IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 593 OF 2020

JOHN NGUSA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Shinyanga)

(Lukuna, SRM Ext. J.)

dated the 13th day of November, 2020

in

Criminal Appeal No. 75 of 2020

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JUDGMENT OF THE COURT

4th & 12th December, 2023

KOROSSO, J.A.:

The appellant herein, John Ngusa is challenging the judgment of the Resident Magistrate's Court (Lukuna, SRM Extended Jurisdiction) in Criminal Appeal No. 593 of 2020 delivered on 13/11/2010. The decision affirmed the conviction and sentence imposed by the District Court of Shinyanga at Shinyanga (the trial court) on 24/8/2005, in Criminal Case No. 336 of 2004. The trial court had tried him for the offence of rape contrary to sections 130(1) and (2)(e) and 131(1) and (3) of the Penal Code, Cap 16 of the Laws of Tanzania. The expounded particulars of the offence were that the appellant, on 30/11/2004 on or about 16.00 hours at Miyuguyu village, Kishapu District within Shinyanga Region, did have

carnal knowledge of the victim (PW3), a girl aged 8 years old. The appellant pleaded not guilty, and at the end of the trial, the appellant was convicted of the offence charged and sentenced to thirty (30) years imprisonment. Dissatisfied, he preferred the present appeal to the Court.

What we can gather from the evidence adduced by four witnesses for the prosecution is that the appellant lived in the house of Emmanuel Nkinga (PW2) which neighboured Madaha Ng'wandu's (PW1) house in Miyuguyu village, Kishapu District, Shinyanga Region. On 30/11/2004 at about 16.00 hours, PW1 went to his brother's (PW2) house, and upon entering the appellant's room, he saw the appellant lying on top of PW3, his niece and PW2's daughter, having sexual intercourse. Upon seeing them, he rushed out to find PW2 at his father's house and reported the incident. Thereafter, together with PW2 they went back to the crime scene and managed to apprehend the appellant. The matter was reported to the Village Executive Officer and later to the Police and PW3 was taken to the hospital for medical examination with a PF3 on hand. The PF3 was filled by a doctor at the hospital. However, he was not called to give evidence and it was thus tendered in evidence by PW2 and admitted as exhibit P1. PW1 and PW2 gave evidence that they did examine PW3's private parts and saw bruises and sperm in her vagina. The cautioned statement of the appellant was tendered by C3476 D/Sgt Peter and admitted as exhibit P2. On his part, the appellant denied the

charge and evidence adduced by the prosecution witnesses and contended that the incident was fabricated and founded on the failure of PW2 to honour a debt obligation of Tshs. 105,000/= he owed to the appellant despite various efforts by the appellant to recover it. After a full trial, satisfied that the prosecution had proven the charges beyond reasonable doubt, the trial court convicted the appellant and sentenced him accordingly as already stated herein.

The appellant was aggrieved and thus appealed to the High Court where the hearing of his appeal was transferred to the Resident Magistrate's Court Shinyanga Region, before Lukuna, SRM with Extended Jurisdiction, who dismissed the appeal in its entirety, hence the present appeal. The appellant filed two memoranda of appeal on 30/4/2021 and 21/11/2023, premised on a total of seven (7) grounds of appeal that fault both the trial and first appellate courts essentially on the following grievances:

1. Failure to properly evaluate the evidence of the victim (PW3) and PW1 which was contradictory and inconsistent particularly on the circumstances of his apprehension after the alleged incident and thus cannot corroborate each other.
2. Impropriety of the admission of the appellant's cautioned statement which was involuntarily taken.

3. The fact that the age of the appellant (DW1) having been disputed the issue was not properly addressed in the determination of the case at the trial and appeal.
4. Impropriety in consideration of the evidence of PW3 which did not comply with *voire dire* rules or requisite legal requirements when recording the evidence of a child of tender age.
5. The age of the victim was not proved since no witness testified on it.
6. Lack of medical evidence to corroborate and prove penetration against the victim to prove rape charge against the appellant.

On the day the appeal came before us for hearing, the appellant was present in person, fending for himself, whereas, Ms. Mwamini Yoram Fyeregete, learned Senior State Attorney represented the respondent Republic assisted by Mr. Louis Boniface Mbwambo and Ms. Mboneke Alexander Ndimubenya, learned State Attorneys.

On taking the floor to amplify his grounds of appeal, the appellant commenced by adopting all the grounds of appeal filed and prayed for the appeal to be allowed and for him to be set to liberty. He proceeded to expound his grounds of appeal randomly. The appellant contended that his conviction by the trial court and its affirmation by the first appellate court was erroneous because the evidence adduced by the prosecution witnesses was not watertight casting a lot of doubts that the

courts failed to take cognizance of, in the determination of the case. He went on to narrate incidents that he implored us to address; one, the improbability of PW1's evidence. He argued that PW1's evidence was that upon entering the appellant's room and seeing him and the victim having sexual intercourse, he left to go to find PW2 who at the time, was on his farm working, a farm situated about one kilometre away. Two, the different times of the incident adduced by the witnesses. He contended that while PW1 and PW2 alleged the time of the incident was around 16.00 hours, PW3 stated it was at night. Three, whereas, the evidence of PW2 stated that when he was informed of the incident he rushed back to arrest the culprit having gathered some villagers to join him, however, no villager was called to testify apart from PW1, the police officer (PW4) and the victim (PW3). Four, the circumstances of his arrest. While PW3's evidence was that after PW1 came into the room and saw her and the appellant, the appellant jumped through the window and disappeared, PW1 and PW2 stated that they arrested him when they came together and found him still there with PW3. According to the appellant, the evidence of the prosecution witnesses was contradictory, and it was thus improper for the trial and the first appellate court to find them to be credible witnesses and rely on their evidence to convict him.

The appellant also faulted the trial court for failing to properly address the issue of his age being under eighteen at the time of his trial, He argued that the trial court should have ordered a hospital to examine him to determine his age after his mother failed to prove his age. He finalized his submission contending that in the absence of evidence from a medical expert and since the PF3 was improperly admitted into evidence despite patent irregularities, the prosecution witnesses failed to prove penetration or that he committed the alleged offence as charged. He thus prayed for his appeal to be allowed.

In response, Ms. Fyeregete commenced by pointing out that she supported the conviction and sentence meted out by the trial court and affirmed by the first appellate court. She then proceeded to respond to ground one of the additional grounds of appeal on the impropriety of the *voire dire* test conducted on PW3. She conceded to the ground stating that after the trial court found that PW3's intelligence was not up to standard, in compliance with section 127(2) of the Tanzania Evidence Act, (the Evidence Act), and that PW3 should have been discharged from giving any evidence unsworn or otherwise. She thus prayed that her evidence be expunged from the record. The learned Senior State Attorney asserted that even if PW3's evidence was to be expunged as prayed there remains ample evidence from PW1 and PW2 to sustain the conviction of the appellant for the offence charged.

On the first and second grounds of appeal found in the memorandum of appeal that addressed contradictions in the evidence of PW1 and PW3 on the arrest of the appellant, she implored us to rely on the evidence of PW1 and PW2 since it was found to be credible by the trial court. She contended that PW1's evidence was to the effect that he witnessed the appellant having carnal knowledge of PW3 and rushed to report to her father, PW2, which led to the arrest of the appellant at the crime scene.

Regarding ground two of the additional memorandum of appeal alleging that the age of PW3 was unproven, Ms. Fyaregete contended that the complaint is misconceived since on page 8 line 11 of the record of appeal, PW1 stated that the victim was eight years old. Nevertheless, she argued that even if that evidence was not considered, the fact that the victim was under the age of 18 cannot be challenged, since the trial court proceeded to conduct a *voire dire* test before recording her testimony, which plainly shows that the victim was under fourteen years of age. She implored us to find the ground of appeal to lack substance.

In response to ground three found in the additional memorandum of appeal addressing whether penetration was proved in the absence of evidence from a medical expert, she alleged that although the first appellate court expunged the PF3 (exhibit P1), penetration was proved by the evidence of PW1 and PW2 who testified that after the incidence,

they examined PW3's private parts and saw bruises and sperms. She urged us to find the ground unmerited.

The third ground found in the memorandum of appeal challenges the trial court's reliance on the cautioned statement of the appellant (exhibit P2). The learned Senior State Attorney argued that since the first appellate court expunged the cautioned statement, it is no longer an issue and it was not relied upon to affirm the conviction and sentence. She thus implored us to find the ground misconceived and unmerited.

On the issue of the age of the appellant at the time of the commission of the offence and the trial, Ms. Fyaregete argued that the appellant raised the issue when giving his testimony as a defence witness, and the trial court exercised its discretion to call his mother as a witness to address the issue but unfortunately, she failed to bring any evidence to support the appellant's claims. In those circumstances, she argued, it is the appellant who failed to prove that he was under eighteen years of age at the time, and it was not the duty of the court to assist him in proving his own age. She thus implored us to find the complaint to lack substance. She concluded by imploring us to find the appeal unmerited and dismiss it.

The appellant's brief rejoinder was a reiteration of his earlier submissions on the unreliability of the evidence of the prosecution

witnesses and went on to argue that penetration was not proved since PW1 and PW2 were not experts to determine whether there were sperms or not. He also argued that in a traditional setting examining PW3's private parts a father and or an uncle was highly improbable. He thus urged us to allow the appeal for the reason that the prosecution failed to prove its case against him to the standard required.

We have carefully considered the submissions by the contending parties and perused through the record of appeal, plainly the conviction of the appellant was essentially based on the trial court's reliance on the evidence of PW1, PW2 and PW3 together with exhibits P1 and P2 which led it to find that the prosecution had proven the charges against the appellant. On the part of the first appellate court, although it expunged exhibits P1 and P2, it held that the ingredients of the offence charged were amply proved by the evidence of PW1, PW2 and PW3.

In this appeal, we will begin addressing ground one of the additional grounds that challenged consideration of the evidence of PW3 whilst the *voire dire* test was improperly conducted and the fact that she did not promise to tell the truth. It is important to note here that the evidence of PW3 was taken on 9/3/2005 before the amendments of section 127(2) of the Evidence Act by Act No. 4 of 2016 which came into operation in 2016. It is the said amendment that changed the prerequisites for recording the evidence of a child of tender age and

introduced the requirement for a trial magistrate or a judge to require a witness of tender age to promise to tell the truth to the court and not to tell any lies. Therefore, the appellant's argument that section 127(2) of the Evidence Act was not complied with for the reason that PW3 did not promise to tell the truth and not tell lies, we find it to be misguided.

Nevertheless, suffice it to say that at the time PW3 testified, section 127(2) of the Evidence Act required the conduct of a *voire dire* test before taking the evidence of a child of tender age. We find it important to reproduce what transpired in court when PW3 was called to testify on 9/3/2005.

> *"PW3: (Victim), Sukuma 8 yrs a standard two pupil, x-tian*
> *Section 127 TEA 1967*
> *2 +2 - PW3's reply = 5*
> *-What is the name of your father- PW3's reply- Nkinga*
> - *Do you know the meaning of taking the oath? She does not know the meaning of taking an oath.*
>
> *This court is satisfied that PW3 (victim) does not possess special intelligence however; she shall adduce the unsworn evidence.*
>
> ***R. M. GWAE***
> ***RESIDENT MAGISTRATE***
> ***09/03/2005"***

Certainly, the above excerpt shows that there was an attempt by the trial court to conduct a *voire dire* test before recording the evidence of PW3. In the case of **Mwilali Mussa v. Republic**, Criminal Appeal No. 18 of 2017 (unreported), the Court held that;

> *"The purpose of a voire dire test under section 127(2) of the Evidence Act is to ascertain whether or not a child of tender age is competent to testify. It is also intended to ascertain whether a child understands the nature of an oath or if he does not, whether or not he knows the duty of telling the truth".*

(See also, **Khamis Samwel v. Republic**, Criminal Appeal No. 320 of 2010, **Omary Kurwa v. Republic**, Criminal Appeal No. 89 of 2007 and **Juma Raphael v. Republic**, Criminal Appeal No. 42 of 2003 (all unreported)).

As correctly expounded by the learned Senior State Attorney, upon determining that PW3 had no sufficient intelligence, the trial court erred in proceeding to record her evidence as unsworn and thereafter relying on it to convict the appellant. This is because, upon such determination on the poor level of her intelligence, PW3 was incompetent to testify because of her tender age within the provisions of section 127(1) of the Evidence Act, and as held in the case of **Khamis Samwel v. Republic** (supra), her evidence was thus valueless. We thus find that with due

respect, the first appellate court erred by failing to properly address this issue and relying on PW3 evidence to affirm the appellant's conviction despite the witness being incompetent. We thus expunge the evidence of PW3 from the record. Therefore, this ground has merit.

The law has always been that in sexual offences, evidence of the victim is the best (see **Selemani Mkumba v. Republic** [2006] T.L.R. 379. However, a conviction may still be sustained if there is some other cogent evidence on the record as held in **Nyasani Bichana v. Republic** (1958) E.A. 190 and **Khamis Samwel v. Republic** (supra). Therefore, having expunged PW3's evidence and taking into account that the first appellate court did expunge exhibits P1 and P2, the PF3 and the appellant's cautioned statement, the underlying issue for our determination is whether there remains sufficient evidence on record to sustain the appellant's conviction for the offence charged. It is important to note that, when addressing this issue, grounds one and two of the memorandum of appeal and grounds two and three of the additional grounds will be considered and determined conjointly.

The learned Senior State Attorney submitted that the remaining evidence of PW1 and PW2 was sufficient to prove penetration and that it was the appellant who committed the offence, while the appellant argued that PW1 and PW2's evidence be found to be unreliable for being contradictory and inconsistent, particularly on the circumstances and

time he was apprehended. The appellant also questioned the absence of any evidence from a medical expert to corroborate the evidence alluding to there being evidence proving penetration.

Indeed, to prove the offence of rape contrary to sections 130(1), (2)(e) and 131(1), (3) of the Penal Code for which the appellant was charged, the prosecution side was expected to prove one, the age of the victim; two, penetration; and three, that it is the appellant who was the culprit. While section 130 (1) provides for the offence of general rape, section 130 (2) (e) of the Penal Code provides for statutory rape as hereunder: -

> *"Section 130(1) -It is an offence for a male person to rape a girl or a woman.*
>
> *Section 130 (2)-A male person commits the offence of rape, if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions;*
>
> *(a) - (d) Not applicable*
>
> *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man".*

It has been previously held that in proving the charge of statutory rape, one important ingredient is proving the age of the victim. In **Alex**

Ndenya v. Republic, Criminal Appeal No. 340 of 2017 (unreported) we stated:

> *"... age is of utmost importance and in a situation where the appellant was charged with statutory rape then the age of the victim must specifically be proved before convicting the appellant".*

(see also, **Winston Obeid v. Republic**, Criminal Appeal No. 23 of 2016 and **Aloyce Maridadi v. Republic**, Criminal Appeal No. 208 of 2016 (both unreported)).

The other ingredient to be proved is penetration and that it was the accused who did it. On the importance of penetration to prove a charge of rape, in the case of **Mathayo Ngalya @Shaban v. Republic**, Criminal Appeal No. 170 of 2006 (unreported), we stated:

> *"The essence of the offence of rape is penetration of the male organ into the vagina... For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence".*

In the instant appeal, in terms of section 122 of the Evidence Act, we agree with the learned Senior State Attorney that under the circumstances, there is no doubt that the victim was under the age of eighteen years. This is so, since a *voire dire* was conducted before recording her evidence as reflected in the record of appeal. We, however, do not agree with her contention that there was proof that PW3 was eight years old at the time of the incident. This is because such an assertion is founded on only the testimony of PW1, PW3's uncle, whom we find is not the best witness to be relied upon to prove the age of the victim where a parent also testifies and fails to mention the said age, like in the instant case. On this, it is also important to note that the first appellate court erred in stating that PW2 also testified that PW3 was aged 8 (see page 60 line 15 of the record of appeal). It has been held before, that testimonies on the age of a victim, should come from the victim, her parents, birth certificates, school records, or medical experts. Therefore, we remain with the fact that PW3 was under the age of eighteen years of age.

On the issue of whether there was penetration, it is on record that in determining this issue, the first appellate court after having expunged the PF3, like the trial court, it also relied on the evidence of PW3, to prove penetration. The learned Senior State Attorney invited us to consider the evidence of PW1 and PW2 to find that penetration was

proved. She stated that PW1 and PW2 were found to be credible witnesses by the trial and first appellate courts and testified that they saw sperm and bruises in the private parts of the victim and that this proved penetration.

In delving into this issue, it is also important to address the credibility of PW1 and PW2, who as argued by the learned Senior State Attorney were found to be credible witnesses and whose evidence was relied upon by both the trial and the first appellate courts in the conviction of the appellant. Indeed, it is a well-established principle that every witness deserves credence. In the case of **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003 (unreported), the Court held that:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".*

In another case, **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported) the Court observed that:

> *"...the credibility of a witness is the monopoly of the trial court but only in so far as the demeanor 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. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including the accused".

In the instant case, as alluded to by the appellant, we have found obvious inconsistencies and contradictions in the evidence of PW1 and PW2 regarding the circumstances leading to the apprehension of the appellant and proof of penetration. On page 8 of the record of appeal PW1 stated that on 30/11/2004 at about 16.00 hours, he went to his brother's (PW2) house and found "*this accused committing carnal knowledge/sexual intercourse to my daughter, my brother's daughter (PW3)*" in a room used by the appellant for residential purpose. He went on to state that after having seen them, he proceeded to his father's residence to inform PW2 about the event, and upon arrival back from their father's residence they found the appellant still with PW3. He went on to state that; "*My brother Emmanuel then decided to go to sub-village chairman and Village Executive Officer and by then we had already arrested the accused and roped him.*" He stated further; "*Myself saw sperms on the vaginal parts of (PW3) and some bruises around the vagina*".

On his part, on the same matter, on page 9 of the record of appeal, PW2 is recorded to have stated:

"I was at the shamba during the alleged act of rape. I was informed this incident by PW1. PW1 also informed my wife when I reached at my residence. I found the accused not continuing committing the said offence and other villagers arrested the accused, this accused confessed the offence to us and Village Executive Officer. We particularly observed that the vaginal parts (sperms)".

What we gather from the above excerpts is that while PW1 states that it was PW1 and PW2 who arrested the appellant, PW2 stated that it was the villagers. While PW1 stated that immediately after witnessing the incident he rushed to find his brother at their father's house, PW2 stated that at the time he was at his farm. What is not clear is where PW2 got the information about the incident at the farm of his father's residence, and the exact time that elapsed between PW1 seeing the incident and coming back to the crime scene with PW2 and arresting the appellant. There is nowhere, in the testimony of PW1, where you gauge that at the time of arresting the appellant, there were other villagers around. These inconsistencies in their testimonies leave doubts on the veracity of the adduced evidence. There is also the testimony of PW1 and PW2 on having seen sperm and bruises in PW3's vagina. One wonders, if according to PW2, that PW1 had also told his wife of the incident, wouldn't she be the one to examine PW3, a girl of that age?

Was it probable for a father and/or uncle to examine a young girl's private parts under the circumstances? Especially if there is also evidence that when PW2 came he had other villagers. We are also doubtful of their evidence of having seen sperms in the victim's private parts after the incident, without giving a further explanation on what made them determine what they saw if they did, to be sperm, not being medical experts or experts in sperm identification.

We are alive to the general principle that the second appellate court is not expected to interfere with the concurrent findings of facts made by the lower courts unless there is misapprehension of evidence (see, **The DPP v. Jaffar Mfaume Kawawa** [1961] T. L. R. 149 and **Mussa Mwaikunda v. Republic** [2006] T. L. R. 387. Moreover, in the instant appeal, undoubtedly, determining the credibility of PW1 and PW2 is crucial in determining whether or not the prosecution proved its case against the appellant to the standard required. We find that the doubts we have discerned emanating from contradictions and inconsistencies of the evidence of PW1 and PW2 are material, having failed to resolve them in any way. In consequence, we are inclined to depart from the findings of the trial and first appellate courts that PW1 and PW2 were witnesses of truth. We are of the view that all the grounds of appeal we have addressed above have merit to the extent we have shown.

All in all, we are of the firm view that the appeal is meritorious and thus allow it. We quash the conviction and set aside the sentence imposed against the appellant. We further order for the immediate release of the appellant from custody unless held for other lawful purposes.

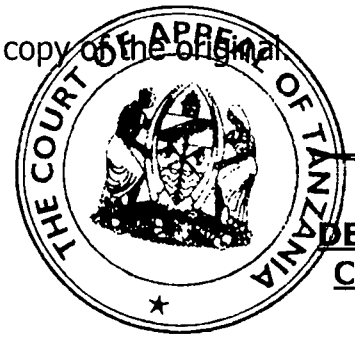
DATED at **SHINYANGA** this 11th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2023 in the presence of the appellant in person and Mr. Louis Boniface Mbwambo, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL