IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 247 OF 2021

SUMITU ABDALLAH ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Bukoba at Bukoba with Extended Jurisdiction)

(Luambano, SRM (Ext. Jur.)

dated the 29th day of March, 2021

in

Criminal Appeal No. 29 of 2021

JUDGMENT OF THE COURT

5th & 14th December, 2023

KHAMIS, J.A.:

In this second appeal, Sumitu Abdallah, the appellant, protests his innocence on a charge that was allegedly fabricated on him. He was arrested about five years ago, and arraigned in the Resident Magistrates' Court of Bukoba at Bukoba on 22nd day of January, 2019 on a charge of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16 [the Penal Code].

The prosecution alleged that, on 12th day of January, 2019 during evening hours, at Machinjioni area within Bukoba Municipality, Kagera

Region, he had carnal knowledge of a girl whose name is withheld (to be referred to as the victim, BB or PW1) aged 10 years old.

Upon denial of the charge, the case proceeded to trial which saw five witnesses testifying in support of the accusation. Following a ruling that he had a case to answer, the accused testified under oath and paraded two more witnesses to negate the prosecution's allegations.

In the ensuing judgment, the trial magistrate found the charge was proved beyond reasonable doubts and convicted the appellant. He was accordingly sentenced to serve a term of thirty (30) years imprisonment with 12 strokes of the cane.

Aggrieved by the conviction and sentence, the appellant preferred an appeal in the High Court of Tanzania at Bukoba. The appeal was transferred to the Resident Magistrates' Court of Bukoba at Bukoba with Extended Jurisdiction. The same was heard by Luambano, Senior Resident Magistrate with Extended Jurisdiction who, by a judgment handed down on 29th March, 2021 found the appellant was properly convicted and dismissed the appeal in its entirety.

Still aggrieved, the appellant raised six grounds of appeal on the basis of which he asked this Court to quash the conviction and set aside the sentence. The said grounds of appeal can conveniently be rephrased as follows:

1) That, both the trial court and the first appellate court erred in law and fact in convicting the appellant and upholding a sentence against him relying on the doubtful evidence and declining to consider the critical DNA evidence whose results exonerated the appellant from the charge of rape and thus violating section 395A of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA).
2) That, the trial court and the first appellate court erred in law in convicting and upholding a conviction and sentence against the appellant while ignoring a discrepancy in the age of the victim which was inconsistent in the charge sheet, clinic card and testimony of her mother (PW2).
3) That, the evidence adduced by the medical doctor (PW3) was incredible and unreliable as the PF 3 was not filled in immediately after the incident such that no elements of rape could be traced.
4) That, in sheer disregard of sections 110 and 112 of the Evidence Act, Cap 6 [The Evidence Act], the trial court and the first appellate court failed to scrutinize the evidence on record and uncover the fabrication exhibited by the prosecution's failure to bring witnesses who allegedly arrested the appellant.
5) That, the trial court and the first appellate court erred in law and fact in admitting the victim's evidence (PW1) without conducting

a voire – dire as per the requirements of section 127(2) of the Evidence Act.

6) That, the trial court and the first appellate court erred in law and fact in failing to take adverse inference against the prosecution case for failure to bring witnesses who claim to have arrested the appellant.

When the appeal was called on for hearing before us, Mses. Judith Mwakyusa, learned Senior State Attorney, Edith Tuka and Alice Mutungi, learned State Attorneys, appeared for the respondent Republic. The appellant was present in person, unrepresented.

Addressing the Court, the appellant adopted the contents of the six grounds of appeal as his submissions. He contended that, he was a victim of a frame-up and moved us to allow the appeal and acquit him. The appellant referred us to the evidence on record and pointed out that, PW2, the victim's mother, had orchestrated two similar events before the incident in question and that, upon cross examination, PW2 conceded occurrence of almost an identical incident in 2012 which involved the victim and DW2.

That piece of evidence, the appellant said, corroborated the evidence of DW1 and DW2 who insinuated PW2 as the habitual plotter for rape by fabricating evidence to implicate different men involving the same

victim. He strongly asserted that, PW2 stitched up the incident to maliciously incriminate him, an innocent man.

The appellant asserted that, he was subjected to a DNA examination whose results showed a non - involvement in the alleged rape incident. According to him, the victim was strategically sent to his Kiosk pretending to collect utensils used for lunch prepared by PW2, a food vendor. According to him, there were three kiosks between PW2's business stall and his kiosk at Machinjioni Street.

He faulted the first appellate court for upholding a conviction against him in sheer disregard of a contradiction in the victim's age which sharply differed between the charge sheet, the clinic card (exhibit P1) and the testimony of PW2. Further, the appellant implored us to disregard contents of PF3 (exhibit P3) for being unreliable as it was allegedly recorded out of time.

On the other hand, Mses. Edith Tuka and Alice Mutungi supported the conviction and the sentence meted against the appellant, arguing that the prosecution case was proved beyond reasonable doubt.

Starting with the second ground of appeal, Ms. Tuka conceded that, the charge sheet, clinic card and PW2's evidence differed on the age of the victim. She was quick to add that, the variation was immaterial as it did not affect merits of the case and explained that, according to the

charge sheet PW1 was ten (10) years old but the clinic card and PW2's testimony revealed she was actually eleven (11) years old.

Responding to a question by the Court on what steps were taken by the prosecution to address the situation, the learned State Attorney conceded that, the prosecution failed to take remedial action in amending the charge in line with section 234 of the CPA. That notwithstanding, Ms. Tuka relied on the case of **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 [2016] TZCA 266 [18 October 2016, TANZLII] in submitting that, evidence of a parent is sufficient to prove age of the victim of rape or any other sexual offence.

The learned counsel further cited two decisions of this Court, **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 [2016] TZCA 218 [26 April 2016, TANZLII] and **Robert Sanganya v. Republic**, Criminal Appeal No. 363 of 2019 [2022] TZCA 18 [10 February 2022, TANZLII] in asserting that, PW2's testimony could independently and sufficiently establish the age of the victim.

On the fifth ground of appeal, Ms. Tuka contended that, the trial court's proceedings reflected at page 9 of the record showed compliance with the mandatory requirements of section 127 (2) of the Evidence Act as the victim promised to tell the truth before she testified. The learned State Attorney invited the Court to keep abreast with the recent

developments in law in which section 127 of the Evidence Act was amended by introducing subsection (7) vide the **Legal Sector Laws (Miscellaneous Amendments) Act**, No. 11 of 2023 and contended that, procedural laws such as that one can apply retrospectively. To buttress the point, she relied on the case of **DPP v. Iddi Hassani Chumu**, Criminal Appeal No. 430 of 2019 [2021] TZCA 3540 [23 December, 2021, TANZLII].

In that case, this Court drew inspiration from the book, **Interpretation of Statutes,** *2008 Edition*, Universal Law Publishing Co. New Delhi, India; and the following decided cases; **A v. The Governor of Arbour Hill Prison** [2006] 1 ESC 45; **Suzarra Jorrede St. Jorre and 4 Others v. Nacisse Stevenson**, Civil Appeal SCA and 6/2015; **John Gichovi Muturi v. Republic**, Misc. Criminal Application No. E 011 of 2021; and; **Farijala Shaban Hussein & Another v. Republic**, Criminal Appeal No. 274 of 2012 [unreported] in holding that, judicial decisions which establish precedents have retrospective effect in cases that are being decided and those which are pending or still to come before the court.

On the third ground of appeal which challenged evidence of the medical doctor (PW4) who examined the victim and contents of the PF3 (exhibit P3) as incredible and unreliable, the learned counsel dismissed

the allegation as unfounded. She contended that the PF3 was filled in by the medical doctor about two and half hours after the incident as reflected at pages 51 and 52 of the record of appeal. Further, she contended that, the appellant's concerns were sufficiently addressed by Dr. Eustace Tibanga (PW4) as reflected at pages 25 to 28 of the record.

On her part, Ms. Mutungi covered the fourth and sixth grounds of appeal. Responding to an allegation that the case was fabricated and an omission to parade material witnesses was fatal, she contended that PW2 sufficiently testified on how the appellant was arrested and there is no law which requires a specific minimum number of witnesses to prove a charge. Relying on **Goodluck Kyando v. Republic** [2006] T.L.R. 363, she argued that, witnesses are assessed by their reliability and credibility and not their numbers.

Pressed to comment on the appellant's assertion that, PW2 was the habitual plotter for rape incidents, the learned counsel conceded that, the doubts created at the scene of crime could be easily cleared if other material witnesses who were present at the scene were called to testify.

On the sixth ground of appeal, Ms. Mutungi referred us to section 143 of the Evidence Act and reiterated that, the law has not prescribed a minimum number of witnesses required to prove the charge. She also cited **Phinias Alexander & 2 Others v. Republic**, Criminal Appeal No.

276 of 2019 [2020] TZCA 1898 [16 December 2020, TANZLII] in which this Court having observed that, none of the neighbours who initially attended the victim was paraded as a prosecution witness, concluded that, the omission leaves a lot to be desired as those neighbours were in a position to corroborate or negate the victim's testimony.

In rejoinder, the appellant reiterated his earlier submissions and had nothing to add.

As this is a second appeal, our mandate is confined to a consideration of questions of law only. The two courts below had a concurrent finding of fact and therefore, we are bound to be circumspect in re-evaluation of the evidence on record in order to establish on whether there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law or procedure. This is the legal stance re-stated in **Amiratial Damodar's Maltase and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31.

Upon going through the grounds of appeal and the parties' rival submissions, we propose to start with the fifth ground of appeal in which the appellant faults the first appellate court for failure to find that the trial court received the evidence of PW1 without conducting voire dire. Voire dire is a French term implying the duty to speak the truth. It denotes the

preliminary examination done by the court to a person presented as a witness or juror, where his competency, interests or capacity is objected to by the law or facts (https://thelawdictionary.org/voir-dire/).

In Tanzania, it is settled law that in receiving the evidence of a child of tender age, the conditions stipulated under section 127 (2) of the Evidence Act have to be complied with. The provision reads:

> *"127 (2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth."*

This sub-section has received judicial interpretation in a plethora of authorities. In **Mathayo Laurence William Mollel v. Republic**, Criminal Appeal No. 53 of 2020 [2023] TZCA 52 [20 February 2023, TANZLII], this Court held that:

> *"We respectfully think that if a child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with...We understand the legislature used the words "promise to tell the truth to the court and not to tell lies". We think tautology is evident in the phrase, for, in our view, "to tell the truth" simply means "not to tell lies". So, a person who promises to tell the truth is in effect promising*

not to tell lies. The tautology in the subsection is, in our opinion, a drafting inadvertency."

In **Sixmund Angelus Masoud v Republic**, Criminal Appeal No. 85 of 2021 [2023] TZCA 1760 [5 September 2023, TANZLII], we considered the testimony of the victim (PW2) who promised to tell nothing but the truth which led the trial court to remark that; "she had promised to tell the truth" and concluded that:

"...to us, as argued by the learned Senior State Attorney, that means that, PW2 promised to tell the truth and not lies. Therefore, section 127 (2) of the Evidence Act was complied with..."

In the instant case, the trial magistrate recorded answers given by the victim (PW1) in response to questions put across her by the trial court, thus:

"....to tell the truth is good unlike to tell lies. To tell lies is a sin before God, so I will tell the truth...."

The record of appeal manifest that, the trial magistrate conducted an investigation to establish whether the child victim was sufficiently intelligent to justify reception of her evidence, further, and that, she understands the nature of an oath and the duty of speaking the truth. In the circumstances, we join hands with the learned State Attorneys that,

section 127 (2) was complied with. As such, this ground of appeal has no merits and it crumbles.

On the second ground of appeal, the appellant averred that there was a discrepancy in the age of the victim which should be concluded in his favour. He contended that, the evidence of PW2 and contents of the clinic card (exhibit P1) contradicted the charge sheet on the age of the victim.

There is no doubt that in an offence such as rape where age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubts. This stance has been repeatedly stated by this Court. In **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 [unreported], we enunciated that:

> *"The evidence in a trial must disclose the person's age, as it were. In other words, in a case such as this one where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim. Under normal circumstances, evidence relating to the victim's age would be expected to come from any or either of the following: the*

victim, both of her parents or at least one of them, a guardian, a birth certificate, etc."

The importance of proving age of a victim in statutory rape under the Penal Code cannot be overemphasized. It is not in doubt that the age of a victim is an essential ingredient of the offence of statutory rape and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In **Abdul Athumani v. Republic** [2004] T.L.R 151, this Court observed that:

> *"The age of the victim of rape is important in sentencing. Under section 131 (3) of the Penal Code as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998: If the victim is under the age of ten years, the sentence is life imprisonment If the victim is not under the age of ten years section 131 (1) provides for imprisonment for a period of not less than thirty years with corporal punishment and an order to compensate the victim."*

Admittedly, the charge sheet appearing at pages 1 to 2 of the record show the victim was ten (10) years old at the time of the incident. However, PW1 stated that, she was eleven years old while PW2 went on record saying the victim was born on 12th April, 2007. Equally, the clinic card (exhibit P1) indicated the same date of birth implying that, on 12th

January, 2019 when the incident allegedly occurred, the victim was about 11 years old.

In **Robert Sanganya v. Republic** [supra] a similar concern cropped up. The charge sheet indicated the victim was 14 years old while PW2, the guardian, stated that, she was 13 years old at the time of the incident. The victim herself (PW1), testified that, she was 14 years old. Resolving the issue, we held that:

> *"However, it is our opinion that whether the victim was fourteen or thirteen years of age, still, she was under the age of eighteen years. Notwithstanding the variance of the age in the evidence as claimed by the appellant, such variance was inconsequential..."*

Applying the reasoning in **Robert Sanganya v. Republic** [supra] to the present situation, we are of the opinion that, the variation in the testimony of PW2, contents of exhibit P1 and the charge sheet is inconsiderable as it is not contested that she was below 18 years. For the said reasons, we find no merits in this ground of appeal which is accordingly dismissed.

On the third ground of appeal, the appellant faulted the lower courts for failure to find the medical doctor (PW4) was incredible and the PF3

she filled was unreliable. The learned State Attorneys made general response on the allegation.

We have inspected the PF3 (exhibit P3) which show the victim was examined by the medical doctor about two and half hours after the incident and noted with concern that, the medical doctor heavily relied on the information supplied to her by PW2 instead of her own findings on examining the witness. We also noted that in the process, she introduced fresh contradictions. Her report (exhibit P3) partly reads; *"biological mother reported to find her young daughter with a male person sleeping on the bed with sexual act going on in a naked manner..."*

Whereas PW1 and PW2 said the appellant forcefully pulled the victim to the mattress and stoutly penetrated her, exhibit P3 show the girl was cheated to have sexual intercourse on a bed. It is equally noted that, throughout her testimony, apart from generally referring to exhibit P3, PW4 did not orally testify on the actual findings of her medical examination on the victim. In view of what we have stated on the contents of the PF3 (exhibit P3), we discard it from being relied in evidence and in view of the evidence of PW4, we allow the third ground of appeal.

On the first ground of appeal, the appellant faulted the lower courts for failure to consider that, he was exonerated of the offence by the

findings of the Chief Government Chemist in the DNA examination report. The learned State Attorneys submitted that, the report did not exonerate him of the offence as it only stated that the samples collected were weak and that, there was no legal requirement to prove rape through DNA.

PW4 Eustace Tibanga, a medical doctor at the Bukoba Regional Referral Hospital, testified that, she examined the victim and filled in the PF 3. She also collected forensic samples from the appellant and the victim for purposes of the DNA. The samples were given to the police for onward transmission to the Chief Government Chemist.

PW5 G 3680 D/C Ulaya, ensured that the collected samples were timely and appropriately dispatched to the Chief Government Chemist. According to PW5 results of the test showed that, the samples could not be detected for lack of quality. We have inspected a report of the Chief Government Chemist dated 12th February, 2019 (exhibit P4) exhibiting negative findings on the DNA test.

Relevance of the DNA test was addressed by this Court in a number of cases including: **Christopher Kandidius @ Albino v. Republic**, Criminal Appeal No. 394 of 2011; **Juma Mahamudu v. Republic**, Criminal Appeal No. 47 of 2013 [both unreported]; and **Aman Ally @ Joka v. Republic**, Criminal Appeal No. 353 of 2019 [2021] TZCA 170 [4 May 2021, TANZLII]. In the latter case, we pointed out that:

"We also find untenable the claim that no DNA or STD evidence on the appellant was introduced to corroborate the victim's medical test results. We endorse the learned state counsel's submissions that there is no legal requirement for use of such evidence..."

In this case, the findings of the Chief Government Chemist in the DNA test (exhibit P4) cannot support the prosecution case and therefore, we allow the first ground of appeal.

Next is the fourth ground of appeal under which the appellant challenged the findings of the first appellate court for failure to scrutinize the evidence on record. This assertion is not an idle talk. In the petition of appeal filed in the first appellate court, the appellant complained that, the trial magistrate failed to consider that, he was a victim of circumstances on account of fabrication by the victim and her mother (PW1 and PW2).

In its judgment, the first appellate court watered down that assertion on the strength of the evidence of PW1, PW2, and PW4 and held that the prosecution proved its case beyond reasonable doubt.

To the best of our knowledge, the first appellate court is charged with the duty of re-assessing the evidence on record. In fact, it proceeds by way of re-hearing and re – evaluation of the entire evidence on record.

As the second appellate court, we are entitled to expect that the first appellate court discharged its duty sufficiently and gone beyond debating what is on record or repeat findings of the trial court. The first appellate court is expected to consciously and purposely subject the entire evidence to thorough inspection so as to arrive at its own independent conclusion on the factual issues.

In the present case, the first appellate court evaluated the prosecution evidence on record and arrived at a conclusion that the appeal was devoid of merits. It is noted that, in the entire judgment of the first appellate court there was no re-evaluation of the evidence led by the accused or defence evidence. This omission, in our view, was prejudicial to the appellant's case, as it prevented that court from arriving at a more informed and reasoned judgment.

To keep the record straight, we are inclined to start with the defence case. The appellant (DW1) testified that, soon after consuming pumpkins prepared by PW2 as his lunch for the day, he felt asleep and powerless. Suddenly, a crowd led by PW2 invaded his Kiosk and accused him of raping the victim. On the gist of the fabrication, DW1 stated that:

> *"Then Joyce (victim mother) took some water from my water basket (container) (kept) in my room and started to paint me on my trouser at the out part of my penis. She did so twice. I tried to*

wake up but I couldn't. Many people were surrounding me. I tried defending myself but they did not listen to me. They told me that even my trouser was wet with sperms. I removed my trouser and showed them my underwear which did not have any sperms only the trouser which was wet with the water Joyce had put on my trousers. I requested to be taken to the police station. They took me to the Bukoba Police Station. I did not rape the girl (victim) even the people who arrested me and took me to the police station were not mentioned before this court, and they were not brought before this court as witnesses. I am the third person to be accused for raping the victim. There are two other people accused before for raping this girl. I pray to tender a charge sheet against another person for raping this same girl (victim)."

The record of appeal shows the appellant's (DW1) prayer to tender in evidence charge sheet involving Colonel Kashai (DW2) and the victim in an incident which occurred in the year 2012 was successfully objected to. However, the contents of that document were well covered by DW2 who disclosed that, he was also a victim of rape fabrication by PW2 and PW1. On examination in chief, he said that:

"I recall in 2012 the mother of the victim accused me for raping her child, the victim in this case who

by then was still very young, before starting kindergarten. After investigation, it was found that I was not responsible, but I was arrested, taken to the police and then arraigned before the District Court of Bukoba. The child (victim) was taken to hospital then it was found that the accusation against me was false. At the end, I was acquitted. Before the acquittal, her husband (husband of the victim's mother) wanted me to give him money for him to withdraw the case but I did not agree to that. The matter ended when the victim was 6 (years old). It was found that the victim's mother was sending the victim to men so that later on she could accuse them for raping her and then she would start demanding money from them. And it was a fact in our street at Machinjioni Street near NHC Kashai. I am the neighbour to the victim's mother place of business and the victim started to have sexual relationship with men in her young age. So when the accused (appellant) was accused for raping her, I knew that it was a made up story like it happened to me before. That is why I am here to tell this Court the truth."

The evidence of DW1 and DW2 was corroborated by the testimony of PW2 Joyce Stephano, who on cross examination by the appellant as reflected at page 14 of the record, admitted that:

"In 2012 the same incident happened to the victim but I was not there at my place of work... Even those who arrested Mzee Kashai disappeared..."

From the testimonies of DW1, DW2 and DW3, it is not disputed that, the appellant was not the first person to be accused of raping the victim. Colonel Kashai (DW2) was charged in the District Court of Bukoba for the similar incident in 2012 and acquitted. As in the present case, the previous episode took place at Machinjioni Street, and witnesses involved in arresting him, disappeared. In the circumstances, a cautious look is required in examining the record to clear out the doubts expressed by the appellant and DW2.

Our examination of the record of appeal reveals inconsistency and contradiction in the prosecution case. This is vividly seen in the evidence of the key witnesses, PW1 and PW2. Proceedings show that, PW1 informed the trial court that when she arrived at the appellant's kiosk to collect plates, she found him lying on the mattress inside a room and he pulled her there. When she raised an alarm, the appellant increased the volume of a radio and shuttered her mouth. She further testified that, as the ordeal continued, she kept calling her mother for assistance who heard the call and arrived for a rescue.

On the other hand, PW2 gave a different account of the event. She narrated that, PW1 was sent to pick plates from the appellant's kiosk but

was late to return, and therefore she became suspicious and decided to follow her. Upon arrival at the appellant's kiosk, she did not find her all around the kiosk. Later on, she was informed by neighbours that, the girl was actually inside the kiosk and she decided to storm in. At the door of the room, she found the victim's sandals, popularly known as '*yeboyebo*' and inside she found the pair in *flagrante delicto*.

It is evident that PW2 did not hear the victim yell for help and the neighbours who were just outside the timber-made kiosk were as deaf as a beetle. On a cross examination, PW1 stated that, there are three different kiosks between her mother's business stall and the appellant's kiosk. Records show Machinjioni Street is a business area and the incident took place during day time. The businessmen and customers in the area were busy at the time. How possible could it be that, all the neighbours around the place did not hear the victim call for help but her voice was heard by PW2, who was then very far from the scene? To us, this is a contradictory narration that leaves a lot to be desired.

The two prosecution witnesses also contradicted each other on how the alleged rape was executed at the scene. Describing the scene, PW1 testified that, the kiosk was divided into two parts: the front room used as a shop for selling tomatoes, onions and other consumables; and a room at the back with a mattress inside. Whereas during examination in chief,

she explained that, the incident occurred on a mattress in the back room. On cross examination, the victim said the radio was kept in the front room. We think it is not out of place to wonder, as to how the appellant managed to increase the volume of a radio located in a different room away from where he was allegedly raping the victim? To us, that is unimaginable.

At this state of affairs, we are reminded of the decision in the case of **Nkanga Daudi Nkanga v. Republic**, Criminal Appeal No. 316 of 2013 [unreported], wherein the Court discarded the testimony of the appellant who had two versions of the incident and found him untrustworthy. We adopt that line of reasoning in respect of the evidence of PW1 and PW2 as demonstrated above, and allow the fourth ground of appeal.

In the sixth ground of appeal, the appellant challenged the first appellate court for failure to draw an adverse inference against the prosecution for failure to bring as witnesses neighbours who arrested him. This ground is related with the preceding ground.

It is trite law that, where a witness who might have been expected to be called and to give evidence on a matter, is not called by the prosecution, the question is not whether the court may properly reach conclusions about issues of fact but whether, in the circumstances, it should entertain a reasonable doubt about the guilt of the accused.

We are mindful that section 143 of the Evidence Act provides that, no particular number of witnesses is required to prove any fact in a case. We are also aware that, in **Goodluck Kyando v. Republic** [2006] T.L.R. 363, this Court held that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing him or her.

We are equally aware that, the leading authority on this point is **Bukenya & Others v. Uganda** [1972] E.A 549 wherein the defunct East African Court of Appeal held that:

> *"1. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.*
>
> *2. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.*
>
> *3. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."*

In the case of **Bukenya & Others v. Uganda** [supra], the Court was categorical that the prosecution is not expected to call the excess of witnesses. The adverse inference will only be made by the court if the prosecution evidence is not or barely adequate. Accordingly, it will not be

inferred where evidence tendered is sufficient to prove the particular issue or the entire case. In order for the adverse inference to be made, the evidence of the missing witness must be such as would have elucidated a matter. The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the particular case.

In the present case, the record speaks in volume on the importance of the witnesses who were present or participated in the arrest of the appellant. There is a serious allegation that PW2 fabricated the case against the appellant and manufactured evidence. In our view, presence of those witnesses in court was necessary to clear the air around the appellant's arrest bearing in mind the contradictions we laboured to point out in the evidence of PW1 and PW2.

In the circumstances of this case, we exceptionally find that, the prosecution's failure to call the people who arrested the appellant at the scene was detrimental to its case as it remained with doubts that should be decided in favour of the appellant. For that reason, we allow the sixth ground of appeal.

Having regard to our findings in each ground of appeal, we are of the considered opinion that, the charge of rape was not sufficiently proved to warrant the appellant's conviction. Apart from PW1, PW2 and PW4 whose evidence have been discussed at length, the remaining two

witnesses are PW3 and PW5, police officers involved in the investigation of the case whose testimonies were mainly hearsay.

In the result, we find the appeal meritorious and accordingly allow it, quash the conviction and set aside the sentence meted out against the appellant. Finally, we order the immediate release of the appellant from custody unless he is otherwise held for other lawful cause.

DATED at **BUKOBA** this 13th day of December, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in 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