IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 546 OF 2021

CHARLES S/O KASSIM @ KITOBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Itemba, J.)

dated the 27th day of August, 2021

in

(DC) Criminal Appeal No. 116 of 2021

.....

JUDGMENT OF THE COURT

20th & 26th September, 2022

MWAMPASHI, J.A.:

The appellant, Charles s/o Kassim @ Kitobe, was charged and convicted of the offence of rape contrary to sections 130(1) (2)(e) and 131(1) both of the Penal Code, [Cap 16 R.E 2002, now R.E. 2022] by the District Court of Mkuranga at Mkuranga (the Trial Court). It was alleged by the prosecution that on 10.02.2020 at about 22:00 hours at Mkuranga within the District of Mkuranga in Coast Region, the appellant did have carnal knowledge of a 17 years old girl, who, for the sake of hiding her identity, will hereinafter be referred to as the victim or PW2.

The appellant pleaded not guilty to the charge and after a full trial he was convicted of the charged offence and sentenced to life

imprisonment. In addition, the appellant was ordered to pay TZS. 500,000 to PW2 as compensation. Aggrieved, he appealed before the High Court at Dar es Salaam (Itemba, J), in Criminal Appeal No. 116 of 2021 wherein his appeal was dismissed save for the sentence which was reduced from life to thirty (30) years imprisonment. Still aggrieved, the appellant, has filed this second appeal before this Court.

Before we proceed, an account of what led to the appellant's conviction *albeit* in brief, will be helpful. In proving the charge against the appellant, the prosecution paraded four witnesses. Apart from the victim (PW2), other three witnesses were Maria d/o of Vincent (PW2's mother) who testified as PW1, Hereswida Mussa (PW3) and WP. 2867 D/Stg. Beatrice (PW4). The prosecution did also rely on two exhibits, namely; a Police Form Report (PF3) and PW2's birth certificate, which were tendered in evidence as PE1 and PE2 respectively. The appellant was a sole witness in his defence.

PW1's testimony was to the effect that she used to live together with the appellant in a rented house as tenants. Sometimes in November, 2019, PW2 who had just finished her Ordinary Level education in Dodoma where she had been living with her father, visited and came to stay with her mother while waiting for her examination results. On

08.02.2020 at about 04:30 hours, PW1 realised that PW2 was not in the house. Her efforts to look around for PW2 proved futile and when the appellant was approached, he firstly denied to know the whereabouts of PW2 only to later disclose that he had seen PW2 leaving the house. PW2 returned home later but this incident was enough to let PW1 become suspicious that her daughter and the appellant were having an affair. On 10.02.2020 PW2 went missing again and PW1 suspected that the appellant was involved. The appellant denied any involvement and he even accompanied PW1 to the police station where the disappearance of PW2 was reported. On the following day, that is on 11.02.2020, PW1 was called by the police and asked to go at the police station where she was informed that her daughter had been brought there by the appellant. When interrogated in the presence of PW1, PW2 stated that she had spent the last day at the bus stand and the night under a mango tree close to their home.

As to what was the testimony of PW2, it is on record that PW2 claimed that she had sexual intercourse with the appellant for the first time on 26.12.2019 in the appellant's room. That was after the appellant had promised that he would pay school fees for her and cover the costs of her further studies. As to what happened on the material day, that is, on 10.02.2020, PW2 testified that on that day, at about 06:00 hours, her

mother, PW1 pressed and insisted that she must be told the truth about her relationship with the appellant. Having realized that her relationship with the appellant had been known by her mother, PW2 decided to run away. She went at the market place where she was later picked by the appellant who took her at one Mama Sara at Kiguza where the appellant introduced her as his niece. She stayed at Mama Sara's till at about 20:00 hours when Mama Sara chased her and the appellant away after she had realised that the two were lovers. From there, the appellant took her to Kwa Mboya Guest House where they had sexual intercourse before the appellant left till in the morning when he came back and took her to the police station.

PW2 further testified that on their way to the police station, the appellant instructed and warned her not to tell the truth when asked about where she had been and that her answer should be that she had spent the day at the bus stand and the night under the mango tree close to their home. This is what she replied to the police upon being interrogated. On the following day, upon seeing her mother angry and unhappy, PW2 made a different narration of what she stated at the police, that is, she implicated the appellant. Thereafter, she was taken back to the police station where she revealed all what had allegedly

happened between her and the appellant. From the police station she was taken to the hospital for medical examination.

There was also evidence from Hereswida Mussa (PW3), the medical doctor, who medically examined PW2 and who tendered a PF3 as exhibit PE1 and also from the case investigation officer WP. 2867 D/Stg. Beatrice (PW4) who tendered PW2's birth certificate as exhibit PE2.

In his sworn defence, the appellant maintained his denial to have raped PW2. He told the trial court that on 11.02.2020, he came back home from the night shift and was informed by PW1 that PW2 had gone missing. He assisted in looking for PW2 by calling her on phone. PW2 told him that she was at Mkuranga bus stand. He went at the bus stand, picked PW2 and took her to the police station where upon interrogation PW2 stated that she had been hiding at the market place. In cross-examination, the appellant stated that PW2 had been tutored by PW1 to lie and claim that she had been raped by him because PW1 who had been his lover was suspecting that he had an affair with another woman in the name of Mary.

The learned trial court's magistrate found the evidence given against the appellant sufficient to prove the charge. In so finding, he placed much reliance on PW2 whose evidence was found to be credible

and reliable. PW2 was found a witness of truth whose evidence was the best in terms of **Selemani Makumba v. Republic** [2006] T.L.R. 92. As we have alluded to earlier, the appellant's first appeal to the High Court was unsuccessful save for the sentence which was reduced from life to thirty (30) years imprisonment hence the instant second appeal.

Although in his memorandum of appeal, the appellant had listed a total of eight grounds of appeal, it is however our considered view that his complaints revolve around the following three substantive grounds: **One**, that the courts below wrongly relied on the incredible and unreliable evidence from PW2 to ground the conviction; **Two,** that the prosecution failed to parade, the Guest House attendant who was a material witness for the prosecution and **Three,** that, the case against him was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas, the respondent Republic was represented by Ms. Hilda Kato Mkunna, learned Senior State Attorney.

When invited to argue his appeal, the appellant adopted the grounds of appeal as listed in his memorandum of appeal and the written submissions he had earlier filed on 09.09.2022. Addressing the first and second grounds, it was argued by the appellant that PW2 was

not truthful, credible and reliable because she gave two different accounts of where she had been on the material day. He explained that PW2 who had initially stated to the police that she had spent the material day at the bus stand and the night under the mango tree, changed her story on the next day just to please her mother by claiming that she had spent the night at Kwa Mboya Guest House where she had been raped by the appellant. It was further argued by the appellant that, under those circumstances, the attendant of the Guest House where it was claimed PW2 was raped by the appellant, was a material witness whom the prosecution ought to have called to testify and tell the court if PW2 was indeed taken there by the appellant. The appellant concluded by arguing that the case against him was not proved beyond reasonable doubt and therefore he prayed that his appeal be allowed.

Ms. Mkunna intimated, at the outset, that she was not supporting the appeal. In response to the first ground, she argued that, PW2 was a credible and reliable witness and further that her evidence sufficiently supported the charge against the appellant to the required standard. Ms. Mkunna insisted that the offence being statutory rape, the evidence from PW2, a girl under the age of 18, on how the appellant took her to the Guest House and raped her, proved all the required ingredients. She submitted that PW2 did not tell the truth on the first instance when she

was taken to the police station because the appellant had warned and threatened her not to tell the truth. It was concluded by Ms. Mkunna on this ground that the two lower courts did not err in basing the conviction on PW2's evidence because in cases involving sexual offences, the best evidence is that from the victim and also that in law, the sole evidence of the victim can be safely relied upon by the court to sustain a conviction. On this, Ms. Mkunna placed reliance on the decision of this Court in **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016 (unreported).

As regards the second ground on the failure to call a material witness, it was submitted by Ms. Mkunna that the Guest House attendant was not a material witness because such a witness could not have proved the offence of rape which was committed against PW2 in privacy. It was argued by her that the witnesses called by the prosecution gave the required sufficient evidence that proved the charge and also that under section 143 of the Evidence Act [Cap. 6 R.E. 2002 now R.E. 2022] (the Evidence Act), there is no particular number of witnesses required for proving any fact.

It was finally argued by Ms. Mkunna on the last ground of appeal, that, basing on the evidence from PW2 which was corroborated by other

prosecution witnesses, the case against the appellant was proved to the hilt as required by the law. She therefore urged the Court to find the appeal baseless and dismiss it in its entirety.

The appellant had nothing to respond in rejoinder when given an opportunity to do so.

Having considered the arguments made for and against the appeal, the crucial issue for our determination is whether the appeal is meritorious or not. However, under the circumstances of this appeal, we are of the view that the decisive particular issue is on the credibility and reliability of PW2.

Before venturing into the determination of the above stated issue, we wish to note that we are mindful of a settled principle that this being a second appeal, the Court should rarely interfere with the concurrent findings of facts by the lower courts unless there has been a misapprehension of the substance, nature and quality of such evidence occasioning a miscarriage of justice or resulting into an unfair decision. See- **Jacob Mayani v. Republic** (supra), **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported) and **Director of Public Prosecution v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149.

In determining whether a witness is trustworthy and that what he is telling is true, the trial magistrate or judge is enjoined to correlate the demeanour of the witness and the statement he makes in court during his testimony. If he is not consistent then his credibility is questionable. It should also be pointed out, at this very stage, that, demeanour is not the only way in which the credibility and reliability of a witness can be assessed. In **Shabani Daud v. Republic,** Criminal Appeal No. 28 of 2001 (unreported) the Court observed as follows:

> *"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..."*

Further, in **Salum Ally v. Republic,** Criminal Appeal No. 106 of 2013 (unreported), the Court gave a guide on how the evidence given by a witness can be assessed so as to establish that the witness is credible and reliable and therefore that his evidence can be acted upon. The Court observed that:

> *"...on whether or not, any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware*

that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails the ability to assess whether the witness's testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances particularly in a particular case".

Guided by the principles and positions of the law as stated above, we should now begin with the first ground on the credibility and reliability of PW2. On this, we hasten to state, at the outset, that the nature and quality of the evidence that was given by PW2 and on which the appellant's conviction was grounded, justify our interference of the concurrent finding on the credibility and reliability of PW2, in this second appeal. In doing so, we are fortified by the decision of the Court **in Edwin Mhando v. Republic** [1993] T.L.R. 170, where it was observed that:

"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of facts are based on correct appreciation of the evidence. If, as in this case, both courts below completely misapprehended the substance, nature and

quality of evidence, resulting in an unfair conviction, this Court must, in the interest of justice intervene".

Admittedly, as we have also alluded to above, the appellant's conviction was grounded not only on the concurrent finding that PW2 was credible and reliable but also on the principle that in terms of the decision of the Court in **Selemani Makumba** (supra), PW2's evidence was the best. On this, it will not be out of context if we restate the position that while it is true that in sexual offences cases the best evidence is that of the victim, such evidence should not be believed and taken or acted upon blindly and wholesome without the court satisfying itself that such evidence is plausible, credible and reliable. See- **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 and **Pascal Yoya @ Maganga v. Republic**, Criminal Appeal No. 248 of 2017 (both unreported).

As we have alluded to above, having carefully examined and analysed the evidence on record, the lower courts' judgments and the submissions made for and against the appeal, we have found it compelling to interfere with the concurrent finding of the two lower courts on the credibility and reliability of PW2. We are of a settled view that the two lower courts did not properly comprehend the substance,

nature and quality of PW2's evidence. It is our observation that under the circumstances of this case, the credibility of PW2 was dented hence unreliable. This is cemented by the fact that PW2 gave two different accounts of what really transpired on the day she went missing, that is on 10.02.2020. According to the evidence on record, particularly from PW1, and PW2, it is not disputable that when PW2 was initially taken to the police station on 11.02.2020 and upon interrogation by the police, her statement was to the effect that she had spent the day at the bus stand and the night under the mango tree close to their home. She did not mention about being taken to Kwa Mboya Guest House or being raped by the appellant. A day later, that is, on 12.02.2020, PW2 came out with a different story that on the day she went missing, the appellant had taken her to one Mama Sara where she spent the day and then to Kwa Mboya Guest House where she spent the night and was allegedly raped by the appellant.

Ms. Mkunna strongly urged us to find that PW2 had to hide the truth when taken to the police at the first instance, because the appellant had threatened and warned her not to tell the truth. With due respect, we are unable to agree with her. It is our observation that under the circumstances of this case, PW2 had no good reason not to tell the truth when she was taken to the police station at the first

instance. It should also be borne in mind that in her evidence, PW2 did also tell the trial court that she had to name the appellant and state that she had been raped by him in order to please her mother (PW1) who was still unhappy and angry with her. We are of a considered view that, for the aforesaid reasons, PW2's credibility and hence her reliability is highly suspect.

Furthermore, the fact that PW2 did not tell the claimed truth at the first instance when she was initially taken to the police station, renders her account unreliable and doubtful and what she narrated a day after the incident, an afterthought. In **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39, the Court observed that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. By analogy and in the same way as the Court observed in **Marwa Wangiti Mwita** (supra), we also find that it is unsafe to rely on evidence of PW2 who did not reveal about the fateful incident when interrogated by the police for the first time.

Basing on the above, it is therefore our finding that PW2's shaky and unreliable evidence cast a reasonable doubt on the prosecution case

against the appellant which must be resolved for the benefit of the appellant.

The determination of the first ground of appeal as discussed above, takes us to the second ground on the failure by the prosecution to call material witnesses. While to the appellant, the Guest House attendant was a material witness, to Ms. Mkunna, the said attendant was not a material witness because under the law no particular number of witnesses is required to prove any fact in the case. First of all, we should point out, at the outset, that in the instant case, section 143 of the evidence Act is not applicable and is cited by Ms. Mkunna out of context. We also side with the appellant that under the circumstances of this case, particularly where the appellant is not only denying to have participated in any way in the disappearance of PW2 on the material day but also to had taken and raped PW2 in Kwa Mboya Guest House, then the Guest House attendant, was a material witness. The said witness could have cleared the contested and doubtful evidence from PW2 that she was taken to that Guest House by the appellant. In the same vein, it is also our observation that even Mama Sara who allegedly spent the day with PW2 after the later had been taken there by the appellant, was a material witness whose evidence could have supported PW2's shaky evidence that she was taken there by the appellant and also that she

spent the day over there before being taken to Kwa Mboya Guest House.

The position of the law and the effect of the failure to call a material witness is settled. In **Aziz Abdallah v. Republic** [1991] T.L.R. 71, the Court observed that:

> *"The general and well-known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to 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".*

Further, in **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (unreported), where a material witness was not called and where the prosecution tried to take refuge under section 143 of the Evidence Act, as Ms. Mkunna has attempted to do in the instant case, the Court made the following observations:

> *"... so, before invoking section 143 of the TEA regard must he had to the facts of a particular case. If a party's case leaves reasonable gaps it can only do so at its own risks in relying on the section. It is thus now settled that, where a*

witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against the party, even if such inference is only a permissible one".

See also **Dauson Athanaz v. Republic,** Criminal Appeal No. 285 of 2015 (unreported) and **Pascal Yoya @ Maganga** (supra).

As we have intimated above, the prosecution in the instant case did not call the Guest House attendant and Mama Sara as witnesses and no reasons were assigned why the said two witnesses could not be called to testify. It is our considered view that had the prosecution called the said two witnesses to testify, the evidence from PW2 that the appellant was involved in her disappearance and therefore that she was raped by him in Kwa Mboya Guest House, would have been given credence. For the said failure to call the said two material witnesses, the trial court ought to have drawn an adverse inference against the prosecution. The second ground of appeal is therefore decided in affirmative.

On the basis of the foregoing findings on the first and second grounds of appeal, the third ground should not detain us at all. It goes without saying that the case against the appellant was not proved to the

hilt. There was no sufficient evidence to prove that the appellant had carnal knowledge of PW2 on 10.02.2020 as alleged by the Prosecution.

All said and done, we find that the appeal is meritorious and we thus allow it. Consequently, we quash the conviction, set aside the sentence imposed on the appellant and order his immediate release from the prison unless he is being held for some other lawful cause.

DATED at **DAR ES SALAAM** this 26th day of September, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered this 26th day of September, 2022 in the presence of the Appellantin person and Ms. Hilda Kato Mkunna, learned Senior State Attorney for the Respondent/ Republic, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL