1 cannot be relied to support the prosecution case as its contents were not read over and explained to the appellant after it was admitted in evidence. She therefore urged us to disregard exhibit P1.

Overall, Ms. Shani argued that the credibility of PW2 is doubtful as in view of her testimony at the trial, she cannot be taken as a reliable witness concerning the incident. In the result, she implored us to allow

the appeal, quash conviction, set aside the sentence imposed on the appellant and order his immediate release from the prison custody.

On his part, the appellant graciously welcomed the concession of the respondent Republic's counsel that the case against him was not proved to the required standard. To this end, he prayed that his appeal be allowed resulting in his release from prison.

Having heard submissions from the parties, we think this appeal can conveniently be disposed of by a thorough scrutiny of the evidence in the record to ascertain whether or not the prosecution witnesses were credible and worth of belief on the incident of rape.

It is settled law that the best test for the quality evidence is based on the credibility of a witness (see **Yohana Msigwa v. The Republic** (1990) T.L.R. 143**, Anangise Masendo Ng'wang'wa v. The Republic** (1993) T.L.R. 202 **and Richard Mtengule and Another v. The Republic** (1992) T.L.R. 5.

It is in this regard that in **Shabani Daudi v. The Republic,** Criminal Appeal No. 28 of 2001 (unreported) the Court stated that: -

> *"Credibility of a witness is the monopoly of the trial court but only in so far as demenor is concerned. The credibility of the witness can also*

be determined in two other ways. One, when assessing the coherence of the testimony of that witness and two, when the testimony of that witnesses is considered in relation to the evidence of other witness including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court".

On the other hand, we are mindful of the settled position that as the second appellate court, we are only supposed to deal with questions of law.

However, as stated in **Michael Elias v. The Republic**, Criminal Appeal No.243 of 2007 (unreported), the above alluded position depends on the requirement that the finding of facts by the courts below was based on correct appreciation of the evidence in the record. For purpose of emphasis the Court stated as follows: -

".. this approach rests on the premise that the findings of facts are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature and quality of evidence resulting in an unfair conviction, this Court must in the interest of justice interfere."

Guided by the above settled position, we intend to reconsider the evidence laid at the trial and confirmed by the first appellate court in relation to the verdict reached, that is, the conviction and sentence of the appellant in connection of the offence charged.

Admittedly, in the instant appeal; firstly, we agree with the learned State Attorney that the delay in reporting the incident dented the prosecution case. The record of appeal reveals that the appellant appeared at the trial court on 19th September, 2016 in connection of the offence which was allegedly committed on an unknown date of April, 2016. Besides, according to the record of appeal, there is no indication as to when the incident was reported to the police and on when and how the appellant was arrested. The doubts on the delay on naming the appellant in connection of the offence is compounded by the fact that it is only PW1 and PW3 who testified that they were told by PW2 that the appellant raped her sometimes in April, 2016 after she was examined by PW4 and found to be pregnant. It was the further testimonies of PW1 and PW3 that after the examination they informed the Village Executive Officer (VEO) who interrogated PW2 who on that particular day said the appellant raped her and as a result she became pregnant. Unfortunately, though the VEO was not summoned to testify at the trial, PW2 did not

say anything as to whether she was interrogated by the VEO concerning the responsible person in the presence of PW1 and PW3 and whether she told them that the appellant raped her on the alleged day of April, 2016. However, according to the record of appeal, PW2's testimony was simply that she was raped by the appellant and that she did not tell anybody as she was afraid to be beaten by the appellant. We think that the testimonies of the witnesses on this issue were a major contradiction and casted doubts on the prosecution case on what really happened and the responsible person.

Moreover, the doubts on the occurrence of the incident of rape and the date of arrest of the appellant is strengthened by the fact that according to the record of the trial court's proceedings, no police officer who investigated the case appeared to shade light on the alluded two issues. Indeed, though the police force issued the PF3 on 10th September, 2016, there is no evidence from the prosecution side as to when the incident was reported to the police station and whether the appellant was mentioned in connection of rape.

On the other hand, PW1, PW2, PW3 and PW4 differed on the place where the victim was examined. While PW1 and PW2 stated that the victim was examined at Muhida Dispensary and found to be

pregnant in September, 2016, PW3 testified that PW2 was examined at Badi Dispensary in the end of August, 2016 and was found to be four months pregnant. On the contrary, PW4 who examined PW2 testified that on 10th September, 2016 he examined her at Malampaka Dispensary and found her to have 14 weeks pregnancy. PW4 was firm that on that particular day PW2 came from Muhida Village where she studied at Muhida Primary School. The doubts in the witnesses' testimonies with regard to the date and place PW2 was examined is apparent and could only be sorted out by a Police Officer who issued the PF3, but nobody appeared from Malampaka Police Station. Apparently, from the testimony of PW1 and PW3 there is no indication that they accompanied the victim to the place where the examination was held as PW2 testified that she was sent to Muhida Dispensary by a teacher known as Georgia. This was contrary to the testimony of PW3 that PW2 was sent to the hospital by a teacher known as Beita Joja.

In view of the serious contradiction of the prosecution witnesses with regard to important facts concerning the occurrence and the involvement of the appellant in committing the offence of rape, we hold a firm view that their credibility was questionable and thus they had to be disbelieved by both the trial and first appellate courts.

In the circumstances of the instant appeal, we wish to reiterate what was stated in **Mathias Bundala v. The Republic**, Criminal Appeal No.62 of 2004 (unreported) that: -

> *"Good reasons for not believing a witness include the fact that the witness has given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses."*

To this end, we are settled that the above observation applies in the circumstances of this case as apart from particular witnesses giving improbable evidence on the incident and the involvement of the appellant in the commission of the offence, they materially contradicted each other in their testimonies at the trial.

On the other hand, we are mindful of the settled law that the best evidence in sexual offences comes from the victim as stated in **Selemani Makumba v. The Republic** (2006) TLR 384 and several other decisions of this Court. However, we hasten to emphasize that, that position equally depends on the unquestionable credibility of the respective witness on the facts of the incident and the connection of the suspect to the complained offence.

In the instant appeal, we hold a firm view that PW2 is not credible and thus not reliable because; firstly, her failure to name the appellant

who she knew well within a reasonable time casted doubt on her credibility. As we have demonstrated above, she did not say anything as to whether she told anybody, including her parents, after the incident. Besides, according to the record of appeal, she was discovered with fourteen weeks of pregnancy after examination. It is in this regard that in **FESTO MAWATA v. THE REPUBLIC**, Criminal Appeal No. 229 of 2007 (unreported) the Court stated that: -

> *"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."*

Moreover, in **VENANCE NUBA AND TEGEMEO PAUL v. THE REPUBLIC,** Criminal Appeal No.425 of 2013 (unreported) it was held that:-

> *"... this Court has persistently held that failure on the part of the witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."*

(see also **Aziz Athumani @ Buyogera v. The Republic**, Criminal Appeal No.222 of 1999; **Juma Shabani @ Juma v. The Republic**, Criminal Appeal No.168 of 2004 and **John Bakgumwa and Two Others v. The Republic**, Criminal Appeal No.5 of 2013 (all unreported).

Secondly, her evidence in chief was shaken during cross examination. Particularly, in her evidence in chief she did not state that during the incident she raised alarm and that when she raised it she was attacked by the appellant after the incident of rape. However, she raised it during cross-examination by the appellant. In the premises, we are settled that the delay in reporting the incident and naming the suspect to the parents or police or any other person in authority within a reasonable time seriously impacted the victim's credibility and the prosecution case as a whole.

In an akin situation, in **Yust Lala v. The Republic**, Criminal Appeal No. 337 of 2015, the Court stated that: -

> "... *in our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1. It was her evidence that she did not mention the appellant for all that period*

because of his threat that he would slaughter her if she disclosed to anybody that he raped her. Since she was not staying with the appellant, we find it doubtful that with such a serious offence, she could for all that period fail to tell her mother about it."

Similarly, in the circumstances of the instant appeal, we hold a firm opinion that the credibility of the victim (PW2) was seriously dented by her silence in informing the parents or any other person on the incident of rape.

Ultimately, from the foregoing, we agree with the learned State Attorney that despite the irregularity of not reading over and explaining the PF3 after it was admitted, which we accordingly disregard, the prosecution case was not proved to the hilt. Be that as it may, it was the obligation of the prosecution to prove that PW2 was raped by the appellant on the alleged unknown date of April, 2016 (see **Ryoba Mariba @ Mungane v. The Republic**, Criminal Appeal No. 74 of 2003 and **Christopher R. Maingu v. The Republic**, Criminal Appeal No.222 of 2004 (both unreported).

In the result, based on our re-evaluation of the evidence above, we interfere with the concurrent findings of facts of both the trial and

first appellate courts and hold that the prosecution did not lead sufficient evidence to show that the appellant raped the victim on the alleged unknown date of April 2016.

Consequently, we allow the appeal based on the single ground, quash conviction and set aside the sentence. We further order that the appellant be released from prison custody unless lawfully held for other causes.

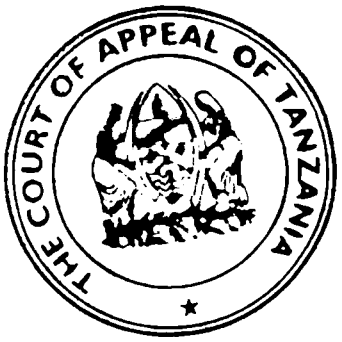
DATED at **SHINYANGA** this 24th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 24th day of August, 2021 in the presence of appellant in person and Ms. Salome Mbughuni, learned Senior State Attorney, assisted by Nestory Mwenda and Venance Mkonongo, learned State Attorneys, for the respondent/Republic is hereby certified the true copy original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL