IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., LEVIRA, J.A, And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 519 OF 2021

SHABANI SALIMU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from Decision of the High Court of Tanzania, Dodoma at Dodoma)

(Masaju, J.)

dated the 03rd day of September, 2021

in

DC Criminal Appeal No. 18 of 2020

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JUDGMENT OF THE COURT

12th & 21st December, 2023

LEVIRA, J.A.:

Shabani Salimu, the appellant, was aggrieved by the decision of the High Court of Tanzania at Dodoma (the High Court) on first appeal, Dc Criminal Appel No. 186 of 2020 which was dismissed for lacking in merit. In the said appeal, the appellant had challenged the decision of the Resident Magistrate's court of Singida at Singida (the trial court) which convicted him of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap 16 (the Penal Code) and sentenced him to serve a term of thirty (30) years in prison. Following the decision of the High Court, the appellant has preferred the present appeal.

It is on record that on 16th June, 2019 at about 15:00 at Bugantika Village, Matongo Ward, in Ikungi District and Region of Singida, the appellant did have sexual intercourse with 13 years old girl whom we shall refer to as the victim or PW1 to protect her dignity. The incident, occurred when the victim and her sister's son one Paulo Nkinga (PW5) met the appellant on the way as they were coming from another village going back to their village. According to PW1, the appellant left the son of her sister to go home and he grabbed her hand, took her to the bush, strangled her neck, removed her clothes, raped her and she started bleeding. PW1 screamed for help and her sister Helena Bundala (PW4) came for her rescue, the appellant ran away and PW1 was taken back home.

The incident was reported to the local leader by PW4, the appellant was arrested at Matongo Centre by villagers and taken to the village office. The victim and the appellant were sent to Ikungi Police Station and later the victim was sent to the hospital for medical examination. The evidence of PW1 was corroborated by that of PW4, PW5 and one Sophia Ibrahim (PW6) who happened to see the accused trailing PW1 and PW5. The incident was investigated by WP. 7575 DC Dalahile (PW7) who also took PW1 to the hospital where she was examined by Tibaijuka Katunzi (PW9), Medical Doctor. In his examination, PW9 discovered that PW1 had

bruises on her vagina with tear on her clitoris. He then filled the PF3 which was admitted as exhibit P2 during trial.

While at the police station, the appellant was interrogated and his cautioned statement (exhibit P1) was recorded by No. F 7175 DC. Athuman (PW8) who testified that the appellant confessed before him to have committed the charged offence. The appellant was then taken before the justice of peace one Simon Kayinga (PW10) to whom he also confessed that he committed the offence which he was charged with. The appellant's extra judicial statement was admitted as exhibit P3 during trial without being objected by the appellant.

Basing on the evidence on record, the trial court was satisfied that the prosecution had established a *prima facie* case against the appellant and thus required him to state how he would wish to make his defence. He opted to defend himself under affirmation. In his defence, the appellant distanced himself from the commission of the charged offence.

In the instant appeal, initially the appellant had presented a memorandum of appeal comprising six (6) grounds. Later, at the hearing of the appeal he sought and the Court granted leave for him to present a supplementary memorandum of appeal containing twelve (12) grounds of appeal, making a total of eighteen (18) grounds of appeal. Having thoroughly perused the appellant's grounds of appeal, we think, for

convenience purposes, they can be condensed into the following complaints:

1. That, the appellant was erroneously convicted on a defective charge.
2. That, the evidence of PW1 was received contrary to the requirements of the law under section 127 (2) of the Evidence Act.
3. That, the identification of the appellant by PW1 was not water-tight as he was a stranger to her.
4. That, the evidence of PW9 and exhibit P2 were not reliable as the bruises found on the victim's vagina could be caused by anything else.
5. That, the prosecution evidence given by PW1 and PW4 was contradictory.
6. That, the evidence of PW7 is not in the record of appeal.
7. That, the appellant's cautioned statement and extra judicial statement were admitted and relied upon contrary to the law.
8. That, the case against the appellant was fabricated because there was delay in arraigning him.
9. That, the defence case was not considered by the lower courts.
10. That, the case against the appellant was not proved to the required standard.

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Mss. Patricia Mkina and Rachel Tulli, both learned State Attorneys.

As part of his submission in support of the appeal, the appellant only urged the Court to consider his grounds of appeal with no more. In reply to the appellant's complaints as reduced from his grounds of appeal before us, both learned State Attorneys had an opportunity to respond.

Ms. Tulli responded to the first complaint regarding the alleged defective charge to the effect that, the charge was proper as it complied with the requirements of the law under sections 132 and 135 of the Criminal Procedure Act, Cap 20 (the CPA). She submitted further that the same contained the statement and particulars of the offence. Therefore, she urged us to dismiss this complaint.

Having considered the appellant's complaint and the submission by the counsel for the respondent on the first complaint, the issue which we need to determine is whether the charge laid against the appellant was defective. Before determining this issue, it is important to make an observation that the appellant's complaint is general. He did not give any explanation as to why he thought that the charge was defective; even after a reply from Ms. Tulli. However, since the complaint is a matter of law, we shall determine it.

While responding to the appellant's complaint the learned State Attorney stated, which we agree, that the charge which was laid against the appellant complied with the requirements of the law under sections 132 and 135 of the CPA. These provisions provide for the contents of a charge. Section 132 of that Act reads:

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge."*

Also, section 135 (a) (ii) requires the charge to contain specific section of the law creating the offence. It states as follows:

> *"The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible to use technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence."*

We have assessed the charge that was laid against the appellant but we could not see any defect. The contents prescribed in the above quoted provisions are found in the said charge. The statement of the

offence clearly states that the appellant was charged with rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Panel Code [CAP 16 R.E. 2002]. This statement of the offence sent a clear information to the appellant regarding the offence and the provisions of the law which he had contravened; together with the punishment, in case found guilty. Moreover, the charge contained particulars of the offence which informed him about the nature of the offence, when and where was it committed, and to whom it was committed. In the circumstance, we find the appellant's complaint without merit. We dismiss it.

Regarding the appellant's second complaint in ground 2 that the evidence of PW1 was recorded in contravention of section 127 (2) of the Evidence Act, Cap 6 (the Evidence Act), Ms. Tulli submitted that the said provision requires a child of tender age called as a witness to give evidence upon a promise to tell the truth not lies. This, she said, was observed at page 12 of the record of appeal where PW1 promised the trial court to tell the truth. She added that the court record is authentic and what was reported was sufficient to show that indeed, she made that promise. As such, she said, the appellant's complaint is baseless and prayed it to be dismissed.

We have respectfully considered the submission by the counsel for the respondent in respect of this complaint and the record of appeal. The

issue for our determination is whether the trial court complied with the requirement of the law under section 127 (2) of the Evidence Act while recording PW1's evidence.

Section 127 (2) of the Evidence Act provides that:-

> *"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 to the court and not to tell any lies."*

It is plain in the instant case that PW1 was aged 13 years old at the time of giving evidence and thus, a child of tender age. Therefore, her evidence had to be given in compliance with the above quoted provision. This provision puts a legal requirement for the court to ensure that before recording the evidence of a child of tender age, the said child promises to tell the truth and not to tell any lies, if that evidence will be taken without an oath or making an affirmation, as the case herein. We do not need to overemphasise that, the promise to tell the truth is made to the court.

At page 12 of the record of appeal, before PW1 started to give her evidence, the court recorded that *'the witness has promised to tell the truth before the court and that knows the importance of saying the truth.'* The trial magistrate reported what the child had told him and proceeded to record her evidence. In **Wambura Kiginga v. Republic**, Criminal

Appeal No. 301 of 2018 (unreported); while dealing with none compliance with the provision under consideration, the Court had this to say:

> *"In the circumstances of this case, we think, as indicated a while ago, that substantive justice needs to be done even in favour of children of tender age, who while giving evidence, every circumstance, like in this case, suggests that they told the truth and not lies, even if they might not have taken oath or affirmation or promise to tell the truth and not lies in compliance with subsection (2) of section 127 of the Evidence Act. This is explained by the enactment of section 127(6) of the Evidence Act which provides that:*
>
> *(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offences the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth."*

The Court went on to state:

> *"We must confess at the outset that we construed the opening phrase, "Notwithstanding the preceding Provisions of this section," to mean that, a conviction can be based on only subsection (6) of section 127 without complying with any other sub section of 127 including sub section (2). Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127(2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are; first, there must be a clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding non-compliance with section 127 (2), a person of tender age still told the truth."*

As it was the circumstance in the above decision, in the instant case the trial magistrate did not record the words of the victim, the child of tender age in a direct speech while promising to tell the truth as per the requirements of subsection (2) of section 127. He only reported what the child promised and proceeded to record her evidence without oath. Being guided by our previous stance, we have scrutinized the record of appeal and we are satisfied that PW1 was a credible witness and her

evidence was the truth. We say this having considered the coherence of her evidence of what had befallen her on a material day, together with corroborative evidence from other prosecution witnesses including PW9 who medically examined her private parts and filled exhibit P2. Apart from that, the appellant's confession to the charged offence confirms what PW1 told the trial court. We are as well alive of our recent decision in **Felix Kilipasi v. Republic,** Criminal Appeal No. 260 of 2021 (unreported), where we also made a reference to our past decision in **Wambura Kiginga** (supra) and held that subsection (6) of section 127 can salvage the situation where there is non-compliance with subsection (2) of section 127. Having so stated, we find and hold that PW1's evidence was properly taken and what he told the court was the truth. The appellant's complaint is thus baseless. We dismiss it.

Ms. Tulli opposed the appellant's third complaint regarding his identification at the scene of crime. She referred us to page 10 of the record of appeal where PW1 stated that the incident took place during day time. She urged the Court to take judicial notice under section 58 of the CPA. She further referred us to pages 14 to 16 of the record of appeal where the evidence of PW3 and PW4 to whom the appellant was mentioned by the victim (PW1) to be the one who raped her. It was her firm submission that, the appellant was properly identified taking into

consideration the proximity between him and PW1. In support of her argument, she cited the case of **Ajili Ajili @ Ismail v. Republic,** Criminal Appeal No. 505 of 2016 (unreported).

In this complaint the main issue we are required to consider is, whether PW1 properly identified the appellant at the scene of crime. Before we embark in determining this issue, we think, it is important to state that proof of identification of an accused person at the scene of crime is not a requirement in every criminal charge/case. It depends on the circumstances of each case.

It is glaring on the record of appeal that, the offence with which the appellant was charged took place in a broad day light it being committed at about 15:00 hours as per the charge sheet and PW1's evidence. In the circumstances, factors like the intensity of light and the illuminated area need not be strictly proved. The proximity between the appellant and the victim (PW1), as submitted by Ms. Tulli, together with the time spent by the two, in our view, is sufficient to identify a culprit, even if is a stranger.

In the instant case, there is no dispute that the appellant was a stranger not only to PW1 (the victim), but also to PW5 and PW6 who testified to have seen him at the scene of crime. Although the appellant was a stranger to PW1, she managed to describe him to PW4, as short and black person and the jacket he wore. PW4 informed PW3 about the

incident. PW3 recognized the appellant as he knew him and where he was working. Later, the village leaders were informed. Eventually, the villagers started to search for the appellant and found him at Matongo Centre. PW1 managed to name the appellant by describing him immediately after the incident, that is why he was arrested shortly thereafter – see: **Ajili Ajili @ Ismail** (supra).

Even if for the sake of argument, though we are not saying so, PW1's evidence was not sufficient, the appellant corroborated it through his confession (exhibit P3), that indeed, he raped the victim. Therefore, the appellant's complaint that he was not properly identified at the scene of crime, stands dismissed.

The appellant's complaint in the fourth ground of appeal was that the evidence of PW9 and exhibit P2 were not reliable as the bruises with tear seen on PW1's vagina could be caused by anything. In response, Ms. Tulli submitted that PW1 testified on how the appellant penetrated her at page 12 of the record of appeal. Her evidence was corroborated by the evidence of the doctor (PW9) who examined her and found that, indeed, her vagina was penetrated as she had bruises with tear. PW9 filled the victims PF3 (exhibit P2) which also supported his oral assertion in respect of the findings he made after the examination. Ms Tulli argued that this complaint is baseless.

In this complaint the Court is invited to determine whether the evidence of PW9 and exhibit P2 were reliable. This complaint challenges credibility of PW9, the medical doctor who examined PW1 and came up with findings contained in exhibit P2. The complaint is based on assertion that the bruises found in PW1's vagina by PW9 could be caused by anything, not necessarily the penetration.

The law on credibility of a witness is settled, that every witness is entitled to credence unless there are cogent reasons not to believe a witness – see: **Goodluck Kyando v. Republic,** [2006] T. L. R. 363. At this stage where we are dealing with an appeal, we can satisfy ourselves on the credibility of PW9 by assessing coherence of his testimony and consider it in relation to the evidence of other witnesses, particularly, PW1 and the appellant (DW1). In **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2001 (unreported), the Court stated:

> "*Credibility of a witness is the monopoly of the trial court but only in so far as demenor is concerned. The credibility of the witness can also be determined in two other ways.* ***One****, when assessing coherence of the testimony of that witness, and* ***two****, is considered in relation to the evidence of other witnesses including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court*

when examining the findings of the first appellant court."

In the present case, the issue regarding PW9's credibility was raised before the first appellate Judge who is on record at page 70 of the record of appeal stating:

> *"There was also proof of the crime of rape, for the victim of crime (PW1) had been sexually penetrated. Her genitalia bore marks of violence such as bruises and tear according to Dr. Tibaijuka Katunzi (PW9) and the Medical Examination Report thereof, prosecution exhibit P2."*

We had time to go through the evidence of PW9 and exhibit P2. First and foremost, we agree with the first appellate Judge that PW9 was a credible witness. There is nothing on the record suggesting why this witness should not be believed. At page 34 of the record of appeal, PW9 testified on how he received PW1 at Ikungi Health Centre on 17th June, 2019, conducted examination and came up with the findings; that PW1 had bruises on her vagina, and there was a tear on her clitoris. Thereafter, he reported those findings by filling PF3 (exhibit P2) which was admitted without objection from the appellant. When given an opportunity to cross examine PW9, the appellant did not ask any question.

Our assessment of PW9's evidence leaves us with no flicker of doubt that, it was coherent. This is due to the fact that all he stated fit together well with the evidence of PW1 who complained to had been penetrated by the appellant and the confession made by the appellant, that indeed, he raped the victim PW1. We do not find any reason to discredit the evidence of PW9 and exhibit P2. For the evidence he adduced and the exhibit he tendered were both reliable. The appellant's complaint in this regard, is thus, meritless and we dismiss it.

Regarding the appellant's fifth complaint that the prosecution evidence was contradictory in respect of the evidence of PW1 and PW4, Ms. Mkina conceded to this complaint. She said, it is true that while PW1 testified at page 12 of the record of appeal that on the fateful day the appellant asked PW5 to go and take bicycle from somewhere, he refused; then the appellant asked PW1 to go there and she agreed. Upon return she found them to have gone away from where she left them. On the contrary, in his evidence, PW5 stated that he was the one who went to fetch the bicycle unsuccessfully and when he came back the appellant took PW1 by force, she was crying. PW5 went back home crying for help. Although Ms. Mkina agreed that there was such contradiction, she argued, it did not go to the root of the case. Therefore, she urged us to disregard it. As regards the evidence of PW1 and PW6 Ms. Mkina submitted that

there was no contradiction. As such, she said, the evidence of PW6 corroborated PW1's evidence.

The issue we need to consider in this complaint is whether the prosecution evidence was contradictory and if so, whether the contradiction goes to the root of the case. In particular, the appellant challenged the evidence of PW1 at page 12, where she said: *"On my return I found them to have gone away from where I left them,"* and when PW4 said at page 16, *"then in a short time came back my son, he was running and crying and I did ask him what was wrong and he told me victim has been taken by someone...."*

We have carefully read the record of appeal; we wish to state that we do not see any contradiction of evidence between the two witnesses. It has to be noted that, the evidence of PW1 covered the period before the commission of the offence. This is the time when PW1 said that she was sent to fetch a bicycle by the appellant, while PW4 was referring the time when PW5 went back home crying after seeing the appellant taking PW1 to the bush. Therefore, we find no contradiction in that evidence.

We take note that, the line of argument by Ms. Mkina who conceded to the alleged contradiction, with respect, was a misdirection. This is due to the fact that she went astray and considered the evidence of PW5

instead of PW4. Even if we take that line of argument, the difference between the evidence of PW1 and PW5 which was conceded by Ms. Mkina was on who went to fetch the bicycle. It is on record that the appellant asked PW1 to go fetch a bicycle but she refused. If that is the case, how then it was possible that she testified that: *"On my return I found them* [the appellant and PW5] *to have gone away from where I left them."* On the other hand, PW5 is on record testifying at page 17 *that "I did go and came back and told him that we have not found the bicycle and the accused here took the victim by force, she was crying ...."* Much as we agree that there was such a difference on account of the evidence of those two witnesses, but in our considered view, it was minor. We say so because in this case what was supposed to be proved was not who went to fetch the bicycle; but whether the appellant raped the victim. The evidence of PW5 corroborated what PW1 stated in respect of who took the victim to the bush and PW1 testified that while in the bush the appellant penetrated her by inserting his manhood in her vagina. Therefore, we agree with Ms. Mkina, and it is our finding, that the contradiction was minor as it did not go to the root of the case. In the circumstances, we hold that it raised no reasonable doubt on the prosecution case. The appellant's complaint fails. We dismiss it.

In the appellant's sixth complaint, he claimed that the evidence of PW7 was not included in the record of appeal. Ms. Mkina referred us to page 21 of the record of appeal where the evidence of PW7 is found and urged us to dismiss the complaint. We have perused the record of appeal and we agree with Ms. Mkina's submission, indeed, the evidence of PW7 is found therein. This ground of appeal is unfounded. We dismiss it.

Submitting on the appellant's seventh complaint as regards the appellant's cautioned and extra judicial statements, Ms. Mkina agreed that the cautioned statement (exhibit P1) was admitted contrary to the law. She elaborated that, the said exhibit does not show whether the appellant was given any right and it was recorded out of time. She thus prayed that this exhibit be expunged from the record.

Regarding the appellant's extra judicial statement (exhibit P3), Ms. Mkina submitted that it was taken in accordance with the law. According to her, there is no specific time to record it provided by the law but it was recorded one day after the incident. The same was properly admitted during trial and that is why the appellant did not object it at the time it was tendered. Besides, she said, the appellant did not cross – examine the witness who tendered it. Ms. Mkina insisted that the appellant admitted that he raped the victim in his extra judicial statement.

Therefore, the same is admissible and reliable. She cited the case of **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 (unreported).

The appellant's complaint is twofold. **One**, it enjoins us to determine whether the appellant's cautioned statement (exhibit P1) was properly received and relied on to ground his conviction. **Two**, we are as well urged to determine the same issue in respect of the appellant's extra judicial statement (exhibit P3). We prefer to start with exhibit P1.

It is common knowledge that an accused person has a right among others, to choose who should be present when his statement is being recorded. This is among the fundamental rights to be observed, otherwise failure to observe it may result to invalidation of the recorded statement. It is apparent on the face of record that, when the appellant's cautioned statement was about to be tendered by PW8 during trial, the appellant objected. Therefore, an inquiry was conducted and the appellant testified as DW1. The right under consideration was among the issue that featured. On page 28 of the record of appeal the appellant was recorded saying:

> *"In the morning at 10:00 hours I was called out by the file investigator who wanted to take my statement but I did deny since there was no any relative, he then closed the door and moved away and came with cane and started to beat me and lastly forced me to sign something I was not aware".*

What the appellant testified in the above excerpt is to some extent reflected in the appellant's cautioned statement which was eventually admitted despite being objected. The said statement is found on page 41 of the record of appeal, but it does not suggest that he opted to have no one while recording it. For this reason, Ms. Mkina urged us to expunge that statement from the record. We agree with Ms. Mkina and we shall explain. As we have already intimated, the right of an accused person to have a lawyer or relative while recording his statement is fundamental and it touches the voluntariness of the statement itself. In the circumstances that the same is not provided, it cannot be said with certainty that the statement was voluntarily made; especially, in the situation as in the present case, where the appellant objected its admission. Thus, admission of the appellant's cautioned statement (exhibit P1) in the present case, in our considered opinion prejudiced the appellant. For the interest of justice, we expunge it from the record.

We now revert to consider the appellant's extra judicial statement (exhibit P3) which was tendered by PW10. We have examined the record of appeal and found that the said statement was tendered without being objected by the appellant at page 38 of the record of appeal. We have as well scrutinized the appellant's extra judicial statement (exhibit P3) and we are satisfied that it meets all the requirements of the law. As such, all

the instructions provided in the Chief Justice's Guide were observed, to wit, **one**, the time and date of the appellant's arrest was indicated; **two**, the place where he was arrested; **three**, the place where he slept before the date he was sent to the justice of peace; **four**, he was asked whether any person by threat or promise or violence persuaded him to give the statement; **five**, whether he really wished to make a statement on his own free will; and **sixth**, he was informed that his statement may be used as evidence against him.

Although there is no specific law that sets time limit for recording extra judicial statement as alluded to above, we are satisfied that the appellant was sent to the justice of peace within reasonable time; since he was arrested on 16th June, 2019 and sent there on 18th June, 2019 - see: **Martin Fabiano & Another v. Republic**, Criminal Appeal No. 84 of 2020 (unreported).

Basing on all we have endeavoured to discuss above, we find that the appellant's extra judicial statement (exhibit P3) was properly admitted and relied on both courts below. The appellant's complaint thus is without merit. As a result, we hereby dismiss it.

Ms. Mkina submitted in respect of the eighth complaint that, the case against the appellant was not fabricated as he claimed. The appellant

was convicted on strong evidence of the victim (PW1) which was corroborated by the evidence by other prosecution witnesses. She urged us to dismiss this complaint.

We have thoroughly gone through this complaint and we think, Ms. Mkina's response was too general. The gist of the appellant's complaint is that there was delay in arraigning him and thus he concluded that the case against him was fabricated. This complaint invites us to determine whether indeed there was a delay in arraigning the appellant.

It is settled position that an accused person who is under custody, has to be taken to court within twenty-four (24) hours – see: section 32 (1) of the CPA. In the instant case, it is on record that the appellant was taken to custody on 17th June, 2019. However, he was not taken to court until on 2nd July, 2019, far beyond the twenty-four (24) hours required by the law, as he was facing rape charge. We have scrutinized the record of appeal but we could not find the reason(s) for such delay. What is apparent is that after he was arrested on 16th June, 2019, the appellant was taken to the Village Executive Officer (Ikungi) where he spent a night and in the following day, that is, on 17th June, 2019 was taken to Ikungi Police Station custody, as intimated above. The delay was of almost fifteen (15) days.

Luckily, this is not a first scenario the Court is facing. In **Jafari Salum @ Kikoti v. Republic,** Criminal Appeal No. 370 of 2017 (unreported), while dealing with a case where the appellant's arraignment was delayed for about thirty-nine (39) days, the court had this to say:

> *"The appellant claims this to have offended the mandatory provisions of sections 32 (1) of the CPA. Indeed, as Ms. Ally submitted, the evidence is silent as to what made the appellant be arraigned after about 39 days after he was arrested. This is perhaps why Ms. Ally went into speculation that the delay might have been caused by the appellant's endeavours to have the matter settled out of court. Much as we do not find ourselves safe to go into speculation, as Ms. Ally did, we do not think this procedural mishap was fatal as to vitiate the trial of the appellant".*

Being guided by our previous decision above, we are as well, not ready to work on speculations, as whatever reason we may try to think, it will end up leading us into speculations. Just as it was in the above case, we do not think that failure to arraign the appellant herein within twenty-four (24) hours was fatal as to vitiate the trial of the appellant.

Other things being equal, it follows that, the appellant was prosecuted and convicted on the strength of prosecution evidence, as

rightly so, in our view, submitted by Ms. Mkina. Having considered circumstances of this case, it is our finding and we so hold, that the delay in arraigning the appellant, means nothing closer to fabrication of the case against him. This we say, taking into consideration that even the appellant himself could not tell as to who fabricated it and why. The appellant's complaint is thus, unmerited. We dismiss it.

Regarding the appellant's ninth complaint that his defence of intoxication was not considered by the trial court, Ms. Mkina conceded. She thus urged us to consider it under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) and come up with a finding whether or not the case was proved as it was decided in **Yusuph Ndaturu Yegera @ Mbunge Hitler v. Republic,** Criminal Appeal No. 195 of 2017 (unreported).

We have thoroughly perused the record of appeal and considered Ms. Mkina's response in respect of this ground. However, with respect, we are unable to go along with the concession by the learned State Attorney due to the fact that, the appellant's complaint is not supported by record. He said nothing regarding being intoxicated. His defence was very brief and we shall let it speak for itself hereunder:

"DEFENCE HEARING START

DW1: SHABAN S/O SALIM, 25 YEARS, ISLAM, MTINKO – SGD

DW2: I am peasant of Matumbo village in Mtiriko – Singida rural, I remember on 16/6/2019 at 19:00 hours I was at Matongo village in Ikungi District when came three young men at my room who put me under arrest and they did phone the village chairman who came and they told him that I have raped, they took me to the village executive and the lady (victim) was brought later. I was taken to Ikungi Police Station on 17/6/2019 at around 10:00 hour. The investigation took my statement, they denied me a chance for my relative.

I pray for court mercy, I pray for the court to acquit me from the charge of rape since I never did that offence.

CROSS – EXAMINATION:

BY PROSECUTION: *I cannot know exactly those who arrested me. I do not know the name of the victim.*

Sgd: *R. A. OGUDA – SRM*

17/8/2020"

We also take note that the appellant referred us to page 15 of the record of appeal as a base of the alleged defence of intoxication. Our perusal of the record shows that, on that page the trial court recorded the evidence of one Desa Ihonde (PW10) who stated:

"On that day we had a drink with the accused on a local bar and I know him well and the description made by the accused (sic) made us Identify him well."

Again, with respect, the excerpt above was not the appellant's defence and it has nothing to do with a defence of intoxication. In short, the appellant's complaint that his defence of intoxication was not considered is unsubstantiated. We dismiss it.

Addressing the appellant's tenth complaint, Ms. Tulli submitted firmly that the prosecution proved the case against the appellant beyond reasonable doubt. That, the appellant was charged under sections 130 (1) and (2) (e) and 131 (1) of the Penal Code. Therefore, the prosecution had to prove the age of the victim, that there was penetration and that she was penetrated by the appellant. She submitted further that, at page 14 of the record of appeal, the father of the victim one Bundala Kulaba (PW2) stated that the victim was 13 years old.

In proving penetration, Ms. Tulli stated that the evidence of the victim (PW1) at page 12 of the record of appeal was very clear on how the appellant penetrated her. Her evidence was corroborated by the doctor who examined her (PW9) and found bruises with tear on PW1's vagina and exhibit P2. Besides, she said, the appellant confessed in his

extra judicial statement (exhibit P3) that he raped the victim and when exhibit P3 was being tendered, the appellant did not object. She submitted further that, on page 37 of the record of appeal the justice of peace (PW10) who recorded the appellant's extra judicial statement also testified that, the appellant admitted the charge. The appellant did not cross - examine PW10. She cited the case of **Hassan Uki v. Republic,** Criminal Appeal No. 127 of 2017 (unreported). Therefore, she argued, it is clear that the appellant committed the offence with which he was charged. She urged us to dismiss the entire appeal.

We have considered the appellant's complaint, submission by the respondent's counsel and the entire record of appeal. The crucial issue for our determination is whether the case against the appellant was proved beyond reasonable doubt. The answer to this issue is not farfetched. The appellant was charged with the offence of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code. Since the victim was a child of tender age, it was incumbent upon the prosecution to prove the age of the victim and penetration. Proof of her age was done by the victim's father (PW2) who testified that she was 13 years old – see: **Isaya Renatus v. Republic** Criminal Appeal No. 542 of 2015 (unreported). Moreover, penetration was proved by PW1 and was corroborated by PW9 and exhibit P2. That it was the appellant who penetrated PW1, there is

evidence from PW1 and the appellant's confession (exhibit P3). We agree with Ms. Tulli that the prosecution proved its case against the appellant beyond reasonable doubt. As a result, we uphold the decision of the High Court and dismiss the appeal in its entirety.

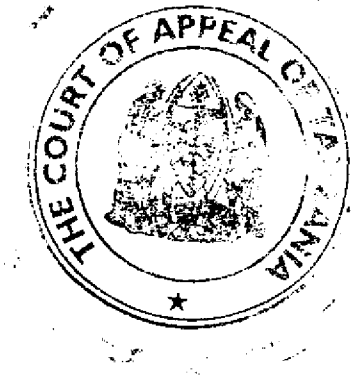
DATED at **DAR ES SALAAM** this 20th day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 21st day of December, 2023 in the presence of the Appellant in person - linked via Video conference from High Court Dodoma and Ms. Rose Isabakaki, 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