IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 536 OF 2017

EMMANUEL KABELELE..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kibella, J.)

Dated the 27th day of October, 2017
in
DC. Criminal Appeal No. 99 of 2016

JUDGMENT OF THE COURT

20th August & 23rd September, 2021.

KAIRO, J.A.:

Emmanuel Kabelele, the appellant, was charged in the District Court of Shinyanga with the offence of rape contrary to sections 130 (1) and (2) 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 offence that, on the fateful day, that is, 2nd April, 2013 at Ilobashi Village within Shinyanga District in Shinyanga Region, the appellant did rape a girl child of 15 years old who for the purpose of this judgment, we shall refer her as the "victim" or "PW1" to conceal her true identity.

To prove its case, the prosecution called four witnesses who were the victim (PW1), Veronica Said (PW2) - the mother of the victim,

Mahona Mbute (PW3) - a person who assisted the victim to go back home after the alleged incident) and Dr. Fredrick Mlekwa (PW4) - a doctor who examined the victim and also tendered the PF3 which was admitted as exhibit P1.

The factual background of the case is that, on 2nd April, 2013 morning hours, the victim was sent by her parents to go and guard against birds in their paddy farm where she stayed until 6.00pm and decided to go back home. On her way, she allegedly met the appellant whom she was familiar with being a co-villager. It was alleged that the appellant seduced her but she refused. The appellant then got hold of her and fell her down. He undressed her underwear, covered her mouth to stop her from shouting and inserted his penis into her vagina. According to the victim, the ordeal was so painful and took about 30 minutes. After he quenched his thirst, the rapist left the victim weak and bleeding. She started to go back home slowly due to pain and fortunately she met PW3 who was also a co-villager. She requested his assistance to be taken back home claiming she had a stomach ache as she feared that PW3 would decline assistance if told about the rape incident. She was assisted and when reached home, she narrated the episode to her mother (PW2). PW2 then informed the victim's father and together with some neighbours, took the victim to Ilobashi Dispensary.

She was examined by a nurse and given one day bed rest. Thereafter, the Ward Executive Officer (WEO) together with the victim's father went to arrest the appellant. They later reported to the Police where they were given a PF3 and went to the Government Hospital for further treatment. The victim was examined by PW4 who according to his findings established that, the victim's hymen was ruptured and her *posterior fornix* perforated. Thus, the victim had to undergo an operation to repair the injured part. PW4 then filled the PF3 on 16th April, 2013 which he tendered in court and was admitted as exhibit P1.

When defending himself, the appellant raised a defense of alibi which was supported by George Edward (DW2) and Benjamin Hamisi (DW3) who alleged that, on the fateful day, the appellant had gone to assist DW2 with the weeding work at his maize farm. That the appellant and DW3 left the home of DW2 back to Ilobashi and parted at around 8:30pm. The appellant was later arrested around 2:00 midnight being accused of rape. Following the said arrest, his parents were asked to pay TZS. 1,800,000.00 by the victim's father but managed to pay TZS. 500,000.00 only. However, the record is silent on the purpose of the said payment. The matter resurfaced on 25th April, 2013 when the appellant was arrested and charged of this case which upon full trial, the trial court dismissed the appellant's defence of alibi for being weak. It

went on to conclude that the victim's evidence was credible and reliable and thus the prosecution proved the case beyond reasonable doubt. The appellant was thus sentenced to serve thirty years imprisonment and pay the victim a compensation of TZS. 500,000.00.

Unsatisfied with both the conviction and sentence, the appellant unsuccessfully appealed to the High Court. Still determined to protest his innocence, the appellant has lodged in this Court the memorandum of appeal which comprises eight grounds of appeal paraphrased as follows:-

1. *That PW1 was not a credible witness.*
2. *That, PW1 credibility is shaken for failure to report the incident to PW3 whom she first met.*
3. *That There are contradictions on the time of the commission of offence and time of PW1's arrival at home which goes to the root of the case.*
4. *That Exh. P1 (PF3) indicates that, PW1 was lately admitted on 16.04.2013.*
5. *That Exh. P1 (PF3) indicates that PW1's file was opened on 16.04.2013.*
6. *That the investigator and WEO as crucial witnesses were not called to testify.*
7. *That all prosecution witnesses unreliable, hence their evidence could not be relied on to ground conviction.*
8. *That the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal the appellant appeared in person, unrepresented whereas, the respondent Republic had the services of Mr. Jukael Reuben Jairo assisted by Ms. Caroline Mushi, both learned State Attorneys.

When called to amplify his grounds of appeal, the appellant adopted the grounds in the memorandum of appeal and preferred to let the respondent respond first but reserved his right to rejoin, if need to do so would arise.

It was Ms. Mushi who responded to the grounds of appeal and declared the respondent's stance to oppose the appeal. Ms. Mushi told us that she would address the first and seventh grounds together, then the fourth and fifth also would be addressed together, but the rest will be responded separately.

Starting with the first and seventh grounds, Ms. Mushi submitted that the appellant's complaints is hinged on the credibility of PW1 (the victim), for what he alleged telling lies by the said witness. She elaborated that the victim was a credible witness who proved that she was raped by the appellant. She referred us to page 12 of the record of appeal where the victim narrated what transpired on the incident day which narration, she argued to be credible and reliable. She went on to elaborate that, after the ordeal, PW3 assisted her back home and that

though she did not tell him over the incident, PW3 heard it later. That upon reaching home she met PW2, and told her to have been raped. Ms. Mushi contended that apart from PW2 and PW3 corroborating the victim's evidence, the same was further corroborated by PW4, the doctor who examined her and proved that the victim's hymen was ruptured. Besides, there was PF3 (exhibit P1) which contains what PW4 observed after he examined PW1. She thus concluded that the trial court as well as the first appellate court were correct to conclude that all prosecution witnesses were credible worth believing as there was no reason for not believing them. To bolster her argument, she cited the case of **Edson Mwombeki v. Republic;** Criminal Appeal No.94 of 2016 (unreported) which referred **Goodluck Kyando v. Republic**, [2006] T.L.R. 363. She also argued that this Court being the second appellate court is essentially not required to reverse the concurrent fact findings of the two courts below unless both courts misapprehended the evidence before it, to which Ms. Mushi argued not the situation in the case at hand. She thus concluded that the first and seventh grounds of appeal are unmerited.

Addressing the second ground, although Ms. Mushi conceded that the victim did not tell PW3 about what happened to her being the first person she met after the incident when requesting for assistance, she however argued that the inaction was given plausible explanation by the

victim. She further attributed the said inaction to the cultural aspect because to be raped is considered shameful. That apart, she argued that the victim told PW2 immediately after reaching home about the fateful incident. She concluded that despite her failure to inform PW3, that does not mean that she was not raped, as such, the second ground of appeal is unfounded.

Regarding the time when the offence was committed and the time when the victim reached home, Ms. Mushi submitted that PW1 in her testimony stated that she met the appellant in the evening and that is when she was raped and reached home around 6:00pm, which facts were also echoed by other witnesses. Thus, there is no contradiction as argued by the appellant, likewise his contention that the incident was cooked, has no base, she insisted.

Reacting to the fourth and fifth grounds of appeal collectively, Ms. Mushi argued that PW4 was categorical in his testimony as to when he received the victim and when he filled the PF3. She refuted the contention that PW4 did not indicate that he examined the victim on 16th day of April, 2013 as suggested by the appellant. She expounded that a similar incident was a subject of contention in the case of **Haji Omari v. Republic,** Criminal Appeal No. 336 of 2020 (unreported) at page 7 wherein the Court observed that, it is not uncommon for medical report

to be signed days after the injury or illness has been attended. She thus prayed for the dismissal of the fourth and fifth grounds for want of merit.

As for the sixth ground of appeal, Ms. Mushi submitted that it is true that neither the investigator nor the Ward Executive Officer (the WEO) were called to testify during the trial. She however argued that since both of them were not present at the scene of incident, their evidence would have just been hearsay. She further argued that, the stance of the law is to the effect that in sexual offences, the victim's evidence is the most reliable, adding that though the duo did not testify, but the rape incident is not discounted for that reason. She also argued that no particular number of witnesses are required to prove a certain fact citing section 143 of the Evidence Act, Cap 6 R.E 2019 to bolster her argument. She concluded that, their absence notwithstanding, the offence was proved to have been committed and the appellant was not prejudiced in any way. Thus, the sixth ground is baseless.

Regarding the seventh ground of appeal whereby the prosecution witnesses are accused of lying-in favor of the prosecution side, Ms. Mushi refuted the said allegation insisting that the witnesses were credible and reliable ones and thus the appellant's prayer to discount their evidence is baseless.

With regards to the eighth ground of appeal to the effect that the prosecution case was not proved beyond reasonable doubt, Ms. Mushi generally refuted the contention. She submitted that in rape offences, the victim has to prove penetration of the male organ to the vagina as provided in section 130 (4) of the Penal Code. She elaborated that, the victim testified that, the appellant had inserted his penis into her vagina and she felt pains and that the rape lasted for about 30 minutes. Ms. Mushi contended further that, it is settled principle that the best evidence in sexual offences comes from the victim as per **Selemani Makumba v. Republic** [2006] T.L.R. 379, and that in the case at hand, the victim aptly demonstrated it whereby she mentioned the appellant to be the one who raped her. Ms. Mushi also submitted that the victim's testimony was corroborated by that of PW4, the doctor who examined her and filled the PF3 which was admitted as exhibit P1. After examination, PW4 observed that the victim's hymen was ruptured which confirms that she was penetrated. She went on submitting that, apart from the Doctor, the victim's evidence was also corroborated by her mother (PW2) who took her to Ilobashi Dispensary for examination after the victim told her that she was raped. As to who raped her, Ms. Mushi submitted that the victim mentioned to PW2 that it was the appellant who raped her and referred us to page 17 of the record of appeal to verify her contention. However, when requested to pin point the specific

words of the victim denoting that, she could not and Mr. Jairo who intervened to offer explanation told us that the record of appeal is silent on that aspect. Ms. Mushi eventually prayed the Court to find this appeal to have no merit and dismiss it.

In his rejoinder, the appellant contended that the incident was a concoction as PW1 lied. He elaborated that at first, the incident was stated to have happened on 2nd April, 2013, but later when testifying, the victim stated that the rape incident occurred on 22nd April, 2013. The appellant further faulted exhibit P1 (PF3) to have been tampered with in the particulars showing the date the victim was taken to hospital. He clarified that, at first it was written 10th April, 2013 but later it was altered to indicate 3rd of April, 2013. Further to that, the age of the victim showed to be 15 years according to the PF3 at the police, but PW4 recorded it to be 20 years. For the pointed-out flaws, the appellant prayed the Court to find that the offence against him was not proved and order for his release from prison.

Having carefully considered the arguments for and against the grounds of appeal and thorough scrutiny to the record of appeal, the main issue for our determination is whether the prosecution proved its case beyond reasonable doubt as found by the trial court and confirmed by the High Court on appeal.

It is a well-established principle by this Court that in sexual offences like the one at hand, the best evidence comes from the victim, being better placed to express the suffering during the ordeal. The victim's explanation has to state penetration and who penetrated her. The cherished principle has been expressed in **Selemani Makumba v. Republic** (supra) and followed in **Daudi Shilla v. Republic,** Criminal Appeal No. 117 of 2007, **Hamis Mkumbo v. Republic**; Criminal Appeal No.124 of 2007 (both unreported), to mention but a few among many others. Penetration, being a legal requirement to be established is provided under section 130 (4) of the Penal Code: -

> *"For the purposes of proving the offence of rape:*
> *(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and*
>
> *(b) N/A* "

In the case at hand, the victim in her testimony has stated categorically that on the fateful day she was raped. She then informed her mother (PW2) about the incident who also informed her husband and the victim was taken to the hospital for examination and treatment. The victim's rape account was confirmed by PW4, the doctor who examined her and made a finding that her hymen was ruptured and her

"posterior fornix" damaged to the extent that she had to undergo an operation to repair it.

Basing on the stated factual account, we are of firm conviction that the victim in this case was raped. The follow up question is who raped the victim? The two courts below made concurrent findings that it is the appellant who raped her. This is refuted by the appellant. We are alive to the principle that in the second appeal like the present one, the Court should rarely interfere with the concurrent findings of facts by the lower courts. However, the Court is required to interfere if there has been misapprehension of the nature and quality of the evidence and other recognized factors occasioning miscarriage of justice. The position was well articulated in the case of **Wankuru Mwita v. Republic**, Criminal Appeal No.219 of 2012 quoted in the case of **Mbaga Julius v. Republic**, Criminal Appeal No. 131 of 2015 (both unreported) wherein the Court stated: -

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-*

direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

In their submission, Mr. Jairo conceded that the record of appeal is silent on the victim's revelation to her mother with regards to who raped her. On this account, we think it is imperative to let the record speak for itself as reflected at pages 12-13 of the record of appeal hereunder: -

"Then I went home slowly and sometimes resting till I found one man; Mahona Mbute who also stay at Ilobashi then I asked him to take me home that I was sick of stomach. I lied him to worry that he may refuse to take me home. At home I found my parents and a stranger then I told my young sister Getruda to go and call my mother and after she came, ***I told her that I was raped and she called father and told him in my absence then my father told my brother Jumanne to go and called a neighbour and together they took me at Ilobashi dispensary and we were me, father, mother and Jidugu;*** *Being there I checked my vagina by a nurse and I slept there for one night. Then this Councilor came and called WEO who also came at hospital and went to arrest the accused. However, PW1 pointed to the accused person. Later myself, father and Kamuze went to the police and gave a card and go to government hospital and I checked by a doctor and he said I got fracture inside my vagina and I was*

supposed to go for operation and the operation was done and have a bed rest of a week."

[Emphasis added]

Looking at the extract of the victim's testimony, it is our considered view that the victim did not mention the person who raped her to her mother (PW2) as found by the trial and first appellate courts. Basing on the principle in the case of **Selemani Makumba,** it was the victim who was supposed to mention the offender. Her failure to do so raises doubt if it was the appellant who raped her. Since it was not disputed at the trial that the appellant was a village mate, the victim could have easily mentioned him to PW2 as the person who raped her on the material date. With respect, the victim did not mention the appellant to be the person who raped her as suggested by Ms. Mushi.

The appellant has also complained that there were contradictions with regards to prosecution witnesses' evidence. We gathered from the record of appeal that all of the prosecution witnesses except the victim testified that the offence was committed on 2nd day of April, 2013. The version by the victim is to the effect that, she was raped on 22nd April, 2013. Upon perusal on the original case file, we noted the date of the commission of the offence as testified by the victim to be 22nd April, 2013. Construing from the principle in **Selemani Makumba** (supra), it is the victim who can give a correct account of the date of the

commission of the offence, which means the prosecution witnesses have distinct dates regarding the date when the offence was committed. Instructively in **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006 (unreported), the Court considered discrepancies in the prosecution case and stated: -

> *"Another observation worth making here is that while normal discrepancies do not corrode the credibility of the witness, material discrepancies do. Normal discrepancies are those which are due to normal errors of observations, memory errors due to lapse of time, or due to mental disposition such as shock and horror at the time of occurrence of the event. Material ones are those going to the root of the matter or not expected of a normal person."*

In another case of **Mohamed Matula v. Republic**, (1995) T.L.R.3 which was referred in **Moshi Hamisi Kapwacha v. Republic,** Criminal Appeal No. 143 of 2015 (unreported), the Court considered among other issues, contradictions and inconsistencies in the prosecution evidence and the duty of the trial court to address the same. Particularly, the Court held: -

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to*

resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."

In the case at hand, we are of firm view that the glaring pointed-out inconsistencies and contradictions on the date of the incident as alleged in the charge go to the root of the matter. It is unfortunate that the trial court did not address them though they are apparent on the record. As for the first appellate court, it also did not apprehend correctly the substance of the evidence before it, considering that being the first appellate court, it ought to have re-evaluated the evidence.

Thorough scrutiny of the record of appeal also reveals that the charge sheet indicates the date of the commission of the offence to be 2nd day of April, 2013. In the case of **Abel Masikiti v. Republic**, Criminal Appeal No. 24 of 2015 (unreported), the Court, in an akin situation whereby the issue among others was the variance of the date of the commission of the offence between the charge sheet and the evidence, had this to say: -

"In a number of cases in the past, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet which the accused was expected and

required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal. Short of that failure of justice will occur...."

Revisiting the record of appeal, though PW1 testified that the incident occurred on 22nd April 2013, no amendment was done to cure the defect observed. It means therefore that the evidence by the victim who is legally required to offer the best evidence did not support the allegation in the charge sheet, hence the charge legally remained unproved. [For this stance see **Japhet Anael Temba v. Republic**, Criminal Appeal No.78 of 2017 and **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No.175 of 2018 (both unreported)].

Despite the pointed-out inconsistencies, the appellant has also complained on the failure by the prosecution to call an investigator and the WEO to testify at the trial court, which was conceded to by Ms. Mushi. However, apart from contending that the two persons were not eye witnesses, she took refuge under section 143 of the TEA which stipulates: -

"143. Subject to the provisions of any other written law, no particular number of witnesses

shall in any case be required for the proof of any fact."

We are not disputing the cited legal stance. However, the record of appeal suggests according to PW1 that the appellant was first arrested by WEO on 2nd April, 2013 and later released. He was again apprehended on 25th April, 2013 and arraigned at the trial court on 29th April 2013. There is also evidence that the PF3 was issued by the police on 2nd April, 2013. In this regard, we think, the WEO and the investigator were material witnesses whose testimonies would have answered the questions raised by the appellant concerning his arrest and release as well as the issuing of PF3 to the victim. But further the witnesses would have addressed the questions as to how and where arrested, why released and re-arrested, what was the TZS. 500,000.00 paid for; which now remain to be unanswered questions. In the circumstances, we think, the prosecution was required to call the respective witnesses to testify so as to give insight of those unanswered questions. Besides, no reason was given as to why they were not called to testify. The omission, with respect, entitles the Court to draw an adverse inference. In **Azizi Abdallah v. Republic** (1991) T.L.R. 71 referred in **Haji Bakari Hassan v. Republic, Criminal Appeal No. 365 of 2004** (unreported), this Court held among others that: -

"(iii) the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

The rule on adverse inference was further reiterated in **Sungura Athumani v. Republic**, Criminal Appeal No. 291 of 2016 (unreported) at page 8 wherein we stated: -

"Speaking of the rule in adverse inference, it is not quite the obligation of the prosecution to call a superfluity of witnesses. On the contrary, the prosecution is expected, as it is, indeed, in the best interests of justice, for it always be concerned with shortening trials. Thus, where a particular case an incident is deposed by a large number of witnesses, the non-featuring in court of some of the witnesses should not be taken as a cause to disbelieving the prosecution version. ***Nonetheless, the general and well-known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question are within reach but are not called without sufficient reason being shown, the***

court may draw an inference adverse to the prosecution." *(Emphasis added).*

We are thus settled in our mind that this is a fit case given the circumstances, which entitles us to draw adverse inference against the prosecution and we accordingly do so. The result is to throw more doubts into the prosecution case which legally must be resolved in favour of the appellant, see **Shabani Mpunzu@ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002 in **Michael Godwin and Another v. Republic**; Criminal appeal No. 66 of 2002 (both unreported).

In view of what we have endeavoured to discuss, it is glaring that, there were misdirection and misapprehension of evidence which compels us to interfere with the lower courts' decision. Having re-evaluated the evidence, we are convinced that the pointed-out flaws, to wit; **one,** omission by the victim to mention who raped her to those she met immediately after the incident. **Two,** the inconsistencies and contradictions in the prosecution account with regards to the date when the offence was committed. **Three,** the date of occurrence of the offence stated in the charge sheet is not supported by the victim's account. This rendered the victim's account uncorroborated considering that other witnesses testified that the offence occurred on the date

stated in the charge sheet. **Four,** the failure by the prosecution to call material witnesses to adduce evidence on the arrest, release and re-arrest of the appellant cast serious doubts to the prosecution case. In the circumstances, with much respect, we hold that, in totality, the prosecution did not prove the case against the appellant beyond reasonable doubt.

All said and done, we find merit in all the grounds of appeal. Hence, we allow the appeal, quash conviction and set aside the sentence and order of compensation imposed on the appellant. We further order that the appellant be released from custody forthwith unless otherwise held for other lawful reason.

DATED at **DAR ES SALAAM** this 16th day of September, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered on 23rd day of September, 2021 in the presence of the Appellant in person, who appeared through video facility linked from Shinyanga prison and Mr. Nestory Mwenda, learned State Attorney for the Respondent who is also appeared through video facility linked from the High Court Shinyanga, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL