IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: NDIKA, J.A., KITUSI, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 124 OF 2018

BENEDICT JOACHIM KIMARO @ BENE @ KIBONGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 19th day of March, 2018

in

DC. Criminal Appeal No. 60 of 2017

JUDGMENT OF THE COURT

28th September & 5th October, 2022

MAKUNGU, J.A.:

In the Resident Magistrate's Court of Moshi sitting at Moshi (the trial court), the appellant was charged with two counts namely; Unnatural Offence contrary to section 154(1)(a)(2) and Rape contrary to sections 130(1)(2)(e) and 131(3) of the Penal Code [Cap 16 R.E 2002], (Now R.E 2022).

It was alleged in the charge sheet on both offences that on 10th May, 2016 at Mlao Village within Rombo District in Kilimanjaro Region, the

appellant had both sexual intercourse with and carnal knowledge against the order of nature of a girl aged 8 years old who testified during the trial as PW2. We shall maintain reference to her as PW2 or victim. The trial court convicted the appellant and sentenced him to serve life imprisonment on both counts. He unsuccessfully appealed to the High Court, and this is his second appeal.

The facts are simple though nerve-wracking, considering the age of the alleged victim. On 10/5/2016 about 15:00 hours when the victim was coming back home from school, experiencing pain in her stomach. On the way she met the appellant her neighbour who called her. She refused but the appellant chased and apprehended her. He brought her inside one of his houses as there was no one else. He brought her into his bedroom and ravished her. According to the victim, she was ordered not to make alarm and was threatened to be killed. Later the victim went home while having difficulties in walking.

The grandmother of the victim, Kandida Faustin (PW1) and the grandfather of the victim, Faustine Kitalala Kimario (DW5) adduced in support of Pw2's account. That on 10/5/2016 the victim came back from

school at 15:00 hours complaining about stomach pain. According to them on 11/5/2016 the victim was taken to hospital for medical treatment. They said that the victim refused to divulge any information to them that she was raped and sodomized until when she was taken to Huruma Hospital. She, however, told a medical officer (PW3) in the presence of PW1 and DW5 that it was the appellant who had raped and sodomized her after dragging her into his bedroom.

There was also evidence of a medical officer (Dr. Willbroad Kyejo) PW3, that when he examined PW2 on 18/5/2016, he observed there were bruises inside the vagina and anus. He discovered also that something penetrated into the system of urine. He concluded that the said bruises might be caused by being penetrated by a blunt object. His medical report (PF3) was tendered before the court and admitted as exhibit P.1.

And the last two witnesses for prosecution case were; WP 3175 D/CPL Salestina (PW4), a police officer who investigated the matter from the time when the victim was admitted at Huruma Hospital up to the time when the appellant was arrested at Mererani. During her investigation, she found that on 10/5/2016 the appellant was present at the scene of the

crime, and on the basis of the evidence she took the appellant to court. Athumani Mohamed (PW5), a Mrolelyo Village councillor within Rombo District testified to have met the appellant in the evening of 9/5/2016. He saw him again on 10/5/2016 around 10:30 hours riding a motorcycle with Masai attire and he talked to him. He testified also to have participated with the police officers to arrest the appellant at Mererani. He also visited the victim while she was admitted at Huruma Hospital and she disclosed to him to have been raped and sodomized by the appellant.

In defence, the appellant totally denied the allegation and raised a defence of alibi that on 10/5/2016 he was at his home at Mererani. He alleged that he was constructing his house in the morning and around 14:00 hours he attended his group meeting. His defence was supported by DW2, DW3 and DW4.

In convicting the appellant, the trial court accepted PW2's account that it was him who ravished her. The trial court's conclusion therefore, was that the appellant was the culprit.

As stated earlier, on the first appeal the High Court of Tanzania sitting at Moshi, Fikirini, J. (as she then was) upheld both convictions and sentence, hence the present appeal.

In the memorandum of appeal, the appellant has enumerated three (3) grounds of appeal which in a nutshell fault the first appellate court for; **one,** holding that PW2, PW3 and PW5 proved the case beyond reasonable doubt; **two,** upholding the conviction while the evidence of PW2 was taken in contravention of the requirement for concluding a *voire dire* test; and **three,** the defence evidence was not considered.

At the hearing, the appellant who was also present before us, had the services of Mr. Benedict B. Bagiliye, learned advocate whereas the respondent Republic had the services of Ms. Mary Lucas, learned Senior State Attorney.

For the sake of convenience in arguing the grounds of appeal, Mr. Bagiliye opted to abandon the second ground of appeal and argued the first and third grounds of appeal together as one that the prosecution case was not proved beyond reasonable doubt. When invited by the Court to

orally argue the appeal, the appellant's advocate fully adopted the contents of the appellant's written statement of arguments.

The central issues addressed by Mr. Bagiiiye in arguing his ground of appeal were that **first,** the prosecution's witnesses were not credible witnesses in particular PW2, **second** failure by the prosecution to parade as witness a school teacher of the PW2; and **three,** there were contradictions and inconsistences in the testimonies of the PW1, PW2, PW3 and DW5.

Submitting on the issue of credibility of PW2 in particular, Mr. Bagiliye argued that PW2 told the doctor on duty that her stomach pain was due to a fall from a tree to a stone. He argued further that PW2 failed to name the appellant immediately after the incident. Likewise, she failed to name one person who was living in their house and a person who took her to hospital.

Pertaining to the failure by the prosecution to parade as witness, a school teacher, Mr. Bagiliye argued that the evidence of a school teacher was crucial to prove if PW2 was in school and she was released because of

stomach pain. He referred us to the case of **Mohamed Said Matula v. Republic** [1995] T.L.R 3.

As to the complaint on contradictions in the testimonies of the prosecutions witnesses, he argued that it was not known when the matter was reported to police and who reported it. He argued further that PW1 testified that PW2 was sent to Ureni Hospital before she was transferred to Huruma Hospital whereas DW5 mentioned Kilu Mashati Dispensary. He argued further that the alleged crime was not possible to be committed in the house of the appellant during day time because the place was open and busy because the appellant provides water services around the place.

By way of conclusion, he submitted that the cumulative effect of the weaknesses pointed out above is to raise reasonable doubts which should have been resolved in favour of the appellant. In his submissions, therefore, the case was not proved beyond reasonable doubts. He henceforth prayed that the appeal be allowed and the appellant to be set free.

In her submissions in rebuttal, Ms. Lucas, learned Senior State Attorney was very brief but precise. First, she opposed the appeal, urging

us to find the convictions and sentences soundly based on the evidence and the law. The learned Senior State Attorney argued that, the proof on both charges against the appellant is cemented by the victim's evidence which is the best. Besides such account is supported by the evidence of PW1 and PW3. Thus, relying on the case of **Selemani Makumba v. Republic**, [2006] T.L.R. 379, Ms. Lucas argued that the victim's evidence was the best in the circumstances.

As to the complaint on the credibility of PW2, the learned Senior State Attorney argued that the trial court got satisfied that her evidence was cogent with no contradictions, therefore she was credible.

Pertaining to the issue of contradictions and inconsistencies raised by the appellant, Ms. Lucas submitted that the testimonies of PW1 and PW3 corroborated the victim's version and that the alleged inconsistencies were rather minor. Concluding her submissions, she argued that the medical evidence adduced by PW3 as Exhibit P1 was consistent with the PW2's evidence that she was raped and sodomized. Finally, the learned Senior State Attorney urged us to dismiss the appeal in its entirety.

In rejoinder, Mr. Bagiliye reiterated what he stated in his earlier submissions as well as his prayer for a favourable verdict.

Having carefully considered the arguments for and against the appeal and the evidence on record, it is clear that the conviction of the appellant which was upheld by the first appellate court hinges on **one**, the credible evidence of PW2 that she was raped and sodomized by the appellant on 10/5/2016 when she was coming back from school which was confirmed by the testimonial account of PW3. **Two**, the victim mentioned the appellant to PW1, and PW3 to be the assailant. **Lastly**, in sexual offences, the best evidence is the credible account of the victim who is better placed to explain how she was ravished and the person responsible.

Pertaining to the credibility of a witness, apart from that being a domain of the trial court only in so far as the demeanour is concerned, it can be determined by the second appellate court when assessing the coherence of that witness in relation to the evidence of other witness including that of an accused person. See – **Shaban Daudi v. Republic**, Criminal Appeal No. 28 of 2001 (unreported). In this regard, this being a second appeal, it is trite law that the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless there has been

a misapprehension of the evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. See – **DPP v. Jaffar Mfaume Kawawa** (1981) T. L. R 149 and **Felix Kichele and Another v. Republic**, Criminal Appeal No. 159 of 2015 (unreported). In the latter case we said:

> *"It is an accepted practice that a second appellate court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate court. Indeed, there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the High Court. That is part of the reason why under section 7(6) of the Appellate Jurisdiction Act, 1979 it is provided that a party to proceedings under part X of the CPA, 1985 may appeal to the Court of Appeal on a matter of law but not on a matter of fact."*

Before addressing the ground of appeal, we deem it crucial to state that, having revisited the evidence of PW2 we are satisfied that it was proven that the victim was raped and sodomised on the material day. Her evidence on that respect was not controverted by the appellant in cross examination. PW3's findings, as documented in his medical report (Exhibit P.1) that the victim sustained injuries on her vagina and anus due to

forceful penetration by a blunt object, were consistent with her evidence that she was raped and sodomised.

The question as to who was the culprit was correctly answered by the courts below. They accepted PW2's evidence as credible and reliable naming the appellant as the culprit. We are satisfied that the victim's narrative was coherent, explicit and reliable. Given that the crimes were committed in the afternoon and that the victim knew the appellant quite well, the question of the identity of the culprit does not arise.

Regarding the complaint on the absence of exact dates when the matter was reported to police and who reported it, we find the complaint baseless. We say so because at page 18 of the record of appeal PW3 stated as follows:

> *"The nurse reported to Police Station, the police came.... On 12/5/2016 the police woman came she is Selestina."*

Also, as rightly found by the first appellate court, in the event the appellant's advocate did not cross examine the crucial prosecution witnesses whose accounts incriminated the appellant on the charged offences that was tantamount to acceptance of the evidence as accurate.

See – **Emmanuel Sang'uda @ Sulukuka and Another v. Republic**, Criminal Appeal No. 422 B of 2013 (unreported). In the premises, we have no cogent reason not to believe the prosecution account which was not materially contradicted be it by another witness or the appellant. See – **Goodluck Kyando v. Republic** [2006] T. L. R. 363 and **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported). In addition, we agree with the learned Senior State Attorney that the victim's evidence was the best because she was better placed to explain the manner in which she was raped and sodomised by the appellant. See – **Selemani Makumba v. Republic**, (supra).

There was yet another point. That the matter was not disclosed immediately by the victim. As clearly submitted by learned Senior State Attorney the appellant was threatening her in case she would disclose the scandal. Considering the immaturity of the victim and the fear of a reprisal from the appellant should she spill the beans, the delay is quite understandable. It does not affect the prosecution case

Moreover, we found the appellant's defence in particular DW5's evidence to have augmented that of the victim. We found also the appellant wanted to settle the matter with the parents, according to the

evidence of PW5, but he failed. Thus, by any standards, the defence evidence was unable to introduce any doubt into the prosecution case.

In view of what we have endeavoured to discuss we are satisfied that both charges were proven against the appellant and we do not find cogent reasons to reverse the verdict of the two courts below. We thus find the appeal not merited and it is hereby dismissed in its entirety.

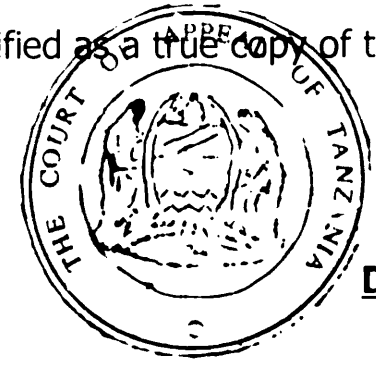
DATED at **MOSHI** this 4th day of October, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 5th day of October, 2022 in the presence of Mr. Benedict Bagiliye, learned counsel for the Appellant and Ms. Sabitina Mcharo, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL