IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

MUGASHA, J.A., MWANDAMBO, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 576 OF 2019

SWED ISMAIL MSANGI ....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Fauz , J.)

dated the 18th day of November, 2019
in
DC. Criminal Appeal No. 6 of 2019

JUDGMENT OF THE COURT

25th September, & 2nd October, 2023

MAIGE, J.A.

At the District Court of Same ("the trial Court"), the appellant was charged with the offence of rape c/s 130 (1) and (2) (e) of the Penal Code, Cap. 16, R.E., 2019 ("the Penal Code"). He was accused of having sexual intercourse with his 13 years old step daughter (the victim) at Suji village within Same District in Kilimanjaro Region (the village). The charge alleged a period of sexual misconduct stretching from March to May 2017. The trial court found the appellant guilty of the offence and

sentenced him to thirty years imprisonment. The High Court of Tanzania sitting at Moshi (the first appellate court) sustained the conviction and sentence.

The appellant still believes that his conviction and sentence was incorrect. He has thus brought this appeal which is the subject of this judgment. In the initial memorandum appeal, there were seven grounds whereas in the supplementary memorandum of appeal, ten grounds. In our careful reading, however, the grounds in both the memoranda raise five main complaints. **First**, the appellant was convicted on a defective charge sheet. **Second**, the appellant was sentenced without the penal provision being cited. **Third**, the appellant was convicted based on the evidence of PW1 which was received in violation of the requirement of section 127(2) of the Evidence Act. **Fourth**, the appellant was convicted without his defence being considered; and **Fifth**, the case against the appellant was not proved beyond reasonable doubt.

The substance of evidence on which the appellant was convicted came from five witnesses including the victim herself who testified as PW1. She testified that until July, 2017, she was staying at the village with her mother Namsemba Amon Mtaita (PW4) and her step father, the

appellant. Sometimes between March and May, 2017 while at home, the appellant told her that she had already grown up and he would wish to teach her how to make love. When she refused so to do, the appellant yielded a knife and by force, he had sexual intercourse with her. He repeatedly committed the same sexual misconduct in a subsequent period until in May 2017 when the victim got sexual education from a group of women who visited her school for that purpose. She had a similar education from some sisters who visited the school for that purpose at a Women Day in April, 2017. She went on testifying that; no sooner had she started refusing having sex with the appellant than the latter became furious with her. She was repeatedly being assaulted such that she had scars on her legs. She said, when PW4 went to Chome village to attend her sick mother in July, 2017, she was left in the custody of her grandfather (PW2). She said, before she could depart therefrom, she disclosed the incident to her grandmother.

PW2 testified that on 5th August, 2017 when the victim came at his residence with some wounds on her leg, he asked her what was wrong, and she said, she had been beaten by the appellant allegedly because she did not properly clean the house. He testified further that, a week

after, when the appellant and PW1 came at his residence to take the victim back home, the latter disclosed to her that she had been repeatedly raped by the appellant. He said, having been informed as such, he shared the information with his brother Mkitunda Dengera who eventually shared it with his wife Sara Elihaki Mrindoko (PW3). That, upon being advised by PW3, PW2 reported the incident to the WEO and the former reported it to the police.

PW3 testified that, having been informed of the incident by her husband on 25th August, 2017, she, on the next day, went to the residence of PW2 and, on 27th August, 2017, the matter was reported to the police and the victim taken to hospital for examination. She was examined by Dr. Veronica Benjamini Tumaini (PW5) who established as per exhibit P1 that, though there were no bruises in her vagina, her virginity was not intact.

PW4 testified that, she had been in marital relation with the appellant since 2014 after she had been divorced from her previous husband one James Waziri Mtaita. She told the trial court that, on 14th July, 2017, the appellant assaulted the victim to the extent of causing injury on her leg. She went on that, when she went to take care of her

sick mother sometime in July, 2017, she left the victim in the custody of PW2. She said, when she wanted to take the victim from PW2 after coming back to the village, the latter advised her to wait until the victim finished her examinations. She said, she became aware of the incident on 30th August, 2017 when it was disclosed to her by the WEO.

In his testimony in rebuttal, the appellant vigorously refuted having committed the offence. He associated the case with the misunderstanding between him on the one hand and the biological father of the victim together with his in laws, on the other. He said, the conflict erupted after the victim had passed her primary school examination and her biological father wanted to take her with him so that she could do her secondary education in Morogoro. Clarifying on this, the appellant stated:

> *"I being the step-father and mother and the mother of the child we talked to her and advised the girl to stay here telling her that she will join her biological father's life after she had attained the maturity age, she agreed. Sometime in Jan. 2017, the girl's father came and approached my in-law telling them his intention of taking his daughter, they agreed though my wife did not agree. Your hon. My in-laws decided to fabricate*

this case against me so that I can be away from my wife and my distance was used as a chance of taking that girl by force from Same to Morogoro."

In her judgment, the learned trial magistrate believed the victim's story on the commission of the offence to be true. Though she observed as a fact that, the medical report did not establish of there being bruises in the victim's vagina, she was quick to imply that, it was near to impossible for the doctor to find as such considering the interval between the rape and the medical examination of the victim. That aside, she was satisfied that, the case was proved beyond reasonable doubt. Perhaps as an oversight, she did not at all comment on the appellant's defence. Equally so, for the first appellate court which in effect concurred with the trial court. We note, however, that, at page 95 of the record of appeal, the first appellate court made a general remark that, the appellant's defence did not cast any doubt in the prosecution's case. As we revealed herein above, failure to consider the appellant's defence is one of the grounds of the complaint.

In the conduct of this appeal, the appellant appeared in person without representation whereas the respondent Republic enjoyed the

services of Ms. Revina Tibilengwa, learned Principal State Attorney and Ms. Eliainenyi Njro, learned Senior State Attorney. The appellant when called upon to address the Court on the grounds of appeal, he had nothing to say besides fully adopting his two versions of memoranda of appeal. Ms. Tibilengwa who argued the appeal for the respondent addressed all the grounds and urged us to uphold the conviction and sentence of the two courts below.

With the above exposition of the nature of the controversy, we shall determine the merit or otherwise of the appeal while aware of the well-known principle of law that, in a second appeal like this, the Court would only intervene with concurrent factual findings of the courts below where there is misapprehension of the evidence or where there is a misdirection or non- direction on essential principle of law. We shall be guided by the said principle.

Our starting point is on the complaint in the first ground that, the charge is defective for want of citation of the specific section imposing the penalty. Ms. Tibilengwa conceded that, indeed, the provision creating the punishment, namely, section 131 (2) (e) of the Penal Code was omitted. She submitted, however, that, the omission was a mere trivial

irregularity which could be cured under section 388(1) of the Criminal Procedure Act without causing any injustice. With respect, we entirely subscribe to her contention having satisfied ourselves from the record that, the particulars in the charge encapsulate all elements of the offence and the legal implications thereof and as such, the appellant cannot reasonably claim to have been unable to appreciate the nature and seriousness of the offence he was facing. We have come to such a conclusion because, under the provision just referred, that is the criteria for deciding whether the irregularity has caused any failure of justice as to result into reversal of a decision of the lower court on appeal or revision. Therefore, in the case of **Jamali Ally @ Salum v. R**, Criminal Appeal No. 52 of 2017 (unreported), we stated in relation with this as follows:-

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of*

the offence are curable under section 388(1) of the CPA."

Next is a complaint in the second ground that, the appellant was sentenced without the specific penal provision being inserted in the judgment. The learned counsel for the appellant conceded to the complaint with a note that, the irregularity is curable under section 388(1) of the Criminal Procedure Code. For the same reason as in the first complaint, we agree with the learned counsel that the omission is curable under the respective provision. The complaint is thus dismissed.

We proceed with the third complaint that the evidence of the victim was admitted and relied upon despite not meeting the conditions under section 127(2) of the Evidence Act. For the respondent, it was submitted that, the conditions was fully met as the victim testified on oath after the trial magistrate satisfied herself, upon inquiry that, she did understand the meaning of giving testimony on oath and was capable of giving rational answers.

Our examination of the record of appeal reveals at page 8 thereof, that the appellant did give evidence on oath. We have also observed that, before testifying as such, the trial magistrate asked the victim among

others, if she understood why do people take oath and she responded, "I know the meaning of taking oath, is the commitment to speak the truth not lies". Having made the inquiry as afore stated, the learned trial magistrate resolved that the witness was capable of testifying on oath. With respect, she was correct, for the answer the victim gave in relation to the question just mentioned, suggested in our view that, she was not only able to testify on oath but more so to give rational answers to the questions posed on her. On that account, thus, we find the complaint devoid of any merit and dismiss it.

This now takes us to the third ground of complaint that, the appellant' defence was not considered. On this, Ms. Tibilengwa was admissive right away that, indeed the appellant's defence was not considered by either of the two courts below. That being the case, she urged us, which we accept, that we should step into the shoes of the first appellate court and scrutinize the respective defence evidence in line with the prosecution case and find out if it raised any reasonable doubt. We shall do so as we are considering the last complaint. Having said that, we turn hereunder to the last ground of complaint in which we shall also consider the appellant's defence.

The complaint in here is that the case against the appellant was not proved beyond reasonable doubt. From the two versions of the memoranda of appeal, besides his defence not being considered, the appellant has pinpointed three areas of weaknesses in the prosecution case most of which goes to the credibility of the testimony of the victim. **First**, the victim's delay to report the incident. **Second**, contradictions in the prosecution evidence. **Third,** failure to consider the circumstances surrounding the incident.

In response to this, Ms. Tibilengwa contended that, the evidence of PW1 as corroborated by PW2 and PW4 proved beyond reasonable doubt that; it was the appellant and no one else who committed the offence. She submitted that , the evidence being that of the victim, was the best evidence in law and the two courts below rightly placed reliance on it to convict the appellant. To that effect, she referred us to the case of **Selemani Makumba v. R.** [2006] T.L.R. 379. The delay to report the incident, she submitted, was justified on the reason that the appellant threatened to eliminated the victim should she disclose what happened to her. She ruled out there being any contradictions in the prosecution evidence. With regards to the defence evidence, she submitted that the

same did not raise any reasonable doubt on the prosecution case. In conclusion, therefore, she urged us to dismiss this ground of complaint.

We shall start our discussion with a note that, this being a criminal case, the prosecution had a duty to establish, beyond reasonable doubt that, the appellant is the one who was behind the offence. Should any reasonable doubt be observed, it is settled, it has to be resolved for the accused. This is because, it is settled, it is better that ten guilty persons escape than one innocent suffers.

Much as we agree with the learned Principal State Attorney that; the evidence of the victim is the best and can, under section 127(6) of the Evidence Act, be solely relied upon to sustain conviction, it is our understanding that for such evidence to be believed, it must be credible and probable. The question which follows, therefore, is whether such evidence was credible and probable as to link the appellant with the offence without any reasonable doubt.

As we observed in **Mathias Bundala v. R**, Criminal Appeal No. 382 of 2016 (unreported), the test involved in determining such a question is "whether his or her testimony is probable or improbable when judged by the common experience of mankind". The probity or otherwise of a

testimony, it is equally the law, cannot be judged by having a glance over one piece of evidence in isolation of the other. Quite apart, the evidence has to be weighed in line with other pieces of evidence inclusive that of the defence. Thus, in **Shabani Daudi v. R.**, Criminal Appeal No. 28 of 2000 (unreported), we observed:-

> *"The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused."*

The offence under discussion allegedly happened between March and May, 2017 and it was disclosed in August, 2017. There is an interval of hardly three months period in between. The appellant contends that, the delay to mention him in the circumstances of this case, raises doubt on the credibility of the victim's story. However, before we examine this claim, we find it necessary to start with a caveat that, delay in disclosure of the sexual misconduct though may be relevant to the victim's credibility, it cannot *ipso facto* give rise to adverse inference against the credibility of such witness. This is because victims of rape do react

differently after sexual abuse. Therefore, to decide whether the delay affects the credibility of the witness, the same has to be assessed in the light of all facts of the case. We shall adopt this approach in resolving the controversy.

The evidence of the victim asserts that the sexual abuse under discussion took place repeatedly from March to May, 2017 in the dates and times, she could not remember. Her evidence, it would appear, has a detailed account on what happened on the first incident. From there, she said, the appellant repeated the wrong on several occasions. She could, however, not remember how many times did the appellant rape her. Much as the victim could probably forget the dates on which she was sexually abused, it is highly improbable for her not to recall the estimated time of the happening of at least some of the incidents. The victim was of 13 years old. She had just passed her primary school education. The trial magistrate before receiving her evidence conducted an inquiry and established that she was intelligent enough to be examined under oath. It is uncommon for such a girl not to recall how many times she was sexually abused in the events which lasted for just a period of less than three months.

The victim's evidence about whether the appellant raped her demonstrates yet another inconsistency and contradiction. While in her evidence in chief she said, "*the accused used to make sex several times especially on Friday*", in her testimony under cross examination at page 11 of the record she said, "*We normally do together at the farm on Sunday.*"With the total silence of the dates and times of the happening of the incidents in her evidence this may render the probative value of her evidence questionable.

A further factor to be considered is that, although the victim said at page 10 of the record that she disclosed the incident to her grandmother (PW3) who in turn revealed it to PW2, the evidence of the latter suggests that, the incident was revealed to him by the victim and thereafter he disclosed it to PW3's husband. In the premises, it is difficult to make out a sufficiently cohesive version.

More to the point, her story suggests that one month after the incident, a team of sisters visited her school to educate pupils about sexual awareness. Of significance to note from her evidence is the fact that, the said sisters advised them not to allow anyone to abuse them sexually and in case they had been raped, they "should report to the

proper authorities." Perhaps coincidental, one month after, another group of women came at the school and reminded them about the same. Yet, despite being severally beaten as a result of refusal to have sex with the appellant, she could not dare disclose it to any of the groups of the women. Neither her teachers. She could not disclose it to her mother too. More so, when she was asked by PW2 on 5th August, 2017 why she was being beaten by the appellant, she did not say it was because of the incident. Instead, she said, the reason was that she did not clean the house properly. Conversely, when the appellant wanted to take the victim back home, she was quick to disclose the incident to PW2. This would defeat the proposition that the delay to disclose the incident was due to the fear to be killed by the appellant.

Besides, the timing of the disclosure when looked at in line with the defence, raises a doubt if the story was not, as claimed by the respondent, framed up to deny the appellant and her wife custody of the victim. We say so because of a number of reasons. **First**, while the evidence of the victim suggests that the appellant started beating her in May, 2017 when she refused having sex with him, the evidence of her mother (PW4) is specific that, the victim was assaulted for the first time

on 14th July, 2017. It is the same month when the victim shifted to the residence of PW2 where she subsequently disclosed the incident.

Two, PW4 claims that she left the victim to PW2 in July 2017 when she had travelled to Chome to attend her sick mother (PW3). Quite unusually, throughout her testimony, PW3 did not assert sickness in the alleged period or at all. Neither that she had been in attendance by PW4. Indeed, her evidence does not mention PW4 at all. This being one of the material events surrounding the alleged disclosure of the incident by the victim, it is highly questionable why could it be forgotten in PW3's evidence.

Three, while PW2 claimed to have been informed of the incident one week after 5th August, 2017 and subsequently reported it to the WEO, the date when he reported the same is not in his evidence. We note, however, that, in his evidence at page 15 of the record of appeal, PW4 suggests that the incident was reported to the WEO on 30th August, 2017. We wonder why could it take so long to report the incident.

Still on the same point, PW2 claims that after the disclosure in question he quickly shared the information with the husband of PW3 who in turn informed the latter. In her evidence, PW3 claims that she was

informed of the incident by PW2 on 25th August, 2017 and two days after she reported to the police and advised PW2 to take necessary steps. We wonder again, if the story is true, was it natural for PW2 not to disclose the same to anyone, including, as we said above, the victim's mother, until such time. It is equally improbable how would PW2 who was the victim's grandfather not report the incident until he was requested by her sister in law PW4 who was not even in the custody of the victim.

Four, the incident, according to the prosecution evidence was reported to the police, District Educational Officer and WEO. More importantly, PW2 testified that, at the office of the WEO, the appellant confessed commission of the offence. Yet, neither the WEO nor the WEO was called to testify and no reasons therefor is in evidence. The police investigation officer who would be much conversant on how the incident was reported and investigated into was equally, for undisclosed reasons, not called. In view of the gaps in the prosecution case as pointed out above and the nature of the appellant's defence, it is without any doubt that, the witnesses above mentioned were very material in clearing the doubt in the prosecution case. Thus, in **Yohana Chibwingu vs. R. ,**

Criminal Appeal No. 177 of 2015 (unreported), dealing with more or less a similar issue, the Court observed:

> *"Failure to call the chairman, the investigator or District Commissioner to whom, PW1 allegedly reported the robbery is a very serious omission in the case for the prosecution, because it leaves a lot of important questions unanswered. This is compounded by the absence of an identification parade for PW2 and PW3 to identify the perpetrators of the crime. These unanswered questions create serious doubts, which doubts must be resolved in favour of the appellant."*

Arriving at such conclusion, the Court reasoned as follows:-

> *"At the end of hearing of this appeal, we kept on asking ourselves a number of questions to which we had no answers. The appellant charged with a serious offence of robbery. Was the offence not investigated by the police? If so, who investigated it? Why wasn't the investigator called to testify? If he had testified he would have answered several questions, including for instance, whether PW1 gave a description of the appellant in the first report? Did he really abscond? Was any statement taken from the appellant about the instant? We have also wondered why weren't the chairman of the appellant's village or District*

Commissioner to whom PW1 said reported, called to testify?

We made a similar observation in **Boniface Kundakira Tarimo v. R.**, Criminal Appeal No. 350 of 2008 (unreported) where we stated:-

> *"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 inference may be drawn against that party, even if such inference is only permissible."*

Much as it is upon the prosecution to decide who should be called as witnesses, the position of the law is such that, if a person who is unreasonably not called as a witness is a material witness, the prosecution is bound to produce him and if not, the Court may draw an adverse inference for the omission (See **Aziz Abdallah vs. R.** [1991] T.L.R. 71.

In view of what we have demonstrated above, we are of the opinion that, the evidence of PW1 when appraised, as we did, in line with other evidence and the circumstances of the case, was too good to be believed. As such, it left so many questions unanswered which

questions raised reasonable doubt which should be have been resolved for the appellant. Accordingly, we quash and set aside the appellant conviction and sentence and order for his release from prison custody unless held there for some other lawful cause.

Order accorrdingly.

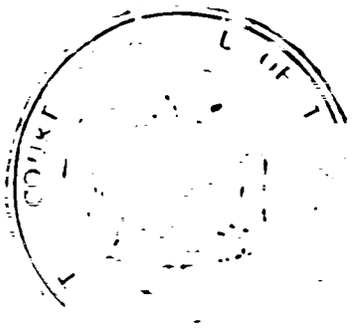
DATED at **MOSHI** this 30th day of September, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of October, 2023 in the presence of the Appellant in person and Ms. Bertina Tarimo, 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