IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 363 OF 2019

ROBERT SANGANYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Dar es Salaam (Extended Jurisdiction) at Kisutu)

(Sarwatt, SRM EXT. JUR.)

dated the 2nd day of August, 2019

Ext. Jur. Criminal Appeal No. 3 of 2019

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JUDGMENT OF THE COURT

30th June, & 10th February, 2022

MASHAKA, J.A.:

This is a second appeal by the appellant ROBERT SANGANYA. Before the District Court of Temeke, the appellant was charged and convicted of rape contrary to sections 130(1) (2) (e) and 131(1) of the Penal Code [Cap 16 R.E. 2002] (the PC). He was sentenced to serve life imprisonment. His first appeal which was transferred to the court of the Resident Magistrate of Dar es Salaam at Kisutu and heard before Hon. S. S. Sarwatt, Senior Resident Magistrate

exercising Extended Jurisdiction (EJ) under section 45(2) of the Magistrate's Court Act, [Cap 11 R.E. 2019]) brought relief; the sentence was set aside and substituted with thirty years imprisonment. In his quest to assail the conviction and sentence, he is knocking on our doors in this final appeal.

Gathered from the particulars of the offence, the prosecution case alleged that on diverse dates between 2017 and 26th day of April, 2018 at Uvumba Kibada area within Kigamboni District in the region of Dar es Salaam, the appellant had sexual intercourse with one VK, a 14 years old girl. To protect her modesty, we shall refer to the victim as PW1 the title under which she testified. The appellant pleaded not guilty to the charge. At the trial, the prosecution relied on the evidence of four prosecution witnesses namely; PW1 (the victim), PW2 (Gelewada Chiwango) the aunt and guardian of PW1, PW3 (Rose Tarimo) a clinical officer who conducted a medical examination of PW1 and filled the PF3 and PW4 (WP 10208 DC Lucina), the police officer who investigated the case. Three documentary exhibits admitted in evidence were the PF3 (exhibit P1), Report Book (RB) number 61/2008 (exhibit P2)

though not attached to the record of appeal and the Baptism certificate and a copy of school register (exhibit P3) collectively.

In his sworn defence, the appellant denied to partake in any sexual intercourse with PW1, that he knew her as a neighbour and claimed to have never had any misunderstandings with PW1.

The facts laid before the trial court narrated that PW1 a girl aged 14 years was living with PW2. On the fateful day, PW1 was sent by PW2 on an errand to buy sugar and kerosene. On the same day at 21.00 hours, it was recounted that PW1 went to the appellant's house where the appellant took her in his bedroom, undressed her and whereupon he took out his penis and inserted it into her vagina. After the act, the appellant had a bath and PW1 left at 23.00 hours and made her way home. When she reached home, PW2 told her to stay outside. The next day she was taken to the police station, interrogated on where she went and stated that she was at the appellant's place. She was taken to the hospital, where her vagina was examined by PW3 and found with sperms.

As recounted by PW2, when she returned home, she found the sugar and kerosene at the door and PW1 was nowhere to be seen. PW1 returned home late that night and PW2 refused to open the door for her and told her to sleep outside the house. The next day, morning hours, PW2 interrogated PW1 and she told her that she went to the appellant's room where she had sex with the appellant. PW1 narrated to PW2 how the appellant took his manhood and inserted it into her vagina. That after he accomplished the act, the appellant took a shower and around 23.00 hours PW1 left the appellant's room and returned home. Further, PW1 confessed that the appellant was her lover and they had been in a sexual relationship although she could not remember how many times, they had intercourse. PW2 took PW1 to the police station where PW1 was interrogated by PW4 and a PF3 was issued. PW3, a clinical officer examined PW1 and found no bruises in her vagina with lost hymen. PW3 found sperms alive in PW1's vagina and filled the PF3.

Upon investigation, PW4 discovered that PW2; had at an earlier date warned the appellant about his sexual relationship with

PW1, had reported the matter at the Police station and was given RB No. 61/2008. Subsequently, the appellant was arrested and charged.

In his defence, the appellant vaguely denied the commission of the offence and alleged that he was arrested without any plausible reason. On the strength of the account of PW1 as corroborated by PW2 and PW3, it was established that the appellant had sexual intercourse with PW1 amounting to rape under the law. The trial court was thus satisfied that the case was proved beyond reasonable doubt and the appellant was convicted and sentenced to serve a life imprisonment.

As alluded to earlier on, the appellant's appeal before Hon. S. S. Sarwatt, learned SRM - EJ hit a snag save for the sentence. The first appellate court sustained his conviction but reduced the sentence of life imprisonment to thirty (30) years imprisonment. Still claiming his innocence, the appellant has lodged this final appeal relying on four substantive grounds of appeal rephrased as follows: -

1. *THAT, the first appellate court erred in upholding the appellant's conviction based on a floating charge, where he was not informed the number of times, he allegedly abused the victim.*
2. *THAT, the first appellate court grossly erred in upholding the appellant's conviction based on unjustified corroborated prosecution evidence.*
3. *THAT, the first appellate court grossly erred in upholding the appellant's conviction based on the particulars of offence which lacked essential ingredient the word "UNLAWFUL" between the words did have and carnal knowledge hence defective charge.*
4. *THAT, the first appellate court erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt as charged.*

A supplementary memorandum of appeal was lodged raising three grounds rephrased as follows: -

5. *THAT, the first appellate court erred in law and fact by upholding the appellant's conviction in a case where the age of the victim was not established per requirement of the law in cases pertaining to statutory rape.*

6. *THAT, the learned SRM (Extended Jurisdiction) erred in law and fact by upholding the appellant's conviction in a case where she failed to objectively appraise the evidence on record.*

7. *THAT, the learned SRM (Ext. Jurisdiction) erred in law and fact by upholding the appellant's conviction in a case where the trial magistrate failed to comply with the mandatory provisions of section 231 of the CPA (Cap 20 RE 2002) as the substance of charge was not explained to him before entering his defence.*

At the hearing of the appeal, the appellant was present in person connected through the Court's video link to Ukonga Prison, without representation. The respondent Republic enjoyed the services of Ms. Salome Assey assisted by Ms. Grace Lwila, both learned State Attorneys. Ms. Assey took the floor to oppose the appeal after the appellant had adopted the grounds of appeal and invited the Court to allow the learned State Attorney to respond to his grounds of appeal first and to respond later in rejoinder if need arose.

At the earliest, we are compelled to make our observation that we are sitting on a second appeal in which our interference with the concurrent findings of the facts by the trial and first

appellate courts is very limited. It is a settled principle of this Court to rarely interfere with concurrent findings of facts by the two courts below. See: **Raymond Mwinuka v. The Republic,** Criminal Appeal No. 366 of 2017 and **Daniel Matiku v. The Republic**, Criminal Appeal No. 450 of 2016 (both unreported). The Court rarely interferes except where there has been misapprehension of the nature and quality of the evidence and other recognized factors occasioning a miscarriage of justice. We guard against unwarranted interference and we would only do so on such concurrent findings of facts only if we are satisfied that they are on the face of it unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or an omission to consider available evidence or wrong conclusion on the facts or mis-directions and non–directions on the evidence or a violation of some principle of law. On this, we are guided by our directions in **Daniel Matiku v. The Republic** (supra), **Julius Josephat v. R.,** Criminal Appeal No. 03 of 2017 and **Juma Mzee v. R.,** Criminal Appeal No. 19 of 2017 (both unreported).

The scope of our discussions will depend on whether or not we find rationale for interfering with the findings of facts by the trial and first appellate courts.

We commence with the defective charge founded on grounds 1, 3 and 5 that the charge of rape against the appellant is a floating charge and the appellant was not informed the number of times he allegedly had sexual intercourse with PW1. Further, he argued that the particulars of the offence lacked an essential ingredient the word 'unlawful' between the words 'did have' and 'carnal knowledge' which rendered the charge defective. Furthermore, the evidence failed to establish the age of the victim as required by the law in cases pertaining to statutory rape as the charge and PW1 stated age of PW1 was 14 years while PW2 the guardian testified that she was aged 13 years.

The learned State Attorney did not support the appeal and submitted that the first ground had no merit as the charge was supported by the testimony of PW1 and the word 'unlawful' missing from the particulars of offence in the charge was not an essential ingredient and therefore did not affect the said charge or evidence

relying on the case of **Paul Dioniz v. Republic,** Criminal Appeal No. 171 of 2018 (unreported). On the inconsistent description of age in variance with the charge and PW2, the learned State Attorney argued that both the ages stated were under 18 years, hence the complaint had no merit.

In his first ground of appeal, the appellant argued that the first appellate court erred in holding conviction based on a floating charge as he was not informed the number of times, he allegedly raped PW1. Section 130 (4) of the Penal Code stipulates that: -

> *"(4) 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) Evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent."*

The proof of rape is penetration of the manhood into the vagina of the victim, however slight, it is sufficient to constitute the

essential ingredient to prove the offence. The testimony of PW1 at page 13 of the record of appeal stated that *"on the 26/4/2018, I was at Robert's house. I went there at 21:00 hours. I went to have sex with him. We took off our clothes; we slept on top of his bed he took out his 'dudu lake akaingiza kwenye uke wangu', when I say 'dudu' I mean 'uboo wake'."* This testimony was taken under oath and during cross - examination the appellant did not cross examine PW1 to challenge this fact. We find that the alleged failure by the PW1 to mention how many times the appellant raped her does not in any way vitiate the evidence. The first ground fails.

Section 130 (1) and (2) (e) of the Penal Code provides that: -

> *"(1) it is an offence for a male person to rape a girl or a woman.*
>
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more*

years of age and is not separated from the man."

The mentioned above provision firmly states that a man commits statutory rape when he has sexual intercourse with a girl under 18 years, with or without her consent. It is undeniably true in the particulars of the offence at page 1 of the record of appeal the word 'unlawful' is not stated. We discussed in **Paul Dioniz v. The Republic** (supra) and held that: -

"Non-inclusion of the word "unlawful" in the circumstances of this case does not make the charge defective. This is so because inclusion or non-inclusion of such word is immaterial in a charge of rape involving a child aged 8 years. As was rightly submitted by the learned State Attorney, there is no lawful sexual intercourse to a child aged 8 years old."

Our position in **Paul Dioniz v. Republic** (supra) is relevant to thus appeal. The non-inclusion of the word 'unlawful' in the particulars of offence is not an ingredient of the offence of rape as claimed by the appellant. It is immaterial to include the said word

in any charge of rape where a male person had sexual intercourse with a girl, with or without her consent when she is under eighteen years of age. There is no lawful sexual intercourse with a girl who is under eighteen years of age. The charge was thus not defective and in consequence, the third ground is devoid of merit and we dismiss it.

The appellant's fifth complaint is on the age of PW1 being unknown allegedly because the evidence failed to establish the age as required by the law in cases pertaining to statutory rape. The appellant contended that the charge stated the age was 14 years, while PW2 the guardian testified that she was 13 years old. To prove the age of a victim of rape, the court relies upon the testimony from the parent or guardian, the doctor who examined the victim and the victim. It is not in dispute that the charge sheet indicated the age of PW1 to be 14 years, while PW2 stated that the age of PW1 was 13 years, and PW1 testified that she was 14 years old.

We find it worthy to note that during preliminary hearing before the trial court, the appellant admitted his personal

particulars, the name of the victim and that she was 14 years old, forming part of the matters which were agreed not in dispute. However, it is our opinion that whether the victim was fourteen or thirteen years of age, still, she was under the age of eighteen years. Notwithstanding the variance of the age in the evidence as claimed by the appellant, such variance was inconsequential. Furthermore, the concern raised by the appellant after his failure to cross examine the witnesses on the age of PW1 or even allude to it during his defence is deemed to have accepted that matter and is estopped from raising in this appeal. At best, that was an afterthought. See: **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010, **Mustapha Khamis v. The Republic,** Criminal Appeal No. 70 of 2016 (both unreported).

We are alive to the intention of the legislature to protect a child under the age of eighteen years from indulging in sexual intercourse at a young age. The provision was couched to deal with such acts of taking advantage of a child. Therefore, a criminal act was committed whether PW1 was 14 or 13 years of age, her consent was immaterial as she was under the age of 18 years. We

find the appellant raped PW1, a child. Thus, we find the complaint by the appellant devoid of merit.

The other complaint is on the credibility of witnesses. It is trite principle when it comes to rape cases, the best evidence is from the victim while other prosecution witnesses may give corroborative evidence. See: **Selemani Makumba v. Republic** [2006] T.L.R. 379, **Galus Kitaya v. The Republic,** Criminal Appeal No. 196 of 2015 and **Godi Kasanegala v. The Republic,** Criminal Appeal No. 10 of 2008 (both unreported).

PW1 testified before the trial court how she had sexual intercourse encounter with the appellant at the appellant's place of residence, which is statutory rape. The rape took place on the 26/04/2018 and PW1 accompanied by PW2 on the 27/04/2018 went to report at the police station and got a PF3 which was filled by PW3 after conducting an examination on PW1. PW3 found that the victim had no hymen and there were signs of penetration. Also, there were visible sperms in PW1's vagina. Besides, the investigator (PW4) testified on how she conducted the investigation, gathered evidence and exhibits and finally arrested the appellant. We find it

pertinent to emphasize that the best evidence in sexual offences is the credible account by the victim who is better placed to explain how she was raped and the person who is responsible, as held in **Selemani Makumba v. Republic** (supra). In assessing the credibility of a witness, it is limited to the extent of demeanor and is the monopoly of the trial court. In **Yohana Dioniz and Another v. Republic,** Criminal Appeal No. 114 of 2009 (unreported), we emphasized that: -

> *"This is a second appeal. At this stage the Court of Appeal would be very slow to disturb concurrent findings of fact made by the lower courts, unless there are clear considerations or misapprehensions on the nature and quality of evidence, especially if those findings are based on the credibility of witnesses."*

Further, we held in **Goodluck Kyando v. R,** Criminal Appeal No. 118 of 2003 (unreported) that: -

> *"Every witness is entitled to credence and must be believed and his testimony accepted*

unless there are good and cogent reasons for not believing a witness."

The testimony of a witness will always be found to be true, consistent and believable unless the veracity of the witness has been assailed on his or her part to misrepresent the facts or has given fundamentally contradictory or improbable evidence. However, there are other ways in which the credibility can be assessed as we held in **Shabani Daudi v. The Republic,** Criminal Appeal No. 20 of 2001 (unreported) that: -

"The credibility of a witness can also be determined in other two ways, that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses."

On the credibility of PW1, PW2 and PW3, the trial court had properly assessed their evidence and found it credible, free from any contradictions. The evidence of PW1 was sufficiently corroborated by PW2 and PW3. We are of the considered view that the first appellate court was entitled to find as it did, that PW1 had

been raped by the appellant, she gave cogent and consistent evidence that the appellant whom she knew before the date of incident was a neighbour, affirmatively identified him and had sexual intercourse with her. According to the prosecution evidence, it can be safely ascertained that PW1, PW2 and PW3 were credible witnesses to be trusted. While it is the domain of the trial court to determine the demeanor of the witnesses, the learned SRM (EJ) was satisfied on the competence and credibility that PW1 and PW2 were truthful and reliable witnesses and there was no reason to interfere with the findings of the trial court.

The complaint on the objective appraisal and analysis of the evidence that the approach of the first appellate court on the prosecution's obligation to prove the case beyond reasonable doubt anchored on the fourth and sixth grounds of appeal. It is trite law that the prosecution has the obligation to prove the case beyond reasonable doubt. It is expected that the prosecution will rely on the testimonies of the victim (PW1) who is the key witness, parent or guardian (PW2) of the victim who will provide the age of the

victim, the clinical officer (PW3) who examined the victim and the investigator (PW4) of the case.

As we pointed out earlier, the evidence of PW1 that she was raped by the appellant is the best evidence, which was properly acted upon by the two courts below to ground the conviction of the appellant. The credible evidence of PW1 and PW2 was reliable to prove the offence of rape by the appellant. We find the detailed account by PW1 how the appellant raped her is coherent and reliable as well as the evidence of PW2 and we have no reason to interfere with the findings of the lower courts regarding the veracity of PW1 and PW2. PW3 provided an account and findings of the examination of PW1 on the 27/04/2018. We see no justification for not believing the evidence of PW1, PW2 and PW3 which the prosecution based its case on. These witnesses are entitled to credence. See: **Edson Simon Mwombeki v. The Republic**, Criminal Appeal No. 52 of 2016 (unreported). The defence advanced by the appellant did not shake up the evidence of PW1, PW2 and PW3. Thus, in view of the credible evidence of the witnesses and the objective analysis of the evidence, the

prosecution proved its case against the appellant beyond reasonable doubt. We find grounds four and six devoid of merit.

The seventh ground is that the learned SRM (EJ) erred in law to uphold the appellant's conviction whereas the trial magistrate failed to comply with the mandatory requirement under section 231 (1) of the CPA as the substance of the charge was not explained to him before entering his defence. The learned State Attorney strongly argued that the trial magistrate complied with section 231(1) of the CPA, addressed the appellant who adequately responded and eventually defended himself.

We entirely agree with learned State Attorney that the trial Magistrate addressed the appellant in terms of section 231(1)(a) and (b) of the CPA. The record of appeal at pages 25 and 26 shows after the ruling of the trial court that a *prima facie* case had been established by the prosecution reads as follows: -

"Court:

Accused is hereby addressed under section 231 (a) and (b) of the CPA.

Signed

Hon. S. B. Fimbo – SRM

18/10/2018

Accused:

I pray to defend on oath. I have no witness to call.

Order: *Defence hearing on 24/10/2018.*

AFRIC.

Signed

Hon S.B. Fimbo – SRM

18/10/2018".

The above excerpt from the record obviously shows that the trial magistrate complied with the statutory requirement under section 231 (1) (a) and (b) of the CPA. It is worthy to note that the substance of the charge and the evidence adduced by the prosecution was explained to the appellant in the ruling, where the trial court explained to the appellant that a *prima facie* case of the offence of rape was established and called upon to defend himself. The trial court addressed the appellant in terms of section 231 (1) (a) and (b) of the CPA. His response as highlighted above stated that he would defend himself on oath and had no witness to call. We find this complaint to be baseless.

The second ground of the substantive memorandum of appeal though it was not raised at the first appellate court was on a point of law relating to want of corroboration, which we have adequately discussed in the course of the judgment. Thus, we dismiss this second ground.

For the above reasons, we find the appeal has no merit and it is dismissed in its entirety.

DATED at **DAR ES SALAAM** this 4th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The judgment delivered this 10th day of February, 2022 in the presence of Appellant in prison connected via Video Conference from Ukonga Prison and Ms. Jacquline Werema, State Attorney for the Respondent is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL