IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A and FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 571 OF 2020

JUMA ANTONI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate Court of Dodoma at Dodoma)

(Dudu, PRM EXT J)

dated the 9th day of July, 2020

in

Criminal Appeal No. 04 of 2020

JUDGMENT OF THE COURT

5th & 9th May, 2022

MUGASHA, J.A.:

The appellant Juma Antoni was charged and convicted of the offence of rape contrary to sections 130(1) (2)(e) and section 131(1) of the Penal Code, [Cap 16 R. E. 2019]. It was alleged by the prosecution that, the appellant on the 23rd April, 2019 at Rofati Village within Chemba District in Dodoma Region did have carnal knowledge of the victim a girl aged 13 years old. He was sentenced to a jail term of thirty (30) years. The victim shall be referred to as V.T or the victim for the purposes of concealing her true identity.

Aggrieved, he unsuccessfully appealed before a Resident Magistrate Court of Dodoma with Extended Jurisdiction. His appeal was dismissed and the conviction and sentence were confirmed. Still aggrieved, he has preferred the present appeal.

Briefly, the facts underlying the conviction of the appellant as can be gathered from the record are as follows: The appellant is a step father of the victim and they both resided in the same house together with Tatu Zacharia (PW2), the victim's mother. On the fateful day, PW2 took her child to a clinic at Tumbakose hospital. It was alleged that, on the same day while PW2 was away, the appellant and the victim went to the farm to harvest maize. While there, the appellant asked V.T who obliged and he went close to him, unexpectedly, the appellant fell her down and ravished her. Out of pain, the victim in vain tried to raise an alarm but the appellant threatened to kill her and cautioned not to reveal about the shameful incident to any one or else she would be jailed. She bled profusely and opted to return home to sleep but the bleeding continued and blood flowed on the floor. On seeing this, it was alleged that, the appellant went outside, collected sand and splashed it on the blood mixing it with sand and threw the mixture in the latrine. Later, the appellant prepared food and woke up the victim so that she could eat, but she ate

very little and retired to sleep as she felt dizzy. On the following day the victim's mother returned home. Since there was no flour in the house, PW2 asked the victim to take maize for grinding at the milling machine and that is when the victim narrated about the rape incident to her mother. This made PW2 to report the incident to the vigilant officer and the sungusungu who upon embarking to arrest the appellant, who resisted and threatened to strike them with an arrow. Then, the appellant locked the victim and PW2 inside the house and they were immobile for three days and could not go anywhere. However, as luck would have it, they managed to escape and reported the matter to Village Chairman of Tumbakose and later to Chemba Police Station. The victim was initially taken to Chambalo Dispensary and later to Kondoa Hospital where she was medically examined by Dr. Amon James (PW3). According to the Doctor, he attended the victim three months after the rape incident and he established that there were no bruises on the victim's private parts, but two fingers could easily penetrate the victim's vagina. PW3 tendered the PF3 which was admitted at the trial as exhibit P3. Subsequently, the appellant was arrested and arraigned for the offence charged.

On the part of the appellant, he denied the accusations by the prosecution. He told the trial court that the case was framed up against

him because of a misunderstanding with his wife who had placed some local medicine in the kitchen so that they could be separated and she remarry another man. According to him, this was revealed by the victim and as such, he called some elders so as to have the matter discussed and PW2 had no explanation.

After a full trial, believing the prosecution account to be true, the appellant was found guilty as charged, convicted and sentenced as earlier stated. Aggrieved by the decision, the appellant lodged the present appeal faulting the conviction on the following grounds: **One**, the trial and first appellate courts did not consider the variation between the preliminary hearing and the evidence on the record. **Two,** the two courts below did not consider failure by the prosecution to paraded the police as a witness. **Three,** the charge was not proved beyond reasonable doubt. **Four,** the two courts below erred to ignore the doctor's account merely because it was expert's evidence. **Five**, the two courts below failed to draw an inference adverse on the prosecution as it failed to parade a Sungu Sungu Commander.

At the hearing the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Ms. Neema John Taji, learned State Attorney.

The appellant who was a lay person, urged the Court to set him free contending that the charge of rape against him was not proved at the required standard. Basically, the appellant is faulting the two courts below on failure to assess the credibility of the victim's account and improper evaluation of the evidence adduced at the trial.

The learned State Attorney at the outset, opposed the appeal. She contended that the charge of rape was proved against the appellant beyond reasonable doubt. She advanced the reasons that: **one,** the victim had narrated how her step father took her to the farm and raped her in the absence of the mother; **two**, on return of the mother, the victim recalled how the appellant locked them inside the house for three days and they managed to escape and report the incident to a sungusungu commander and the village chairman of Tumbakose who gave them a letter to report to the police which they did and went to the hospital for medical examination. It was the learned State Attorney's argument that, the victim's account was best and credible worth belief and it sufficed to establish that it is the appellant who raped the victim. She added that, the victim's account was not shaken by the appellant during the cross-examination. On this submission, she urged us to find the appeal not merited and proceed to dismiss it.

Upon being probed by the Court on the variance in the prosecution account on the dates when the victim was taken to the hospital, Ms. Neema urged us to believe the evidence of the victim whose demeanour was assessed by the trial court and found to be credible. On a further probe as to why was the Investigator, the Village Chairman of Tumbakose Village and Sungu Sungu commander were not paraded as witnesses, she was quick to cite the provisions of section 143 of the Evidence Act stating that, it is upon the prosecution to decide the number of witnesses to testify for the prosecution. As for the defence of the appellant, although she conceded that it was not considered, yet she urged us to consider only the evidence of the victim who is a crucial witness on the rape incident. To support her propositions, she cited to us the provisions of section 127 (7) of the of the Evidence Act [CAP 6 R.E. 2019]. Finally, she urged the Court to dismiss the appeal and sustain the conviction and the sentence.

After a careful consideration of the grounds of appeal, the submission of the parties and the record before us, the main issue for consideration is whether the charge of rape was proved against the appellant beyond reasonable doubt.

In the first ground of appeal, it is the appellant's complaint that the two courts below did not consider the variation between Preliminary Hearing and the evidence on record. This complaint is unfounded because Preliminary Hearing is conducted by the court to accelerate speedy disposition of criminal cases by acknowledging facts in dispute and those not in dispute as per the dictates of the provisions of section 192(2) and (3) of the Criminal Procedure Act [CAP 20 R.E.2019]. It is on account that; the preliminary hearing does not constitute an integral part of the trial. See the case of **SHABANI SAIDI LIKUBU V. REPUBLIC**, Criminal Appeal No.228 of 2020 and **MGONCHORI BONCHORI MWITA GESINE V. REPUBLIC**, Criminal Appeal No.410 of 2017. Thus, first ground of complain has no merit.

The next issue for our determination is whether the charge was proved against the appellant beyond reasonable doubt which covers the remaining grounds of complaint. At the outset, we restate that, it is the settled position of the law that, the Court will interfere with concurrent findings of the courts below unless if there has been misapprehension of the nature, and quality of the evidence and other recognized factors occasioning miscarriage of justice. See: **ISAYA MOHAMED ISACK VS REPUBLIC** Criminal Appeal No. 38 of 2008 (unreported), **DPP VS**

JAFFAR MFAUME KAWAWA [1981] TLR. 149 and **SEIF MOHAMED E.L ABADAN VS REPUBLIC,** Criminal Appeal No. 320 of 2009 and **WANKURU MWITA VS REPUBLIC**, Criminal Appeal No. 219 of 2012 (all unreported). In the latter case, the position was emphasized by the Court having said as follows:

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

It is also settled law that, although assessing the credibility of a witness basing on demeanour is the exclusive domain of the trial court, it can still be determined by the appellate court when assessing the coherence and consistency of the witness and when such witness is considered in relation to the testimony of other witnesses including that of an accused person. See - **SHABAN DAUDI VS REPUBLIC**, Criminal Appeal No. 28 of 2001 and **DANIEL MALOGO AND TWO OTHERS VS**

REPUBLIC, Consolidated Criminal Appeals No. 346, 475 and 476 of 2021. (both unreported). In this regard, the assessment of the credibility of a witness is crucial because, every witness is entitled to belief unless the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses. (See in **GOODLUCK KYANDO VS REPUBLIC,** [2006] TLR 363, and **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No. 62 of 2004 (unreported).

We shall accordingly be guide by the stated position of the law in determining this appeal.

It is glaring that the victim was the only prosecution witness on the alleged rape incident in which she claimed to have been raped by her step father. This was echoed by her mother to whom the victim narrated the incident which was reported to the police and three days later the victim was taken to the hospital for medical examination. However, according to PW3 the victim was taken to the hospital three months after the incident. Therefore, since apart from the testimonial account of the victim there is no other direct evidence on the alleged rape incident, the manner in which such evidence ought to be treated is regulated by the provisions of section 127 (7) of the Evidence Act stipulate as follows:

"127(7) 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 of as the case may be the victim of sexual offence on its own 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."***

[Emphasis supplied]

In the light of the bolded expression, where the only evidence is that of the victim or a witness of tender age the court is required to receive such evidence notwithstanding that it is not corroborated. However, the court is cautioned not to act on such evidence to convict an accused person, unless it assesses the credibility of the victim's account or of the witness of tender age and satisfy itself that such evidence is truthful. We emphasised this in the cases of **REHANI SAID NYAMILA VS REPUBLIC**, Criminal Appeal No. 222 of 2019 and **MOHAMED SAID VS**

REPUBLIC, Criminal Appeal No. 145 of 2017 (both unreported) In the latter, case we stated:

> *"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 the rules of evidence in general, and s. 127 (7) of Cap 6 in particular, and that such compliance will lead to punish offenders only in deserving cases."*

In the premises, although the best evidence of rape is that which comes from the victim, however, that is not a waiver on the court assessing the credibility in order to satisfy itself that the witness is telling nothing but the truth. In this regard, a follow up question in this case is whether the evidence of the victim in this case is credible and worth belief. The trial magistrate attended the issue of credibility of the victim from pages 34 to 38 of the record of appeal to the effect that, **One,** the victim was consistent in her testimony having narrated to her mother how she was raped by the appellant; **two,** she mentioned the culprit at the earliest opportune time; **three,** the victim's account was supported by PW2 who examined the victim and found the vagina swollen with bruises. However, although the trial magistrate dismissed the doctor's account on attending

the victim three months after the incident which is not about medical expertise and it is in sharp contrast with the victim's account who claimed to have been taken to the hospital three days after the incident because the appellant had locked them inside the house.

Apparently, the Resident Magistrate with Extended Jurisdiction concurred with the trial court that the victim was indeed a credible witness. Yet, having considered the testimony of the doctor being at variance with that of the victim on the date when the victim went to the hospital, he concluded as follows:

> *"...Again we have oral evidence of PW3 the [clinical officer] involved to medically examine the victim three months later after the ordeal and found her not virgin as the two fingers penetrated easily to her vagina. That made him to form an opinion that the victim had been penetrated in her vagina.*
>
> *The oral evidence of PW3 is well supported with PF3 (Exhibit P1) again judging by the record it is clear that although the appellant tried to impeach the testimony of the prosecution witnesses, he did not succeed again their evidence was left unshaken indeed their defence suffice to corroborate the evidence of the victim if at all need be."*

In the first place as earlier stated, although the evidence of the doctor (PW3) was that of an expert, the date on which the victim was taken to the hospital had nothing to do with medical expertise and as such, the evidence on the date in question should not have been ignored or treated casually by the two courts below as it has a bearing on the credibility of the victim. Thus, the contrast on the date when the victim was taken to the hospital all coming from the prosecution side cast a serious doubt on the prosecution case and it raises more questions than answers on the credibility of the victim's account. Thus, it was incumbent on the RM with Extended Jurisdiction sitting on first appeal which is like a rehearing, to resolve the contradiction by re-evaluating the trial evidence instead of being swayed by the findings of the trial court and casually attending the matter which should not be condoned.

Therefore, as earlier stated, the contradiction on the date of reporting to the hospital taints the credibility of the victim and in a nutshell, she was not truthful as to when she was taken to the hospital. We say so because the PF3 which was tendered as Exhibit P1, shows that the PF3 was issued by G3735 DC Shinji on 1/8/2019 which is not compatible with the victim's account and that of PW2 on being issued with

the PF3 three days after the incident. Again, this sheds the prosecution case with a cloud of doubt.

Apparently, it is on record that, the matter was initially reported to the Chairman of Tumbakose village who gave a letter to the victim and her mother so that they could report the matter to the police. However, the Chairman was not paraded as a witness for the prosecution and neither was the letter produced at the trial to substantiate if at all the reporting was three days after the fateful incident. Also another person who was not paraded as a prosecution witness was the Sungu Sungu Commander to who was also informed about the incident. These were material witnesses who could have clarified to the court on what caused the delay to take the victim to the hospital. The doubt remained unclear because the prosecution failed to parade those witnesses and specifically the police investigator. This, entitles this Court to draw an inference adverse to the prosecution. See – **AZIZ ABDALLA VS REPUBLIC** [1991] T.L.R 71, the Court among other things held:

> *"the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not*

called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.

In the case at hand, although it is upon the prosecution to determine the number of witnesses in terms of section 143 of the evidence Act, it was incumbent on the prosecution to call witnesses to testify on the material fact on the reason behind taking the victim three months to the hospital *vis a vis* the victim's account that she was taken to the hospital three days after the incident. More so, the prosecution never told the trial court if those witnesses were not within reach or could not be found.

Finally, on account of what transpired at the trial, can it be safely vouched that the charge was proved against the appellant at the required standard. Our answer is in the negative. We are fortified in that regard because, it is a basic principle in criminal law that, it is upon the prosecution to prove its case and it must do so beyond reasonable doubt. See: **HAMISI MSITU v REPUBLIC**, Criminal Appeal No. 71 of 2009 (unreported). In the case at hand, on account of what we explained earlier, the prosecution did not discharge the onus and the alleged failure of the appellant to cross-examine the victim, did not boost the prosecution case. Also, since the victim's account failed the criteria and test of credibility stated under section 127 (7) of the Evidence Act, it is unsafe to

act on it to sustain the conviction of the appellant. Therefore, we decline Ms. Neema's suggestion to rely on the victim's account to find the prosecution case proved at the required standard.

In view of what we have endeavoured to discuss, we find appeal merited and proceed to allow it and order the immediate release of the appellant unless he is held for other lawful cause.

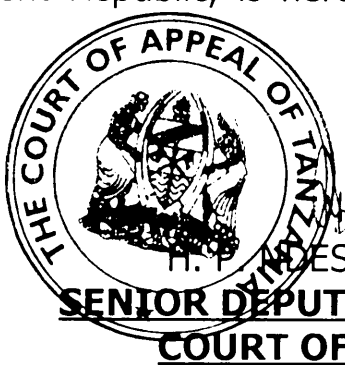
DATED at **DODOMA** this 7th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 29th day of April, 2022 in the presence of the Appellant in person and Mr. Henry Chaula, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



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