**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: MUGASHA, J.A. MWANDAMBO, J.A. And MAIGE, J.A.)**

**CRIMINAL APPEAL NO. 162 OF 2020**

**RASHID SAID MASUMAI..... APPELLANT**

**VERSUS**

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

**(Appeal from the Decision and Order of the High Court of Tanzania at Moshi)**

**(Mwingwa, J.)**

**dated the 16th day of May, 2019**

**in**

**(DC) Criminal Appeal No. 57 of 2015**

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## JUDGMENT OF THE COURT

25th & 27th September, 2023

**MUGASHA, J.A.:**

The appellant was charged and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code (Cap 16 R.E. 2022). It was alleged at the trial court that on 5/9/2013 at Igoma sub village at Kisiwani village within Same District in Kilimanjaro Region, the appellant did unlawfully have carnal knowledge of a girl aged 5 years. For the purposes of concealing her identity, the girl shall be referred to as the victim. The appellant was sentenced to a jail term of

30 years. His appeal before the High Court was not successful hence the present appeal.

Brief facts underlying this appeal are as follows: The victim, her father Yasin Selemani who testified as PW1, the victim's uncle Kirima Nuru (PW3) and the appellant all resided in the same village. They all happened to be present at a ceremony on the fateful night of 5/9/2013, at the house of one Rama. As the ceremony was going on having noticed that the victim was not seen PW3 inquired from the victim's father who as well, replied that he had not seen the victim. According to PW3, he was joined by other people to mount a search of the victim. Subsequently, PW3 allegedly saw the appellant in the bush raping the victim. He raised an alarm and many people assembled. The victim's father was informed and the appellant was arrested. According to the victim's father, it is PW3 who informed him on the occurrence of the fateful incident. However, none of those who assembled were paraded as prosecution witnesses. Also, although the matter was reported to the police who issued a PF3 to have the victim medically examined, the person who arrested the appellant was not called to testify at the trial.

Hadija Tengeza (PW4), the doctor who examined the victim, found no sperms or injuries on the victim's vagina and concluded that, there

was no indication that the victim was raped on the alleged date that is, on 5/9/2013. However, she established that the victim had sexual intercourse in previous occasions.

The appellant denied the accusations levelled against him. He alleged that the case was fabricated by PW3 because they had grudges and they actually insulted each other on the fateful day when PW3 threatened that he would report that the appellant had raped the victim. The appellant's evidence on the existence of a fight was flanked by Awadh Rashid Lyimo, DW2 who saw them fighting, separated them and warned them not to quarrel because they were relatives.

Ultimately, the prosecution account was believed to be true and the trial court concluded that the charge was proved to the hilt given that the evidence of the victim was corroborated by that of PW3 and PW4. As earlier stated, the appellant was sentenced to a jail term of 30 years.

The High Court, besides affirming the trial court's decision, it also found that the prosecution evidence which corroborated the victim's account was not assailed by the appellant who did not cross-examine PW3 and PW4. Yet, it was the first appellate court's finding that the appellant's account bolstered the prosecution case given that, he did not

dispute to have been at the scene of crime on the fateful date. It is against the said backdrop, the appellant has knocked the doors of the Court seeking to impugn the verdicts of the two courts below in order to demonstrate his innocence. He has lodged a memorandum of appeal with seven grounds which mainly constitute three points of grievance namely: **One,** the evidence of the victim was taken contrary to the mandatory requirements of section 127 (2) of the Evidence Act, Cap 6 (R.E. 2002) in assessing on whether the child (PW2) possessed enough intelligence and understood the duty of speaking the truth. **Two**, the conviction was erroneously grounded as the two courts below relied on uncorroborated prosecution account while the offence of rape was not established beyond reasonable doubt; and **three**, failure by the two courts below to consider the appellant's defence which occasioned a failure of justice.

At the hearing of the appeal, the appellant appeared in person, unrepresented. He adopted the memorandum of appeal without more and urged us allow the appeal reserving the right to rejoin if need arises.

As for Ms. Eliainenyi Njiro, learned Senior State Attorney who appeared alongside Ms. Revina Tibilengwa, learned Principal State

Attorney she did not support the appeal contending that the charge was proved to the hilt against the appellant. On this, she conceded that although the victim's account was taken in violation of the provisions of section 127 (2) of the Tanzania Evidence Act (Cap 6 R.E. 2022) and as such, it deserves to be expunged. However, she was quick to point out that there was other independent evidence from PW3 which could suffice to prove the prosecution case. She submitted that, the evidence of PW3 suggest that he saw the appellant raping the victim in the bush. She added that the doctor's evidence further supports the prosecution case. With such evidence, she argued that the guilt of the appellant was proved to the hilt.

Regarding the complaint on failure to consider the defence evidence by the two courts below, although Ms. Njiro conceded and implored on the Court to consider the defence of the appellant, she argued that such defence did not assail the prosecution case. On this, she argued that the allegation that the case was fabricated because of existence of grudges between the appellant and PW3 was an after though because the appellant did not cross-examine PW3 on that aspect.

Having considered the grounds of complaint, submission of the parties and the record before us, we have to determine if the charge was proved to the hilt against the appellant.

We begin with the complaint on the procedural irregularity alleged to have vitiated the victim's account taken in violation of section 127 (2) of the Evidence Act before the 2016 amendments vide Written Laws (Miscellaneous Amendment Act) No. 2 of 2016. Given that the victim was 7 years old at the trial, she was a witness of tender age in terms of section 127 (5) of the Evidence Act. Thus, her evidence ought to have been taken as per the dictates of section 127 (2) of the Evidence Act which stipulated that:

> *"127 (2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*

According to the cited provision, the trial could know that a witness of tender age was not possessed of sufficient intelligence to

justify the reception of his evidence by conducting *voire dire* examination which entailed recording questions put to the witness and answers given. See: **VERANADA COSTA@ NSURI VS REPUBLIC,** Criminal Appeal No. 229 of 2007 (unreported). However, this was not the case as what transpired at the trial is discerned at page 10 of the record of appeal as hereunder:

> ***"PW2: ZUHURA YASINI STD 1***
>
> ***Court:*** *The witness seems to be under 7 years let* ***VOIRE DIRE TEST BE CONDUCTED.***
>
> *I am std 1*
> *I am at Primary School at Njiro Primary School*
> *I know my father he is here in court.*
> *My mother is at home."*

However, the finding of the trial court reads as follows:

> *"**Court:** The witness does not understand the nature of oath. Therefore, she will give her evidence without an oath."*

Besides the record missing the questions posed by the trial magistrate, what can be discerned from the responses of the victim are details on her school, the faith she professed and knowledge about her

parents which did not suffice to gauge if the victim understood the meaning of oath or not and if she knew the meaning of telling the truth. In the premises, the finding of the trial court that the witness did not understand the nature of oath, is not backed by the record. In this regard, the victim's account was taken in violation of the law and the omission rendered the victim's account valueless. Thus, we agree with Ms. Njiro to have such evidence expunged as we hereby do.

Having expunged the victim's account, the question at hand is whether the remaining prosecution evidence can sustain the conviction of the appellant. While the appellant faulted the court below to have based his conviction on weak prosecution account to convict, it was Ms. Njiro's assertion that PW3 was the eye witness as he saw the appellant raping the victim as corroborated by the evidence of the doctor and PW1, the victim's father.

At the outset, we wish to restate that in criminal cases the standard of proof is higher as the prosecution must prove the charged offence beyond reasonable doubt. For a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed. See: **MAGENDO PAUL AND ANOTHER VS**

**REPUBLIC** [1993] T.L.R 219 and **JAFARI JUMA VS REPUBLIC,** Criminal Appeal No. 252 of 2019 (unreported).

Given that in the present case the appellant was charged with the offence of rape, a follow up question is whether the charge was proved beyond reasonable doubt. We shall give our answer after scrutinizing the evidence relied upon to ground the conviction. However, we shall be guided by the principle that, the Court rarely interferes with concurrent findings of facts by the courts below unless there has been a misapprehension of the nature, quality of the evidence resulting in unfair conviction or violation of some principle of law, occasioning a failure of justice. See: **DPP VS JAFFAR MFAUME KAWAWA** [1981] T.L.R. 149, **SALUM MHANDO VS REPUBLIC** [1993] T.L.R. 170, **SEIF MOHAMED E.L ABADAN VS REPUBLIC,** Criminal Appeal No. 320 of 2009 (both unreported).

As earlier stated, since the conviction of the appellant was based mainly on the evidence of the victim, PW2, PW3 and PW4 as corroborating witnesses, we think the two courts below did not properly evaluate the entire trial evidence and we shall explain. Given that the victim's account has already been discounted, the remaining prosecution account is that of PW1, PW3 and PW4. According to the charge the

fateful incident was at 20.00 hours at night and PW3 recounted to have seen the appellant raping the victim in the bush. Since it was at night, it was obviously dark and the conditions were ordinarily not conducive for a clear visibility. However, the record is silent on the presence of any source of light at the scene of crime which could have enabled PW3 to clearly see what was happening in the bush. Neither did such evidence come from PW1 who happened to be at the scene of crime. In this regard, it is doubtful if at all PW3 saw the appellant raping the victim. In the premises, the two courts below should have considered the circumstances surrounding the occurrence of the offence before concluding the guilt or otherwise of the appellant.

Moreover, we have gathered that the doctor's account raises eyebrows on whether the victim was raped on the fateful day. The doctor's findings are reflected at page 14 of the record of appeal as follows: -

> *"I examined her but she could not show any sign of being raped. But her vagina was not normal as to her age. As to her age her vagina should be normal. It seemed she had experience the sexual intercourse. I advised her parents that because of no signs of rape*

*no further examination can be done. There were no signs of male sperms or either injuries to her vagina."*

With the above findings, it is glaring that, besides penetration not being proved, PW3's account on the occurrence of rape of the victim on the fateful day is improbable and not worth to be believed having been materially contradicted by the Doctor. This clouds a heavy shadow of doubt on the prosecution case and it was not safe to ground the conviction of the appellant basing on such doubtful prosecution account.

Looking at what was behind the scene of the alleged rape incident, the appellant's defence sheds some light having contended that the charge was fabricated because of a fight between him and PW3. However, the appellant's defence was not considered by the two courts below. It is settled law that, failure to consider defence evidence when dealing with the prosecution evidence is misdirection. See: **HUSSEIN IDD AND ANOTHER VS REPUBLIC** [1986] T.L.R. 166. At page 169 the Court observed:

*"It seems clear to us that the judge dealt with the prosecution evidence on its own and arrived at the conclusion that it was true and credible and as a result he rejected the alibi put forward as a deliberate lie. In our view this is a serious misdirection. The*

*judge should have dealt with the prosecution and defence evidence and after analysing such evidence, the judge should then reach a conclusion. Here Accused 1 was deprived of having his defence properly considered by the judge. In the circumstances we think it unsafe to let the conviction of Accused 1 stand."*

We shall consider the appellant's account given that we are mandated to do what the High Court ought to have done. Given the weak prosecution evidence weighed against the unassailed appellant's defence which is flanked by Awadh Rashid Lyimo DW2 who found the duo quarrelling and warned them not to fight because they were related, it is highly probable that it is the fight which fuelled initiation of the criminal charge. Had the two courts below considered the entire evidence at the trial and subjected it to a thorough scrutiny as we have done, they would not have concluded that the guilt of the appellant was established beyond reasonable doubt.

In the circumstances, the cumulative effect is that the charge was not proved to the hit against the appellant and such, the conviction of the appellant is unwarranted. Therefore, the appeal is merited and it is

allowed. We quash the conviction and set aside the sentence meted and order his immediate release unless held for other lawful cause.

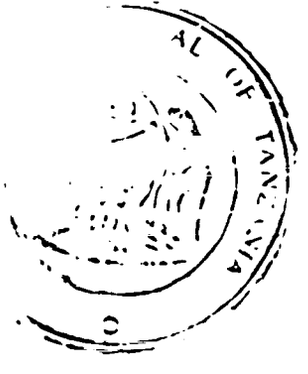
**DATED** at **MOSHI** this 27th day of September, 2023.

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

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

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

The Judgment delivered this 27th day of September, 2023 in the presence of the Appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney and Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



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