IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 31 OF 2019

NIMO SAMU ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) ..... RESPONDENT

[Appeal from the Decision of the Resident Magistrate Court at Mbeya]

(Herbert, SRM-Ext. Juris.)

dated the 15th day of November, 2018

in

HC Criminal Appeal No. 42 of 2018
(Ext. Criminal Appeal No. 30 of 2018)

.....

JUDGMENT OF THE COURT

23rd November, 2021 & 7th November, 2022

MASHAKA, J.A.:

Before the Resident Magistrate Court in Mbeya, the appellant NIMO SAMU was arraigned with the offence of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code. It was alleged that the appellant had carnal knowledge of a girl (name withheld) aged eleven years. To protect her identity, we shall hereafter refer to her as the victim or PW2. The prosecution alleged that the appellant committed the offence on 10th day of June, 2017 at Iramba area within the City and Region of Mbeya. The conviction of the appellant was based on the evidence adduced by six witnesses and two documentary exhibits. Upon

his conviction, the appellant was sentenced to thirty years imprisonment and ordered to pay a compensation of TZS. 1,000,000/= to the victim.

The factual background unveiled by the prosecution during trial can be recapped as follows: Ambele Mgiga (PW1) stayed with her husband and two daughters in a house composed of two bedrooms and a sitting room. One bedroom was used by PW1 and the appellant used the other. The remaining room was used as a joint sitting room and sleeping place for PW1's daughters. On the 10th June, 2017, while sleeping, PW1's daughter Irene called for her assistance to cover her up. PW1 directed her to tell PW2 to do so, instead Irene replied that she was missing. PW1 woke up, went to the sitting room and started searching for PW2, but she could not find her. Surprisingly, the main door was locked from the inside. PW1 called her husband and the appellant who was her co-tenant to the sitting room.

Both PW1, her husband and the appellant decided to go outside the house to search for PW2, whereby PW1 alleged to have locked the door from outside. The search was unsuccessful and returned inside the house finding PW2 sleeping in the sitting room. Her parents asked PW2 in the presence of the appellant where she was and responded that she was in the toilet. They inquired further from PW2 how she went to the

toilet while the main door was locked inside and the windows were closed as the toilet was outside the house but PW2 did not provide an answer, instead PW1 advised her husband to go and sleep.

The next morning, PW1 and her husband interrogated vigorously PW2 for an explanation where she went the previous night. Upon being threatened to get a beating from PW1, PW2 explained that she was in the appellant's room and on further questioning as to what she was doing there, PW2 alleged that the appellant called her into his room to take his radio which was at the sitting room. On entering the appellant's room, he started to caress her, took off all her clothes and raped her. Though PW2 did not explain to PW1 on what she meant to be raped, PW1 alleged that she understood. On hearing this ordeal, PW1 started crying loudly and drew the attention of Stella Osea Nkwama (PW3) her neighbour who came to enquire on what had happened. PW3 called the ten-cell leader who called the Police. The police came and arrested the appellant. The matter was reported to the Police where PW2 was issued with the PF3 and taken to the hospital by PW1 for medical examination.

PW2 was examined by Ms. Stella Mkumbe (PW4) a clinical officer with Ruanda Health Centre who, besides finding the labia majora swollen, she noted the presence of dried seminal fluid but without any

bruises and with loss of virginity. These findings made PW4 to conclude that there was penetration into the vagina of the PW2 and recorded in the PF3 which was admitted in evidence as exhibit P2.

PW2 gave unsworn evidence upon the trial court examined her and satisfied itself that she possessed sufficient intelligence but did not know the meaning of oath. Before giving her evidence, PW2 promised to tell the truth.

In his defence, the appellant denied any involvement in the commission of the offence. He claimed to have been framed by PW1 though he admitted that he had no quarrel with her. Further he alleged that when they went outside the house to search for PW2, the door of the said house was not closed. He also argued that since there were other people living in the outside rooms, it was not easy for him to commit the offence and contended that if it was true that he raped the victim, she would have raised an alarm.

The trial court evaluated the evidence adduced by both prosecution and defence and accepted the prosecution case to have proved the offence beyond reasonable doubt, hence the appellant was found guilty, convicted and sentenced as alluded to earlier. On his appeal to the first appellate court, the Senior Resident Magistrate with

Extended Jurisdiction upheld the findings and decision of the trial court, hence this second appeal.

The memorandum of appeal has seven grounds of appeal raising three main complaints namely; **one**, the evidence by the prosecution did not prove the offence beyond reasonable doubt; **two**, contradictory evidence by the prosecution witnesses; and **three,** the first appellate court did not evaluate the evidence properly and ignored the defence evidence.

When the appeal was placed before us for hearing, the appellant was present in person, fending for himself. The respondent Republic enjoyed the services of Ms. Zena James, learned State Attorney. The appellant adopted the memorandum of appeal and opted to let the learned State Attorney respond first to his grounds of appeal and reserved his right to elaborate, if need to do so would arise.

Initially on her part, Ms. James opposed the appeal and brought to our attention of the appellant's memorandum of appeal based on four grounds which were later incorporated in the supplementary memorandum of appeal filed on the 21st June, 2019 comprised of seven grounds of appeal. She proposed to argue jointly grounds one, five and

six and grounds two and three and finally, grounds four and seven, to be argued separately.

The complaint raised in grounds one, five and six is that the prosecution failed to prove the ingredients of rape beyond reasonable doubt. Ms. James submitted that the offence was proved by the victim who testified that the appellant had sexual intercourse with her explaining how the appellant's penis entered into her vagina and corroborated by PW4 and exhibit P2. Ms. James bolstered her assertion by referring us to **Selemani Makumba v. Republic** [2006] T.L.R. 379 and **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008 (unreported) that the best evidence of rape was that of the victim who demonstrated how the appellant penetrated her vagina. She emphasized that the evidence of PW2 was sufficient to prove the offence. On the age of the victim, both PW1 and PW2 stated that she was eleven years old when she was allegedly raped by the appellant. Ms. James was of the firm view that PW1 being the parent testified on the age of PW2 and tendered exhibit P1 to prove the age supported by our decision in **Bundala Ngussa @ Jinyebu v. Republic,** Criminal Appeal No. 56 of 2019 (unreported).

Ms. James argued that though PW2 did not state where she was the previous night when she went missing from her sleeping place, she reasoned that it was due to threats exerted by the appellant. Hence PW2 proved the rape offence by the appellant.

Submitting on grounds two and three relating to alleged contradictions between PW1 and PW2 on the date of the alleged rape and the victim's date of birth, Ms. James argued that the contradictions were minor and did not cause any miscarriage of justice placing reliance on the case of **Chrizant John v. Republic**, Criminal Appeal No. 313 of 2015 (unreported). She explained that, in her testimony, PW1 stated that PW2 was born on 20th July, 2016 while PW2 stated that she was born on 20th July, 2006, the same date gleaned from exhibit P1. Ms. James clarified that PW1 intended to state the date of birth to be 20th July, 2006 according to exhibit P1. Concerning the fateful date of the incident, Ms. James maintained that PW1, PW3 and PW4 stated that the date was 10th June, 2017 and even the victim (PW2) in her examination in chief stated that the date of incident was 10th June, 2017, only to state 10th July, 2017 during her cross examination which Ms. James urged the Court to disregard it. She invited the Court to dismiss grounds two and three.

The complaint in ground four is that the trial court did not consider the findings revealed in exhibit P1 showing that there were no fluids or blood on the vagina or bruises and that the victim was not a virgin. Ms. James claimed that the trial court considered exhibit P2 and argued that even if the victim was not found with bruises or blood, that was not enough to conclude that the victim was not raped because a slightest penetration of the appellant's penis into the vagina of the victim is all what was required to prove the offence. She prayed to the Court to dismiss ground four.

The complaint by the appellant in ground seven was that the trial and first appellate courts failed to consider the defence evidence. Ms. James contended that the evidence adduced by the appellant was considered by both the lower courts and found that it failed to shake the prosecution case. As ground seven lacked merit, she prayed it be dismissed.

Concluding her submissions, Ms. James urged the Court to dismiss the appeal.

In his rejoinder, the appellant brought to our attention a new ground that on the date of the incident when PW1, her husband and the appellant went out at night to look for PW2, the door to the sitting room

was not locked. He argued further that, PW2 was threatened by PW1 that she would beat her and that is the reason why PW2 named the appellant the next morning. He denied to have raped PW2.

Upon our perusal of the oral submissions and record of appeal, we intend to determine the appeal; commencing with grounds two and three jointly, grounds one, four, five and six jointly and; ground seven.

In ground two, the complaint by the appellant is on alleged contradictions between PW1 and PW2 on the victim's date of birth. The appellant was charged under section 130 (1) (2) (e) and (2) of the Penal Code which 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".* [Emphasis made]

The section cited above makes it mandatory that before a conviction is made under section 130 (2) (e), there must be proof of the victim's age to be under eighteen years at the time of the commission of the alleged rape and there must be proof of penetration. Age of the victim may be proved through the victim, guardian, parent, medical practitioner or, where available, by production of a birth certificate. In a number of our decisions, we have held that the evidence of a parent is better than that of a medical doctor as regards the child's age. See **Edward Joseph v. Republic**, Criminal Appeal No. 19 of 2009 and **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 0f 2016 (both unreported).

In the instant appeal, PW1 who was the mother of PW2 stated that at the time of adducing evidence, the victim was 11 years old as she was born on 20th July, 2016 and tendered the clinic card (exhibit P1). PW2 testified that she was eleven years old, born on 20.07.2006 and was in standard five. Undeniably, PW1 having tendered exhibit P1 showing that PW2 was born on 20.07.2006, a fact which was never contested by the appellant during cross examination hence impliedly meant the appellant accepted the age of the victim. (See our stance in **Mustapha Khamis v. Republic,** Criminal Appeal No. 70 of 2016

(unreported)). There can be no doubt that under any circumstances, PW2 was under the age of eighteen. In our view, the difference of the year between PW1 and PW2 was a minor slip which does not go to the root of the case the more so because exhibit P1 stated clearly the age of the victim.

In ground three the appellant complained that there was a contradiction on the date of the alleged rape of PW2. According to the charge, the alleged rape took place on the 10th June, 2017 which was corroborated by PW1, PW2, PW3, PW4 and PW5. However, during PW2's cross examination by the appellant, she stated that she was raped by the appellant on the 10th July, 2017 when the appellant's wife had travelled. Ms. James argued that the contradictions were minor and did not cause any miscarriage of justice. She reinforced her argument by referring us to the case of **Chrizant John v. Republic**, Criminal Appeal No. 313 of 2015 (unreported). She clarified that the date of incident as stated by PW1, PW2, PW3 and PW4 was 10th June, 2017 and only PW2 stated that it was 10th July, 2017 during her cross examination. We accept her invitation to disregard the contradiction as minor and accordingly find grounds two and three of appeal to be devoid of any merit and dismiss them.

The complaint that the prosecution evidence failed to prove the charge is based on grounds one, four, five and six of appeal. The appellant's complaint in ground four was that the trial court did not consider the findings in exhibit P1 in which PW4 stated that there were no fluids or blood on the vagina or bruises and the victim was not a virgin. It was Ms. James's contention that the trial court considered the PF3 and found that even if the victim was not found with bruises or fluid or blood, it was not proof that the victim was not raped. Expounding further, Ms. James argued that the prosecution required a slightest penetration of the appellant's penis into the vagina of the victim as provided under section 130 (4) of the Penal Code to prove rape. Thus, Ms. James maintained that the prosecution proved the offence of rape.

The appellant's complaint in grounds one, five and six is that the charge against the appellant was not proved beyond reasonable doubt. We held in a number of rape cases that the best evidence is that of the victim. See **Selemani Makumba v. Republic** (supra) and **Edson Simon Mwombeki v. Republic** (supra) and **Edward Nzabuga v. Republic** (supra). However, the evidence as to the whereabouts of PW2 on that fateful night, which we think is crucial, is told by PW2 who gave two different versions. In the circumstances, the evidence of PW2 is

called for questioning her credibility, giving two different versions to her parents and failing to state at the earliest before her parents on the fateful night and the next morning.

This being a second appeal, it is a settled principle of this Court not to interfere with concurrent findings of fact by the two courts below. See: **Raymond Mwinuka v. Republic**, Criminal Appeal No. 366 of 2017 (unreported). We guard against unwarranted interference and we will only interfere with such concurrent findings of fact only if we are satisfied that they are on the face of it is unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law. See: **Daniel Matiku v. Republic**, Criminal Appeal No. 450 of 2016 (unreported).

In assessing the credibility of a witness, it is limited to the extent of demeanor which is the monopoly of the trial court. In the case of **Yohana Dioniz and Another v. Republic**, Criminal Appeal No. 114 of 2009 (unreported), the Court 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."

It is trite law 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 as we held in **Goodluck Kyando v. Republic** [2006] T.L.R 363. The testimony of a witness will always be true unless its veracity has been assailed to misrepresent the facts established 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. Republic**, Criminal Appeal No. 28 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."

Further, in **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R 39, the Court expounded 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...."

It is not in dispute that PW1, PW3, PW5 and PW6 did not witness the appellant committing the offence. According to the evidence of PW1, while sleeping with her husband, her daughter Irene called for her assistance to cover her up. PW1 went to the sitting room to cover her up after being told that PW2 was missing. PW1 started searching for PW2 but could not find her. Surprisingly, the main door was locked from inside. PW1 called her husband and the appellant their co-tenant to the sitting room. They both decided to go outside the house to search for PW2, in which PW1 alleged to have locked the door from the outside. After a fruitless search, they returned inside the house only to find PW2 sleeping in the sitting room. Her parents asked PW2 in the presence of the appellant, where she was and answered that she was in the toilet. As the toilet was outside the house, they inquired further from PW2 how she went to the toilet while the door was locked and the windows were closed but PW2 failed to offer an answer in which PW1 advised her husband they go and sleep.

The next morning upon PW2 being questioned vigorously by PW1 and her husband for an explanation of her whereabouts the previous night and threatening to give her a beating, PW2 explained that she

was in the appellant's room and on further questioning as to what she was doing there, PW2 alleged that the appellant called her into his room to take his radio which was left at the sitting room. On entering the appellant's room, she explained that the appellant caressed her, took off all her clothes and raped her. Though PW2 did not explain to PW1 on what she meant to be raped but PW1 stated that she understood what she meant. However, PW2's evidence on the fateful night was that when PW1, her father and the appellant went outside the house to search for her, she was in the toilet and returned back to the sitting room. Upon their returning inside the house, they found PW2 sleeping in the sitting room. When PW2 was interrogated by her parents on her whereabouts in the presence of the appellant, she answered that she was in the toilet. As much as PW1 and her husband inquired further on how PW2 went to the toilet outside the house while the door was locked and the windows were closed, PW2 was unyielding to provide an answer. The next day before her parents, after vigorous interrogation and threats to receive a beating from PW1, PW2 changed her story.

There was no other evidence adduced by the prosecution concerning PW2's whereabouts on the fateful night and how PW2 went to the toilet. There was no evidence adduced by the prosecution on

who precisely saw PW2 coming out of the appellant's room and mere suspicions that she could have been in the appellant's room cannot validate evidence and ground conviction. PW2 gave a false explanation on her whereabouts. No prosecution evidence was adduced on why the parents did not interrogate PW2 vigorously on her unknown whereabouts from her sleeping place in the sitting room and why did they accept the explanation that she went to the toilet while they noted that the door was locked. The appellant raised a doubt shaking the prosecution evidence that the door was not locked as alleged by PW1 in which the prosecution failed to challenge this assertion. These questions were left unanswered, raising doubts.

With the state of prosecution evidence, it cannot be safely ascertained that PW2 was a credible and truthful witness whose evidence would ground a conviction. In this regard both the trial and first appellate courts wrongly acted on the incredible and untrustworthy evidence of PW2 to convict the appellant. Also, the defence evidence was not considered by the lower courts which we will consider shortly. There was a misapprehension of the evidence which ought to have been addressed by the first appellate court. The benefits of those doubts ought to have been given to the appellant.

In the circumstances, we find that PW2 gave implausible evidence and therefore left with no evidence led by the prosecution upon which to sustain the appellant's conviction. We observed and emphasized in **Abiola Mohamed @ Simba v. Republic**, Criminal Appeal No. 291 of 2017 (unreported) that: -

> *"There is a need to subject the evidence of the victim to scrutiny in order for courts to be satisfied that what they testify is nothing but the truth. The testimony of the victim of sexual offence should not be taken as gospel truth but has to pass the test of truthfulness. It is only through this litmus test that courts will ensure that only deserving offenders are kept behind bars.....".*

It is our conclusion that the conviction was based on weak and incredible prosecution evidence which failed to prove the guilt of the appellant beyond reasonable doubt. Grounds one, five and six are merited.

The complaint in ground seven, the appellant argued that the first appellate court failed to adequately analyze the defence evidence adduced concerning the fateful day, that the sitting room door was not locked as stated by PW1, resulting in ignoring his defence. The

appellant further submitted that since PW2 was threatened by PW1 to give her a beating, that the threats compelled PW2 to name the appellant as the perpetrator. Ms. James referred us to the record where the trial court reached its findings that the case against him was just a plot and in evaluating the defence evidence, the trial court was unable to understand why would PW1 devise a plot against the appellant as alleged while he admitted during cross examination in the defence case that he had no squabble with PW1.

When a trial court fails to perform its duty under the law to consider the defence evidence, the High Court being the first appellate court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of fact. There are numerous Court's decisions emphasizing that, to mention one which we pronounced that stance in **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010 (unreported) and had this to say: -

> *"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."*

Guided by the above legal position, the issue is whether the trial court duly considered the defence evidence and whether on its failure to do so, the first appellate court performed its legal duty.

Admittedly, the record of appeal, in the instant case, does not reflect compliance with the above requirements. The trial court failed to consider the defence raised by the appellant that when PW1, father of PW2 and the appellant went outside to search for PW2, the door was left ajar not locked as asserted by PW1. The prosecution failed to challenge this assertion by the appellant in his defence case. At page 35 of the record of appeal, evidence of the appellant stated that: -

> *"In that house we do live three families. The third family is living at the outside room.* ***Yes, we went to look for the victim at the outside of our house. The door of the house was not closed.*****.....** *Yes, the neighbor who is living at the outside room was present in his room....."* [Emphasis made]

This defence raised by the appellant was not considered by the two courts below that the door of the house was not closed. This defence evidence was not evaluated and accorded weight by the said two courts. According to the record of appeal, the two courts below only considered and evaluated the fact that there was no proof of a

quarrel or hatred between the appellant and the family of PW2, finding as it did that it failed to shake the prosecution case.

The prosecution evidence was not weighed against that of the appellant. The trial court ought to have done so mindful of the legal position that the onus to prove the charge beyond reasonable doubt rests on the prosecution and not on the appellant who is required to lead evidence that would cast doubt on the prosecution evidence. We entirely agree with the appellant that both courts below did not pay homage to the settled law that a trial magistrate and a first appellate judge are imperatively required to consider and evaluate the entire evidence to arrive at a balanced conclusion. An omission to do so is a serious misdirection and a clear indication that there was no fair trial. In such situations a trial is rendered a nullity. We held in **Hussein Idd and Another v. Republic** [1986] T.L.R. 166 that: -

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

The appellant was supposed to only raise a reasonable doubt, which he did. With respect, we find the conclusion and the concurrent

findings by the two lower courts to be contrary to the established principle of criminal justice. Consistent with the settled law, the resultant effect is that, such findings cannot be allowed to stand. Consequently, we find ground seven of appeal to have merit.

On the basis of the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We order the immediate release of the appellant from custody unless he is held for any other lawful cause.

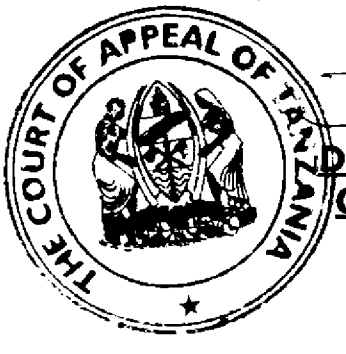
DATED at **DAR ES SALAAM** this 31st day of October, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2022 in the presence of appellant in person linked via video conference from Ruanda Prison Mbeya and Ms. Anastasia Elias, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL