IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 561 OF 2019

CHRISTOPHER MARWA MTURU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mkeha, J.)

dated the 29th day of October, 2019
in
DC Criminal Appeal No. 139 of 2017

JUDGMENT OF THE COURT

24th & 27th October, 2022

KEREFU, J.A.:

This is a second appeal by Christopher Marwa Mturu, the appellant, who was before the District Court of Kahama charged with and convicted of the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (b) of the Penal Code, [Cap. 16 R.E. 2002] (now Revised Edition, 2019) (the Penal Code). It was alleged that, on 13th day of May, 2017 around 14:00 hours at Mhungula area, within Kahama District in Shinyanga Region, the appellant, for sexual gratification, performed the

act of rubbing his penis on the genital parts of a girl aged three (3) years. Thus, the appellant was sentenced to twenty-two years imprisonment term.

It is on record that, the appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of four (4) witnesses. The appellant relied on his own evidence as he did not summon any witness.

In a nutshell, the prosecution case as obtained from the record of the appeal is that, the victim HR (name withheld) was living with her mother Editha John (PW1) together with her siblings. PW1 was working with Sekepa Security Group as a security guard. On the fateful date, at about 14:00 hours, while PW1 was not at home, Veronica Leornard (PW2) went to the house and found the appellant with the victim. PW2 testified that, she saw the victim on the appellant's laps, while the appellant's zip was open, the victim's pant was undressed and the appellant was rubbing his penis on the victim's genital parts. Upon seeing such an awful act, PW2 went to call Stela Thobias (PW3) who also came at the scene of crime and witnessed the incident. In her testimony, PW3 supported the narration by PW2 and added that, while they were in the process of

calling the men for assistance, the appellant released the victim and went away. It was her further testimony that the appellant went closer to the groundnuts' ginnery where he was later found sleeping. The matter was reported to the Police and the appellant was, eventually, arrested.

On her part, PW1, the victim's mother, testified that on the fateful date, around 14:00 hours, while at work, she received a phone-call from one Neema Ndundi who informed her that her daughter had been raped and they were at the Police Station with the suspect. PW1 stated that, upon receiving that shocking information, she rushed to the Police Station where she found that her daughter had already been issued with a PF3 and taken to the hospital for medical examination. WP. 3956 Detective Corporal Paskazia (PW4) interviewed the appellant and recorded his cautioned statement. In her testimony, PW4 stated that during the interview, the appellant denied to have committed the offence.

In his defence, the appellant dissociated himself from the accusations levelled against him. He challenged the evidence of PW1, PW2 and PW3 that they gave an untrue story before the trial court. He, in particular, asserted that, he was framed up by PW1 due to the existing

grudges between them, as he said, he used to have love affairs with her, though he did not disclose the nature of the alleged dispute.

At the end of it all, the learned trial Magistrate, having considered the evidence from both parties, found that the charge against the appellant was proved to the required standard. Thus, the appellant was found guilty, convicted and sentenced as indicated above.

On appeal, the first appellate court, apart from rectifying the sentence from twenty-two years to a minimum sentence of twenty years imprisonment, dismissed the appellant's appeal, hence this second appeal. In the memorandum of appeal, the appellant raised five (5) grounds of complaint which can be conveniently paraphrased as follows:

1. *That, the charge was not proved beyond reasonable doubt by the prosecution side;*
2. *That, the trial court together with the first appellate court erred in law to convict and sentence the appellant by relaying on the hearsay evidence adduced by PW1, PW3 and PW4;*
3. *That, there was no expert evidence adduced by the prosecution side to prove the case beyond reasonable doubt;*

4. *That, a child who is said to be raped was not brought before the trial court to prove the case beyond reasonable doubt through a voire dire examination; and*
5. *The case was a cooked one with the aim of defaming the appellant in the society.*

At the hearing of the appeal, the appellant appeared in person without legal representation whereas the respondent Republic was represented by Ms. Ajuaye Bilishanga Zegeli, learned Principal State Attorney assisted by Ms. Caroline Mushi, learned State Attorney.

When given an opportunity to argue his appeal, the appellant adopted his grounds of appeal and preferred to let the learned Principal State Attorney to respond first but he reserved his right to rejoin, if need to do so would arise. We respected his choice and we thus, right away, invited Ms. Zegeli to respond to the grounds of appeal.

In response, Ms. Zegeli from the outset, declared her stance of opposing the appeal by fully supporting the conviction and the sentence meted out against the appellant. Responding to the second ground of appeal, although she conceded that the evidence of PW1 and PW4 was hearsay, she contended that the said evidence was not relied upon by the

lower courts to determine the case against the appellant. She insisted that the appellant's conviction and sentence were founded on the evidence of PW2 and PW3 who witnessed the incident.

As regards the third ground on the failure by the prosecution to call the doctor to testify before the trial court, Ms. Zegeli urged us to find the said ground to have no merit as she argued that due to the nature of the offence the appellant was charged with, the doctor could not have detected anything worth to testify in court. To bolster her proposition, she referred us to our previous decision in **Rajabu Ponda v. Republic,** Criminal Appeal No. 342 of 2017 (unreported).

On the fourth ground, although, Ms. Zegeli readily conceded that the victim of the crime was not called to testify before the trial court and that, there was no reason stated for such a failure, she was quick to remark that the same is not fatal and could not have weakened the prosecution case because, according to her, there was sufficient evidence adduced by other prosecution witnesses to prove the offence. It was her strong argument that, even without summoning the victim of the crime, the evidence of PW2 and PW3 was sufficient to sustain the appellant's

conviction. To support her proposition, she referred us to the case of **Issa Ramadhani v. Republic,** Criminal Appeal No. 409 of 2015 (unreported).

In relation to the appellant's complaint that the prosecution case was not proved beyond reasonable doubt, Ms. Zegeli forcefully argued that the prosecution managed to prove the case against the appellant to the required standard through the evidence of PW2 who was the eye witness to the incident. She added that, the evidence of PW2 was corroborated by PW3 who went to the scene of crime, after being called by PW2, and also found the appellant with the victim. She insisted that PW2 and PW3 were truthful and credible witnesses. As such, she challenged the claim by the appellant that the incident was framed by PW1, as she contended that, PW1 was not the one who initiated the matter or reported the same to the police. Based on her submission, Ms. Zegeli prayed for the entire appeal to be dismissed for lack of merit.

In his brief rejoinder, the appellant did not have much to say other than insisting that the incident was framed by PW1 and praying the Court to consider his grounds of appeal, allow the appeal and set him free.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we find it appropriate to start by stating that, this being the second appeal, we are guided by a salutary principle of law which was restated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. Republic**, [2006] TLR 387 and **Omary Lugiko Ndaki v. Republic**, Criminal Appeal No. 544 of 2015 (unreported) that, in a second appeal the Court is only entitled to interfere with the concurrent findings of facts made by the courts below if there is a misdirection or non-direction made. The rationale behind that, is that the trial court having seen the witnesses is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record. We shall be guided by the above principle in disposing of this appeal.

Moving to the merit of the appeal, we wish to begin with the second ground of appeal on the appellant's complaint that the decisions of the lower courts relied on the hearsay evidence adduced by PW1, PW3 and PW4. Having revisited the evidence of these witnesses, there is no doubt that the evidence of PW1 and PW4 was hearsay, but as correctly argued

by Ms. Zegeli the said evidence was not relied upon by the lower courts to found the appellant's conviction. As for the evidence of PW3, we agree with Ms. Zegeli that the same was partly hearsay, to the extent that she was informed and called by PW2 to witness the incident. Upon her arrival at the scene of crime, PW3 gave direct evidence on what she witnessed. Specifically, at pages 10 to 11 of the record of appeal, PW3 after narrating how she was called by PW2 to witness the incident at the scene of crime, she testified that:

> *"...As we were in the process to call the men for assistance, the stranger released the victim and turned back. It was easier to identify the suspect as was clear, by then I was the guardian of the victim. Later, he was arrested at the back of the ginnery where he was asleep. Lastly, we reported the matter to the police who arrived and arrested the suspect."*

Upon, cross-examination and re-examination, PW3 insisted that, she saw the appellant with the victim at the scene of crime.

Therefore, and as correctly submitted by Ms. Zegeli, since, in convicting the appellant, the lower courts relied heavily on the evidence

of PW2 and PW3 whom they found to be reliable and credible witnesses, we find the second ground to have no merit.

Reverting to the third and fourth grounds of appeal on the failure by the prosecution to summon as witnesses the doctor who was alleged to have medically examined the victim and the victim of crime, we agree with the submission of Ms. Zegeli that such failure did not, in any way, weaken the prosecution case. We wish to emphasize that, pursuant to the provisions of section 143 of the Evidence Act, [Cap. 6 R.E. 2022], there is no legal requirement for the prosecution to call a specific number of witnesses. What is required is the quality of evidence and the credibility of witnesses. See **Yohanis Msigwa v. Republic** [1990] T.L.R. 148 and **Hassan Juma Kanenyera v. Republic** [1992] T.L.R. 100.

Furthermore, in sexual offence cases, the testimony of the doctor is not the only evidence to prove the offence, other evidence on the record can as well prove it. As correctly submitted by Ms. Zegeli, in the circumstances of this case, the evidence of the doctor could not have any weight in the prosecution case. We find support in our previous decisions in the cases of **Rajabu Ponda** (supra), **Edward Nzabuga v. Republic,**

Criminal Appeal No. 136 of 2008 and **Charles Joseph v. Republic,** Criminal Appeal No. 199 of 2016 (both unreported). Specifically, in **Edward Nzabuga** (supra), the Court having considered as whether the expert's opinion or production of medical report (PF3) overrides oral evidence by witnesses who witnessed the incident, it stated that the sexual offence can be proved orally without an expert opinion or oral evidence by experts i.e without a doctor who examined the victim testifying in court and/or tendering a PF3.

Similarly, in the case at hand, we are satisfied that, even without the evidence of the doctor, the testimony of PW2 and PW3 is quite sufficient to prove the offence the appellant was charged with.

In the same spirit, we equally find that the learned Principal State Attorney was also correct in pointing out that, even the failure by the prosecution to summon the victim to testify could not have affected the prosecution case. We have reaffirmed this position in our numerous decisions where we sustained conviction independent of the evidence of the victim of the crime. See for instance, **Haji Omari v. Republic**, Criminal Appeal No. 307 of 2009, **Khamis Samwel v. Republic**,

Criminal Appeal No. 320 of 2010 and **Shabani Said Likubu v. Republic,** Criminal Appeal No. 228 of 2020. In the former case, we categorically stated that:

> *"The law recognizes that there are instances where charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased. Senility, tender age or disease of the mind may prevent a victim from testifying in court (See section 127 of the Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victims' testimony. In this case, the victim was a four-year-old child. He was indeed a child of tender age. Though, we agree that ideally the reason for the non-taking of the testimony of the victim should have been entered on record however such failure neither weakened the case for the prosecution nor resulted in a failure of justice."*

Being guided by the above authorities and having considered the available evidence on record, we equally agree with the submission by Ms. Zegeli that failure by the prosecution to summon the victim of the crime to testify before the trial court did not, in any way weaken the prosecution case. We accordingly find the third and fourth grounds of appeal with no merit and we dismiss them.

The appellant's complaint in the first ground is to the effect that the prosecution case was not proved to the required standard. Ms. Zegeli disputed this claim, as according to her, the prosecution managed to prove the case against the appellant to the required standard through the evidence of PW2 and PW3 who witnessed the incident. To ascertain this fact, we have revisited the testimonies of PW2 and PW3 and we agree with her that the said witnesses clearly explained on how the incident occurred. PW2, in particular, at pages 9 to 10 of the record of appeal, narrated how she found the victim on the laps of the appellant while her pant was undressed, the appellant's zip was opened and the appellant was busy rubbing his penis on the victim's genital parts. PW2 clearly explained how she went to call PW3 who went to the scene and also found the appellant still with the victim.

Likewise, PW3 at pages 10 to 11 of the same record, corroborated the evidence of PW2 by stating that she was called by PW2 to witness the incident and explained how they both went to the scene of crime and found the appellant still with the victim. PW3 also narrated on how they started looking for the assistance to arrest the appellant and how the appellant released the victim and was later arrested. As intimated above,

in convicting and sentencing the appellant, the lower courts relied on the evidence of these two witnesses. For clarity, at pages 41 to 42 of the record of appeal, the first appellate court, while sustaining the appellant's conviction and sentence, stated that:

> *"The record indicates that PW2 was an eye witness of the event that led to the appellant's arrest. The witness testified on how on 13/05/2017 at about 02:00 pm, found the appellant rubbing his penis on the victim's genital parts. It was during day time. PW2 called Stella (PW3) who also responded to the call to see the purported inhumane act. According to PW2 the victim was a 3 years child. The appellant was a person known to the witness (PW2) even before the material day. During cross examination, the witness told the court on how she found the victim on the appellant's laps. The witness insisted on how she witnessed the act of the appellant rubbing his penis to the victim's genital organs. PW3, who was at the material time the victim's guardian, corroborated the testimony of PW2...The trial court found that PW2 and PW3 were credible witnesses. Like the trial Magistrate, and as correctly submitted by Ms. Tuka learned State Attorney, I see nothing on record to fault the trial Magistrate's finding on the credibility of the two witnesses."*

In the circumstances, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion. Moreover, it is our considered view that, the appellant's assertion that the case was framed up against him due to the existing dispute between him and PW1, the mother of the victim, was highly improbable in the circumstances of this case. It is on record and as correctly submitted by Ms. Zegeli, PW1 was not the one who initiated the matter and/or reported the same to the police. PW1 was only informed about the incident, through a phone call from one of her colleagues, that her daughter had been raped by the appellant.

It is equally on record that, during the trial, the appellant did not cross examine PW1 on that aspect. It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find support in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported). In the circumstances, we find the first ground of appeal devoid of merit.

In conclusion and for the foregoing reasons, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

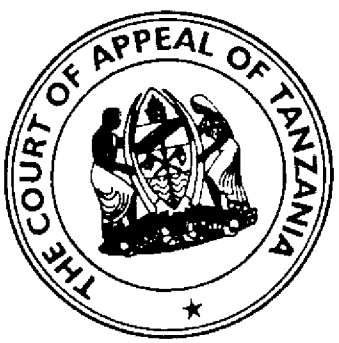
DATED at **SHINYANGA** this 26th day of October, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 27th day of October, 2022 in the presence for the Appellant in person and Ms. Rose Kimaro, learned State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL