IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 514 OF 2019

OROKO WANKURU @ MNIKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the Court of Resident Magistrate of Musoma (with Extended Jurisdiction) at Musoma]

(Ng'umbu, RM EXT. JUR.)

Dated the 10th day of October, 2019

in

Criminal Appeal No. 38 of 2019

JUDGMENT OF THE COURT

25th October & 4th November, 2021

WAMBALI, J.A.:

Oroko Wankuru @ Mniko, the appellant was arrested and later formally arraigned before the District Court of Serengeti at Mugumu on the offence of rape contrary to the provisions of sections 130(1) (2) (e) and 131(1) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019) (the Penal Code). From the record of appeal, it is indicated that the allegation which confronted the appellant was to the effect that; on 4th May, 2017 at Machochwe Village within Serengeti District in Mara Region, he had sexual intercourse with a victim; a

girl aged fourteen (14) years without her consent. To protect the identity of the girl, we will refer her as the "victim" or "PW1."

As the appellant pleaded not guilty to the charge, a full trial was conducted in which the prosecution side adduced evidence in support of their respective position concerning the allegation laid in the charge.

In short, it was the firm evidence of the victim (PW1) that on the fateful date in the evening hours, she was in their farm fetching grass at Machochwe Village where she was invaded by the appellant, her step father, who was also in the same farm, undressed her and thereby he succeeded to fulfil his desire to have forceful sexual intercourse without her consent. During the encounter, PW1 testified, she raised alarm which was responded to immediately by her brother, Petro Michael (PW2) who after reaching the scene of crime saw the appellant running to an unknown place.

On his part, PW2 testified that after the incident, he took the victim and reported the matter, firstly, to the wife of the sub village chairman, Marwa, B. Marwa (PW4) and later to Machochwe Police Station whereby Police Form No. 3 (PF3) was issued to the victim for medical examination. Thereafter, they proceeded to Machochwe

Dispensary where the victim was examined by Joseph Kiberenger @ Mwita (PW3), a clinical officer. After the examination PW3 filled the PF3 indicating that the victim's vagina was penetrated because there was evidence of the presence of sperms and bruises. The PF3 was tendered and admitted in evidence at the trial as exhibit PE1 and the contents thereof were accordingly read out by PW3 in the presence of the appellant.

Marwa B. Marwa (PW4) the sub village chairman of Kichongo, Machochwe village also testified at the trial and confirmed that on 4th May, 2017, he received information from his wife that PW2 and the victim had gone to his residence while he was away to report on the rape incident. He testified further that as on that day he returned in the night, he followed the matter at the police station the following day where he found that the complaint had been registered by the victim and PW2. He was also informed that the suspect (the appellant) who the victim and PW2 mentioned to have committed the alleged offence had gone into hiding and thus they started tracing him. PW4 affirmed that after the appellant's hiding in the village for some few weeks, he escaped to Sirari, Tarime District where he was later arrested in July, 2017.

On her part, WP 5665 DC Sijali (PW5) who on 8th May, 2017 was assigned to investigate the complaint of the victim and the involvement of the appellant, started her task immediately. She testified that she made efforts with the relatives of the victim to trace the appellant and as a result he was arrested at Sirari, Tarime District and was sent to Police Station at Mugumu on 26th July, 2017 before he appeared at the trial court on 27th July, 2017.

Notably, after the closure of the prosecution case, the appellant was found with a case to answer, and was thus called upon to enter his defence and informed of his rights pursuant to section 231(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) (the CPA). The appellant responded by informing the trial court that he would give evidence on oath and he named three witnessed who would have supported his defence.

According to the record of appeal, hearing of the appellant's defence was adjourned several times from 26th September, 2018 until 25th October, 2018 when he informed the trial court that since he had failed to procure the attendances of his intended witnesses whose whereabouts were unknown, he would proceed to defend the case on his own. He thus withdrew the request to summon the

respective witnesses. The prayer was granted and he was therefore called upon to enter his defence. As it were, surprisingly, after he was sworn, he opted to remain silent. The trial Resident Magistrate then heard the prosecutor's brief comment on the action taken by the appellant, and set the date of judgment.

In the end, after the trial Resident Magistrate evaluated the prosecution evidence in the record and took note of the appellant's stand of not entering his defence, he was fully satisfied that the case was proved to the required standard. Hence, he convicted and sentenced the appellant to thirty (30) years imprisonment.

The appellant unsuccessfully appealed against the conviction and sentence as the Court of Resident Magistrate of Musoma presided over by Ng'umbu (RM. EXT. JUR) after the High Court transferred the appeal to that court, dismissed the appeal in its entirety; hence this second appeal. He has therefore lodged his memorandum of appeal comprising six grounds of appeal. However, since some of the grounds of appeal make reference to the same matter, we think for purpose of our determination, the appellant's complaints can be compressed and paraphrased into the following four grounds of appeal: -

1. *That the evidence of the victim (PW1) was wrongly admitted and relied upon as it was taken contrary to the provisions of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019.*
2. *That the appellant was not informed his right provided under section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019 and that the PF3 which was admitted as exhibit PE1 was based on assumption not supported by scientific reasons, hence unreliable.*
3. *That the appellant was wrongly convicted and sentenced to imprisonment for thirty years based on incredible witnesses whose evidence were not corroborated as required by law.*
4. *That the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared remotely through a video conference facility linked between the court room and Musoma Prison. On the adversary side, the respondent Republic was duly represented by Mr. Kainunura Anesius, learned Senior State Attorney assisted by Mr. Mafuru Moses and Mr. Frank Nchanila, learned State Attorneys.

Addressing the Court on the substance of the appeal, Mr. Anesius basically conceded to the appellant's complaint in the first ground of appeal. The respective ground is premised on the complaint that the evidence of the victim (PW1) was taken in disregard of the

requirement of the law in terms of section 127(2) of the Evidence Act, Cap. 6 R.E. 2019 (the EA). He amplified that according to the record of appeal, there is no indication that the trial court asked the victim to promise to speak the truth before her evidence was recorded at the trial. In his firm view, the omission was fatal rendering the evidence of PW1 to be discounted from consideration in determining the guilt of the appellant.

In the event, relying on the decision of the Court in **Masanja Makunga v. The Republic,** Criminal Appeal No. 378 of 2018 and **Issa Salum Nambaluka v. The Republic,** Criminal Appeal No. 272 of 2018 (both unreported), Mr. Anesius implored us to discount the evidence of PW1.

Having perused the record of proceedings of the trial court in the record of appeal, we entirely agree with the learned Senior State Attorney that there is no indication that the learned trial Resident Magistrate complied with the provisions of section 127(2) of the EA by requiring the victim (PW1), a witness of tender age, to promise to tell the court the truth before she adduced her evidence at the trial.

Similarly, we are in agreement with the learned Senior State Attorney that the omission is fatal as propounded in several decisions of this Court including; **Geoffrey Wilson v. The Republic** (Supra), **Masound Mgosi v. The Republic,** Criminal Appeal No. 195 of 2018, **Abdallah Nguchika v. The Republic,** Criminal Appeal No. 182 of 2018, **Yusufu Molo v. The Republic,** Criminal Appeal No. 343 of 2017 (all unreported) and **Masanja Makunga and Issa Salum Nambaluka** (supra) referred to us during his submissions. Indeed, it is acknowledged that the consequence which should follow on such omission is to have the requisite evidence of the witness discounted.

Consequently, we hold that the omission is fatal, and thus we discount the evidence of PW1 and allow this ground of appeal.

Next for our consideration is the complaint of the appellant in the second ground of appeal on the reliability of PW3's report contained in the PF3 (exhibit PE1) and the alleged non-compliance with the provision of section 240(3) of the CPA.

Firstly, we agree with Mr. Anesius that the complaint of the appellant on this matter is misplaced. This is because according to the record of appeal, PW3 who tendered exhibit PE1 was duly

summoned by the prosecution and testified at the trial. More importantly, apart from tendering the PF3 and explaining its contents as required, the appellant cross-examined him on what he found when he examined the victim. Thus, it is surprising that the appellant complains at this stage of the second appeal that he was not accorded the right enshrined in section 240(3) of the CPA. Indeed, according to the record of appeal, we note that he did not complain on this issue in his first appeal as evidenced by the grounds of appeal in the petition of appeal he lodged before the first appellate court.

Secondly, we also subscribe to the submission of the learned Senior State Attorney that the PF3 was not based on assumption not backed by scientific reason as alleged. We are settled that at the trial, PW3 fully explained his findings which he filled in the PF3 after he examined the victim in the presence of the appellant who cross-examined him, but did not shake the substance of his testimony concerning the medical report. In the event, we are satisfied that the second ground of appeal is without merit and we dismiss it.

With regard to the third ground of appeal, Mr. Anesius, submitted that even in the absence of the evidence of PW1 which has been discounted, the remaining evidence of PW2, PW3, PW4 and PW5 suffices to ground the appellant's conviction of the offence of rape. He submitted that PW2 went to the scene of crime immediately after the alarm was raised by the victim and saw the appellant escaping to an unknown place. He added that as PW2 was familiar to the appellant who together with the victim they lived in the same house for sometime as their step father, properly recognized him and could not have mistaken his identify with another person. In his view, the evidence of PW2 with regard to the person he saw escaping from the scene of crime on that fateful day leaving the victim helpless is not hearsay. On the contrary, he submitted, it was based on what he saw and that is why he immediately reported the incident to the wife of PW4 and to the Police at Machochwe Police Station who started to trace the appellant until he was arrested hiding at Sirari, Tarime District.

Moreover, Mr. Anesius submitted that the evidence of PW3 who tendered the PF3 which was admitted as exhibit PE1 rendered credence to the finding that the victim's vagina was penetrated on

the material day as there was sign of bruises and sperms. Therefore, he argued that the provision of section 130(4) of the Penal Code was fully satisfied by the prosecution. He argued further that the evidence of PW4, the sub-village chairman and PW5, the investigator, left no doubt that the involvement of the appellant on the incident of rape was reported immediately to the relevant authorities. He maintained that it took sometime to arrest the appellant because he had escaped and shifted from Machochwe village to Sirari in Tarime District. In his submission, the appellant's conduct of escaping from his residence indicated that he was involved in committing the offence of rape. The learned Senior State Attorney therefore, urged us to confirm the finding that the two courts below properly believed the evidence of PW2, PW3, PW4 and PW5 because they are credible and reliable, and thereby dismiss the third ground of appeal.

We have closely examined the evidence of PW2, who in the absence of the victim's evidence forms an important part of the prosecution evidence concerning the occurrence of the incident of rape as submitted by the learned Senior State Attorney. For the

sake of clarity, we deem it appropriate to reproduce the substantial part of PW2's evidence thus:-

> *"I am a peasant, I know one Christina Michael, and she is my young sister, a daughter of my young mother (aunt). I remember on 04/05/2017 in the evening hours, I was walking in the area near home where we planted grass; I heard a call for help. I made a follow up to the area, I saw a person about 70 meters running, I identified to be Oroko Wankuru because of broad sunlight. We lived together for a year after my father died, he is my step father. I decided to go to the scene. I found the victim one Christina, who told me that she, was raped by the accused person whom I saw running. We made a follow up with my young brother, could not find the accused. We took the victim to Machochwe Police Station; it was about 19:00 to 20:00 hours. We opened the case MCC/RB/192/2017, we were introduced to go home and the victim should not take bath till next day when we will go for medical examination. We did so, the next day we went to the hospital and the doctor's report revealed that the victim was indeed raped. The process to trace the accused followed. The victim mother was hiding the accused and obstructed our mission to*

find the accused. The accused took the said mother and all the children including the victim and shifted to Sirari, Tarime..."

Admittedly, according to the record of appeal, the above reproduced testimony of PW2 which contained very important facts on the occurrence of the incident of rape and the conduct of the appellant was not greatly disturbed during cross-examination by the appellant. In essence, it remained unchallenged. As depicted from the record of appeal, during the brief cross-examination of PW2 by the appellant his firm response was as follows: -

"-It was in the evening hours before sunset at about 17:00 hours.

-After the incident, you ran away and you conspired with the victim's mother and hired a vehicle and shifted to Sirari".

Clearly, in view of the above naked facts exposed by PW2 and the appellant's failure to shake his evidence through cross examination, at this stage, the appellant cannot be justified to challenge the witness's credibility as claimed in his argument in support of the grounds of appeal. We also take note of the fact that through the same argument, the appellant raised the complaint

that during the preliminary hearing, according to the narrated facts, those who were mentioned to have gone to the scene of crime and saw him were Maisarya Michael and Marwa Michael and not PW2. We think this complaint is also misplaced at this stage. First, because according to the record of appeal, the appellant disputed all the narrated facts except the particulars concerning his name. Most importantly, he duly signed the memorandum of matters not in dispute. It would have made a difference if he would have agreed to all the narrated facts in which the said persons were mentioned. Second, at the trial, he heard the evidence of PW2 and did not cross-examine him on the allegation that he was not among the persons who allegedly responded to the alarm raised by the victim on the fateful date. Third, it is unfortunate that despite the damning allegation on his involvement in the rape incident raised by the evidence of PW2, the appellant did not offer his defence when he was accorded that opportunity. If the appellant has testified in defence of the case, he would have probably denounced the prosecution version of evidence or raised doubt not only to PW2's evidence but also to other witnesses, that is, PW3, PW4 and PW5. On the contrary, as we have intimated above, despite being informed of his legal rights before he defended himself in terms of

section 231(1) of the CPA and promised to give evidence on oath, he opted to remain silent when it was his turn to do so. The appellant cannot therefore, be heard to blame the trial and the first appellate courts for finding the remaining prosecution witnesses credible and reliable while he did not exercise his right to firmly challenge their evidence at the trial.

Equally important, we note that the appellant did not shake the evidence of PW3 and the contents of exhibit PE1 which was read over to him and indicated that the victim's vagina was penetrated on the fateful day. Therefore, in the circumstances of the case at hand, in absence of the victim's evidence which is always taken to be the best as propounded in several decisions of this Court, for instance, **Selemani Makumba v. The Republic** [2006] T.L.R. 379, medical evidence comes in to prove the occurrence of sexual intercourse upon a finding that penetration was fully established. It is in this regard that in **Issa Hamis Likamalila v. The Republic,** Criminal Appeal No. 48 of 2003 (unreported), the Court stated that: -

> *"Only when carnal knowledge is in dispute would medial evidence be required to prove whether rape has been committed on the victim."*

Indeed, the Court went further and stated that: -

> *"When rape is not in dispute and section 240 (3) of the CPA has not been complied with causing medical evidence to be excluded, as is the case here, the court can determine the rape case on available evidence."*

(See also **Prosper Majoera Kisa v. The Republic,** Criminal Appeal No. 73 of 2003; **Shaban Ally v. The Republic,** Criminal Appeal No. 50 of 2001 and **Salu Sosoma v. The Republic,** Criminal Appeal No. 31 of 2006 (all unreported).

In the present case, as the evidence of the victim has been discounted, the medical evidence which left no doubt on the occurrence of rape together with the evidence of PW2 who went to the scene of crime and saw the appellant running away, has to be taken as highly reliable in grounding the conviction of the appellant. Indeed, the evidence of PW4 and PW5 which was not seriously challenged on the conduct of the appellant who initially went into hiding in the same village after he disappeared from his residence before he relocated to Sirari, Tarime District, renders credence to his involvement in the incident. As submitted by the learned Senior State Attorney, by escaping the appellant that he knew was being

traced in connection of the offence of rape of the victim who they lived in the same house before the incident.

Moreover, we are settled that the failure of the appellant to cross-examine the prosecution witnesses on very vital matters disables him to discredit their credibility and reliability in supporting the prosecution case as he is taken to have accepted their evidence. For emphasis, we wish to reiterate what the Court stated in **Damian Ruhele v. The Republic,** Criminal Appeal No. 501 of 2007 relying in **Cypian Athanas Kibogoyo v. The Republic,** Criminal Appeal No. 88 of 1992 that:-

> *"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also a trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."*

In the event, we are satisfied that the two courts below properly believed the evidence of PW2, PW3, PW4, PW5 and exhibit PE1 in finding the appellant guilty of the offence he was charged with and that the evidence was duly corroborated. Ultimately, we dismissed the third ground of appeal.

Lastly, in view of the deliberations we have made above with regard to the evidence of the prosecution which was not greatly challenged by the appellant during cross-examine and his failure to offer his defence, we entirely agree that the prosecution proved its case beyond reasonable doubts.

In the end, save for the first ground of appeal which we have allowed, the appeal is dismissed.

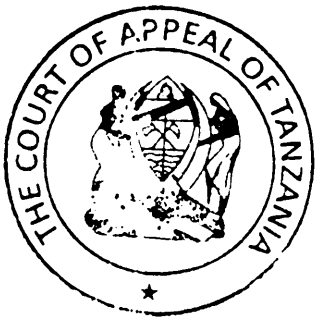
DATED at **MUSOMA** this 3rd day of November, 2021

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2021 in the presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic and the Appellant appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL