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

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

**CRIMINAL APPEAL NO. 436 OF 2017**

**TAFIFU HASSAN @ GUMBE ..... APPELLANT**

**VERSUS**

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

**(Appeal from the judgment of the High Court of Tanzania at Shinyanga)**

**(Makani, J.)**

**dated the 11th day of August, 2017**
**in**
**(DC) Criminal Appeal No. 172 of 2016**

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## JUDGMENT OF THE COURT

18th & 27th August, 2021

**LEVIRA, J.A.:**

Tafifu Hassan @ Gumbe, the appellant, was arraigned before the District Court of Shinyanga at Shinyanga for two counts of sexual offences; to wit, rape contrary to sections 130 (1), (2) (e) and 131 (1) and unnatural Offence contrary to section 154 (1) (a) all 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 as per the charge sheet, that on 13th June, 2015 at Ngokolo area within the Municipality in Shinyanga Region, the appellant had sexual intercourse with and carnal knowledge of the victim, a girl aged 10 years old against the order of nature. For

the purpose of this appeal, we shall refer to the victim as NEM or the victim so as to hide her identity. After a full trial he was found guilty in both counts and was sentenced to 30 years imprisonment for each count and the sentences were ordered to run consecutively.

Before we determine the grounds of appeal, we find it pertinent to give in a nutshell the background of this case. The appellant is the husband of the victim's mother and they lived together. On 13th day of June 2015 at around 8:00am the victim together with other children from a neighbouring house were sleeping in the sitting room at her home. The appellant woke them up them by pouring some water on them and therefore they ran away. However, he got hold of the victim, took her to their room, undressed her and he as well undressed and thereafter had sexual intercourse with her. Also, the appellant decided to have forceful anal sex with her. The victim cried out of pain but the appellant threatened to kill her and ordered the victim to go out. A good a Samaritan saw her and when she was asked what happened she narrated the whole story.

When arraigned before the court the appellant denied the charges against him and maintained that on 13th day of June 2015 he was found

sleeping in his house, the police arrested him, took him to the police and subsequently, to the court where he was charged as stated above. Having heard the evidence of both the prosecution and defence, the trial court found the appellant guilty of both counts, it convicted and sentenced him as above stated. Dissatisfied with that decision, he unsuccessful appealed to the High Court hence the current appeal.

The Appellant lodged a memorandum of appeal comprising of nine grounds. In the memorandum of appeal, the appellant is challenging the decisions of both lower courts. The grounds of appeal presented before the Court are paraphrased as follows: -

1. That, a fresh plea of the appellant was not taken at the commencement of the trial.
2. That, the prosecution witnesses were not credible and their evidence in respect of time/period of incident, arrest, report, treatment and interrogation of the appellant was doubtful.
3. That, the unsworn evidence of the victim (PW2) required corroboration of other witnesses apart from unsworn evidence of PW1 and PW2.

4. That, the record of appeal at pages 28 and 43 ere not properly arranged.

5. That, the evidence of PW4 was not credible and reliable.

6. That, the cautioned statement (Exhibit P2) was recorded contrary to the law.

7. That, the appellant's sentences were supposed to run concurrently instead of consecutively.

8. That, the mother of the victim as material witness was not called by the prosecution to testify.

9. That, the evidence of PW2 and PW3 was not taken in camera.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent Republic was represented by Ms. Salome Mbughuni, learned Senior State Attorney assisted by Ms. Wampumbulya Shani and Mr. Jukael Reuben Jairo, both learned State Attorneys.

The appellant adopted his grounds of appeal at the onset while dropping the fourth ground, opted to hear first from the respondent's counsel as he reserved his right to make a rejoinder.

In reply, Ms. Shani opposed the appeal. She submitted in respect of the first ground that the charge sheet was read to the appellant and he pleaded not guilty as it can be seen at page 3 of the record of appeal. Therefore, she argued that it is not true that the same was not read to him. Besides, she said, there is no law which requires the court to re-read the charge sheet except when the accused prays before the trial court for the same to be read again. In the circumstances, she stated that since the charge was read when the appellant was arraigned, he was not denied any right and therefore this ground is baseless.

Responding on the second ground of appeal on credibility of witnesses, Ms. Shani submitted that there was no contradiction of time as the appellant was arrested after the incident, on the same day, interrogated and the victim's treatment as well started on the same day of incident. Therefore, according to her, the credibility of witnesses was not shaken. She prayed for the Court to dismiss this ground.

Ms. Shani argued the third and nineth grounds of appeal together. Specifically on the 3rd ground, she conceded that the evidence of PW1, PW2 and PW3 was taken without oath and it required corroboration as stated in the case of **Hassani Kamunyu v. Republic**, Criminal Appeal

No.277 of 2016 (unreported). However, it was her submission that in the case at hand there was corroboration. She referred us to pages 18-20 of the record of appeal where PW4, a doctor who examined the victim testified and tendered a PF3 (exhibit P1) and submitted that his (PW4's) evidence corroborates that the victim was raped and sodomised.

She also referred us to pages 21-23 of the record of appeal where WP. 3676 D/Corpl. Ruth (PW5) who recorded the appellant's cautioned statement testified and tendered the said cautioned statement as (Exhibit P2). It was Ms. Shani's submission that Exhibit P2 also proved that the appellant committed the offence. As such, she said, that exhibit was tendered and admitted without any objection from the appellant. She added that the appellant did not cross examine the witness and this proves that what is stated by the witnesses is correct. Therefore, she urged the Court to dismiss this ground as well.

In respect of the ninth ground of appeal, Ms. Shani though she conceded that the evidence of PW2 and PW3 was not recorded in camera, however, she argued that such omission did not affect the appellant and there was no miscarriage of justice. In support of her

argument, she cited the case of **Herman Henjewele v. Republic**, Criminal Appeal No.164 of 2005 (unreported). She thus prayed the Court to disregard this ground.

As regards the fifth ground of appeal, Ms. Shani admitted that, PW4 was not mentioned in the list of witnesses as a matter of procedure but the court is not prohibited to add a witness. So, adding him did not prejudice the appellant, she emphasised. To substantiate her stance, she cited the case of **Bandoma Fadhili Makaro & Another v. Republic**, Criminal Appeal No.14 of 2005 (unreported). She prayed for this ground to be dismissed for being baseless.

It was Ms. Shani's argument that the sixth ground of appeal is baseless because the appellant's cautioned statement was recorded in accordance with the law, signed and tendered in court without any problem. She urged us to dismiss it.

Responding on the eighth ground of appeal, Ms. Shani submitted that the same is without merit as the evidence on record was sufficient to prove the case. According to her, it was not necessary to summon the mother of the victim as witness to testify and thus this ground is also baseless.

The seventh ground of appeal regarding the appellant's sentence was argued by Mr. Jairo. He admitted that it was not proper for the trial magistrate to order the appellant's sentences to run consecutively. This he said is due to the fact that the offences were committed in the same transaction. He cited the case of **Ramadhani Hamisi@ Joti v. Republic**, Criminal Appeal No.513 of 2016 (unreported). He went on submitting that the trial magistrate ought to have assigned reasons for ordering the sentences to run consecutively but he did not. Besides, it was his further submission that the punishment of the second count of unnatural offence with which the appellant was charged is life imprisonment. Therefore, he urged us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) to enhance the 30 years imprisonment sentence to life imprisonment.

Finally, he urged us to dismiss the entire appeal for being without merit.

In a brief rejoinder, the appellant stated that he was not given the right to cross examine PW2 and PW3 as he was told that they are not supposed to be cross examined because they were children. He

reiterated his complaint that the mother of the victim was not called to testify. Therefore, he prayed for his grounds of appeal to be considered and the Court to set him free.

We have considered the grounds of appeal, record of appeal and the parties' submissions. The main issue calling for our determination is whether the appellant's conviction which was upheld by the High Court was based on strong prosecution account. It is trite law that the burden of proof against the accused always lies on the prosecution and no conviction shall be entered on account of weak defence but upon proof of the case beyond reasonable doubt – See **Awadhi Abrahamani Waziri v. Republic,** Criminal Appeal No. 303 of 2014 (unreported). In the light of the above position, we now proceed to consider the merits or otherwise of the grounds of appeal.

Starting with the first ground of appeal, the appellant's main complaint is that the successor magistrate proceeded with the trial without taking afresh the appellant's plea. There is no doubt that the appellant was arraigned before the trial court on 16th June, 2015 to answer the charges. According to the coram found at page 3 of the record of appeal, on that date, the presiding magistrate was Hon. R. S.

Mushi, Resident Magistrate. The charge was read over to the appellant and he pleaded not guilty in respect of both counts and thereafter, the court entered a plea of not guilty. As the investigation was incomplete the hearing of the case could not take place up until on 19th August, 2015 where trial commenced before Hon. J. E. Massesa, Senior Resident Magistrate as it can be seen at page 8 of the record of appeal. The record is silent as to whether or not the charge was read again to the appellant, but it only indicates the appellant's response after the Public Prosecutor who said they were ready for the hearing, the appellant was recorded saying, *"I am also ready."* From there the trial proceeded. Following what transpired above, since the charge against the appellant was read over to him when he was arraigned, this sufficed. However, non-compliance is not prejudicial to the accused provided the charge was initially read over and he was able to give his defence. In the current case the trial was conducted by Hon. J. E. Massesa throughout and there was no change of magistrate. In the circumstances, we do not find any prejudice on the part of the appellant as he was accorded the right to defend his case and he exercised it. This ground of appeal is devoid of merit.

In the second ground of appeal, the appellant is challenging the credibility of prosecution witnesses saying that there was contradiction in their evidence in respect of time of the incident, report, arrest, treatment and interrogation. It is on record that the incident occurred on 13th June, 2015 at about 8:00 am to 9:00 am; all prosecution witnesses mentioned that date. The record is silent on the time of the appellant's arrest but he was arrested after the incident was reported to the police by Brunamary Chilioma (PW1) and he was interrogated by WP. 3676 D/Corpl. Ruth (PW5) on the same date from 12:00 pm to 12:55 pm. As regards the treatment of the victim, Dr. Dismas Steven (PW4) from Shinyanga Region Referral Hospital testified that he received the victim on the same date and treated her. We have thoroughly gone through the record of appeal and we could not see any contradiction. We agree with Ms. Shani that there are no contradictions in the prosecution evidence in respect of those areas identified by the appellant. If there is any contradiction, which we say there is none in the current case, the law is settled that not every discrepancy will cause the prosecution case to fail as stated in the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (unreported), that: -

*"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

Therefore, we do not find any merit in this ground and it fails.

In the third and ninth grounds of appeal the appellant's complaint is that the unsworn evidence of PW2 required corroboration apart from the of evidence of PW1 and PW3 which was also taken without oath. Admittedly, as reflected at page 8 of the record of appeal, the evidence of PW1 was taken without oath. This contravened the mandatory provision of section 198 of the CPA which provides that:

*"Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act."*

This Court in the case of **Nestory Simchimba vs. The Republic,** Criminal Appeal No. 454 of 2017 (unreported), held that: -

*"Since, in the present case, PW1 and DW1 gave their evidence without being affirmed, on the authorities above, their words recorded when*

*they gave testimonies was no evidence at all and, in that accord, we entirely agree with Mr. Mtenga that such evidence deserved not be considered by the court to determine the guilt or otherwise of the appellant. The evidence by PW1 and DW1 is hereby accordingly discarded."*

Applying the above position to the current case, the evidence of PW1 deserves to be disregarded as we accordingly do. However, we take note that PW2 and PW3 gave unsworn testimony due to their age and their evidence was corroborated by that of PW4, the doctor who medically examined the victim and tendered the PF3 and that of PW5 a police officer who recorded the appellant's cautioned statement. Their evidence proved that PW2 was raped and sodomised on the fateful date. This ground of appeal is destitute of merit and it is dismissed.

As regards to the ninth ground of appeal on the complaint that the evidence of PW2 and PW3 was taken in contravention of section 186 (3) of the CPA, this ground is wanting and, in our view, should not take much time as the record speaks loudly at pages 11 and 12 that their evidence was recorded on 2nd September, 2015 in camera. At page 12 of the record the trial court order is to the following effect: -

> *"**Court**: I hereby order that the proceedings be conducted in camera. Save for the accused, the prosecution, the bench and social welfare miss Pamela, clerk, the rest are excluded from hearing the proceedings."*

Even if section 186 (3) of the CPA was not complied with, it could not have affected the appellant because in essence, that provision is aimed at protecting a child witness and not an adult as in the present case. After all, such omission if it happens is curable under section 388 of the CPA. See the case of **Herman Henjewele v. Republic**, Criminal Appeal No.164 of 2005 and **Rajabu Juma Mwelele v. Republic**, Criminal Appeal No.325 of 2017 (both unreported). As a result, the ninth ground of appeal is bound to fail.

In the fifth ground of appeal the appellant's complaint is twofold. In the first limb, the appellant complained that PW4 testified while he was not listed during the conduct of Preliminary Hearing. It is true that PW4 was not mentioned in the list of prosecution witnesses during Preliminary Hearing but failure to mention him was a matter of procedure as stated by Ms. Shani. If we may add, the appellant has not stated how he was affected. That apart, the law is settled that in the proceedings conducted by subordinate court, the court is not prohibited

to add a witness. Therefore, by adding PW4, we do not find any prejudice on the part of the appellant. For this position see the case of **Bandoma Fadhili Makaro and Another v. Republic**, Criminal Appeal No.14 of 2005, **Leonard Joseph @ Nyanda v. Republic**, Criminal Appeal No.186 of 2017 and **Charles Haule v. Republic**, Criminal Appeal No.250 of 2018 (all unreported). In **Bandoma Fadhili Makaro** (supra) when the Court was dealing with an akin situation had the following to say: -

> *"... There is no equivalent provisions for trials in the subordinate courts and there is no law therefore which prevented the prosecution to call as witnesses PW2 and PW5, even though those witnesses were not listed at the preliminary hearing."*

Being guided by the above position of law, we find that the first limb of appellant's complaint is devoid of merits.

As regards the second limb, the complaint is that the evidence of PW4 was not credible and reliable due to the fact that in his oral account he stated that he filled the victim's PF3 after being admitted for one week. The following are his words at page 20 of the record of appeal: -

*"... she was admitted in the hospital for one week. After that I failed (sic) in the PF3 form."*

While the date appearing in the PF3 is 13th June, 2015, the incident date as it can be seen from page 33 of the record of appeal is 13th June, 2015. This ground need not detain us much as it is settled position that documentary evidence supersedes oral account. Therefore, we do not find the alleged difference to have impeached the credible account of PW4; see, **Said Ally Ismail v. Republic** (supra). Thus the second limb of complaint is as well without merits. Generally, the fifth ground of appeal fails.

In the sixth ground of appeal, it is the appellant's complaint that exhibit P2 (appellant's cautioned statement) was recorded contrary to the law as it was not signed by the one who recorded it. Exhibit P2 which is found at page 32 of the record of appeal was recorded by PW5 on 13/6/2015 as alluded to above and the same was signed on the same date. We agree with Ms. Shani that there was no any violation of the law in recording the statement, exhibit P2 and in that regard, this ground of appeal is unfounded.

In the eighth ground of appeal, the appellant complained that the victim's mother was not called as a witness to testify, thus an adverse

inference ought to be drawn against the prosecution. It is true that the victim's mother was not called to testify. However, it is common knowledge that it is not the number of witnesses that determines the guilt or otherwise of an accused person but their credibility and weight of evidence are matters of highest consideration (see section 143 of the Evidence Act, [Cap 6 R.E 2019]). In the case of **Bakari Hamis Ling'ambe v. Republic,** Criminal Appeal No.161 of 2014 (unreported), the Court held that: -

> *"It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (Section 143 of the Tanzania Evidence Act, Cap 6). A court of law could convict an accused person relying on the evidence of a single witness if it believes in his credibility, competence and demeanor."*

Moreover, it is the prosecution that enjoys the discretion to choose which witness to call. In **Abdallah Kondo v. Republic**, Criminal Appeal No.322 of 2015 (unreported), the Court stated that: -

> *"...it is the prosecution which have the right to choose which witnesses to call so as to give evidence in support of the charge. Such witnesses must be those who are able to*

*establish the responsibility of the appellant in the commission of the offence..."*

In the light of the above position, we find that the prosecution exercised their right and called material witnesses to prove their case. We note that the appellant just insisted that the mother of the victim ought to have been called as a witness but he did not show whether she was a material witness to justify court's adverse inference against the prosecution. Having so stated, we find that this ground of appeal is without substance.

We now turn to consider the seventh ground of appeal. As indicated above, this ground was argued by Mr. Jairo who concurred with the appellant that his sentences were supposed to run concurrently instead of consecutively as ordered by the trial court because the offences were committed in the same transaction. He supported his argument with the case of **Ramadhani Hamisi @ Joti v. Republic**, Criminal Appeal No. 513 of 2016 (unreported). However, Mr. Jairo was of the view and we agree that since the second count was charged under section 154 (1) (a) of the Penal Code, the appellant ought to have been sentenced to life imprisonment in terms of section 154 (2) of the same Act on account that the victim's age was below eighteen years. Indeed, that is the law.

Consequently, in terms of section 4(2) of the AJA we hereby revise the consecutive order and sentence in respect of the second count, in lieu thereof, we enhance the appellant's sentence to life imprisonment.

In the end, the appeal is dismissed in its entirety.

**DATED** at **SHINYANGA** this 27th 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 27th day of August, 2021 in the presence of appellant in person and Mr. Jukael Reuben Jairo, learned State Attorney for the respondent/Republic is hereby certified the true copy original.

D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**