**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**CORAM: WAMBALI, J.A., LEVIRA, J.A. And MAIGE, J.A.)**

**CRIMINAL APPEAL NO. 511 OF 2020**

**ANORD MTULUVA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania Iringa District Registry at Iringa)**

**(Matogolo, J.)**

**dated the 5th day of August, 2020**

**in**

**DC Criminal Appeal No. 06 of 2020**

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# JUDGMENT OF THE COURT

*3rd & 9th November, 2022*

**MAIGE, J.A.:**

At the District Court of Iringa at Iringa (the trial court), the appellant was charged with and found guilty of the offence of rape contrary to section 130 (1) and (2) and 131 (1) of the Penal Code [Cap. 16, R.E. 2002, now R.E. 2022]. He was sentenced to thirty years imprisonment. His appeal to the High Court of Tanzania Iringa District Registry at Iringa (the first appellate court), did not succeed and henceforth this second appeal.

The facts of the case as can be gathered from the record of appeal are not difficult to narrate. The appellant was arraigned at the trial court after being suspected to have raped a two years girl who shall, for the purpose of hiding her identity, be referred to as "the victim". The incident happened on 6th day of July, 2018 at Mapogolo village within the District and Region of Iringa.

Until the date of the incident, the victim was residing with her grandmother Magdalena Shipangule (PW1) at the said Mapogolo village. In accordance with the testimony of PW1, on the material date, the victim disappeared from home for some time. When she came back at around 3: 00 pm, she was dirty and looked not okay in her private parts. She had sperms both in her vagina and anus. When PW1 asked the victim what happened, she revealed that it was the appellant who had injured her.

Getruda Nyarusi (PW2), a lady who had her residence near to that of PW1, testified that, on the same time, as she was coming from fetching water, she saw the victim coming from an unfinished house with the appellant being behind her. A mean while after, PW2 heard some people

shouting that the victim had been raped. PW2 told the people that she had seen the victim soon before with the appellant.

The matter was reported to the street chairperson and then to the police station. Eventually, PW1 took the victim to the hospital where she was examined by Dr Othman Salim Kihara (PW5) who established as per the medical report in exhibit P1 that, she had been raped. Luci Kivipa (PW4), the victim's mother, testified that, after being informed of the incident as she was in her farm, she right away went to the hospital where the victim was admitted and when she asked the victim who did that, she named the appellant to be the person who raped her.

In his testimony in defense, the appellant denied commission of the offence. He claimed that PW1 fabricated the case after the appellant had ceased to be her tenant two days before the incident.

The trial court, in convicting the appellant believed the evidence of PW1 and PW4 that, they were told by the victim that it was the appellant who raped her. It also believed the evidence of PW2 that, she had seen the victim and the appellant together soon before coming from unfinished house. It also took into account that, the appellant was well known to

findings of the trial court.

In the memorandum of appeal, the appellant has enumerated ten grounds which can conveniently be reduced into four main complaints. **First,** the substance of the charge was not explained to the appellant after the closure of the prosecution case as section 231(1) of the Criminal Procedure Act (the CPA requires. **Second,** the PF3 was improperly received in evidence. **Third,** material witnesses namely; the victim and the street chairman were not called to testify at the trial. **Fourth,** the case against the appellant was not proved beyond reasonable doubt.

In the conduct of this appeal, the appellant appeared in person without representation whereas, the respondent Republic had the services of Mr. Alex Mwita, learned State Attorney.

When invited to address the Court on the grounds of appeal, the appellant adopted the memorandum of appeal; and the written submissions he filed on 31st August, 2021 to form part of his oral argument and urged us to allow the appeal. Mr. Mwita on his part, supported the appeal. We have duly considered the parties' concurrent submissions and herein after we are going to consider the merit or otherwise of the same.

the provision of section 231 (1) of the CPA. The complaint by the appellant is that the substance of the charge was not explained to him before he was invited to testify in defence. That, he submitted, denied him an opportunity to be adequately familiar with the prosecution case. Mr. Mwita did not comment on this point.

On our part, we agree with the appellant that, under the above provision, the accused is entitled, after the closure of the prosecution case and if a *prima facie* case is made out, to have the substance of the charge explained to him and his rights whether to give evidence on oath or not and whether he shall call witnesses explained to him. In this case, the record shows that, while his right to testify whether on oath or otherwise and to call witnesses, was duly explained to him, the record is silent as to whether or not the substance of the charge was read explained to him. The record shows, however, that, in his evidence in defence, the appellant started by saying that "I am facing the offence of rape." Thereafter, he proceeded to name the person he is accused to have raped and the time and place where the alleged rape was committed. This, in our view, is an indication that, the appellant was fully aware of the accusation against him when he was testifying in defence. In the circumstance, the omission by

complaint is thus dismissed.

Next for consideration is the complaint that the PF3 was improperly admitted. The impropriety complained of is that, it was not read out and explained to the appellant after it had been cleared for admission as the law requires. Truly, the record of appeal indicates that, the document was not read out and explained to the appellant after being cleared for admission. We agree with the learned State Attorney that, the omission was fatal. We thus, exclude exhibit P1 from the evidence on the record. With that, we remain with the oral account of PW5, the doctor who examined the victim.

This now takes us to the third complaint as to failure of the prosecution to call material witnesses, namely; the victim and the street chairperson. In relation to the victim, it was the appellant's submission that, the victim being the best witness in sexual offences, her evidence was very material to prove that it was the appellant who raped her. He submitted further that, in not calling her as a witness, the prosecution denied itself to have the best evidence in proof of their case. The appellant does not agree with the two courts below that; the victim was not called because he was incompetent to testify. In his contention,

of the trial magistrate to make determination after observing the procedure under section 127 (2) of the Evidence Act.

The appellant was supported by the counsel for the respondent Republic who added that, since no special finding was made by the trial magistrate under section 127(2) of the Evidence Act, the victim is deemed, under section 127(1) of the same Act, to be a competent witness. He submitted, however, that failure to produce her as a witness does not necessarily render the prosecution case incapable of being proved. Neither does it lead to any miscarriage of justice in so long as there is sufficient evidence from other witnesses to prove the case, he added. To cement his contention, the learned State Attorney cited the case of **Dickson Chilongola v. Republic**, Criminal Appeal No. 347 of 2009 (unreported).

From the record of appeal, it would sound clear to us that, when the matter came for continuation of the prosecution case on 12th February, 2019, the learned State Attorney who was prosecuting the case informed the trial court that, the victim who was by then three years, was not aware of what happened and could not be helpful to the prosecution case. With that submission, the trial magistrate discharged the victim from the list of

was granted, to close their case.

In **Dickson Chilongola v. The Republic** *(supra),* like in the instant case, the prosecution declined to produce the victim of tender age as a witness and the trial court accepted without determining whether the victim was incompetent. In an appeal to the Court, the appellant contended that, in the absence of the victim's evidence, the offence of rape could not be proved. The Court in the first place, observed that, though the trial magistrate was expected to determine the issue of the competency of the victim and record the reasons, the omission was not fatal. Having observed as such, the Court took the view that, non-production of the victim for the reason of competence does not by itself water down the prosecution case so long as there is evidence to prove the case. In particular, the Court observed, at pages 5 and 6 of the typed judgment as follows:

> *"The complaint that the case was not proved beyond reasonable doubt because the victim never appeared in court nor was a finding made to the effect that he was not competent to testify does not in our considered view water down the case for the prosecution. The law recognizes that there are instances where charges may*

*Take murder for example where the victims are deceased. Senility, tender age or decease 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 victim's testimony."*

Applying the above principle, therefore, we can hold, without any hesitation that, the mere failure of the prosecution to call the victim as a witness does not *ipso facto* render the prosecution case unproved. Neither does it lead to any miscarriage of justice. What is important is whether there is sufficient evidence to link the appellant with the offence regardless of the victim not being called to testify. We shall, therefore, further consider the issue when we will be dealing with the last complaint as to sufficiency of evidence to sustain conviction. For the same reason, we shall discuss the failure of the prosecution to call the street chairperson in line with same complaint.

In his written submissions, the appellant has assigned three reasons why his case was not proved beyond reasonable doubt. **One**, the circumstantial evidence of PW1 and PW2 was contradictory as regard the time when the appellant was seen with the victim and as to when the

claims that she appeared at 9:00 pm, PW2 claims in her evidence on cross examination to have seen the victim and the appellant at around 4:45 pm.

**Two**, the testimony of PW2 on the identification of the appellant is very weak in that; while there is nowhere, she claimed to have known the appellant before, her evidence does not describe the appellant's identity through which PW2 identified him. In addition, he submitted, PW2 mentioned the appellant as "the brother" with no further description. He submitted, therefore that, if PW2 had known the appellant before, he would have identified him by name.

**Three**, as the evidence of PW2 is silent as to the distance th appellant and the victim were in when she saw them, it cannot be sa that, the appellant was with the victim. In the final result, he submitte that, the case against him was not proved beyond reasonable doubt.

Commenting on this, Mr. Mwita submitted in the first place that; for the reason of the victim not testifying, the appellant was obviously convicted on circumstantial evidence, which evidence did not, however, sufficiently connect him with the offence. The appellant, he submitted, was linked with the offence for mere reason that he was seen with the

seen with the victim raises a mere suspicion that the appellant might have committed the offence. To him, that was not enough to establish behind reasonable doubt that, it was the appellant who committed the offence. He relied on the case of **Ally Fundi v. Republic** [1983] T.L.R. 2010 where it was held that, a mere opportunity to commit an offence cannot form a basis of conviction.

The counsel further submitted that, the claim by PW1 and PW4 that, it was the appellant who committed the offence basing on what they were told by the victim, was, in the absence of the evidence of the victim, a mere hearsay which cannot be relied upon. The counsel further admitted that, it was an oversight for the prosecution not, for undisclosed reason to produce the street chairperson to whom the victim was sent by PW1 after the incident. According to him, the street chairperson was a very material witness and non-production of him weakened the prosecution case. In his conclusion, therefore, the case against the appellant was not proved beyond reasonable doubt and the appeal is not without merit.

We have taken time to carefully consider the mutual submissions of the parties in respect of the two complaints and more importantly we have examined the record of appeal between lines. We think, the question

proved beyond reasonable doubt.

Both the appellant and the counsel for the respondent speak the same language that the case was not proved beyond reasonable doubt. They submit in essence that, in the absence of the evidence of the victim, the evidence of PW1 and PW2 is nothing but a mere hearsay whereas as that of PW2 just raises a possibility that, the appellant might have committed the offence. That being the case, they submitted, the appellant was wrongly convicted on mere a suspicion. There is merit on this contention. We will assign the reasons as we go along.

The complaint at the trial court was that, the victim was raped at the material date. There was no serious contention whether she was raped or not because the oral evidence of PW5 on this has never been shaken What was in dispute was whether it was the appellant who raped her. The prosecution story contemplated of there being direct evidence from the victim. The evidence of the victim, as correctly submitted by both the appellant and the respondent, could be the best evidence. The victim was however not called as a witness. The prosecution attorney said that he prepared her and established that she could not adduce any helpful evidence. As a result, she was not produced as a witness.

the evidence of PW1, PW2 and PW4. PW1 claimed that, she was told by the victim that, it was the appellant who raped her. PW4 made the same story. We agree with the learned state attorney that, without the evidence from the victim, the said evidence remains as mere hearsay which is incapable of being relied upon to establish whether the same is true or not. PW2 on her part, claimed to have seen the victim coming from unfinished house with the appellant being at her behind. That alone, as correctly submitted for the respondent, cannot connect the appellant with the offence though it may raise a suspicion that, the appellant might have committed the offence. Mere suspicion however, has never been the sole basis for sustaining conviction. On this, we are inspired by the decision of the High Court in the case of **Ally Fundi v. Republic** *(supra)* where it was held, correctly in our view that, a mere opportunity to commit an offence cannot be the basis for convicting the accused, suspicion, however grave it may be, cannot be a substitute for proof in a court of justice.

of the testimony of PW2 on the identification and/ or recognition of the appellant. In her evidence appearing at page 17 of the record of appeal, she testified as follows:

> *"Then I saw the child (name withheld) coming from the rear part of their house where there is a house still under construction. She was going at her home while at her behind there was a brother, who is now the accused person."*

It can be seen from the above extract that, PW1 named the person who was with the victim as "the brother". She did not explain in evidence who that brother was. She did not throughout her evidence, mention the appellant with his name. Nor did she make any description of his identity. With this, it cannot be said with certainty that, PW2 correctly identified the appellant.

Still on the same point, PW1 claimed to have taken the victim soon after the incident to the street chairperson where she reported the incident. Alas, the said chairperson who would have confirmed the assertion was not produced. Besides, PW2 testified that, a short while after meeting with the victim and the said brother, she heard some people shouting that the victim had been raped. Thereafter, she went there and

those people, her evidence is mute. There was not produced, among those people anyone to confirm her claim either. We agree with the learned State Attorney that, the evidence of the street chairperson just as it is the evidence of one among those people to whom PW2 disclosed the name of the appellant was very material in explaining the missing link in the prosecution case. The omission to call them without disclosing the reasons raise doubts on the prosecution case. Thus, in **Dickson Chilongola v. Republic** *(supra), it* was held:

> *"We are mindful of the fact that it is upon the prosecution to decide whom to call in the proof of their case. However, in the circumstance of this particular case we are settled in our minds that failure to call the above witnesses whom we consider to have been crucial weakened the case for the prosecution."*

A similar position was stated in **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (unreported) where it was held that:

> *"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse*

*such inference is only permissible."*

In the circumstance, therefore, the fourth ground of appeal succeeds. Consequently, we find the appeal meritorious and we accordingly allow it. Ultimately, we quash the conviction of the appellant and set aside the sentence thereof. We order that the appellant be released forthwith from prison unless held there for some other lawful cause.

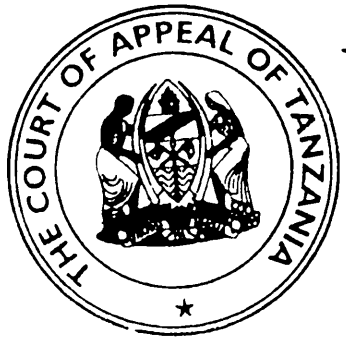
**DATED** at **IRINGA** this 8th day of November, 2022.

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

This Judgment delivered this 9th day of November, 2022 in the presence of the Appellant in person and Ms. Veneranda Masai, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**