IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 203 OF 2021

SELEMANI HASSANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Dyansobera, J.)

dated the 14th day of July, 2021
in
Criminal Appeal No. 60 of 2020

.....

JUDGMENT OF THE COURT

16th & 22nd March, 2022

NDIKA, J.A.:

Following his trial by the District Court of Lindi, the appellant, Selemani Hassani, was convicted of statutory rape and sentenced to the mandatory life imprisonment. His first appeal to the High Court of Tanzania sitting at Mtwara went unrewarded. This is his second appeal.

Based on the testimonies of three witnesses and supplemented by one documentary exhibit, the prosecution sought to establish the charge that the appellant, on 6th January, 2020 at Angaza-Wailes area within the Municipality

and Region of Lindi, had carnal knowledge of a girl aged 9 years. So as to protect her privacy we will not disclose her name. Henceforth, we will refer to her as "the complainant" or simply as PW1, the codename by which she testified.

The prosecution case tended to show that PW1 was a grade four pupil born on 10th June, 2011, implying that on the fateful day (that is, 6th January, 2020) she was aged eight years and seven months. According to her, after she came back home from school around 16:00 hours on the fateful day, she went to the home of one of her playmates, Sophia, within the neighbourhood. There, she met the appellant whom she asked if she could see Sophia. He allowed her to get into the bedrooms to see if Sophia was there. She checked in the first room but her friend was not in. As she was getting into the next room, the appellant followed and pushed her while threatening to slaughter her should she raise an alarm. Having cowed her down, he removed his clothes and those of the complainant and then forced his manhood into her vagina. According to her, the appellant inserted his penis into vagina three times on that occasion. When he was through, he let PW1 go.

From the scene of the crime, PW1 trudged back home where she found her two sisters. She did not disclose to them of her tribulation nor did she tell her mother, who testified as PW2, when she came back home later that day. On the following day, PW2 took her to hospital as PW1 felt headache and stomachache. Later that night, she disclosed to her what she went through at the hands of the appellant. On 8th January, 2020, she was taken to the Police Station where a complaint was lodged.

On the part of the complainant's mother (PW2), she testified that when she came back home on 6th January, 2020 in the evening, she sensed that something was amiss with PW1. Her daughter was somewhat ill and had refused to eat supper that night. She took her to bed. The following morning, she noted that her daughter's condition had not improved and that her body temperature was abnormally high. She examined her body and noted that she felt too much pain whenever she pressed her stomach. When she pulled up her dress and examined her vagina, she saw a discharge of some fluid and that the vagina seemed raptured and stretched. Despite being pressed as to what had happened to her, the complainant did not disclose anything but kept crying. According to PW2, she promptly decided to take her daughter to the Police Station where a request for medical examination (PF3)

was issued. She then presented PW1 to medical examination at the Sokoine Referral Hospital, Lindi where she was told that her daughter had been raped as her hymen was perforated. In the midnight of 8th January, 2020, she woke her daughter up and pressed her as to who raped her. After a while, PW1 came out and named the appellant as the culprit. She then recounted in detail on how the incident occurred.

Dr. Fidelis Jungulu (PW3), a Medical Officer at the Sokoine Referral Hospital, adduced that he attended the complainant on 7th January, 2020 at 17:49 hours. His findings, which he posted into PF3 (Exhibit P1), were that PW1's vagina exhibited fresh bruises and that her hymen was perforated. He was satisfied that there had been vaginal penetration by a blunt object.

In his testimony upon affirmation, the appellant initially testified that he spent the fateful day with his lover, a certain Rehema Hamisi, implying that he was not at the scene of the crime at the material time. He went on saying that on the following day, PW1's mother came to his home and expressed her displeasure and anger at the appellant's lover, Rehema Hamisi, for her habit of picking PW1 and going to bars along with her despite her being a child of tender years. In cross-examination, he stated that he had no grudges against both PW1 and PW2. On being further pressed, he

said that he was at home on the fateful day and acknowledged to have mistakenly stated the opposite in his evidence in chief.

The appellant's aunt, Amina Mzee Mnali (DW2), testified in support of the defence. She adduced that at the material time the appellant had been staying at his home temporarily. When she came back home on 7th January, 2020 in the evening at 21:55 hours she learnt that PW2 had come to her home earlier in the day and condemned her housemaid (one Rehema) for regularly taking PW1 along with her to bars. On the following day, she warned the housemaid over the alleged habit. However, later in the evening the same day, certain police officers came over, picked the appellant and the housemaid and drove away with them. At the time, the reason for the arrests was obscure. She later learnt from PW2 that the appellant was booked for raping PW1. On probing PW2 on the matter, she uttered to her in Swahili, *"Najua utahangaika sana, pole,"* loosely meaning that *"I am sorry, I know you will be so much troubled."*

In response to cross-examination, she adduced that she had no resentments with PW2 but she was aware that PW2 did not like both the appellant and the housemaid.

The trial court (Hon. M.A. Batulaine – SRM) was impressed by the prosecution case. She found it proved, upon the testimonies of PW1 and PW3 as well as Exhibit P1, that the complainant was raped. As to who the ravisher was, the learned trial magistrate believed the complainant's evidence and held that the appellant was the culprit. While she was alive that in terms of the holding in **Marwa Wangiti & Another v. Republic** [2002] TLR 39 that a delay in reporting a crime should put a prudent court to inquiry, she played down PW1's delay in reporting the crime as she attributed it to the appellant's enduring threat in the mind of the complainant that she would be slaughtered should she spill the beans. She considered the appellant's defence but rejected it on the ground that it was vague, contradictory and peppered with an obvious lie. She thus convicted the appellant of the offence and sentenced him to the mandatory life imprisonment, as hinted earlier.

The High Court, on the first appeal, upheld the trial court's findings of fact on the ground that they were made upon soundly evaluated evidence on record. Accordingly, the court dismissed the appeal thereby upholding the conviction and sentence.

The appellant initially lodged eight grounds of complaint. However, at the hearing of the appeal, his learned advocate, Mr. Japhet Mmuru, who was assisted by Mr. Laurent Ntanga, also learned advocate, only argued grounds 1, 2 and 5, having abandoned grounds 3, 4, 6, 7 and 8. We take the liberty to paraphrase and renumber the aforesaid three grounds as follows:

1. *That, the first appellate court erred in law in upholding the decision of the trial magistrate despite her failure to consider that PW1 did not report the alleged rape promptly and that it was her mother who forced her to name the appellant as the culprit after three days.*
2. *That, the first appellate court erred in law in upholding the decision of the trial magistrate that PW1 identified the appellant as the culprit despite the evidence being contradictory and that PW1's mother pressed her daughter to pick out the appellant after she mentioned several suspected boys and men in the neighbourhood.*
3. *That, the first appellate court erred in law in upholding the appellant's conviction which was based on personal emotions of the trial magistrate as opposed to the evidence on record, implying that the prosecution case was not proven beyond reasonable doubt.*

In his submissions in support of the appeal, Mr. Mmuru argued the first ground independently and then canvassed the other two grounds conjointly.

Beginning with the first ground, Mr. Mmuru sought to punch holes in the credibility of the complainant essentially contending that she delayed,

for an unexplained reason, to report the fateful incident that allegedly occurred at 16:00 hours on 6th January, 2020. He revisited the evidence on record and argued that PW1 did not tell her sisters of it right after returning home from the crime scene that fateful evening, that she said nothing to her mother later in the evening and that she did not disclose the matter to the police and the medic when she was taken to them later. He added that PW1 came out and mentioned the appellant after being forced by her mother in the midnight of 8th January, 2020 but at that point the appellant was in police custody having been arrested earlier that day. Citing our decision in **Marwa Wangiti Mwita** (*supra*), he submitted that unexplained delay in reporting a criminal occurrence should put a prudent court to inquiry. He also referred us to the case of **Isaya John v. Republic**, Criminal Appeal No. 167 of 2018 (unreported) in which this Court gave full credence to an eight year-old victim of sexual molestation who had reported the suspect at the earliest opportunity. It was, therefore, Mr. Mmuru's argument that PW1's tender age would not explain away the delay. He urged us to hold that she was not a witness of truth.

Coming to the other two grounds, Mr. Mmuru submitted that the prosecution was contradictory in that while PW1 said that she named the

appellant as the culprit on 7th January, 2020, her mother (PW2) stated that the revelation was made to her in the midnight of 8th January, 2020. At the time mentioned by PW2, the appellant was in police custody, having been arrested earlier that day. In the premises, the learned counsel urged us to hold that the prosecution case was doubtful, with the attendant consequence that the charge was not sufficiently proven. He moved that the appeal be allowed.

Replying for the respondent, Ms. Faraja George, learned Senior State Attorney, stoutly resisted the appeal. She contended, at the forefront, that PW1 may have delayed reporting the incident but, as shown at page 15 of the record of appeal, she named the culprit just a day, not three days, after the incident. She went on to argue that the delay must be examined within the context that PW1 was a child of tender years and that her mind was overwhelmed by the appellant's enduring threat to slaughter her should she dare disclose the matter. In this regard, she supported a similar approach, reasoning and finding by the trial magistrate in her judgment, shown at page 54 of the record of appeal. She added that it was, therefore, understandable that PW1 was crying uncontrollably when her mother interrogated her on the matter at the time she was not yet ready to disclose her tribulation.

As regards the other two grounds of appeal, Ms. George began by laying out the ingredients of statutory rape the appellant faced, which was predicated on sections 130 (1), (2) (e) and 131 (1), (3) of the Penal Code, Cap. 16 R.E. 2019 ("the Penal Code"). She was alive that the prosecution had to establish vaginal penetration of the complainant, her age indicating her incapacity to consent to sexual intercourse and that the perpetrator of the sexual act was the appellant. The learned Senior State Attorney essentially submitted that based on the evidence of the three prosecution witnesses, it was sufficiently proven that PW1 was raped on 6th January, 2020, that she was nine years old and that the appellant was the ravisher. Placing more reliance on PW1's testimony, she referred us to **Karim Seif @ Slim v. Republic**, Criminal Appeal No. 161 of 2017 (unreported) where the Court referred to its earlier holding in **Selemani Makumba v. Republic** [2006] TLR 379 that, in a sexual molestation case the complainant's evidence is the best evidence. Accordingly, she moved us to dismiss the appeal.

In a brief rejoinder, Mr. Mmuru reiterated that the prosecution case was built on contradictory evidence with the natural consequence that the charged offence was unproven.

Ahead of determining the appeal, we think it is necessary to state that this being a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE 2019, to deal with matters of law only but not matters of fact. However, as held in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a series of decisions that followed, the Court can only intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice – see also **D.R. Pandya v. R.** [1957] E.A. 336.

Additionally, we are conscious that in view of the intrinsic nature of any sexual offence where only two persons are usually involved during commission, the testimony of the complainant is mostly crucial and must be scrutinized cautiously. Indeed, in this context, we held, for instance, in **Selemani Makumba** (*supra*), that the best proof of rape (or any other sexual offence) must come from the complainant. Accordingly, the complainant's credibility becomes the most important point of consideration. If the complainant's evidence is credible, convincing and consistent with human nature as well as the ordinary course of things, it can be acted upon

as the sole basis of conviction – see section 127 (6) of the Evidence Act, Cap. 6 R.E. 2019.

We have carefully examined the evidence on record and considered the contending submissions of the parties in the light of the grounds of appeal. In determining the merits or otherwise of the appeal, we find it convenient to begin with the alleged incongruity between the testimonies of PW1 and PW2. Since it is apparent that this aspect was not specifically dealt with by the courts below, we are enjoined to determine if the said courts misapprehended the evidence on record.

For a start, we go along with Mr. Mmuru that PW1 and PW2 contradicted each other particularly on the time at which the former disclosed to the latter what she suffered allegedly at the appellant's hands. While PW1 said she made the disclosure to her mother in the night of 7th January, 2020, PW2 adduced that the distressing revelation was made to her in the midnight of 8th January, 2020. Going by PW2's timeline, the prosecution case would obviously be thrown into disarray because the appellant was arrested much earlier on 8th January, 2002 and, therefore, there would possibly be no link between PW1's complaint and the appellant's arrest. The question, then, is whether this discrepancy can be harmonized

with the rest of the evidence on record and if not, whether it had any deleterious effect to the prosecution case.

It is germane to observe at this point that contradictions by any particular witness or among witnesses cannot be avoided in any particular case: see **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In **Evarist Kachembeho & Others v. Republic** [1978] LRT n.70 the High Court observed, rightly so, that:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

In the same vein, this Court observed in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) that due to the frailty of human memory and if the contradictions or discrepancies in issue are on details, the Court may overlook such contradictions or discrepancies.

Having reviewed the evidence on record, we think that, in the instant appeal, the incongruity complained of is of no moment and can be explained reasonably by factoring in the mostly unchallenged testimony of the medical witness (PW3) and Exhibit P1. According to PW3, he examined the complainant on 7th January, 2020 and posted the results in the PF3 (Exhibit

P1) the same day at 17:49 hours. The examination occurred after an initial complaint had been made at the Police Station earlier in the day leading to the issuance of a request for medical examination (PF3). At page 15 of the record of appeal, PW1 adduced that:

> *"At the (sic) night when we came from hospital, I told my mother what the accused had done to me."*

Although PW2 adduced that the revelation was made in the midnight of 8th January, 2020, we are decidedly of the view that she must have meant the midnight of 7th January, 2020, which obviously preceded the next day (8th January, 2020). This is borne out of her testimony, at pages 18 and 19 of the record of appeal, when considered in whole. For clarity we extract the relevant parts of the testimony thus:

> *"At Sokoine Hospital, the doctor examined the victim and told me that she was raped and her hymen was perforated.* ***The doctor told me to go to pick the PF3 on 08/01/2020.***
>
> *"**On** (sic) **the midnight of 08/01/2020** I woke up the victim and asked her who raped her. I tried to name all men who live near us but the victim denied*

and named Selemani who lives at (sic) Teacher Mnali.

"The victim told me how the incident took place ....

"Then we went to pick the results at the hospital and me and the victim went to the police. At the police they asked me if I know the suspect. ***I told them that the victim has named him as Selemani.*** *There the police interviewed me and the victim and the victim told the police everything [that] happened to her as she has (sic) told me.* ***Police opened the file.***" [Emphasis added]

We should stress that from the above extract, the following is discernible: one, that PW1 was examined by PW3 at the hospital in the evening of 7th January, 2020 and that at that point the identity of the rapist was undisclosed. Two, that at the end of the medical examination, PW3 asked PW2 to come over the following day (that is, 8th January, 2020) to collect the medical report (Exhibit P1). Three, when PW2 stated that the revelation was made in the midnight of 8th January, 2020, she must have meant either the midnight of 7th January, 2020 or past midnight (meaning the early hours of 8th January, 2020). That is so, because going by the accounts of both PW1 and PW2, the naming of the appellant as the culprit

preceded the collection of the medical report. It is in evidence that PW2, accompanied by her daughter, collected the report from the hospital on 8th January, 2020 and, thereafter, she lodged a formal complaint at the Police Station against the appellant leading to his arrest that very day. Accordingly, the claim that the appellant was arrested before the complainant had named him as the culprit is clearly fanciful. In the premises, we hold that the discrepancy complained of is essentially trifling.

We now deal with the complainant's failure to report the incident promptly. At first, it is common ground that PW1 did not disclose her tribulation as early as possible. She only came out and revealed it in the midnight of 7th January, 2020 after she was pressed by PW2. We interpose and note here that, the delay was for about a day, not three days as claimed by the appellant.

Mr. Mmuru contended, on the authority of **Marwa Wangiti** (*supra*), that the delay severely dented the complainant's credibility and reliability. On the other hand, Ms. George disagreed. She submitted that the delay must be looked at within the context of PW1's immaturity coupled with her mind having been overwhelmed by the appellant's enduring threat to slaughter her should she dare divulge the details of the sexual attack.

At first, we acknowledge that in **Marwa Wangiti** (*supra*), the Court held that unexplained delay to name a suspect should bring the credibility of a witness to question:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his credibility, in the same way* ***as unexplained delay or complete failure to do so should put a prudent court to inquiry.****"* [Emphasis added]

However, we must hasten to say that the above principle must not be made to apply reflexively without having due regard to the particular circumstances of the case concerned. We think that while it can apply fairly unrestrictedly in respect of, say, cases involving property offences, it will not apply with equal force in cases concerning sexual offences where immaturity of the victim, death threats or shame associated with such offences may dissuade the victim from reporting the matter with promptitude. In this regard, we wish to quote, with approval, the observation by the Supreme Court of the Philippines in the **People of the Philippines v. SPO1 Arnulfo A. Aure and SPO1 Marlon H. Ferol, G.R**. No. 180451, October 17, 2008:

> *"Delay in reporting an incident of rape due to death threats and shame does not affect the credibility of*

the complainant nor undermine her charge of rape. The silence of a rape victim or her failure to disclose her misfortune to the authorities without loss of material time does not prove that her charge is baseless and fabricated. It is a fact that ***the victim would rather privately bear the ignominy and pain of such an experience than reveal her shame to the world or risk the rapist's making good on his threat to hurt or kill her.*** "[Emphasis added]

In the instant case, the complainant was a child of tender years and that she testified that the appellant threatened to slaughter her if she divulged the details of the sexual molestation. At her age, she must have been frightened that the appellant would retaliate had she divulged the details. Besides, the delay in reporting the incident was for about a day, which, in our view, is not unreasonably long. By any yardstick, PW1 was a vulnerable person who could not be expected to report her ordeal swiftly unless a conducive and assuring setting for questioning was created. That is why she initially kept crying uncontrollably when her mother interrogated her to find out what the matter was with her. Furthermore, we think that it is significant that no evidence was led that the complainant was prompted

or actuated by an improper motive in making the accusation against the appellant. All these facts render untenable Mr. Mmuru's claim that the complainant was coerced by her mother to pick out the appellant as the culprit. In the premises, we go along with Ms. George that the delay complained of is rational and explicable.

The foregoing conclusion takes us to the final question whether the charged offence was sufficiently established.

As rightly submitted by Ms. George, in proving the offence of statutory rape the appellant faced, predicated on sections 130 (1), (2) (e) and 131 (1), (3) of the Penal Code, the prosecution had to establish the following: one, that there was vaginal penetration of the complainant; two, that the complainant was under the age below ten years at the time of the sexual act; and three, that the perpetrator of the sexual act was the appellant.

Having reviewed the testimonies of PW1, PW2 and PW3 as well as Exhibit P1 in the light of the concurrent findings of the courts below, we hold without demur that the appellant's conviction was based upon soundly evaluated evidence. At first, it was undisputed that the complainant was raped. Her evidence on the alleged sexual act was consistent with the

medical evidence adduced by PW3 and documented in Exhibit P1 that her vagina exhibited fresh bruises with a perforated hymen. Moreover, PW2 physically examined her daughter's private parts a day after the cruel sexual act was committed and detected a discharge of some fluid and that the vagina seemed raptured and stretched. All this evidence sufficiently established that there had been vaginal penetration by a blunt object.

Furthermore, it was also undoubted that the complainant, born on 10th June, 2011, was eight years and seven months when the incident occurred on 6th January, 2020. In terms of the charging provisions, her immaturity rendered irrelevant the question whether or not she consented to the sexual act.

Regarding the identity of the offender, the courts below gave full credence to the complainant's testimony mentioning the appellant as the ravisher. It is clear that PW1 narrated at the trial about her painful ordeal at the hands of the appellant, so openly, candidly and reliably. The incident occurred in daytime around 16:00 hours and that she knew the appellant very well. As held by both courts below, PW1's evidence, being the evidence of victim of a sexual offence, was the best proof – see section 127 (6) of the EA; see also **Selemani Makumba** (*supra*).

In the final analysis, we think that the lower courts' concurrent finding that the appellant sexually abused the complainant is plainly irrefutable. As we are unconvinced that the courts overlooked certain facts of substance or significance or that their findings are clearly arbitrary or perverse, we respect and uphold their concurrent conclusions.

We recall that the appellant initially raised in his evidence in chief an alibi to the effect that he was not at the crime scene on the fateful day on the ground that he spent the day with his lover, one Rehema. It is on record that he abandoned that line of defence upon cross-examination, as he admitted to have lied not being at home that fateful day. The trial court rightly rejected the defence, partly because of the said lie.

We hold untenable the claim, mostly based on DW2's evidence, suggesting that PW2 fabricated the case due to her grudges with the appellant and her housemaid. For a start, the appellant did not cross-examine PW2 on that aspect, necessarily implying that the aforesaid claim is an afterthought. Secondly, in his evidence he said in cross-examination by the prosecuting attorney that he never had any grudges with PW2 and her daughter. It is, therefore, baffling that DW2 raised such an issue in her evidence. It seems that what DW2 said was a self-serving invented story,

which we dismiss without any hesitation. That said, we find all the three grounds of complaint without substance. We dismiss them all.

In the final analysis, we find that the appeal was lodged without any semblance of merit. We dismiss it in its entirety.

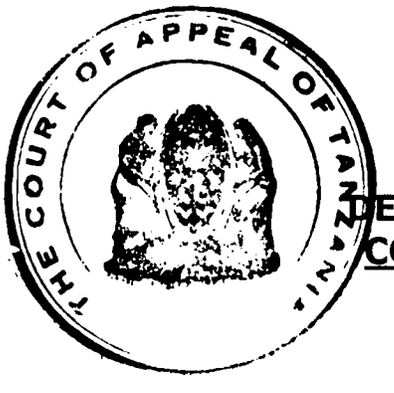
DATED at **MTWARA** this 21st day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2022 in the presence of the Appellant in person, unrepresented and Mr. Abdulrahman Msham, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL