IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 297 OF 2021

DAUDI ANTHONY MZUKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mtwara)

(Ngwembe, J)

dated the 24th day of February, 2021

in

Criminal Appeal No. 64 of 2020

JUDGMENT OF THE COURT

14th & 30th March, 2023

MWANDAMBO, J.A.:

The District Court of Kilwa sitting at Kilwa tried and convicted the appellant Daudi Anthony Mzuka of the offence of rape and sentenced him to 30 years' imprisonment. His appeal to the High Court sitting at Mtwara was barren of fruit, hence the instant appeal.

The appellant's trial before the District Court was triggered by an accusation alleging that, on 12/11/2019 at Nanjilinji Village, Kilwa District, he had carnal knowledge of a girl aged eight years. We shall be referring to as SJC or the victim to conceal her true identity. Upon the appellant pleading not guilty to the charge, the prosecution led evidence through

four witnesses including the victim (PW1) and a medic (PW3) who examined the victim following a complaint on the incident laid by Jaffari Ally Mkunga, the victim's father (PW2) before Omari Hussein Mnulu, the village Executive Officer (PW4) who had the appellant arrested by Militia men for interrogation in his office and subsequently taken to the police. It was common ground that the appellant and the victim's mother were tenants in different rooms in the same house. It was common ground too that, PW2 stayed at a different place away from the house occupied by the victim's mother and the appellant.

Further undisputed was the fact that the victim's mother left for Masasi a day after the alleged incident the victim, a primary school pupil had to join her father presumably until the return of her mother. According to PW2 he noticed her daughter limping as she returned from school on 13/11/2019 at 18:00 hours. Upon inquiry on the reason for her limping, SJC attributed it to a fall while running from picking a mango. A little later, she attributed the limping to a beating by a stick on her leg. The following day, SJC is said to have woken up late with a gloomy face which aroused PW2's suspicion that something was wrong resulting into asking her step mother who was not called as a witness to inspect her.

True to PW2's suspicion, the inspection is said to have revealed bruises on the vagina which looked swollen. Subsequently, PW1 was taken for medical examination at a local health center where, Mashaka Ramadhani Kayago (PW3) a clinical officer who examined her four days of the incident by PW2 revealed swollen labia majora and labia minora and bruises on the vagina but due to complaints of severe pains, PW3 could not go further and test the victim's state of her virginity. On 14/11/2019 a complaint was made to PW4 and, thereafter the appellant was summoned for interrogation in his office. Since, after such interrogation the appellant's responses sounded doubtful on his innocence, PW4 had the matter reported to the police who arrested him on 15/11/2019 and subsequently stood trial on a charge of rape which he pleaded not guilty.

According to SJC, on 12/11/2019 the appellant called her into his room. At that time PW1, carrying mangos which she gave the appellant. As she was exiting the room, the appellant is said to have grabbed her, undressed her dress and underwear, lay her on a mat, and soon thereafter, he undressed himself and unleashed his manhood which he inserted into the prosecutrix's vagina after lubricating it with saliva. PW1's, further testimony was that, the appellant covered her mouth with his hand so she could not shout for help and threatened her with killing should she

disclose the ordeal to anyone. Thereafter, PW1 left and the following day, her mother travelled to Masasi. Nonetheless, SJC was able to go to school before joining her father's second home later in the evening. PW3 who examined the victim subsequently had it that his findings revealed a swollen vagina with some bruises on it. That evidence was found to have established a prima facie case warranting the applicant's defence which he did after the ruling.

In his sworn testimony, the appellant denied the accusations. He told the trial court that, the case against him was framed up by PW2 on a suspicion of love affairs with his wife; the victim's mother. The appellant maintained his innocence and that the victim was couched by PW4 in his office to tell lies against him.

Based on the evidence of the victim who claimed that the appellant summoned her in his room where he lay her on a mat and inserted his manhood into her vagina, the trial court found penetration; an essential ingredient in the charge of statutory rape proved considering that there was no dispute on the victim's age. As to the person responsible for the offence, the trial court believed PW1 as a credible witness who told nothing but the truth on who ravished her on the material date and time. The trial court reached that conclusion guided by section 127 (7) of the

Evidence Act and the Court's decision in **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2010 (unreported) discussing tests applicable in determining credibility of witnesses namely; coherence and the evidence of other witnesses. It discounted the appellant's defence evidence which had it that his arrest was triggered by PW2's suspicions of love affairs with the victim's mother as an afterthought and proceeded to convict and sentence him resulting into an appeal to the High Court.

The first appellate court dismissed the appellant's appeal for lack of merit. It is common cause that, there was little or no dispute on the victim's age. Hence, the ingredients necessary to prove statutory rape had been established. The dispute was whether it was the appellant who was responsible for it. The first appellate court concurred with the trial court that it was none other than the appellant who raped the victim. It accordingly sustained his conviction and sentence.

Before us, the appellant has preferred this appeal predicated upon three grounds. He is complaining that, his conviction was wrongful because, **one;** the charge was defective; **two,** the two courts below did not consider his defence and; **three,** the case against him was not proved to the required standard.

The appellant appeared in person, fending for himself at the hearing of the appeal. Apparently, notwithstanding rule 72 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) requiring grounds of appeal to be concise, the appellant's grounds are fairly detailed qualifying as arguments in some instances citing statutory provisions and decided cases. The appellant had nothing to add and preferred to let the respondent Republic reply to the grounds of appeal reserving his right to a final say in rejoinder should such need arise. Ms. Jacqueline Werema, learned State Attorney represented the respondent Republic resisting the appeal.

Submitting on ground one, Ms. Werema argued and correctly so, that, there is no basis in the complaint that wrong citation of a punishment provision in the charge sheet section; 131 (2) (a) of the Penal Code rendered it defective as contended by the appellant. She was firm that, in so far as the section creating the offence was correctly cited in the manner required by sections 132 and 135 of the Criminal Procedure Act (the CPA), the erroneous citation of the punishment section was innocuous. She called to her aid the Court's unreported decision in **Faustin Yusuph v. Republic,** Criminal Appeal No. 455 of 2018 to bolster her submission. The learned State Attorney urged that, at any rate, had there been a

statutory requirement to cite a punishment section in a charge sheet, the improper citation was curable under section 388 of the CPA.

We respectfully agree with the learned State Attorney guided by our decision in **Abdul Mohamed Namwanga @ Madodo v. Republic**, Criminal Appeal No. 257 of 2020 (unreported) cited subsequently in **Faustin Yusuph v. Republic** (supra). In **Abdul Mohamed Namwanga** (supra), the Court remarked that, citation of a punishment section in a charge sheet is not a legal requirement regardless of the practice in doing so. The Court stressed that, failure to cite a punishment section or its wrong citation cannot render a charge defective attracting nullification of the trial and the resultant judgment, conviction and sentence. Further, the Court took the view that, at any rate, such wrong citation was a curable irregularity under section 388 of the CPA. We take the same position in this appeal. Consequently, we find no merit in this ground and dismiss it.

The complaint in ground two relates to the trial court's failure to consider defence evidence. Ms. Werema conceded that, part of the appellant's defence regarding his complaint that PW4 coached PW1 in his office in relation to the complaint against him before he was subsequently arrested by the police in connection therewith was indeed not considered.

We respectfully agree with the appellant and the learned State Attorney. Be that as it may, the fact that there was an omission to consider part of the appellant's defence by both the trial and first appellate court is not necessarily fatal to the appellant's conviction. It is now trite and indeed this is the spirit under section 4 (2) of the Appellate Jurisdiction Act (the AJA) that, the Court has the same power, authority and jurisdiction vested in the court from which the appeal is brought to do what that court omitted to do. The first appellate court had power to re-evaluate the evidence afresh and come to its own findings of fact in relation to the appellant's complaint. Since that court abdicated its duty, it is open for this Court to step into its shoes and evaluate the evidence with a view to subjecting the prosecution evidence to the entire defence evidence. The Court has done so in various of its decisions, amongst others, **Oscar Justinian Burugu v. Republic,** Criminal Appeal No. 33 of 2107 (unreported) see also: **Hassan Mzee Mfaume v. Republic** [1981] TLR 167. Since failure to consider defence evidence is equivalent to the failure to evaluate the evidence for both the prosecution and defence properly, we shall discuss this aspect when considering the appellant's general complaint in ground three.

In ground three, the appellant faults the first appellate court for sustaining his conviction grounded on weak evidence which did not prove

the charge beyond reasonable doubt. In elaboration to this ground in the memorandum of appeal, the appellant has pointed out several aspects which, according to him, were sufficient to create doubts in the prosecution case. The first relates to failure by the victim to name him at the earliest which had the effect of denting her credibility on the authority of **Marwa Wangiti Mwita & Another v. Republic** [2002] T.L.R. 39 and **Jaribu Abdallah v. Republic** [2003] T.L.R. 271. The two courts below are criticized for not scrutinizing PW1's evidence properly in relation to its reliability and truthfulness and instead, they relied on **Selemani Makumba v. Republic** [2006] T.L.R. 379 in convicting him. Second, the appellant complains that PW1's evidence lacked corroboration and urges that, PW3's evidence was contradictory on the date he examined the victim and was thereby incapable of corroborating the unreliable evidence of the victim. The appellant cited the Court's decision in **Moses Charles Deo v. Republic** [1987] T.L.R. 134 on the desirability for corroborative evidence in sexual offences.

The delayed medical examination of the victim by PW3 was also challenged as indicative of fabrication of the case against the appellant. Finally, the appellant pointed out that, the victim's age was not proved which, according to him, created a doubt which should have been resolved to his benefit.

In response, Ms. Werema challenged the appellant's complaints on the failure to name him at the earliest, lack of corroborative evidence and delayed medical examination that they are new factual complaints which are not permitted by section 6 (7) (a) of the AJA except to the extent they involve matters of law. We do not agree with Ms. Werema on her argument because the grievances pointed out on ground three are meant to justify the appellant's complaint that, his conviction was a result of weak prosecution evidence which was unreliable by reason of lack of doubtful credibility of PW1; the victim of the offence. We shall consider them from that angle rather than distinct grounds of appeal.

In his rejoinder, the appellant raised one main issue. He wondered why PW1's mother could not discover the incident immediately if it indeed happened as found by the trial court and sustained by the first appellate court. According to him, that was indicative of the fact that he was framed up at the instance of PW2 on suspicious love affairs with his wife.

In line with Ms. Werema's submission, since the offence the appellant was charged with was statutory rape, the prosecution was bound to prove existence of, age of the victim and penetration before proving the culprit responsible for it. In view of the evidence on the record, we do not agree with the appellant that the victim's age was not

proved because the evidence on record proved that, PW1 was 8 years at the time the offence was allegedly committed. It is trite law that the victim's age can be proved through a parent, guardian, school teacher, birth certificate or the victim herself (see **Issaya Renatus v. Republic,** Criminal Appeal No. 54 of 2015 (unreported). In this case, the victim's father (PW2) testified as such that PW1 was 8 years old. At any rate, it was not suggested that PW1 was above the age of 18 years in which case consent would have been necessary. This complaint is accordingly discarded.

Next, we shall discuss penetration. It is common cause that the trial court believed PW1 as a credible and truthful witness who proved that, on the material date, she was called in the appellant's room to deliver mangoes to him but as she was exiting the room, the appellant got hold of her and had sexual intercourse with her by inserting his manhood into her vagina. The first appellate court concurred with the trial court that PW1's evidence was watertight and credible proving penetration judged from the presence of bruises on her vagina found by PW3 upon examining her. The learned first appellate judge agreed that, upon examination of the evidence, PW1 was eloquent, clear and direct to the point on what befell her on the fateful date (page 60 of the record of appeal). It is glaring that, the learned first appellate judge accepted PW1's version of her

failure to raise an alarm as the appellant was ravishing her by reason of him preventing her from doing so. As to whether there was corroborative evidence, the first appellate judge found such evidence established through PW2 and PW3 who examined PW1 four days after the incident although the PF3 (exhibit P1) he tendered in evidence was expunged for being erroneously admitted.

The learned first appellate judge appears to have been alive to the need for corroboration and concluded as he did that, there was sufficient corroborative evidence of penetration from PW3 who examined PW1 and found bruises on her vagina. The complaint by the appellant is that the evidence did not prove the charge beyond reasonable doubt which can only mean that the two courts below erred in concurring on a finding that penetration; a key ingredient in rape cases was not proved. That calls for our own evaluation of the evidence to satisfy ourselves whether the evidence by the prosecution proved penetration.

It is glaring that a day after the incident, PW1's mother travelled leaving behind PW1. It is equally glaring that, PW1 attended school the following day but later in the day, she joined her father who stayed at another house away from where she used to stay with her mother. Despite being away from the appellant, PW1 did not disclose the incident

upon her father noticing that she was limping and inquired her on the cause of her limp. It is striking also that, PW1 gave different answers each time PW2 asked her. The record shows that, the following day, PW1 woke up late with a gloomy face having absented herself from school which prompted PW2 asking his wife to inspect her. According to PW2, his wife; the step mother of PW1 obliged and reported to her husband who is recorded to have said the following in his evidence in chief:

> *"On 14/11/2019, 7:00 hours, she [woke] up late without a shining and smiling face. I asked her to go take bath but I had suspicion on something bad. Around 12:00 I asked her step mother to go and check her up but she told me that she saw bruises* ***and outer parts*** *of vagina is not in good condition was swelling (kumevimba).* ***I asked her gain but lied to me.*** *Doctor examined her at Nanjilinji Health Center and told me that she was raped. I was very furious and I wanted to ask her again. Doctor stopped me and told me that I can't. But he interrogated Sheila and told us"* [at page 10, bolding added for emphasis].

It is glaring that, by PW2's own evidence, the victim lied to him on what had happened to her and persisted doing so at the health center. Besides, PW1's step mother who is said to have inspected PW1 and discovered bruises on her outer parts of the swollen vagina was not called

to testify before the trial court. On the contrary, failure to call the first person who inspected the victim and discovered that her vagina was swollen without any explanation for not calling her had a bearing on the prosecution case. The trial court ought to have drawn adverse inference against the prosecution on the authority of the court's decision in **Azizi Abdallah v. Republic** [1991] T.L.R. 71. What emerges from the proceedings is that, it is PW2 who was actively involved at each stage including taking PW1 to the health center and VEO's office, obviously not so unusual. Amidst all this, there is nothing on the record suggesting that the victim's mother was ever involved in the process regardless of the fact that she may not have been a material witness. Although this may sound remote in some cases it was a relevant factor in this case, in our view.

The appellant has complained that, failure by PW1 to report the incident and name the culprit at the earliest dented her credibility. The cases of **Marwa Mwangiti** and **Jaribu Abdallah** are apt on this aspect. Regardless of Ms. Werema's stance, we are of the view that, there is some merit in this complaint. Granted that PW1 may have been threatened by the culprit with death if she disclosed the ordeal to anyone. Granted too that PW1 may have feared telling her father of the ordeal immediately, we are unable to agree with the respondent Republic that the fear could have subsisted indefinitely. First of all, PW1 told her father different stories

of her limping on 13/11/2019 and the following day when she was in safe hands of her own father who constantly inquired her. Secondly, PW1 kept to herself the name of the culprit until when she was quizzed by PW4 in his office which resulted into the appellant's arrest by militia men. It will be recalled that, the appellant is on record having complained against PW4 for coaching PW1 in his office to mention him as the culprit but the trial court did not say anything on this evidence. Upon our closer examination of the record, we cannot say that the complaint was entirely baseless. It was intended to challenge the credibility of the prosecution case which the appellant contended that it was fabricated to teach him a lesson for having love affairs with the victim's mother. Apparently, no police officer testified before the trial court who could have led investigative evidence leading to the appellant's arrest. The testimony we have on record is that of PW1 with questionable credibility, PW2 who was alleged to have grudges with the appellant based on the suspicious love affairs between the appellant and PW1's mother who never testified. The other evidence is that of PW4 who was accused of coaching PW1. The following is what the appellant said in defence:

> *"...I was arrested and taken to Nanjilinji B, VEO office and I found that victim and she was asked if she knows me, she replied that she knows me as uncle. When they*

[insisted] she still had [the] same answer. PW4 V.E.O took that child out I dint know what he told her. When she came back, that child did tell them that: "Ni kweli aliweka mate kidole chake na kunichezea sehemu za siri". I told VEO that what you are doing is not good and he said shut up. Suddenly he said, you are supposed to be in jail..." [At pages 23 and 24 of the record].

Interestingly, the appellant was not cross- examined on this part of the appellant's defence. What emerges from the above is that the VEO (PW4) spent some time with PW1 in his office before the appellant's arrival. It is equally glaring that PW1 recognized the appellant as uncle upon being asked by PW4. She did not refer to him as the person who had raped her. When PW4 took PW1 out, she came back and said this is the person who sexually abused her by a finger which he had lubricated with saliva. Her revelation was different from what she told PW2 and PW3 at the health center.

Furthermore, it is evident that, PW3 told the trial court that he examined PW1 after four days of the incident. He did so upon interrogation to PW1 who, according to PW2, had refused to reveal the truth which irritated him and wanted to ask her again but stopped by PW3. It is after PW3's questioning that PW1 yielded and stated that

someone had done something bad by penetrating her private parts but without mentioning the name of such person. It was after such response that PW3 conducted the examination which enabled him to see to see PW1's swollen vagina with bruises on its outer and inner parts. By his own words, PW3 did not manage to test her virginity as she was complaining of severe pains.

All the same, Ms. Werema submitted that despite the failure to consider part of the appellant's defence by the trial court, had it been considered, it was incapable of shaking the strong case by the prosecution. We do not share the same view considering the above exposition. It has now come to light that, consistent with the appellant's defence, PW4 coached PW1 to say that the appellant sexually abused her even though the complaint related to rape. It has equally been revealed that, PW3 conducted the examination not necessarily with a view to finding out whether the victim was sexually abused but to find the culprit. It is not so difficult to note that, PW2 had a hand in what PW3 was supposed to be doing; his profession aside.

Unlike Ms. Werema, on the whole, the appellant's defence which was not considered by the two courts below dented PW1's credibility so much so that her evidence required corroboration. It did not qualify as

true evidence in the light of **Selemani Makumba** to have been acted upon by the two courts below for lack of credibility. The only corroborative evidence came from the clinical officer (PW3) who did a partial examination after a lapse of four days from the date the alleged incident occurred. However, mindful of the timing and circumstances under which the medical examination was conducted, we are far from being persuaded that PW3's evidence could have been relied upon to corroborate PW1's testimony. Firstly, the examination was done after the lapse of 72 hours. In **Simon Abonyo v. Republic,** Criminal Appeal No. 144 of 2005 (unreported), this Court rejected evidence from a PF3 in a sexual offence in which medical examination of the victim was done after 72 hours like here. Secondly, at any rate, it is trite that the evidence of an expert is not conclusive rather a non- binding opinion which can only be acted upon the court being satisfied that it was beyond circumspection. This Court and its predecessor have pronounced themselves in various decisions on the non-binding nature of evidence of experts including medics like PW3 in this appeal where it is found that there are good reasons for doing so. See for instance: **Hilda Abel v. Republic** [1993] T.L.R 246 and **Nyinge Suwata v. Republic** [1959] EA 974, to mention just a few. It is no wonder that, in **Selemani Makumba v. Republic** (supra), the Court was emphatic that a medical report may help to show that there was

sexual intercourse but cannot prove that there was rape stressing that, true evidence of rape has to come from the victim.

In the event, we are constrained to sustain the appellant's complaint in ground two and three as meritorious. We do so upon being satisfied that, two courts below made concurrent finding of fact as a result of failure to evaluate the evidence of both the prosecution and defence properly. Upon our own evaluation of the entire evidence as seen above, such findings cannot stand. They are accordingly reversed with the net effect that the prosecution evidence was shaky. It had lingering doubts which should have been resolved in the appellant's favour. That reminds us of Lord Chief Justice of the King's Bench Sir Mathew Hale, an English jurist who said that; rape is an accusation which is easily made, hard to be proved and harder to be defended by the party accused, though never so innocent. Mindful of its relevance, this Court has referred this in various cases including in **Moses Charles Deo v. Republic** (supra), **Mohamed Said v. Republic,** Criminal Appeal No. 145 of 2017 and **Thomas Robert Shayo v. Republic**, Criminal Appeal No. 409 of 2016 (both unreported). Of equal relevance is the statement of An English jurist, William Blackstone who said in 1765 that it is better that ten guilty persons escape than one innocent man convicted. This is the approach we have taken in this appeal in the light of the exposition we have made.

In fine, the appeal succeeds and the conviction is hereby quashed and sentence set aside. The appellant shall be released from custody forthwith unless held therein for any other lawful cause.

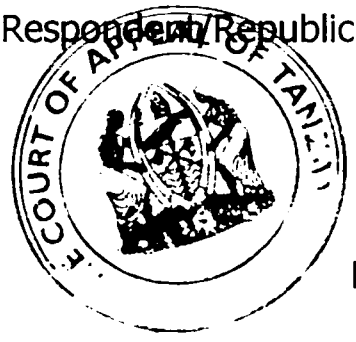
DATED at **MTWARA** this 30th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of March, 2023 in the presence of Appellant in person and Ms. Florence Mbamba Anyosisye, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL