

**IN THE COURT OF APPEAL OF TANZANIA  
AT KIGOMA**

**(CORAM: MUGASHA, J. A., SEHEL, J.A And MWAMPASHI, J. A.)**

**CRIMINAL APPEAL NO. 525 OF 2021**

**TOYIDOTO s/o KOSIMA..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the Court of Resident Magistrate  
of Kigoma at Kigoma)**

**(Mariki, PRM-Ext. Jur.)**

**dated the 23<sup>rd</sup> day of September, 2021**

**in**

**Extended Jurisdiction Criminal Appeal No. 6 of 2021**

.....

**JUDGMENT OF THE COURT**

31<sup>st</sup> May & 5<sup>th</sup> June, 2023.

**SEHEL, J.A.:**

The appellant, Toyidoto s/o Kosima was charged before the District Court of Kibondo at Kibondo (the trial court) with the offence of rape contrary to section 130 (1) (2) (e) of the Penal Code, Cap. 16 R.E. 2019 (now R.E. 2022). He was found guilty as charged, convicted and sentenced to life imprisonment. He was also ordered to pay compensation to the victim at the tune of TZS. 100,00.00 for injuries sustained. His appeal to the High Court, which was later on, transferred to the Court of the Resident Magistrate of Kigoma at Kigoma to be heard and determined by G. E. Mariki, Principal Resident Magistrate with

extended jurisdiction (the first appellate court), was dismissed for want of merit. Hence, this second appeal.

The brief facts of the case are; on 5<sup>th</sup> July, 2020, Joseline Fideli (PW1), the mother of the victim, went to the market and left her seven-year-old daughter and her ten-year-old son at the house of their grandmother. For the purpose of concealing the identity of the victim and that of the boy, we shall be referring to them as PW3 or the victim and PW4 respectively. After PW1 had completed her business at the market, she went to pick the children. She found PW4 having his dinner while PW3 was asleep. She went to wake her up. Immediately, after waking up and seeing her mother, the victim wept without giving any explanation. She asked her what happened but no reply was forthcoming. She thus examined the victim and saw blood in her private part. According to PW2, PW4 told her that the victim was raped by Toyidoto which was the first name of the appellant.

Before the trial court, PW3 narrated how the incident took place. She said that on 5<sup>th</sup> July, 2020, she was at her grandmother's house with PW4 but later, in her examination in chief, she said she was with Musa @ Mustafa. While there, she said, Toyidoto took her behind the house, stripped her clothes and forcefully penetrated his penis into her vagina.

Like PW2 and PW3, PW4 made a similar account that on 5<sup>th</sup> July, 2020, he went to his aunt's house at Nyamguruma with PW3. There, he met Toyidoto who gave him TZS. 200.00 to go and buy sugarcane while leaving behind the appellant with the victim. Upon his return, he could not find them, he called them but there was no response. Later, he said, he saw the victim coming from the bush crying. She was with Toyidoto. PW4 also claimed to have seen the two naked behind the house and when the appellant saw him, he pulled up his trousers and ran away.

Since it was late at night, PW2 did not do anything. She waited till next morning and went to report the matter to Busunzu Police Post where she was issued with PF3. She then took the victim to Busunzu Health Centre but she was directed to go to Kifura Health Centre. As she had no money for fare, she returned home. On 8<sup>th</sup> July, 2021, she took the victim to Kifura Health Centre for medical examination.

The Assistant Medical Officer who examined the victim, one Gabriel Makoi (PW1) observed that the victim was already washed at the time of diagnosis thus he could not find any discharge of fluid. He further observed that the victim had no bruises and no hymen. With such observation, PW1 concluded that the blunt object penetrated to the victim's vagina. He filled PF3 issued to the victim by Busunzu police post on 6<sup>th</sup> July, 2020 which was admitted as exhibit P1.

In his defence, the appellant denied the allegations and claimed that he spent his entire day at the farm. When he came back from the farm at around 18:00hrs, he was surprised to find out that he was accused to have raped the victim. He said that, as he had no relative to help him because he is an orphan and was arraigned before the trial court with the offence of rape.

Relying on the principle stated by the Court in case of **Selemani Makumba v. The Republic** [2006] T.L.R. 379 that the best evidence of rape comes from the victim, the trial court was satisfied that PW3 was credible and reliable witness. Although the trial court observed that there was delay in medical examination, it said that there was no cogent reason for not believing PW3 because there was corroboration coming from the evidence of PW1 who said that the victim was penetrated by a blunt object. It further held that the delay was sufficiently explained by PW2 whose evidence was credible. It held the act of the appellant conduct of sending away PW4 to buy sugarcane was his prior preparation to commit the offence.

Concerning the appellant's defence of alibi, the trial court invoked section 194 (6) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (now R.E. 2022) and accorded no weight to it as it reasoned that the place where the appellant claimed to have been was not far for him to return

and commit the crime. In that respect, the offence of rape with which the appellant stood charged was found to have been proven to the hilt. Accordingly, the appellant was convicted and sentenced as aforesaid. Aggrieved with that finding, he appealed to the first appellate court. The learned PRM with extended jurisdiction concurred with the trial court that PW3 was a credible witness and further observed that the evidence of PW1 that the appellant had sexual intercourse with the victim was corroborated by PW4 who witnessed the appellant on top of the victim but upon his arrival, the appellant pulled his trousers and ran away. He thus dismissed the appeal.

Still aggrieved he has come to this Court with four grounds of appeal which are:

- 1. That, both the trial court and the first appellate court erred in law and fact in convicting the appellant without cogent evidence adduced by the prosecution side to prove the offence beyond reasonable doubt.*
- 2. That, the first appellate court erred in law and fact in failing to critically analyse the contents of exhibit P1, the PF3.*
- 3. That, the first appellate court erred in upholding the conviction of the appellant without considering the principle that the appellant cannot be convicted on the*

*weakness of his defence but on the strenght of the prosecution evidence.*

*4. That, there was no evidence against the appellant as the evidence of PW4 was received against the dictates of section 127 (2) of the Tanzania Evidence Act, Cap. 16 R.E. 2019.*

At the hearing of the appeal, the appellant appeared in person, unrepresented and the respondent Republic was represented by Ms. Sabina Silayo, learned Senior State Attorney.

When the appellant was called upon to submit on his grounds of appeal, he adopted his grounds of appeal without any further elaboration and opted to hear the reply submission from the Republic. He however reserved his right to rejoin, if need arise.

The learned Senior State Attorney begun her reply submission by expressing the respondent's stand that it supported the appeal. She then informed the Court that she will respond to the four grounds of appeal into one combined ground of appeal that, whether the offence was proven beyond reasonable doubt. Elaborating as to why she supported the appeal, Ms. Silayo submitted that the appellant was convicted of the offence of rape. That, he was alleged to have carnal knowledge with the victim, a girl aged seven years on 5<sup>th</sup> July, 2020 at Nyamguruma village within Kibondo District in Kigoma Region. That, to

prove the allegation, the prosecution paraded a total of four witnesses namely, Gabriel Makoi (PW1), Joseline Fideli (PW2), the victim (PW3) and the brother of the victim (PW4). Her contention was that the evidence that implicated the appellant was that of PW3, the victim and PW4 who claimed to have witnessed the appellant raping the victim. However, she argued, the evidence of PW3 and PW4 is full of contradictions and inconsistencies and cast doubt on the prosecution case which should have been resolved in favour of the appellant. The learned Senior State Attorney then detailed the contradictions and inconsistencies as follows:

**One**, both PW3 and PW4 their testimony was self-contradictory on key matters. She explained that PW3 contradicted herself as to whom she was with at her grandmother's place. She referred us to page 19 of the record of appeal where PW3 said she was with her brother, PW4 but at page 22 of the record of appeal she mentioned Musa @ Mustafa. Similarly, PW4 had contradictory versions on where he saw the victim. She referred us to page 20 where PW4 said that he saw the victim naked behind the house and the appellant was on top of her but at page 21, he said that he saw the victim coming from the bush crying and the appellant was pulling his pants up while running away.

**Two**, it is not clear as to who reported the matter to the mother of the victim. She referred us to page 17 where PW2 herself claimed to have been informed by PW4 but PW4 said the mother was informed by the grandmother.

**Lastly**, the record is silent as to who and when the appellant was arrested.

With the pointed-out contradictions, the learned Senior State Attorney contended that the contradictions dented the credibility of the PW2, PW3 and PW4 hence their evidence cannot be relied upon to sustain the conviction and sentence. She therefore urged the Court to find that the appellant's appeal merited and implored us to allow it.

The appellant welcomed the submission of the learned Senior State Attorney and beseeched us to make an order for his release from the prison custody.

Having heard the submission from the learned Senior State Attorney and gone through the record of appeal, we entirely agree with Ms. Silayo that the main issue in this appeal is whether the evidence on record proved the offence of rape against the appellant beyond reasonable doubt to warrant the Court to sustain the conviction and sentence. Ms. Silayo contended that the credibility of the evidence of



key prosecution witnesses, PW3 and PW4 was full of contradictions hence it cannot sustain the conviction of the appellant.

Generally, the assessment of credibility of witnesses is the domain of the trial court. We held this position in the case of **Ali Abdallah Rajab v. Saada Abdallah Rajab & Others** [1994] T.L.R. 132 that:

*"Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record. "*

We are aware that this is a second appeal and pursuant to section 6 (7) (a) of the Appellate Jurisdiction Act, Cap 141, R. E. 2019, normally, the Court is required to confine itself to matters of law. However, where there has been a misapprehension of the evidence or failure to take material point or circumstance into account an appellate Court may interfere with the concurrent finding of facts – see: For example: **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Shabani Daudi v. The Republic**, Criminal Appeal No. 28 of 2001 (unreported), **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387 and **Issa Said Kumbukeni v. The Republic** [2006] T.L.R. 227. For instance, in the case of **Shabani Daudi** (supra) in the case of the Court said:

*"Credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of the witness can also be determined in two other ways. One, when assessing the coherence of the testimony of that witness and two, when the testimony of that witnesses is considered in relation to the evidence of other witness including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

We have stated herein that the trial court convicted the appellant on the strength of the evidence of PW3, the victim of rape and PW4. It also found PW3 as credible witness. The first appellate court concurred with the trial court that the victim was a credible witness. The first appellate court reasoned that the trial court was best placed to see and assess the demeanour of the witness. Indeed, this is the position of the law that the first appellate court had a duty to re-asses the entire evidence and ultimately arrive to its own conclusion but it did not do so.

This Court being the second appellate court had a duty to see whether the two courts below properly assessed and applied the law. Our re-assessment of the entire evidence revealed that both the trial court and the first appellate court did not go further to observe that

there were contradictions and inconsistencies in the prosecution evidence. As rightly submitted by the learned Senior State Attorney, PW4 contradicted himself on where he found the appellant and the victim. During examination in chief, he firstly said that he saw the appellant coming from the bush, the victim crying and the appellant pulling up his trousers. Later, he changed the story and said that he saw the appellant and the victim behind the house while the appellant was on top of the victim having sexual intercourse. The two courts below did not deliberate on the self-contradictory evidence of PW4 who kept on changing stories as how and where he found the victim and the appellant. Yet again, the two courts below did not address the self-contradictory evidence of PW3 concerning the person she was with on that fateful day. It is on record that she mentioned two different names, the name of her brother (PW4) and Musa @ Mustafa. Neither was there any deliberation on the contradictions pointed out by the learned Senior State Attorney in the evidence of PW4 and PW2. It is settled law that where prosecution witnesses give conflicting evidence, it is the duty of the court to resolve the contradictions arising out of the conflicting evidence -see: the case of **Mohamed Said Matula v. The Republic** [1995] T.L.R. 3.

On our part, we find that the self – contradictory evidence of PW3 and PW4 is fundamental and fatal that corrode the credibility of PW3 and PW4. Similarly, the contradictions in the evidence of PW2 and PW4 concerning the person who informed PW2 on the incident that led to the arrest of the appellant. We are fortified with our previous stated in the case of **Mathias Bundala v. The Republic**, Criminal Appeal No. 62 of 2004 [2007] TZCA 16 (16 March, 2007; TANZLII) that:

*"Good reasons for not believing a witness include the fact that the witness has given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses."*

In that respect, we fully concur with Ms. Silayo that the contradictions affected the credibility of the key prosecution witnesses, and therefore, such evidence should not have been acted upon to convict the appellant.

Apart from the inconsistencies and contradictions, there is another factor that dented the prosecution case that the record is silent as to who and when the appellant was arrested. The entire record does not indicate when he was arrested but we gather from the record of appeal that he was arraigned before the trial court on 17<sup>th</sup> December, 2020 while the incident took place on 5<sup>th</sup> July, 2020. Given the peculiar

circumstances of this case, we believe at least an investigative officer could have shed some light on the delayed arraignment of the appellant.

In view of what we have endeavoured to discuss, we find merit in this appeal. We accordingly allow the appeal, quash the conviction and set aside the sentence, with an order directing immediate release of the appellant, **Toyidoto s/o Kosima** from prison unless he is otherwise lawfully held.

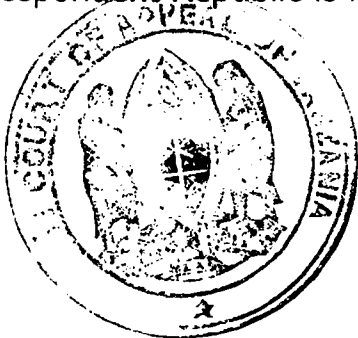
**DATED** at **KIGOMA** this 3<sup>rd</sup> day of June, 2023.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The judgment delivered this 5<sup>th</sup> day of June, 2023 in the presence of the appellant in person and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Amina Mawoko, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**