IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: LILA, J.A., KOROSSO, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 337 'B' OF 2020

ISSA REJI MAFITA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Dodoma)

(Dudu , PRM-Extended Jurisdiction)

dated the 17th day of June, 2020
in
PRM Criminal Appeal No. 2 of 2020

JUDGMENT OF THE COURT

10th & 24th August, 2021

MAIGE, J.A.:

At the District Court of Kondoa ("the trial Court"), the appellant herein was charged with the offence of rape c/s 130 (1) and (2) (e) of the Penal Code, Cap. 16, R.E., 2019 ("the Penal Code"). The allegation was that, on 22nd day of July, 2018, at Sarale village within Kondoa District in Dodoma Region, the appellant had carnal knowledge of PW1, a young girl of 12 years (name withheld). Upon trial, he was convicted and sentenced to 30 years imprisonment. His first appeal to High Court which was heard by a Principal Resident

Magistrate with Extended Jurisdiction was not successful and henceforth the instant appeal.

The evidence leading to conviction of the appellant came from four witnesses including the victim herself who testified as PW1. In her evidence, PW1 told the trial court that, she was 12 years old and a standard four student when the crime was being committed. She claimed to know the appellant as her uncle. She testified that, on 22/7/2018 at 16.00 hrs she was at the farm picking peas. PW2 and his colleague were somewhere a little further grazing goats. As she was there, the appellant emerged. He gave her TZS 500/= to buy some cigarettes for him which she did. She thereafter proceeded with her business. Again, the appellant came and stood at acacia tree. He expelled PW2 and her fellow from the farm. He thereafter came near to PW1 and asked her to take her clothes off. When she refused, he intercepted her legs and removed her underwear. He then removed his trousers. He produced his penis and inserted it into her vagina. She was in pain. She could not raise an alarm as the appellant muzzled her mouth with his hand. When he was through with his illegal transaction, the appellant disappeared. PW1 went home while crying. She was unable to walk properly. On reaching home, she

informed her grandmother what went on. She was then taken to hospital where she was medically examined and given some medicine.

PW2 who represented herself as a child of 10 years testified that, she was present at the scene of the crime at the material date and time. She was with her young brother Elias grazing goats. While there, the appellant came and ordered them to leave the place. As they were leaving, she turned back and witnessed the appellant pushing PW1 down and raping her

On her part, PW3 testified that she was PW1's grandmother and was taking care of her. She claimed to know the appellant as her grandson. PW1, she further testified, called the appellant her uncle. She testified that, on the material date in the morning, she was in church at Kinyasi village. On coming back at or about 17;00 hours, she found PW1 at home crying. On enquiry, PW1 told her that she had been raped by the appellant. She inspected her private parts and found some sperms. She also found the vagina lips swollen. She sponged her with hot water. She thereafter rushed PW1 to hospital where she was medically examined and found that she had been seriously injured. She was transferred to Kondoa.

PW4 confirmed to have medically examined PW1 on 22nd July 2019 and established that, there was swelling and bruises in vaginal lips (labia) and that, the hymen was not intact. He concluded therefore that, PW1 had been raped. PW4 testified further that, as they did not come with PF3 form, he had to fill the findings in a report book and advise PW3 to produce PF3 which she subsequently did. Though, he could not recall when was it brought to him, it is express in his testimony that, he filled in the PF3 on 26th September 2019. He produced the PF3 which was admitted as exhibit P2. In accordance with exhibit P2 there was "redness and swelling bruises of labia minora with partial ulceration of the hymen" and that, "semen and blood not evidenced".

In his testimony in defense, the appellant denied commission of the offence. He associated the case with grudges with his father which came into being after the appellant had refused his request to take part in cattle stealing. Though, he admitted to have been arrested on 9th September 2019, he told the trial court that, he was not informed that his arrest was connected with the instant case. It was not until when he was arraigned in the trial court that, he was caused to know the reason for his arrested, he clarified.

In his judgment, the learned trial magistrate was persuaded by the testimony of the victim (PW1) as corroborated by the evidence of PW2, PW3, PW4 and the documentary evidence in exhibit P2. In his view, which was founded on the authority in **Nyerere Nyague vs. Republic,** Criminal Appeal No. 67 of 2010, since the appellant did not cross examine the victim on the substance of her evidence, he is deemed to have accepted the same as true. The trial magistrate dismissed the defence by the appellant on account that it was too general and did not focus on the accusation in the evidence of PW1. In his conclusion therefore, the case against the appellant was proved beyond reasonable doubt. The first appellate Court having fully subscribed with the factual findings of the trial court, confirmed the conviction and sentence and dismissed the appeal.

This time around, the appellant is trying a second appeal to this Court. He has raised the following grounds of appeal:-

1. *That the charged offence against the appellant was not proved to the requirement standard of law in criminal cases.*
2. *That the bruises, swollen of lip link of hymen to pw1 was not ingredient to constitute rape simply it can be*

caused by other sources such as skipping repo in that child hood.

3. *There were procedural irregularities when receiving exhibit P2 and the said card process before the court.*
4. *That the trial court and first appellate court erred in law and fact when did not even think why either police or social worker was not engaged in this case basing on the age of the victim it was very important to the prosecution side their evidence to be supported by either the police officer as an investigator of the case or social worker.*
5. *That, the trial court and 1st appellate court erred in law and fact when did not consider that the appellant was not in good term with the appellants.*
6. *The trial court and first appellate court erred in law and fact when did not consider that the appellant was convicted and sentenced based on contradiction testimony made by PW3, in court when adducing evidence.*

When the appeal came up for hearing, the appellant appeared in person and was not represented. The Respondent enjoyed the service of Ms. Judith John Mwakyusa and Ms. Miyango Kezilahabi, Senior State Attorney and State Attorney, respectively. The appellant

adopted the grounds of appeal in the memorandum of appeal and urged the Court to allow the appeal.

In her submissions in rebuttal, Ms. Kezilahabi, argued grounds number 1,2,5 and 7 jointly and the 3rd and 4th grounds separately. In addition, she addressed the issue of whether the substitution of the charge sheet was done properly which was raised by the Court on its own motion.

It is worth noting that, the appeal at hand being a second appeal, the power of the Court to disturb the concurrent findings of the lower courts on points of fact is very limited. As stated in **Director of Public Prosecution vs. Jaffari Mfaume Kawaw**a [1981] TLR 149, it can only be intervened where the lower courts misapprehended the evidence or where there is a misdirection or non-direction on essential principle of law. We shall be guided by the said principle.

As a matter of practice, we shall start with the legal issues raised in the third and fourth grounds and the one raised by the Court on its own motion. The complaint in the third ground is that, exhibits P1 and P2 were irregularly admitted. In relation to exhibit P1, Miss. Kezilahabi was quick to concede that, for the reason of the substance

of the exhibit not being read out upon being received into evidence, it was improperly admitted. She therefore, urged the Court to expunge exhibit P1 from the record. She submitted further that, despite the expurgation of exhibit P1 from the record, the oral account of PW1 and PW4 suffices to establish the age of the victim. We are in full subscription with the learned state attorney that, the omission to read out the contents of exhibit P1 after being received in evidence was a serious irregularity which denied the appellant a fair hearing. We accordingly expunge exhibit P1 from the record.

We shall now consider the issue in relation to admission of the medical report in exhibit P2. Ms. Kezilahabi vehemently rebuts the proposition that, the same was admitted irregularly. She submits that, the substance of the document was read out upon being received in evidence. She submits further that, the right of the appellant to have the doctor called for cross examination was not curtailed, as the document was exhibited by the same doctor and the appellant was afforded an opportunity to cross examine him thereon.

We have carefully examined the record and satisfied ourselves that, the contents of exhibit P2 were read out upon admission. On top of that, we are in agreement with Ms. Kezilahabi that, since the

medical report was produced by the same doctor who examined the victim and in so far as the same was available for cross examination, the requirement of the law was complied with. Therefore, with the exception of the propriety of the admission of exhibit P1, the third ground of appeal is dismissed.

We now direct our minds on the complaint in the fourth ground of appeal. It is on omission to engage police or social worker. The contention of the appellant raised in the memorandum of appeal is that, as the victim was a child of tender age, the evidence of a social worker or police was very important. On this, we agree with the learned state attorney that, such a requirement does not apply where, like in this case, the child of tender age is not the accused. This is in line with our position in **Alex Ndendya v. Republic**, Criminal Appeal No. 207 (unreported) referred in **Kiwano Aloyce Kalongole v. Republic**, Criminal Appeal No. 208 of 2018 (unreported) where we stated that:

> *"The presence of the social welfare officer does not envisage situations where the child is a witness; it envisages situations when the child is in conflict with the law; that is, when the child is an accused person"*

Armed with the above authority, we dismiss the fourth ground of appeal.

We turn to the last legal issue which is whether or not the amendment of the charge sheet was not violative of the requirement of 234 (2) (b) of the Criminal Procedure Act, [Cap. 20, R.E., 2019, ("the CPA] . On this, Ms. Kezilahabi was of the contention that, the requirement of the respective provision was substantially complied with because the amended charge sheet was read over and explained to the appellant who entered a plea thereto. In her view, the requirement to recall the prosecution witnesses for further examination in chief or further cross examination would be upon demand on the part of the accused which was not the case. In any event, she submitted, since the amendment had the effect substituting the incorrect penal provision with the correct one, the irregularity, if any, was inconsequential and as such it did not occasion injustice on the part of the appellant. The reason being that, the substituted penal provision imposes a lesser punishment than the initial one.

In **Rehani vs. the Republic**, Criminal Appeal No. 222 of 2017 (unreported), dealing with a similar issue, we made the following statement which we fully subscribe to:-

> *On the second condition, while we are in agreement with the learned State Attorney that, the right on the part of the accused person to recall a witness or witnesses for further examination in chief or further cross examination is upon demand, it is our considered view that, for the purpose of affording the accused a fair trial, the trial court is duty bound to inform him or her of such right. The record does not suggest that the appellant was informed of such right by the Court. This, we subscribe to the appellant, was an irregularity. Nevertheless, considering the fact that the alteration in the charge sheet was with a view to reflecting the correct time of the commission of the offence and no more, we do not think that it occasioned any miscarriage of justice as to affect the substantial validity of the judgment and proceedings of the trial court.*

Guided by the above principle, we entirely agree with the learned State Attorney that, since the amendment had the effect of substituting the incorrect penal provision with the correct one and in view of the fact that the sentence in the substituted charge is lesser than in the initial one, the omission was insignificant and not prejudicial to the appellant. It did not therefore, affect the substantial validity of the judgment and proceedings of the trial court.

This now takes us to the first, second, fifth, sixth and seventh grounds of appeal which relate to the proof of the offence. In her submissions, Ms. Kezilahabi contends that, the evidence of PW1 as corroborated by PW3 and PW4 was credible enough to establish that, it was the appellant who committed the offence. In her view, the trial magistrate was justified to place reliance on such evidence because in rape cases, the evidence of the victim is the best evidence. We were referred to the case of **Selemani Makumba vs. Republic,** [2006] T.L.R. 379 which is in support of that proposition. She submits further that, under section 127 (7) of the Evidence Act, the trial court may solely rely on the testimony of a child of tender age to sustain conviction if it establishes that, the same is credible. She submits therefore that, since the testimony of PW1 on identification of the

appellant and commission of the offence was not challenged by way of cross examination, the trial magistrate was correct in treating the omission as acceptance of the truthfulness of the evidence.

On failure to call investigating police and/ or village executive officer, the learned State Attorney submits that, the same were not material witnesses because the arrest of the appellant was not at issue. After all, she further submits, it was upon the prosecution to decide who is to be called as a witness and that, number of witnesses does not matter. She refutes the proposition in the 6th ground of appeal that, there were contradictions in the prosecution evidence. She submits further or in the alternative that, if there were any contradictions, the same were too trivial to affect the substantial credibility of the prosecution evidence. In any event, she further submits, the contradictions did not touch the substance of the claim by PW1 that, she was raped by the appellant, a person who was well known to her. She therefore, urges the Court to dismiss the appeal.

After reviewing the evidence on the record in line with the grounds of appeal and submissions, we are of the opinion that, the main issue raised in 1st, 2nd, 5th, 6th and 7th grounds which is captured in the first ground which is whether or not the case against the

appellant was proved beyond reasonable doubt. We are certain that, the discussion on this issue will address the remaining grounds of appeal which in essence question the assessment of evidence by the trial court.

It is an elementary position of law that, in criminal cases, the burden to prove the allegation beyond reasonable doubt is on the prosecution. Where a reasonable doubt arises, it is also the law, it has to be applied in favour of the accused person. In this case, the victim of the rape is alleged to be a child of tender age. We subscribe to the learned State Attorney that, under section 127(7) of the Evidence Act, conviction may be based on the sole evidence of the child of tender age if the court is satisfied that she is credible. The respective provision provides as follows:-

> *"Notwithstanding the preceding provisions of this section, wherein criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or 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 as the case may be the victim of the sexual offence on its merits,*

notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons 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."

It has however to be emphasized that, the court cannot base its conviction solely on the evidence of a child of the tender years or the victim of the crime unless it satisfies itself that, the same is credible and probable as to leave no reasonable doubt. This position was stated, in among authorities, the case of **Mohamed Said vs. the Republic,** Criminal Appeal No. 145 of 2017 (unreported) where it was observed as follows:-

"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127(7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases."

As we understand the law, determination of credibility of a witness cannot be made in isolation of other pieces of evidence on the record and the circumstance surrounding the case. Therefore, **in Shabani Daudi v. R.,** Criminal Appeal No. 28 of 2000 (unreported), the Court stated that:-

> *"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."*

For obvious reason, we find it desirable to start with the issue of age of the victim. We understand that, the charge upon which the appellant was convicted is premised under the provision of section 130 (1) and (2) (e) of the Penal Code whereunder an offence of rape is committed, if a male person has sextual intercourse with a girl under eighteen years "with or without her consent". Under the respective provision, it is apparent that, the age of the victim is an essential element of the offence. It is therefore a matter of principle

that age of the victim has to be proved beyond reasonable doubt. There are numerous decisions in support of this position. See for instance, **Weston Obeid vs. R,** Criminal Appeal No. 23 of 2016 (unreported).

Admittedly, with the removal of exhibit P1 from the record, the only testimony which remains on the record regarding the age of the victim is that of the victim herself. She was consistent in her evidence that, she was 12 years old when she was being raped. Indeed, the age of the victim was clearly pleaded in the charge sheet. In accordance with the principle in **Isaya Renatus vs. the Republic**, Criminal Appeal No. 542 of 2015 (unreported), evidence as to proof of age can be given by "*the victim, relative, parent, medical practitioner, or where available, production of birth certificate.*" From the record, it would appear to us, apart from refuting commission of the offence, the appellant did not in his defense and his first appeal raise the issue of age. He has not framed it as a ground of appeal in this second appeal too. In the circumstance therefore, we have no basis to doubt the evidence of PW1 on her age.

We now pass to the necessity of the testimony of the arresting police and the village executive chairman. As we said above, the conviction of the appellant was based on the eyewitness identification and/ or recognition evidence of PW1. The offence was committed during day time and PW1 claimed to have recognized the appellant because it was a person who was well known to her as her uncle. However, the record suggests that, although the offence was committed in July, 2018, it was not until in September, 2019 when the appellant was arrested. This is a period of more than 26 months. The explanation from the prosecution through PW3 is that, the appellant was not arrested because he escaped from the village. In the 7th ground of appeal, the appellant challenges the trial magistrate in accepting this proposition without there being evidence from the arresting police or village executive officer. In her submissions, the learned State Attorney contends that, since the arrest of the appellant was not at issue, the testimony of the arresting officer and village executive officer was immaterial.

With respect, we think the learned State Attorney missed the point. The issue here is not whether or not the appellant was arrested. Quite apart, it is whether or not the arrest of the appellant

after expiry of more than a year was because of his abscondment from the village. In our view, unless the question is answered in the affirmative, the testimony of PW1 that she identified the appellant and disclosed his identity at earliest possible opportunity shall not be free from reasonable doubts. For, unless he escaped from the village, it was highly improbable for a suspect of such a serious offence to remain un-arrested for such a long time.

We have taken time to carefully study the prosecution evidence on the record and we could not come across with any concrete evidence to suggest absence of the appellant from his residence for such a long time. Indeed, there is nothing on the record to the effect that, the appellant had ever been traced and found absent. The general claim in the testimony of PW3 that the appellant was not present in the village is not, in our view, sufficient to establish the proposition. This is more so because in accordance with the testimony of PW1, PW2 and PW4, the incident was reported to hamlet chairman on the same day and subsequently to police. The matter having been reported to police and the village authority, the duty to search and arrest the appellant was of those authorities. In the nature of this case and considering the length of time involved in arresting the

appellant, evidence of the investigator or arresting police was of essence to feel the gaps in the prosecution case and clear reasonable doubts that, the appellant might have not been timely arrested because he was not reported to the relevant authorities at the earliest possible time as the person who committed the offence.

In **Yohana Chibwingu vs. the Republic**, Criminal Appeal No. 177 of 2015 (unreported), the victim, like in this case, identified the appellant as the one who committed the offence and reported the matter to local authorities and the District Commissioner. Subsequently, the appellant was arrested and charged with the offence. In its evidence, the prosecution, without assigning any reason, neither called the investigating officer nor the chairperson of the village authority. The Court was of the considered opinion that, the omission was so serious that it raised reasonable doubt in the prosecution case. In particular, the Court stated as follows:-

> *"Failure to call the chairman, the investigator or District Commissioner to whom, PW1 allegedly reported the robbery is a very serious omission in the case for the prosecution, because it leaves a lot of important questions unanswered. This is compounded by the*

absence of an identification parade for PW2 and PW3 to identify the perpetrators of the crime. These unanswered questions create serious doubts, which doubts must be resolved in favour of the appellant."

In reaching to such a conclusion, the Court reasoned as follows:-

"At the end of hearing of this appeal, we kept on asking ourselves a number of questions to which we had no answers. The appellant charged with a serious offence of robbery. Was the offence not investigated by the police? If so, who investigated it? Why wasn't the investigator called to testify? If he had testified he would have answered several questions, including for instance, whether PW1 gave a description of the appellant in the first report? Did he really abscond? Was any statement taken from the appellant about the instant? We have also wondered why weren't the chairman of the appellant's village or District Commissioner to whom PW1 said reported, called to testify?

A similar position was stated in **Boniface Kundakira Tarimo vs. Republic**, Criminal Appeal No. 350 of 2008 (unreported) where it was held that:-

> *"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."*

Much as we agree with the learned State Attorney that, it is upon the prosecution to decide who should be called as witnesses and that number of the witnesses does not matter, it is our opinion that, if a person who is unreasonably not called as a witness is a material witness, the prosecution is bound to produce him and if not, the Court may, as we hereby do, draw an adverse inference for the omission (See **Aziz Abdallah vs. Republic** (1991) TLR. 71.

Though it is correct, as submitted for the appellant that, failure to cross examine a prosecution witness on material respect is tantamount to acceptance of the evidence to be true, it is our understanding of the law that, the said rule is not absolute. As held in

Kwiga Masa v. Samweli Mtubatwa [1989] T.L.R. 103 which was referred with approval in our decision in **Zakaria Jackson Magayo v. the Republic**, Criminal Appeal No. 411 of 2018 (unreported):-

> *"A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the challenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting part on the point. The witness's story may be improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during crops-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross examine the witness, was not making a concession that the evidence of the witness was true."*

It would also appear to us to be the law that, where, like in this case, the accused is unrepresented layman, before drawing an inference that, he did not cross examine the witness because he

accepted his evidence to be true, the court has to warn itself if the layman accused knew the meaning and effect of not cross examining a prosecution witness. On this, the following statement of the High Court of South Africa in **State v. Maxwell Gordon** (171298) [2018] ZAWCHC 106 is persuasive:-

> *[22] It cannot be fair if an accused person who clearly lacked familiarity with the courtroom strategy and tactics as well as legal knowledge, was ambushed with an explanation of his right to cross examination after the evidence which he did not listen to with an informed mind, was tendered against him. Unsophisticated accused are generally not oriented in any way and arising out of ignorance, do not know what their role is and what is expected of them by the court during evidence -in - chief. The orientation and induction of accused person should ensure that such accused find their position in relation to unfamiliar circumstances of a court and formally introduce them to what is expected on what is to follow. In my view, fairness to unrepresented accused demands that the right to cross-examine and the purpose of cross-*

examination should be fully explained to him or her before the first State witness is sworn in, affirmed or warned.

In any event, it is not true, as suggested in the judgment of the trial court that, PW1 was not cross examined. The record at pages 11 and 16 suggests that, both PW1 and PW3 were cross examined on the involvement of the appellant on the commission of the offence.

Next in our consideration is on the complaint that, the prosecution case was contradictory in material respects. In her submissions, the learned State Attorney denies the assertion. She submits that, if there any contradictions, they were merely trivial and could not affect the substantial credibility of the prosecution evidence. We cannot accept this submission.

We have scanned the evidence on the record in line with the factual allegation in the charge sheet and memorandum of facts. We have observed of there being material contradictions. The proposition in the prosecution case was that, the offence was committed on 22nd July, 2018. In the initial charge sheet which was filed on 27th September 2019, the date of commission of the offence was represented to be on 22nd July, 2019. This would be in line with the

testimony of PW4 who claimed that, PW1 was produced to him for medical examination on the said date. Conversely, on 25th October, 2019, the charge sheet was amended so that the date of the commission of offence would be on 22nd day of July, 2018.

The amendment notwithstanding, the prosecution produced contradictory evidence through PW4 suggesting that, the offence was committed in 2019. Indeed, even the documentary evidence in exhibit P2 suggests that the medical examination was made in July, 2019. When we requested the learned State Attorney to clarify on this point, it was her assumption that, the medical examination of PW1 was made on 22nd July, 2018 and the filling in PF3 in July, 2019. With respect, the assumption is not founded on evidence. The testimony of PW4 on the date of examination of the witness and filling in the PF3 is consistent according to the record. In the absence of evidential clarification from the record, we find ourselves with no factual basis to imply otherwise. Indeed, the testimony of PW4 suggests that, the said PF3 was produced to him in a short while though he could not recall the date. The interval between 22nd July, 2018 and 26th July, 2019 is more than a year. We do not think that, the issue was so immaterial as not to deserve evidential clarification during trial.

The contradiction in the prosecution case on the date of the medical examination of PW1 is very serious considering the interval of a period of more than year. It leaves much to be desired if it was probable for a person who had been raped one year before to be found with bruises in her private parts as suggested in exhibit P2.

We shall wind up with a complaint that the defense evidence was not considered. We note that, in his defense, the appellant claimed that the case was fabricated because of the grudges he had with his father. In his submissions at the first appellate court, the appellant disclosed the person with whom he had grudges as his father's young brother. It is common knowledge that, while in English such a person is called paternal uncle, in Swahili he is called *"baba mdogo"*. Much as we agree with the concurrent opinion of the lower courts that, the appellant's defense was too general and unclear, in the circumstance of this case and in view of the fact that, the appellant was unrepresented layman, the trial magistrate was expected, for the purpose of affording him a fair hearing, to ask him for clarification rather than awaiting to dismiss his defense for being unclear.

It may perhaps be worthy to note that, just as the defense evidence was not clear as aforesaid, the prosecution evidence was also not clear on the nature of the relationship between the appellant and PW1. In accordance with the testimony of PW1, the appellant was her uncle and PW3 her grandmother. On the contrary, the testimony of PW3 suggests that, the appellant was her grandchild too. In her own words, PW3 is on the record testifying that:-

> *"I know ISSA LEJI MAFITA, the accused person, is my grandson, (name withheld) called him uncle."*

Therefore, if both the appellant and PW1 were the grandchildren of PW3 as suggested in above piece of evidence, the appellant was PW1's brother and not uncle as suggested in the testimony of PW1. The person who is consistently mentioned in the prosecution evidence as PW1's uncle is Felician. This person together with PW3 were involved in rushing PW1 to hospital. Testifying on this fact, PW1 stated as follows:-

> *We went home crying, unable to walk, I reached at home and found my grandmother, I told her what behalf me, we went to hamlet chairman, my grandmother, explained what*

happened, we were told to got to the dispensary when my uncle named Felician came we went to Pahi dispensary, I was examined and given the medicine we left.

Narrating the same story, PW3 testified as follows:-

I called my other grandchildren to call Felix Felician the uncle of (name withheld), he came I told him what befell (name withheld), he said, we have to take her to the hospital to the Doctor at Pahi....

We think that, the defense evidence when weighed with the testimony of PW3 and PW1 and the time taken to arrest the appellant would raise some questions on the probative value of the testimony of PW1 on the identification of the appellant. It would as well raise some questions on relationship between the appellant and PW1 unto which the trial court should have inquired to clear a reasonable possibility that the person whom PW1 called his uncle was not the appellant.

In view of the foregoing discussions, we think that, the case against the appellant was not proved beyond reasonable doubt. The appeal is thus with merit and it is accordingly allowed. We

consequently quash the judgment and conviction of both the lower courts and set aside the sentence. We order that the appellant be released forthwith from prison custody unless held there for some other lawful cause.

Order accordingly.

DATED at **DODOMA** this 23rd day of August, 2021

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of the Appellant in person and Mr. Matibu Salum, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL