IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J. A., KENTE, J.A. And MASHAKA, J.A.:)

CRIMINAL APPEAL NO. 246 OF 2019

KHAMIS ABIUS KILAMBO @ USTADHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Galeba, J.)

dated the 21st day of June, 2019

in

Criminal Appeal No. 274 of 2018

JUDGMENT OF THE COURT

5th & 10th July, 2023

MUGASHA, J.A.:

Before the District Court of Tarime at Tarime, the appellant was charged with the offence of rape contrary to section 130 (1)(2)(e) and 131(1) of the Penal Code [CAP 16 R.E 2022]. It was alleged by the prosecution that, on 4/3/2017 at Night time in Nyabikondo village within Tarime District in Mara Region the appellant had carnal knowledge of a girl aged 10 years whom we shall refer to as the "victim" or "PW3" in order to conceal her identity.

After a full trial he was convicted as charged and sentenced to thirty years imprisonment. Before the High Court of Tanzania at Mwanza (Galeba, J,. as he then was), his first appeal was dismissed in its entirety and the conviction and sentence were sustained. Still aggrieved, the appellant preferred this appeal.

The facts underlying the present appeal are briefly as follows: The victim and her mother who testified as PW1 resided at Nyamongo in Nyabikondo hamlet. On the fateful day the victim was sent by her mother to the shop to buy sardines and cooking oil. While on the way back home with the purchased stuff, she met a man named Ostaz who covered her mouth with her hand and took her inside an unoccupied house. Thereat, she was undressed laid on the ground and raped. Thereafter, the culprit left and the victim went home.

On arrival at home, the victim did not disclose to her mother about the rape incident as she feared to be canned by the mother. However, as days passed, the victim's sister smelt a rat having noticed that the victim experienced pain when urinating and she informed their mother who never took the matter seriously. Later, as the pains became unbearable, the victim told her mother that she had a boil and asked the mother to

squeeze it. After PW1 inspected the private parts of the victim, she gathered that the victim's vagina and anus were torn and pus was oozing out from the private parts. When she asked the victim on what had befallen her, the victim initially disclosed to have been raped by an unknown short black man when she was sent to buy food stuff and that, she did not raise any alarm because the assailant had covered her mouth and threatened to kill her. However, the victim later changed her story and stated that she was raped by one Ostaz, the appellant whom she used to see at his workplace, Kisire Hotel. She added that, at the material time there was electricity light which enabled her to recognize the appellant after purchasing the food stuff before she was taken to the unoccupied house where she was raped in the incident which lasted for almost 15 minutes. This presupposes that, there was no light at the unoccupied house where she claimed to have been raped.

The victim's account was flanked by that of her mother who besides, reiterating the victim's account on how she was raped by the appellant, she confirmed that on the material day she had sent the victim to buy sardines and cooking oil, told the trial court that as the victim delayed to return home, she unsuccessfully traced her and when she returned home

without the provisions she declined to punish her because the victim told her that she had lost the money and thus could not buy the food stuffs. The incident was reported to the school authorities and later to the police. WP 9656 PC Laurencia who testified as PW2 took the victim into the investigation room and upon inspecting her, found that pus was oozing out from the victim's private parts. PW2 further testified that, in the recorded statement, the victim mentioned the appellant as the person who raped her. However, upon being cross-examined by the appellant, PW2 stated that she happened to know the appellant after his arrest and after being informed by the victim.

Subsequently, at the police PW2 directed WP 9671 PC Joyce to take the victim to the hospital which she obliged. Kamenya Peter Mwera (PW4), a clinical officer examined the victim and established that she had sustained injuries and had wounds on the vagina which discharged pus. However, none of the prosecution witnesses testified as to when and where the appellant was arrested.

In his defence, the appellant generally denied the accusations levelled against him by the prosecution. He claimed that the evidence was fabricated on account of the prosecution's failure to summon the Hamlet

chairperson and a ten-cell leader to prove if the rape incident had occurred in the neighbourhood. He also challenged the credibility of the victim on ground that, if at all she was sent to buy food stuffs what made her to disappear up to 20.30 raises more questions than answers. He also challenged the authenticity of the PF3.

Believing the victim's account to be true, the trial court found the charge proved beyond a reasonable doubt and proceeded to convict and sentence the appellant as aforestated. On appeal, before the High Court the grounds of complaint raised included: **one,** the unfavourable visual identification since the identification parade was not conducted; two, the victim's delay to name the assailant and **three**, trial court's irregular reliance on the hearsay evidence of PW1 and PW4. The High Court dismissed the appeal in its entirety hence the instant appeal in which the appellant is desirous of demonstrating his innocence. In the memorandum of appeal, the appellant has fronted three grounds of complaint:

1. *That, the trial and the first appellate court wrongly acted and relied upon the evidence of PW3 (the victim) which was obtained in flagrant violations of the law and procedures.*

2. *That, the visual identification as was relied upon by the lower Courts did not qualify to the known yardsticks and elementary factors well provided for by the law and precedent.*
3. *That, the prosecution case plus its evidence in toto was not passed to a term, proof beyond reasonable doubt as burden to the prosecution, in thus the lower courts based conviction on the case which is too weak.*

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Ms. Gisela Alex Banturaki, learned Senior State Attorney assisted by Mr. Morice Hassan Mtoi, learned State Attorney.

Besides adopting the grounds of appeal, the appellant opted to hear first the submissions of the respondent reserving the right to rejoin if need arises. Upon taking the floor, Ms. Banturaki opposed the appeal. In addressing the manner in which the evidence of the victim was taken, she submitted that since the victim testified on oath, her testimony was credible and as such, the trial court was justified to rely on such evidence to ground the appellant's conviction which was sustained by the High Court. She urged us to sustain the conviction and the sentence.

Pertaining to the 2nd ground of complaint in which the appellant is challenging the weak evidence on visual identification, it was Ms. Banturaki's contention that, the appellant was properly identified by the victim considering that, the presence of electricity light at the area where she was grabbed by the appellant before being taken to the unoccupied house and raped. It was further contended that although the record is silent on the intensity of the light at the scene of crime, prior to the fateful incident, the victim who knew the appellant whom because she used to see him at the hotel where he worked. To bolster the propositions, cited to us was the case of **KENNEDY IVAN VS REPUBLIC,** Criminal Appeal No. 178 of 2007 (unreported).

Finally, it was the submission of Ms. Banturaki that, the charge against the appellant was proved beyond reasonable doubt considering that, besides placing the appellant at the scene of crime the victim narrated how she was raped by the appellant who she mentioned to her mother. In this regard, it was argued that, the credible account of the victim demonstrated the best evidence on the occurrence of the fateful incident and the victim's delay to name the victim because she was scared of being canned by her mother. With the said submissions, Ms. Banturaki

urged us to find that the charge against the appellant was proved to the hilt, uphold the concurrent verdicts of the two courts below and dismiss the appeal.

The appellant had nothing useful to rejoin besides, urging the Court to consider the grounds of complaint and pleaded with the Court to set him at liberty claiming that he was not responsible with the rape incident.

After a careful scrutiny of the grounds of appeal, submissions of the parties, the main issues for consideration are: **one,** whether the trial was flawed with procedural irregularity on the manner in which the evidence of the victim was taken and acted upon; and **two,** whether the charge against the appellant was proved to the hilt.

In the 1st ground of complaint, the appellant is faulting the two courts below to have wrongly acted and relied on the evidence of PW3 (the victim) which was obtained contrary to the law. Having considered that the victim was ten years old, we understood the appellant's complaint to be in relation to the law governing the manner of taking evidence of a child of tender age. Although section 127 (2) of the Evidence Act as amended was already in force which requires a child of tender age to give evidence without oath or affirmation, provided she or he promises to tell

the truth, the victim gave a sworn account as reflected at page 29 of the record of appeal. This was in accordance with the provisions of section 198 of the Criminal Procedure Act [CAP 20 R.E 2022] which stipulates as follows:

> *"198 (1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".*

In the case of **KIMBUTE OTINIEL VS REPUBLIC,** Criminal Appeal No. 300 of 2011 (unreported), in expounding the meaning of oath and its implications in evidence, quoted the case of **REX VS PAWLYNA** [1948] Q. R.226-234 where the Court held that:

> *"An oath is a solemn, sacred vow to speak the truth, the whole truth and nothing but the truth:* ***The person who takes the oath impliedly professes that he or she has a consciousness of the duty to speak the truth*** *and has a realization of the consequences of and punishment if willfully making a false assertion."*

In the bolded expression, it is clearly stated that taking an oath is impliedly professing that one is conscious of the duty to speak the truth. In the circumstances, since the victim was allowed to give a sworn account after the trial court had satisfied itself that the victim understood the meaning of oath, the complaint that the victim's account was taken in violation of the law is devoid of merit and thus, the 1st ground of appeal is not merited.

We now turn to the 2nd and 3rd grounds of appeal which shall be disposed together because the appellant's complaint is that the conviction was based on the weak evidence on visual identification of the appellant at the scene of crime and that the charge was not proved to the hilt. This being a second appeal, it is trite law that the Court should rarely interfere with the concurrent findings of lower courts on the facts unless there has been a misapprehension of the evidence; a miscarriage of justice or violation of a principle of law or procedure. See: **PETERS VS SUNDAY POST LTD** [1958] E.A 424, **DPP VS JAFFAR MFAUME KAWAWA (1981) TLR. 149, ISAYA MOHAMED ISACK VS REPUBLIC,** Criminal Appeal No. 38 of 2008 and **SEIF MOHAMED E.L ABADAN VS**

REPUBLIC, Criminal Appeal No. 320 of 2009 (both unreported). We shall be guided accordingly.

In their concurrent findings of fact, both the trial court and the High Court, considered the victim a truthful witness and relied on such evidence to convict the appellant. Having carefully considered the arguments for and against the appeal and the evidence on record we are alive to the fact that, the conviction of the appellant which was upheld by the High Court basically hinges on the credibility of the victim's account.

For reasons to be unveiled in due course we shall consider if the two courts below applied the correct test to evaluate and re-evaluate the evidence before concluding that a victim is truthful witness. We are aware that in our jurisdiction, it is settled law that the best evidence of sexual offences comes from the victim See: **SELEMANI MAKUMBA VS REPUBLIC [2006]** T.L.R.379 We are also aware that, in terms of section 127 (7) of the TEA, a conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim. However, before the court acts on such evidence, it must be satisfied that such evidence contains nothing but the truth. In this regard the provisions of section 127 (7) of the TEA categorically stipulates:

> *"127 (7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence,* ***the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".***

In the light of the bolded expression, receiving the victim's account merely is not a blanket warrant that such evidence must be believed without the court subjecting such evidence to the test of credibility so as to ensure that the victim's account is nothing but the true account of the incident relating to the sexual offence. This was emphasized in the case of **MOHAMED SAID VS REPUBLIC**, Criminal Appeal No.145 of 2017 (unreported), the Court made the following observation:

"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with the rules of evidence in general, and S 127(7) of Cap 6 in particular, and that such compliance will lead to punishing the offenders in deserving cases."

In the light of the cited case in which the assessment of credibility is at stake, although credibility of a witness is the monopoly of the trial court but only in so far as the demeanour is concerned, it can as well be determined by the Court in this second appeal when examining the findings of the first appellate court in two other ways namely: **one,** when assessing the coherence of the testimony of that witness; and **two,** when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person. See: **SHABAN DAUDI VS REPUBLIC,** Criminal Appeal No. 28 of 2001 (unreported) the Court said:

The trial court believed the victim's account as truthful without considering it with other evidence from the prosecution witnesses and that of the appellant. On the part of the High Court, the victim's account was

treated as gospel truth and concluded as good evidence sufficient to ground a conviction even without being corroborated. Having carefully scrutinized the evidence of the victim, with respect, we do not believe that, the two courts below acted on the evidence of the victim after subjecting it to scrutiny and assessing the credibility in order to be certain she gave a truthful testimony worth of belief. We say so because, the victim's credibility is dented because she did not tell the truth because **one**, while at page 44 of the record of appeal the victim had told her mother that she could not purchase the food stuffs because the money was lost, when cross-examined by the appellant at page 31 of the record she gave a different account as follows:

> *"when you arrested me, there was no person at the shop. The shopkeeper went inside after she had sold me the items...."*

Two, besides the victim telling lies on the purchase of food stuff, it is on record that the victim initially told her mother that she was raped by unknown short black man, later she mentioned Ostaz, the appellant as the culprit. If at all she knew the appellant whom she identified at the shop where there was electricity light, what made her not to mention him in the

first instance when narrating to her mother about the rape incident. This leaves a lot to be desired because, it is settled law that, the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability and omission to do so should put a prudent court to inquiry. See: **MARWA WANGITI MWITA AND ANOTHER VS REPUBLIC** [2002] TLR 39.

Three, in the wake of victim's questionable evidence on the familiarity with the appellant, in order to eliminate the possibilities of mistaken identity it was prudent on the part of the police to conduct the identification parade so as to ascertain that the alleged visual identification had no blemishes.

Thus, with the untruthful account of the victim on material points she could hardly be believed in respect of some other points relating to the occurrence of the rape incident, with respect, it was wrong for the two courts below to consider the victim's account credible and worth belief.

Moreover**,** since the victim claimed to know the appellant prior to the incident because she had earlier seen him at his workplace at Kisire hotel, the owner of the hotel and employer of the appellant was a material and independent witness to testify on the material facts and clarify to the trial

court if the appellant actually worked in that hotel and if he was the sole attendant in the hotel. Since the prosecution gave no explanation if the witness was not within reach, this entitles the Court to draw an inference adverse to the prosecution. See: **AZIZ ABDALAH VS REPUBLIC** [1991] 71.

From the circumstances surrounding the trial, it is glaring that, the prosecution case was not properly investigated which is tantamount to the same being killed in the bud because an improperly investigated case is not worthy to be prosecuted. We are fortified in that regard having considered that, the record is completely silent as to when and where the appellant was arrested as the arresting officer was also not paraded as a witness. Although WP 9656 PC Laurencia who was a police officer testified as PW4, gave no clue as to who and when the appellant was arrested which cast doubt on the prosecution case considering that even the victim's mother came to know of the appellant at the trial.

In view of what we have endeavoured to demonstrate, besides the pointed out shortfalls in the prosecution case, since the victim was a crucial witness on whose evidence conviction was grounded, as earlier stated, such evidence was weak and it fell short of proving the charge

against the appellant to the hilt and as such, the 2nd and 3rd grounds are meritorious. Thus, we allow the appeal, quash and set aside the conviction and the sentence and order the immediate release of the appellant unless held for another lawful cause.

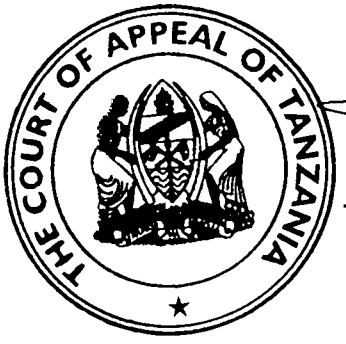
DATED at **MWANZA** this 6th day of July, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 10th day of July, 2023 in the presence of Appellant in person via Video Link from Morogoro IJC and Ms. Martha Mwandenya, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL