IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 602 OF 2021

DAKTARI JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)
(Kagomba, J.)

dated the 14th day of September, 2021
in
Criminal Appeal No. 09 of 2021

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JUDGMENT OF THE COURT

6th & 28th December, 2023

MURUKE, J. A:

Originally, the appellant, Daktari Jumanne, appeared before the District Court of Singida at Singida (the trial Court) charged with one count of rape contrary to Sections 130 (1) (e) and 131 (3) of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022]. The particulars of the offence were that, on 25th day of May, 2019 at afternoon hours at Unyanga area, Mwamkoko Ward, Unyakuni Division within the District and Region of Singida, the appellant did have sexual intercourse with a child of eight (8) years old whom we shall refer to as the victim or PW1 to protect her dignity. The appellant did not plead guilty to the

charge where upon a full trial, he was convicted and sentenced to life imprisonment on 3rd November, 2020.

The appellant was discontented with the trial Court's decision hence he appealed to the High Court of Tanzania at Dodoma District Registry. After hearing both sides, the High Court dismissed the appeal in its entirely.

Undaunted, the appellant is before the Court on a second appeal with two set of memoranda of appeal. In the first set he has raised a total of six (6) grounds and on second set he has raised five (5) grounds of appeal which both raises the following paraphrased ten points of complaint, that; **one**, the victim (PW1) evidence was received in contravention of section 127 (2) of the Evidence Act; **two**, the evidence of PW3 was not properly scrutinized to prove penetration; **three**, the evidence of PW4 was unreliable and could not have been used to ground conviction; **four**, failure of the trial court to observe requirement of section 231 (a) (b) of the Criminal Procedure Act Cap. 20 R.E. 2019 when proceeding with the defence case; **five**, failure of the trial court to consider defence case while analyzing the evidence; **six**, failure of the prosecution to prove the case beyond reasonable doubts. **Seven**, failure of the trial court to read memorandum of undisputed facts in compliance with section 192 (3) of the Criminal Procedure Act Cap. 20 R.E. 2019; **eight**, failure by the

Prosecution to call the chairman of the area to testify; **nine** the delay in arraigning the accused in court; **ten** the charge sheet indicates the incident to have happened on 25th May, 2019, while PW3, the doctor, who examined the victim said he received the victim on 20th May, 2019 at 12:52 for examination. For reasons to be adduced later, ground six of the appeal will be argued as the last ground.

The background facts of the case were fully and clearly set out by the trial court and first appellate court, but we feel that it is necessary to recap them, very briefly, as they are relevant to this appeal. Same goes as follows: On 25th May, 2019, the victim PW1 who was living in the same house with the appellant was at home alone. Her mother Zubeda Ally Isingo (PW2) had gone to a funeral. The appellant who was at home called the victim, and asked her to bring to him some water from their house. As the victim took water to the appellant's room, the appellant grabbed her, removed her underpants and raped her. The victim cried for help, but there was no one to help her. After being satisfied, the appellant then released her with a warning that she should not tell anyone about what happened. When her mother returned home, the victim told her what had happened. The mother reported the incident to the local area chairman and police where, PF3 was issued for medical examination.

The victim's mother (PW2) testified that, she examined the victim and found her vagina bruised and her underpants were dirty. Medical doctor Selina Augustino (PW3) informed the trial court that upon examination of the victim, she found her vagina labia majora swollen and the clitoris was red and enlarged against her normal size indicating penetration. Investigator of the case G.3535 Damas (PW4), testified that he issued PF3 to the victim and interrogated the accused who admitted to have removed the victim's underpants and raped her. However, PW4 did not write the statement of the accused.

The appellant testified with his one witness to exonerate himself from the offence he was facing. He raised a defence that on that date he was not at home, same was supported by his witness Maulid Hema (DW2). He blamed a certain boy whom he had quarreled with to be the one who instigated the charge, without even mentioning the name. At the end, the trial court convicted the appellant, which was upheld by first appellate court.

At the hearing of the appeal, the appellant appeared in person without legal representation, whilst the respondent/Republic had the services of Ms. Magreth Bilali and Ms. Sara Anesius, both learned State Attorneys.

When given the floor to argue his appeal, the appellant prayed to adopt his grounds of appeal to be part of submission in support of his appeal, reserving right to make rejoinder, if need be.

The complaint in the first ground relates to the mode the trial court used in taking the evidence of PW1, being a child of tender age. It was the appellant's argument that, the trial court did not adhere to the provisions of section 127 of the Evidence Act. He argued that the provision requires the court to first examine the child to establish whether he understandS the meaning and nature of an oath and secondly, if he does not understand the nature and meaning of an oath, then he should promise to the court to tell the truth and not to tell lies. In its inquiry of PW1, the trial court did not establish whether or not she knew the nature and meaning of an oath before it allowed her to give evidence upon the promise to tell the truth and not lies. The appellant argued that, failure to comply with the cited provisions of the law renders the evidence of PW1 valueless deserving to be discarded from the record.

In reply to ground one, the learned State Attorney submitted that, it is not true that, Section 127 (2) of the Evidence Act has not been complied with. The Section requires a child below 14 years of age to promise to tell the truth

if she does not understand the meaning of an oath. She argued that PW1 at page 9 of the record of appeal promised to tell the truth as the law requires. Learned State Attorney cited the case of **Mathayo Laurence William Mollel v. Republic**, Criminal Appeal No. 342 of 2015, **John Ngonda v. Republic**, Criminal Appeal No. 45 of 2020, and **Halfan Rajab Mohamed v. Republic**, Criminal Appeal No. 281 of 2020, to support her argument, who then, prayed for dismissal of ground one for lack of merit.

Our starting point in respect of this ground will be section 198 (1) of the Criminal Procedure Act [Cap. 20 R.E 2022] (the CPA) which requires every witness in a criminal case, subject to the provisions of any other written law, to give evidence upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act. This provision states thus:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".*

One of the exceptions to this provision relates to a witness of tender age whose procedure is provided under section 127 (2) of the Evidence Act which states as follows:

"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 lies".

In its interpretation of this provision, the Court had deduced that if the child of tender age understands the nature and meaning of an oath, he/she should give evidence an oath or affirmation or otherwise, if she does not, she will be required to promise to the court to tell the truth and not to tell lies. That means in the situation where a child witness is to give evidence without oath or affirmation, he or she must make a **promise to tell the truth and undertake not to tell lies**. This principle was discussed by the Court in the case of **Mathayo Laurance William Mollel v. Republic** (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023) where it held that:

"In the case at hand, the child witnesses who are the victims on the counts on which the appellant was convicted, did not give evidence on oath or affirmation. They simply promised to tell only the truth. We think this was quite appropriate in terms of sub-section (2) of section 127 of the Evidence Act reproduced above. We are unable to agree with the appellant that the trial court ought to have conducted a test to verify whether the child witnesses knew and understood the meaning

of oath or affirmation. In our considered view, that requirement would only be necessary if the child witnesses testified on oath or affirmation. 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".

In the matter at hand, PW1 was the victim aged eight (8) years old while giving her testimony, she promised to tell the truth as reflected at page 13 of the record of appeal. Under the circumstance it is our view that PW1's evidence was recorded in compliance with Section 127(2) of the Evidence Act, hence the ground is dismissed for on lacks merit.

On ground two the complaint is failure by the two courts below to scrutinize the evidence of PW3 to prove penetration. Learned State Attorney submitted in this ground that, the evidence of penetration was proved by PW1, the victim, as seen at page 9 up to 14 of the record of appeal, citing the case of **Selemani Makumba v Republic**, 2006 TLR 384 – 385, that insists that, in rape cases, the evidence of the victim is the most important evidence to prove penetration. Evidence of PW3 medical doctor corroborated the evidence of victim PW1 and victim's mother, PW2. This ground lacks merits, insisted the learned State Attorney.

In this ground the appellant alleged that the prosecution case failed to prove penetration, faltering the evidence of PW3. Having gone through the record it is crystal clear that penetration was proved. PW1 in her testimony at page 13 of record of appeal stated:

> *"As I got In his room, he inserted his dudu in my private parts. He removed my underwear, pants and skin tight. I felt pain as he inserted his dudu on my private parts. I felt pain and I was watery in my private part".*

Moreover, PW1's evidence was corroborated by PW2, the victim's mother, who examined her and found that PW1 was raped and decided to take her to the chairman then to the police, as seen at page 15 line 19 - 20. Also, evidence of PW3 the medical doctor who examined PW1 confirmed that there was penetration in PW1's vagina. PW3 found PW1's labia majora swollen, vagina was red and enlarged as against the normal size as seen at page 19 line 6-8 of the record of appeal. PW3 tendered a PF3 which was not objected to by the appellant and admitted as exhibit P2. It is thus our decided view that, the allegation regarding proof of penetration has been substantiated by the three prosecutions witnesses, thus ground two lacks merits.

On ground three the complaint is that PW4's evidence was unreliable. Learned State Attorney submitted in reply that, it is true that, PW4 an

investigator of the case did not take Caution Statement of the accused who confessed before him that he raped the victim. However, oral evidence of PW4 testified what actually the appellant confessed before him, and the appellant did not cross examine him on his evidence. She cited the case of **Anna Jamaniste Mboya v. Republic**, Criminal Appeal No. 295 of 2018 (unreported) Court's decision at Dar es Salaam at page 21 and 29 to support her arguments.

It is true as correctly argued by learned State Attorney that, PW4 did not tender any documentary evidence. But his oral account was not cross examined by the appellant then accused at the trial court. Failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. In the case of **Nyerere Nyague v. Republic**, (Criminal Appeal No. 67 of 2010) [2012] TZCA 103 (21st May 2017, TANZILII), which was referred to by the Court in **Kanaku Kidari v. Republic**, (Criminal Appeal No. 326 of 2021) [2023] TZCA 223 (4th May, 2023, TANZILII) the court held that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. As the appellant did not cross examine PW4 on this complaint, we find and hold that the appellant

accepted that the witness PW4 spoke the truth. Thus, the complaint on ground three lacks merits.

On the 4th ground the complaint is that the trial court did not sufficiently comply with the requirement of section **231 (1),(a),(b)** of the CPA. The respondent's counsel submitted that, same was complied with as seen at page 23 of the records. The said provision reads as follows:

> *231. -(I) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-*
>
> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
>
> *(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*

We have examined the record of appeal and we find this ground to be devoid of merit. At page 23 of the record of appeal it is apparent that having found that the prosecution case has established the case against the appellant, the trial court went on explaining to the appellant of his right to defend the case against him, he responded that he was ready to defend his case and he will bring one witness. Therefore, the trial court complied with the requirement of section 231 (1) (a) (b) of CPA. Moreover, even if the complaint was true, it is our opinion that the appellant was not prejudiced in any way, because he managed to mount his defence and even called one witness DW2 to support his defence case, thus ground four lacks merit.

On ground five the complaint is failure by the trial court to consider the evidence of the appellant then the accused at the trial court. On this, the respondent's counsel submitted that, the appellant's evidence was considered at page 39 to 40 of the record of appeal, thus ground lacks merits.

As rightly argued by the learned State Attorney, the appellant's evidence was well considered. At page 39 – 40 of the record the trial court considered the appellant's defence. For clarity the same is here reproduced:

> *"The accused informed the court that, he did not commit the offence since he was at Mafyuku, arriving at the house at 10:00 hours and left up to 15:00 hours*

to be arrested at 23 hours for alleged offence. He went further to say that he had conflict with one young man whom he did not know, and who did not appear before the Court. He informed the Court that he could not rape the victim for her age, and the case was just made against him. His witness corroborated that the case was just made up against the accused who was with him since 15:00 hours to 18:30 hours. However, DW2 informed the Court that his house was in the walking distance to the scene of crime, and that the sexual act can take a short time, up to five minutes. Now the accused is saying that, the case was made up against him for conflict with a person who did not even appear before the court to testify against him. However, DW2 has informed the Court that he was with the accused from 15:00 hours up to 18:30 hours, meaning that he was not with him from 10:00 hours he returned up to the 14:45 or 15:00 hours as he came to his house which was only a walking distance from the scene of crime. When the act of sexual intercourse can be conducted within a short period of time, and while the accused was in the house at 13:00 hours when the victim's mother left, and the accused having failed to cross examine the witness on their evidence against him, this Court sees that his evidence has not managed to raise any reasonable doubt entitling him to an acquittal as it

appears he committed the act on the victim before going to DW2".

The above reproduced paragraph speak it all. Clearly, there was considerations of the appellant's defence at the trial court without any flicker of doubts, thus ground five lacks merit.

Ground seven is failure by the trial court to read the memorandum of agreed facts, contrary to section 192 (3) of the CPA. The learned State Attorney submitted that, according to the signed memorandum of agreed facts, that facts is not in dispute. More so, failure to observe it is not fatal as can be cured by section 388 of the Criminal Procedure Act. It is worth noting that the complaint above falls within preliminary hearing proceedings. It is true as submitted by the respondent's counsel that; the appellant dully signed memorandum of agreed facts as seen at page 6 of the record of appeal. Equally so, the trial court noted that section 192 was complied with. The irregularity is not fatal. From settled case law in this jurisdiction, a trial of a case will not be vitiated for failure to conduct a preliminary hearing or for conducting it improperly. In the case of **Benard Masumbuko Shio v. Republic**, Criminal Appeal No. 123 of 2007 (unreported), the Court held that a trial will not be vitiated by a defective preliminary hearing. Same position was held in decisions in **Mkombozi Rashid Nassor v. Republic**, Criminal Appeal No. 59/2003

Joseph Munene and Another v. Republic, Criminal Appeal No. 109/2002 and **Christopher Ryoba v. Republic**, Criminal Appeal No. 26 of 2002 (all unreported).

In **Christopher Ryoba** (supra), for instance, the trial Court did not comply with the requirements of section 192 (3) of the CPA. The Court held that:

> *"... conducting a preliminary hearing is a necessary prerequisite in a criminal trial. It is not discretionary. The procedures stipulated under s.192 are mandatory. And needless to say, s.192 was enacted in order to minimize delays and costs in the trial of criminal cases.* ***However, in the most unlikely event that a preliminary hearing is not conducted in a criminal case that trial that proceeds without it will not automatically be vitiated .... the proceedings could be vitiated depending on the nature of a particular case ....."*** *[as cited in* ***Benard Masumbuko Shio*** *(supra)].*

Thus, failure to conduct a preliminary hearing will not *ipso facto* vitiate a trial unless such omission results in unfair trial leading to failure of justice. Same principle was insisted in **Hamadi Kassimu Chota v. Republic**, Criminal Appeal No. 68 of 2001, **Dotto Ngasha v. Republic,** Criminal Appeal No. 6 of

2006, **Leonard Jonathan v. Republic**, Criminal Appeal No. 225 of 2007 and **Waisiko Ruchere @ Mwita v. Republic**, Criminal Appeal No. 348 of 2013 (all unreported).

In the case at hand, it is abundantly clear that the trial court did not show clearly that it complied with section 192 (3) of the CPA in that the memorandum of agreed facts was not shown to have been read to the parties. That was an irregularity but on our part, we think, the same was curable in terms of section 388 of the CPA. More so the trial court recorded that "section 192 of the CPA [has been] complied with", that is evident at page 6 of the record. In our view, that should be enough to indicate that the letter of the section had been complied with. Thus, this ground lacks merit.

On ground eight of appeal the complaint is failure by the trial court to call the chairman of an area where the offence was committed. The learned State Attorney submitted that, in terms of section 143 of the Evidence Act, prosecution paraded witnesses that they thought were important to prove their case. More so, the chairman did not witness the ordeal. The learned State Attorney submitted rightly in our opinion, that to prove their case, prosecution called witness material to their case. In prosecution of criminal trials it is not a number of witnesses that ground conviction, but rather weight attached to the

witness's evidence. If Chairman who was not called by prosecution would be material witness, it was the duty of the appellant (accused) to call the chairman to build his defence case. This ground lacks merits.

On the nineth ground the appellant complaint is delay in arranging the appellant because he was arrested on 25th May, 2019, but taken to the trial Court on 12th June, 2019. The respondent's counsel while admitting that there was delay, that was caused by process of investigations, however urged the Court to see that, there was no any prejudice, as the evidence of prosecution was not shaken on account of delay in arranging the appellant.

It is true in terms of section 32 of the CPA, a person arrested need to be taken to the court as soon as practicable. For clarity section 32 of CPA reads as follows:

> ***32.****-(1) When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which he is brought may, in any case, and shall if it does not appear practicable to bring him before an appropriate court within twenty four hours after he was so taken into custody, inquire into the case and, unless the offence appears to that officer to be of a serious nature, release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a court at a time and place to be named*

in the bond; but where he is retained in custody he shall be brought before a court as soon as practicable.

Admittedly, as rightly complained by the appellant and admitted by the respondent's counsel that, there was delay in arranging the appellant in court. He was arrested on 25th May, 2019 and arranged in court on 12th June, 2019, reason being completion of process of investigation of the offence. This is faced with the similar scenario delay in arraignment of the appellant in the case of **Jaffari Slaum @ Kikoti v. Republic**, Criminal Appeal No. 370 of 2017 the court held that:

> *"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".*

Equally so, in the most recent decision of the Court in the case of **Shabani Salim v. Republic**, Criminal Appeal No. 519 of 2021, while faced

with the same scenario as in this case, Court held at page 24 of the Judgment that:

> *"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".*

In the case at hand, records are silent as to what made the appellant be arraigned about 17 days after he was arrested, despite learned State Attorney's submission that, delay was caused by process of investigations of the offence. We have seriouslyu examined the record of appeal, it is our finding that, despite delay to arraign the appellant, did not vitiate the trial. Thus, this ground lack merit.

On ground ten the complaint is on the different dates of the incident in that PW3 Doctor said on 20th May, 2019 while victim says on 25th May, 2019. We have noted at the outset that, this ground is new, was not raised and argued at the High Court. Section 6 (7) of the Appellate Jurisdiction Act, prohibits grounds not discussed by the first appellate court, not to be discussed at this Court. For clarity section 6 (7) (a) of the *appellate Jurisdiction Act, read as follows:-*

> *"Either party:- to the proceedings under part x of the Criminal Procedure Act may appeal to the Court of*

Appeal on a matter of law not including severity of sentence, but not on a matter of fact".

Assuming it is properly raised before this Court yet, it lacks merits, on the following reasons: The appellant was arrested on 25th May, 2019, this is one of the agreed facts signed by both parties as seen at page 6 of the record of appeal. The discrepancy complained of on the date of occurrence of the offence is not fatal, and it is expected, amongst the witness, provided that same did not corrode the credibility of witness. The Court in the case of **Dickson Elia Nsamba Shapwata and Another v Republic** (Criminal Appeal 92 of 2007) [2008] TZCA 17 (30 May 2008, TANZLII) quoted an excerpt from **Sarkar, the Law of Evidence,** 16th Edition, at page. 48 from which excerpt we find it worth recitation here:

"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode

the credibility of a party's case, material discrepancies do".

The appellant did not cross examine PW1, PW2, PW3 and PW4 on the issue, who all proved that the incident took place on 25th May, 2019. The appellant while testifying as DW1 gave account of what happened on 25th May, 2019. This proves that, the appellant knew very well the date of the commission of the offence alleged by the prosecution, when he gave the account of his whereabouts on 25th May, 2019. It is also on record that both appellant and his witness DW2 testified that on 25th May, 2019 the alleged date of incident they were at DW2 home. Therefore, it is a minor inconsistence that does not corrode the truthfulness of PW1 evidence. This ground has been raised as an afterthought.

The complaint on ground **six** is on the offence of rape not being proved. The State Attorney submitted strongly that, PW1 the victim, proved the act of penetration, same was corroborated by PW2 the victim's mother who inspected the victim, found bruises on the victim vagina. More so PW3 who received PW1 for medical examination proved that PW1 was penetrated, PW3 thus recorded her findings in PF3 that was received without objection from the appellant then accused at the trial Court. The respondent's counsel urged the Court to dismiss this ground.

We are in total agreement with the learned State Attorney's submission in this ground on the following reasons: **One**; In sexual offences like the case at hand (rape) things need to be clearly proved, namely, age of victim and penetration. Age was proved by PW2 the victim's mother in her evidence, who also tendered exhibit P1 affidavit in respect of date of birth that was not objected to by the appellant, at page 15 of the record. On the issue of penetration, the evidence of PW1 the victim said it all as being the victim testified how the appellant took his male hood and inserted it on to her sexual organ. The case of **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015, the Court at page 10 of the Judgment, while insisting on the principal that in sexual offences the best evidence is that of the victim, held that:

> *"In the present case, the most crucial witness was the victim (PW1) who categorically stated that the appellant penetrated her by inserting his manhood into her sexual organ. The appellant's demand is clearly a misapprehension which we accordingly reject".*

Being aware of the decision in the case of **Denis Joseph @ Saa Moja v. Republic**, (Criminal Appeal No. 121 of 2021) [2023] TZCA 104 (13th March, 2023, TANZILII) the learned State Attorney submitted correctly so in our view that, the evidence of the victim which, in the eyes of the law, is the best

evidence had established that, taking advantage of the fact that she was then home alone, the appellant went on to have sexual intercourse with her. The case of **Adamu Angetile v. Republic**, (Criminal Appeal No. 402 of 2020) [2023] TZCA 14 (15th February, 2023, TANZILII) underscored the principle that, unless there are good and cogent reasons for not believing a witness, every witness is entitled to credence and must be believed. PW1 should be considered as a credible witness was born out by the appellant's failure or omission to cross-examine her. **Two,** PW1 was correctly believed by the two courts below, because PW1's evidence was so clear, consistent and coherent. **Three,** PW1 mentioned the appellant to her mother (PW2) to be the person who raped her and did so at the police station immediately after his arrest. The appellant being mentioned at the earliest opportunity by PW1 is a proof of reliability of her evidence. **Four**, PW1's evidence was not shaken at all during cross-examination by the appellant before the trial court. It was expected that the appellant would have cross – examined the victim on such vital evidence she testified to incriminate him with offence charged. But that was not done. It is settled that a party who fails to cross-examine a witness while testifying is deemed to have accepted that piece of evidence and will be estopped from asking the trial court to disbelieve what the witness said. This stance was emphasized by the court in the recent case of **Patrick s/o Omary @ Richard**

v. The Director of Public Prosecutions (the DPP) Criminal Appeal No. 236 of 2019) [2023] TZCA 17646 (25th September, 2023 TANZILII).

Five, both courts below believed PW1 as a truthful and credible witness and we agree with that finding. As intimated above, the appellant did not provide us with any plausible reason to interfere with the concurrent findings of the two courts below, neither have we seen any.

Six, initially, the appellant's complaint that the case has been instigated by a certain boy whom he had quarrel with him as he was using his cloth without his consent. However, the said boy did not testify to incriminate him at the trial. More so he said he did not have any quarrel with the victim (PW1) or victim's mother (PW2).

On our part, having gone through the evidence that was tabled before the trial court, like the first appellate court, we totally agree with the concurrent finding by the two lower courts that indeed the appellant was the culprit who raped the victim on that day. There was ample evidence to justify that finding of fact and all the guidelines regarding the applicable statutory law and jurisprudence were duly observed by the lower courts.

Going by the record of appeal, it is not in doubt that the evidence of the prosecution on the record was properly evaluated against that of the defence.

Besides, the evidence of defence had raised no doubt against that of the prosecution. Basing on the foregone analysis, it is our opinion that all the grounds of appeal lack merit. All in all, therefore, on the evidence on record, we are satisfied that the learned Judge of the first appellate court was justified to come to the conclusion that the case against the appellant had been proved beyond reasonable doubt. We therefore dismiss the appeal.

DATED at **DARE ES SALAAM** this 22nd day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of December, 2023 through virtual Court from Dodoma High Court in the presence of the Appellant in person and Ms. Namsifu Lukio, learned State Attorney for Respondent/Republic is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL