IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE J.A., LEVIRA, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 533 OF 2019

SELEMANI YAHAYA @ ZINGA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Kibaha, Extended Jurisdiction at Kibaha)

(Magutu, SRM Extended Jurisdiction)

dated the 12th day of November, 2019

in

Extended. Criminal Appeal No. 29 of 2019

JUDGMENT OF THE COURT

28th September & 6th October, 2021

MAIGE, J.A.:

At the District Court of Mkuranga ("the trial court"), the appellant was charged with the offence of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16, R.E., 2019 ("the Penal Code"). It was alleged that, on 19th day of October, 2018 at or about 22:00 hours at Kisenvule village within Mkuranga District in Coast Region, the appellant had carnal knowledge of PW2, a young girl of 14 years (name withheld). Upon trial, he was convicted and sentenced to 30 years imprisonment. Notwithstanding his first appeal to the Resident Magistrate Court of Kibaha

Extended Jurisdiction, the conviction and sentence of the trial court remained intact and thus the instant appeal. In his memorandum of appeal, he has enumerated the following six grounds: -

1. *That exhibit PE1 (the PF3) improperly found its way in evidence as it was admitted without its contents being read over in Court contrary to the requirements of law.*
2. *The case was not proved by the prosecution to the required standard as the prosecution failed to summon the material witnesses like the victim's sister one Siwema, the chairman of the village council, the Police officer who received the complaint and the alleged letter from the village council. This failure leaves a lot of doubts on the guilty of the appellant and should have prompt an adverse inference against the prosecution. The doubts must be resolved in favour of the appellant.*
3. *That the two courts below erred as they failed to properly and carefully examine the prosecution evidence and see that the case of rape against the appellant was made up. It is on the ground that the PW1 and PW2 stated that the appellant followed them and asked for forgiveness to PW1 at the same time PW2 when was at the police station was put on the electric chair and named the appellant.*
4. *That, the two courts bellow erred in law and in fact in convicting the appellant by basing on the evidence of PW2 and PW1 without proper and careful assessment of their credibility. The same being savagely*

damaged, the benefit of which must be resolved in favour of the appellant.

5. *That, the two courts bellow erred in law and fact when they found the appellant guilty of the offence charged as there was no sufficient and credible evidence to prove that it was the appellant who destroyed the hymen and thus raped the victim.*
6. *That the two courts below grossly erred as they failed to give due consideration to the appellant's defence before finding him guilty of the offence.*

Before we consider the substance of the appeal, a brief factual narration underpinning the background of the case is inevitable. The victim, who testified as PW2, was a young girl of 14 years and a standard five pupil when the offence was being committed. PW2 and the appellant were irrefutably persons who knew each other in that, they were village mates and neighbours. In accordance with the charge sheet and the testimony of the victim (PW2), the offence was committed on 19/10/2018 ("the material day"). On the material day, PW2 was with the appellant at his residence. While there, they both undressed their clothes and the appellant inserted his penis ("mdudu)" into PW2's vagina ("bibi"). Upon completion of the illegal transaction, PW2 went home where she found her sister Siwema and narrated to her what transpired. Her sister advised her

to wash her private parts with warm water and not to reveal the secret to anyone. Therefore, when her mother came back thereafter, she did not disclose to her what went on.

As if that was not enough, on 2nd day of November, 2018 around 22;00 hours, the appellant once again took PW2 to his residential home. Upon PW2's father (PW1) becoming aware of the absence of her daughter at home, he went to the residence of the appellant and asked him if PW2 was there and the appellant denied. A short while after, PW2 went back home and found PW1 outside. When asked where had she been, PW2, in the first place said that she was at the residence of one Bakari. On further interrogation, she said she was at the residence of the appellant. The incident was reported to the Village Council and then Mkuranga Police Station. While at police, PW2 was interviewed and revealed that, it was the appellant who raped her. As it is the procedure, PW2 was issued with a PF3 and taken, by her mother, to hospital for examination. In accordance with the oral testimony of the doctor who examined PW2, Ahmada Said Msumi (PW3) as substantiated by the medical report in exhibit P1, though no sperms were found in her private parts, the hymen was not intact signifying that, she had been involved in sexual transactions. On the same

day, the appellant was arrested and eventually arraigned at the trial court to answer the charge of rape.

In his defense, the appellant denied committing the offence. He said, the case against him had been fabricated because of his refusal to allow his wife to work with PW1 as his assistant in his traditional healing activities.

In his judgment, the trial court found the appellant culpable of the offence. It believed the evidence of PW2, the victim of the crime, as credible and probable enough to link the appellant with the offence. The learned trial magistrate recapitulated on the fact that, PW2 being the victim of the crime and a child of tender age, her evidence would be relied upon without necessarily being corroborated in as long as she, as she did, promised to tell the truth. The first appellate court, subscribed to the finding of the trial court and added that, PW2 being the victim of the offence, was the best witness.

In the conduct of this appeal, the appellant appeared in person and was not represented. The Respondent/Republic was represented by Ms. Rehema Mgimba and Ms. Sofa Bimbiga, learned State Attorneys. The

appellant prayed to the Court to consider the grounds of appeal and let learned State Attorney submit first. On top of that, the appellant, with the permission of the Court, raised an additional ground of appeal to the effect that, the evidence of PW2 was irregularly admitted without the witness taking oath or affirmation.

Before addressing the grounds of appeal, Ms. Mgimba informed the Court that, contrary to the law, the appellant raised some grounds of appeal which were not in the first appeal. Being a layman, the appellant had no comment to make on the issue except that, he left it for determination by the Court. Upon a quick glance over the record, we established that, grounds numbers 2 and 3 were not raised in the first appeal and, therefore, in view of the principle in **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), they could not, as rightly submitted for the respondent, be the subject of this appeal. We accordingly strike them off the record.

Upon striking grounds numbers 2 and 3 off the record, we remain with grounds 1, 4, 5, 6 and the 7th ground which was added at the hearing. The 1st and 7th grounds raise pure points of law and they shall be considered separately. For convenience, the 7th ground shall be

renumbered as 2nd ground. The 4th and 5th grounds of appeal raise a common complaint that the case against the appellant was not proved beyond reasonable doubt. The 6th ground pertains to omission by the lower courts to take into account the defense case. The current approach in addressing such issue is, as rightly submitted for the respondent, to weigh the unconsidered defence evidence against that of the prosecution witnesses and find out if the case was proved beyond reasonable doubts. Thus, in **Julius Josephat v. Republic,** Criminal Appeal No. 3 of 2017 this Court dealing with a similar issue observed: -

> *"We have sought guidance from our earlier decision on this point in **Joseph Leonard Manyota V. Republic,** Criminal Appeal No. 485 of 2015 (unreported) in which, encountered with a situation like the present, we appraised the appellant's defence and weighed it against that of the prosecution witnesses in relation to the matter at hand. This is indeed the approach that we desired to follow in the present case".*

Guided by the above authority therefore, we shall consider the 6th ground concurrently with the 4th and 5th under the proposition that the case against the appellant was not proved beyond reasonable doubts and this shall, for the purpose of this Judgment, be ground number 3.

We propose to start with the 1st ground which questions the propriety of the trial court in placing reliance on exhibit P1. In her submissions, Ms. Mgimba conceded that; as exhibit P1 was not read out in court upon being received in evidence, it was unworthy of being relied upon. Armed with the case of **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 (unreported), she urged us to expunge the said exhibit from the record. She submitted however that, the expunging of the exhibit does not prevent the Court from considering the oral account of the witness who produced the document. She backed up her contention with the case of **Karimu Jamary @ Kesi v. Republic**, Criminal Appeal No. 412 of 2018 (unreported) which supports the proposition. We are in agreement with the learned State Attorney that, because it was not read out upon being admitted, exhibit P1 was wrongly relied upon by the trial court. In the strength of the position in **Karimu Jamary @ Kesi** *(supra),* we expunge exhibit P1 from the record. We shall, where relevant, consider the oral account of PW3 in the course of determining the 3rd ground.

We now pass to the 2nd ground which challenges the evidence of PW2 for being taken without oath or affirmation. The learned State Attorney was admissive in her submissions that, indeed, the evidence of

PW2 was recorded without oath or affirmation. She was however in disagreement with the appellant that, the omission has offended any law as to render the evidence in question ineffectual. She clarified that, under the express provision of section 127 (2) of the Evidence Act, CAP. 6, R.E., 2019 ("the EA"), the general rule that a witness must testify under oath or affirmation, is inapplicable if a witness is a child of tender age who had, like in the instant case, promised to tell the truth.

We have keenly read the provision of section 127 (2) of the **EA**, and we subscribe to the learned State Attorney that, where, like in the instant case, the witness is a child of tender age, his or her evidence can be taken into account even if it is not made on oath or affirmation provided that the witness promises to tell the truth. There are numerous pronouncements which support this proposition. For instance, in the case of **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015 (unreported) where the above provision was judicially considered, it was held that: -

> *"Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies".*

In our judgment therefore, since it is apparent from the record that, PW2 promised to tell the truth, and, there being no dispute that PW2 was a child of tender age when she was testifying, her evidence was properly recorded. The additional ground of appeal is thus without merit and is accordingly dismissed.

This now takes us to the 3rd ground as to whether or not the case against the appellant was proved beyond reasonable doubt. While dealing with this issue, we are alive with two notorious principles of law which must always be taken into account in an appeal like this. First, in criminal proceedings, the Republic is always with a burden to prove the case beyond reasonable doubts and that; where reasonable doubt is apparent, it has to be applied to the benefit of the accused. See for instance, **Ahmad Omari v. Republic,** Criminal Appeal No.154 of 2005 (unreported). Two, in a second appeal like this, this Court would rarely disturb the concurrent factual findings of the lower courts. It can only do so if there has been misapprehension of the evidence, misdirection on a pertinent principle of law or miscarriage of justice. See for instance, **Hamis Halfan Dauda v. Republic,** Criminal Appeal No. 231 of 2009 (unreported).

The submission of the learned State Attorney on this issue was such that, as PW2 was the victim of the crime and her evidence having not been shaken by way of cross examination, it was the best evidence which under section 127 (6) of the **EA,** was sufficient to sustain conviction. In her view therefore, the case against the appellant was proved beyond reasonable doubts. She finally urged the Court to dismiss the appeal.

We, in the first place, agree with the learned State Attorney that, under section 127 (6) of the **EA**, which was before the amendment brought by Act No. (2) of 2016 section 127 (7), conviction in relation to sexual offences may be sustained based on uncorroborated evidence of the victim of the crime or a child of tender age subject to the conditions therein stated. The respective provision provides as follows: -

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of 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."

We understand from the above provision that, for the conviction to base solely on the evidence of the child of tender age or the victim of the crime, the Court has to satisfy itself that, the same is credible and probable as to leave no reasonable doubt. This position was stated in among other authorities, the cases of **Mohamed Said v. the Republic,** Criminal Appeal No. 145 of 2017 (unreported) and **Rehani Said Nyamila v. the Republic**, Criminal Appeal No. 222 of 2019 (unreported). In the former authority, 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.

It is also the law that, assessment of the credibility of a witness, cannot be made in isolation of other pieces of evidence on the record and the surrounding circumstances. On this, we are guided by our decision in

Shabani Daud v. Republic, Criminal Appeal No. 28 of 2000 (unreported), where we 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".*

The importance of weighing the prosecution evidence against the defence case in assessing the credibility of the prosecution evidence was further emphasized in **Hussein Iddi and Another v. Republic** [1986] TLR; 166 where it was held that;

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

The issue therefore is whether, the evidence of PW2 weighed against the evidence of the other prosecution witnesses and that of the appellant, was credible and probable enough as to leave no doubt that the appellant committed the offence? For the reasons which shall be apparent as we go along, we are preparing ourselves to answer this question negatively.

In accordance with the charge sheet, the offence was committed on 19th October 2018 ("the material date") at about 22:00 hours. In the Memorandum of the Facts of the Case, which were read out in court subsequent to the filing of the charge, it is indicated that the date and time of the commission of the offence is unknown. No clarification of this discrepancy was made in evidence or at all. In her testimony however, PW2 claimed to have been raped on the material date. Conversely, her evidence is absolutely silent if she had ever revealed to her father (PW1) the fact that she was raped on the material date. Perhaps, that is why the testimony of PW1 confined itself to what happened on 2nd November 2018. Nevertheless, it is express in the evidence of PW2 that, she disclosed the fact to her sister Siwema soon after the incident. However, the said Siwema has never been called as a witness and no reason for the omission has been disclosed. We do not think that in the circumstance, she was not a material witness. It is also apparent in the evidence of PW2 that, upon being interviewed by Police on 2nd day of November, 2018, she disclosed to them that, she was raped by the appellant on the material date. Explaining the circumstances under which she revealed the incident to Police, PW2 testified as follows: -

"My father took me to the village Council and were given a letter to the Police Station. While on the way Magufuli came along and asked for forgiveness saying he was with me. The Police put me in an electrical shock and told them I was with Selemani the accused."

If what PW2 said is true, we are sorry to say that, the procedure employed by the law enforcement agency to procure evidence from the victim of the crime was archaic and barbaric. It is more so considering the nature of the offence involved and the fact that, PW2 was not only the victim of the offence but an innocent child of tender age as well. Unexpectedly, the police officer who is alleged to have interviewed PW2 was not brought as a witness to explain what prompted him to use force to procure the evidence of the victim if at all what she said was true. More to the point, PW2 was not caused in her testimony to explain if what she narrated to police and subsequently testified upon in Court was not influenced by use of such force against her. This, we have no doubt, affects the substantial credibility of the evidence of PW2 such that, it could not be relied upon to sustain conviction against the appellant.

There is yet another element which affect the credibility of the testimony of PW2. While in her evidence, PW2 told the trial court that, she

had been in love relationship with the appellant from 18/10/2018 to 2/11/2018, the testimony of PW3 suggests that when he interviewed PW2 before medically examining her on 4th November, 2018, she revealed that, the last time to meet with the appellant was 14 days back. It was therefore, two days and not 14 days from the date of the examination as suggested in the evidence of PW2. This would also raise a reasonable doubt if PW2 was speaking the truth as she promised.

We have also considered the fact that, in his defence, which was undeniably not considered by the lower courts, the appellant associated the charge against him with the grudges between him and PW1. The motive being, according to him, his refusal to allow his wife to assist PW1 in his traditional healing activities. In his evidence, we have noted, PW1 introduced himself as a traditional healer. The fact that the victim named the appellant as her rapist after the use of force against her, would, if it was carefully considered and weighed against the defence evidence, raise a reasonable doubt that, the case against the appellant might have been fabricated. For, it is very unusual for the prosecution to use force against its own witness.

In our opinion therefore, the case against the appellant was not proved beyond reasonable doubt. The appeal is henceforth allowed. We consequently quash the conviction and set aside the sentence imposed against the appellant. We order that the appellant be released forthwith from prison custody unless he is held for some other lawful cause.

Order accordingly.

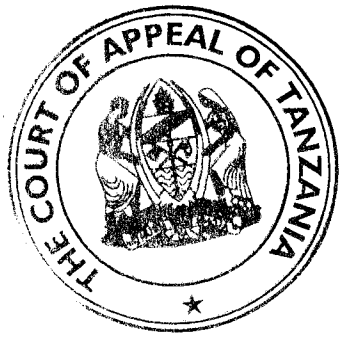
DATED at **DAR ES SALAAM** this 5th day of October, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2021 in the presence of the appellant in person linked via video conference at Ukonga Prison and Ms. Kasana Maziku, Senior State Attorney for the respondent/Republic.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL