

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 242 OF 2021

JUSTUS EVARIST APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Court of the Resident Magistrate of
Bukoba with Extended Jurisdiction at Bukoba)**

(Luambano, SRM-Ext. Jur.)

Dated the 29th day of March, 2021

in

Criminal Appeal No. 22 of 2021

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JUDGMENT OF THE COURT

4th & 14th December, 2023

WAMBALI, J.A.:

The Court of the Resident Magistrate of Bukoba (the trial court) at Bukoba convicted the appellant, Justus Evarist of the offence of rape of a girl aged 17 years (hereinafter to be referred as the "victim" or "PW3") contrary to the provisions of sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16 (the Penal Code). It thus sentenced him to thirty years imprisonment. Unfortunately, his appeal to contest the said decision which was transferred to the Court of the Resident Magistrate of Bukoba (the first appellate court) presided over by Luambano, Senior Resident Magistrate (SRM) with Extended Jurisdiction, was dismissed in its entirety.

Still discontented, the appellant has appealed to this Court to challenge the decision of the first appellate court which confirmed the findings of the trial court.

The allegation which confronted the appellant at the trial court was to the effect that, on 15th October, 2019, during morning hours at Kibirizi Village within Bukoba Rural District in Kagera Region, he had carnal knowledge of the victim.

In support of the prosecution case, it was the evidence of the victim (PW3) that on the fateful date, she was sent by her father, Scarion Petro (PW2) to fetch fire from the house of the appellant. At the appellant's house, PW3 met Paschal, his son, who was in the kitchen and was told to wait in the sitting room. She accordingly complied with the direction. Suddenly, the appellant who had put on a bed sheet emerged from his bedroom, started to touch her and later threw her down on her back. Then the appellant removed her skirt, pant and inserted his penis in her vagina. PW1 testified further that during the sexual intercourse, Paschal went to see what was going on but was chased away by the appellant. The victim continued to shout for help but the appellant covered her mouth with a bed sheet and proceeded to rape her until when he retreated to his bedroom after one person, known as Aman approached the door.

Thereafter, the victim left the place to his home where she reported the incident to PW2.

It is on the record that after the said information, PW2 summoned the appellant for interrogation but he did not admit committing the offence. PW2 also summoned Paschal in the presence of PW3 who conceded that he witnessed the incident of rape committed by his father. Before the arrest of the appellant, PW2 called a ten-cell leader, one Joseph, a woman called Afisa and some neighbours to his place of residence and informed them of what transpired at the scene of crime. They arrested the appellant and went together to Ombweya Primary School where the victim studied. The head teacher, Franco Ndyamukama, gave them the letter to go to the Police Station. However, before PW2, the appellant and other persons stated above reported the incident to the Police Station, they went to Kibirizi Ward Office where PW2 was given another letter by the Ward Executive Officer. At the Rubale Police Station the appellant was put under custody and interrogated before he was charged in court on allegation of committing the offence of rape.

Both PW1 and PW2 testified that medical examination of the victim was conducted at Rubale Dispensary on the same date and that the report was sent back to the Rubale Police Station. Nonetheless, no medical examination report was tendered at the trial and indeed, the doctor did

not appear to testify. Besides, during cross-examination by the appellant, the victim (PW3) stated that she was not shown the result after the said medical examination. On the other hand, PW2 stated that after the doctor examined PW3 they were given another letter written in English and they sent it to the Police Station.

Reginald Constantine (PW1), a teacher at Ombweya Primary School testified that, on the material date at around 7:30 hours, he received a phone call from a ten-cell leader of Lwobutagasi hamlet, Ombweya Village in Kibirizi Ward, one Matungwa who informed him that his pupil, the victim, had been raped and that the rapist was under custody. Thus, PW2 and his colleagues were on the way to Kibirizi Ward Office to report the incident. PW1 therefore reported the incident to the headmaster of the school, Franco Ndyamukama and thereafter he proceeded with his duty of registering voters in the Voters Register.

In the appellant's spirited defence, though he admitted that he was the neighbour of PW2 and that he knew PW3, he strongly contested the allegation levelled against him by the prosecution. He testified that on the said date at around 8:05 hours while he was in his garden cultivating, he was called by PW2 to go to his house where he was informed that he had carnal knowledge of the victim. That he was surprised because on that morning he never saw PW3 at his residence. He testified that during the

said interrogation, initially when he asked the victim why he told her father (PW2) about the incident, while it was not true, she did not say anything and instead she was laughing. He contended that he could not have done that act in the presence of his children who were able to understand what transpired. Besides, he wondered why Paschal, his son, and Aman who allegedly witnessed the incident were not summoned to testify for the prosecution. He stated that when he was sent to Ombweya Village Office, there were many women and doctors who told PW2 to let them examine PW3 but he refused on the argument that the hospital was small and that it did not qualify to examine her. The appellant told the trial court that when he further asked PW3 why she made the allegation against him, she answered that it was her father who initiated the matter.

Having analyzed and considered the evidence of the parties on the record, the trial court found the appellant guilty, convicted and sentenced him to imprisonment as intimated above.

The appellant's memorandum of appeal consists eight grounds of appeal. However, before the hearing of the appeal, it was agreed by the parties and the Court that the appellant's complaints in those grounds can be compressed into three. One, credibility and reliability of the evidence by the witnesses for the prosecution. Two, failure to summon some

material witnesses at the trial court. Three, whether the prosecution case was proved beyond reasonable doubt.

Basically, in support of his appeal, the appellant requested us to consider his grounds and allow the appeal on the contention that, overall the prosecution case was not proved to the required standard.

In response, Ms. Judith Mwakyusa, learned Senior State Attorney assisted by Ms. Edith Tuka, learned State Attorney who appeared for the respondent Republic outrightly supported the appellant's appeal. Ms. Mwakyusa submitted that in the first place, the evidence of PW3 did not precisely show how the offence was committed and thus the doubts raised by the appellant were not adequately resolved by the two courts below. She stated that unfortunately, in the circumstances of this case, though the victim stated that she was examined by a doctor after the incident, no medical report was tendered by the prosecution to support her allegation. Besides, she stated, the evidence of PW2 cannot be relied to corroborate the evidence of PW3.

Secondly, the learned Senior State Attorney submitted that failure by the prosecution to summon two other persons as witnesses, namely Paschal and Aman who allegedly witnessed the incident weakened its case. In her submission, the said witnesses were material to support the story of PW3. To strengthen her submission, she referred the Court to its

decision in **Omary Hussein @ Ludenga and Another v. The Republic**, (Criminal Appeal No. 547 of 2017) [2021] TZCA 543 (30 September 2021, TANZLII) in which further reference was made to the case of **Aziz Abdalla v. The Republic** [1991] T.L.R. 71.

Ms. Mwakyusa concluded her submission by urging the Court to allow the appeal on the contention that the prosecution case was not proved beyond reasonable doubt.

It is beyond controversy that in a criminal case, the prosecution is bound to prove the charge laid against the accused beyond reasonable doubt. In **Mohamed Haruna @ Mtupeni and Another**, Criminal Appeal No. 25 of 2007 (unreported) the Court stated that:

"Of course; in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

On the other hand, the accused has to raise a reasonable doubt on the prosecution case.

We are also aware that in a case of this nature, the best evidence springs from the victim as held in **Seleman Makumba v. The Republic**

[2006] T.L.R. 379 and several decisions of the Court. Indeed, in terms of section 127(6) of the Evidence Act, Cap 6, the court can convict the accused based on the evidence of the victim if it believes it to be the truth of what transpired.

Nonetheless, the evidence of such a witness must be subjected to careful scrutiny before reaching the conclusion that she is credible, see **Majaliwa Ithemo v. The Republic** (Criminal Appeal No. 197 of 220) [2021] TZCA 304 (15 July 2021, TANZLII).

It is also pertinent to point out that the credibility of a witness is the monopoly of the trial court. However, depending on the circumstances, the Court can also determine the credibility of a witness on the second appeal. In **Shabani Daudi v. The Republic**, Criminal Appeal No. 28 of 2001 (unreported), it was stated that:

"The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."

Reverting to the case at hand, having considered the evidence of PW3 amid the defence of the appellant, we are of the view that her evidence cannot be wholly relied upon to ground the appellant's conviction. Similarly, the evidence of PW2 cannot entirely support that of PW3.

We hold this view because; firstly, PW3 did not disclose the estimated time when she went to the appellant's house and for how long did the incident take place. During cross-examination, PW3 stated that the appellant started raping her at 7:00 hours. On the other hand, though PW2 did not state the time he sent PW3 to the house of the appellant, he testified that the rape incident took about 25 minutes. Nonetheless, PW2 did not say whether he was told about this fact by PW3. Moreover, PW1 testified that he was informed concerning the incident by Matungwa, a ten-cell leader at 7:30 hours. In his defence, the appellant testified that he was called by PW2 to go to his residence at 8:05 hours while he was working in his garden. The appellant's defence on this matter was not challenged by the prosecution. In view of the uncertainty on the time when the incident occurred, clarification by PW3 would have helped to clear the doubts, much as, being the victim, she was in a better position to disclose the truth.

Secondly, during examination in chief PW3 said that Paschal also witnessed the incident. During cross examination, she testified that there were four persons in the house including the appellant. Particularly, she stated:

"In your house there were four people, you and your three children Paschal of 7 or 8 years who is the oldest, Tumsime who is a child of around 3 years old and Mwesiga younger brother to Tumsime don't know his age. Paschal came and saw us but you chased him away. You have a wife but when I came to your house, I did not see her..."

From the above excerpt, it is clear that the evidence of PW3 was not consistent with what she stated on the number of persons who were in the house of the appellant during the time of the alleged incident. It is in this regard that, in his defence, the appellant testified that he told PW2 during the interrogation at his house that day that he could not have raped PW3 at his residence in the presence of his children who were not so young as they could understand what transpired at the alleged scene of crime.

Thirdly, both PW3 and PW2 stated that Paschal was called and interrogated at their residence and conceded that the incident occurred as alleged and that his father was involved. However, both of them did

not state whether the said concession by Paschal was disclosed in the presence of the appellant or before or after he was called by PW2. Unfortunately, Paschal was not summoned at the trial to clear doubt on the matter.

Fourthly, PW3 testified and was supported by PW2 that, after the incident she was examined by a doctor at Rubale Dispensary and a report was sent to the Rubale Police Station. However, the said report was not tendered at the trial by the person who examined her as he did not also appear to testify. It is appreciated that the offence of rape can be proved even without medical evidence which mostly supports that of the victim with regard to penetration. In **Ally Mohamed Mkupa v. The Republic**, Criminal Appeal No. 2 of 2008 (unreported), the Court stated that:

"It is true that PF3 (exhibit P1) would have supported the commission of the offence but rape is not proved by medical evidence alone. Some other evidence may also prove it."

It is noteworthy that considering the evidence of the parties at the trial, it is doubtful if PW3 was really examined. Though PW3 stated that the medical report was prepared and that she was not told of the findings, no investigator from the Police appeared to testify whether the said report was received at the Rubale Police Station as testified by PW2. Besides, PW2 did not state what was the finding of a doctor who examined PW3.

Indeed, the said doctor did not appear to testify at the trial and no plausible explanation was given by the prosecution. Moreover, it is in the testimony of PW2 that among those who accompanied him and others to go to report the incident at the Kibirizi Ward Office, was a woman called Afisa. It is not clear why the said woman did not examine PW3 at that initial stage. The doubt on the issue of medical examination is further strengthened by the defence of the appellant when he stated:

"...Then they took me to the Ombweya Village Office and they just asked my name and my age. There were many women and doctors who told Scarion to let them examine his child but Scarion refused saying that their hospitals were so small. Scarion said that everything will be discovered at the police station. Then they took me to the Rubale Police station they asked my name and my age, told me to take off my jacket and they locked me up...until now I don't know if the child was examined and I was not examined either. On the alleged date that child... never came to my house."

It follows that since the evidence of PW1 and PW2 was based on what they were told, the evidence of PW3 cannot on its own be relied upon to ground conviction of the appellant. Therefore, in the circumstances of this case, medical evidence would have assisted to support PW3's evidence with regard to the issue of penetration as

required by law. In the result, we find the first ground of appeal meritorious and allow it.

With regard to the second ground, we entirely agree with the learned Senior State Attorney that apart from other witnesses who were mentioned by PW2 and PW3 to have been aware of the occurrence of the incident, the evidence of Paschal and Aman who allegedly witnessed the same was important. It is thus surprising why the prosecution did not summon those material witnesses to support its case.

It is the law that, in terms of section 143 of the Evidence Act, the prosecution is not bound to parade before the trial court a specific number of witnesses to support its case. However, depending on the circumstances of each case, failure by the prosecution to summon some material witnesses may be detrimental to its case. In this regard, in **Gabriel Simon Mnyele v. The Republic**, Criminal Appeal No. 437 of 2007 (unreported), it was held that:

*"...under section 143 of the Evidence Act (Cap 6 R.E. 2002) no number of witnesses is required to prove a fact – see **Yohanis Msigwa v. The Republic** (1990) T.L.R. 148. But it is also the law (section 122 of the Evidence Act) that the court may draw adverse inference in certain circumstances against the prosecution for not*

*calling certain witnesses without showing any sufficient reasons-see **Aziz Abdalla v. The Republic** (1991) T.L.R. 71."*

Moreover, in **Kisinza Richard v. The Republic** [1989] T.L.R. 143 the Court held that:

"The prosecution is under prima facie duty to call all material witnesses who from their connection with the prosecution in question are able to testify on all material facts. If such witnesses are not called without sufficient reasons, the court may draw an adverse inference to the prosecution."

In the circumstances, since there is no material on the record to explain why the prosecution did not summon Paschal and Aman to testify despite being material witnesses, both the trial and first appellate courts were enjoined to draw adverse inference to its case. We accordingly draw it and allow the second ground of appeal.

Based on the conclusion we have reached in the first and second grounds with regard to the credibility and reliability of the witnesses and the failure by the prosecution to summon material witnesses, it is clear that the case against the appellant was not proved beyond reasonable doubt. In this regard, had the first appellate court thoroughly analyzed the evidence of both sides on the record as demonstrated above, it could have found that the prosecution case was not proved to the hilt. It is

therefore not surprising that the counsel for respondent Republic did not contest the appellant's appeal. In the event, we allow the third ground of appeal.

In the end, we allow the appeal, quash the conviction and set aside the sentence meted on the appellant. Ultimately, we order that the appellant be released forthwith from custody, unless his incarceration is in connection with other lawful cause.

DATED at BUKOBA this 12th day of December, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in the presence of the appellant in person and Mr. Kanisius Ndunguru, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL