IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA.

(CORAM: MWARIJA, J.A., KEREFU, J.A And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 605 OF 2021

ANTHONY TITO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court of Dodoma at Dodoma)

(Mpelembwa, SRM - Ext.Jur.)

dated the 15th day of October, 2019

in

Criminal Appeal No. 24 of 2021

JUDGMENT OF THE COURT

5th & 16th February, 2024

MWARIJA, J.A.:

In the District Court of Bahi at Bahi, the appellant, Anthony Tito was charged with three counts. In the first count, he was charged with the offence of rape contrary to ss 130(1), (2) and 131(1) of the Penal Code, Chapter 16 of the Revised Laws. It was alleged that, on unknown date in August, 2019 at Bahi Sokoni Village within Bahi District in Dodoma Region, the appellant did have carnal knowledge of one V.T. (name withheld for the purpose of protecting her dignity), a girl who was aged 16 years (hereinafter "the victim")

In the second and third counts, the appellant was charged with the offences of impregnating a school girl and aiding and abating or soliciting a school girl for marriage contrary to ss 60 A (3) of the National Education Act, chapter 353 of the Revised Laws as amended by ss 22 of the Written Laws (Miscellaneous Amendments) (No.2) Act of 2016 (the Education Act) and 4 (1) of the Education Act, respectively. It was alleged in the second count that, on unknown date in August 2019 at Bahi Sokoni Village within Bahi District in Dodoma Region, the appellant impregnated the victim. On the third count, it was alleged that on the same date and place as in the first and second counts, the appellant unlawfully solicited the victim to get married to him.

The appellant pleaded not guilty to the three counts and as a result, the case had to proceed to a full trial. At the trial, the prosecution relied on the evidence of four witnesses while in his defence, the appellant relied on his own evidence.

In its judgment, the trial court found that, the second and third counts had not been proved and the appellant was, as a result found not guilty and acquitted. However, as for the first count, the offence was found to have been proved beyond reasonable doubt. He was

consequently convicted and sentenced to thirty (30) years imprisonment.

Aggrieved, the appellant appealed to the High Court. The appeal was transferred to the Resident Magistrate's Court of Dodoma to be heard by Mpelembwa, Senior Resident Magistrate vested with extended jurisdiction (SRM – Ext. Jur). Having heard the appeal, the learned SRM – Ext. Jur. was satisfied that, the appellant was properly convicted of the offence of rape and thus dismissed the appeal. Dissatisfied further, the appellant preferred this second appeal.

It is imperative at this stage, to state the brief facts giving rise to the appellant's arraignment and his ultimate conviction. In 2019, the victim, who was born in 2003, was a Form II student at Kikuyu Secondary School. In the same year, she was transferred to Bahi Secondary School so that she could attend her ailing grandmother. She continued with her studies at the said school until in November 2019 when she absconded after having realized that she was pregnant. The situation in which she found herself compelled her to leave her grandmother's home and went to stay elsewhere. Later, on 23/4/2020, she returned to her grandmother's home and a day thereafter, delivered

a baby. According to the victim, the appellant was the person who impregnated her.

Before she left her grandmother's home, the victim named the appellant to her aunt, Theresia Laurent Maganga (PW2) as the person who was responsible for the pregnancy. When the victim returned to her grandmother's home and after she had delivered, PW2 reported the incident to the police and the appellant was arrested and charged as shown above.

In her testimony, the victim, who testified as PW1, gave evidence to the effect that, the appellant started to seduce her in July 2019. She met him for the first time at the river where the appellant expressed his affection to her and that he intended to marry her. PW1 went on to state that, she refused the proposal but the appellant continued to make advances to her. He later traced the victim's place of residence and when he managed to meet her, he asked her to collect a certain luggage at his home and assist him to send it to one Chege, a Form IV student at her school. When she agreed and went to the appellant's residence, although she resisted to enter in the house, the appellant forcefully pulled her inside the house. She resisted and raised an alarm but the appellant threatened to finish her if she continued to do so. Having

dragged her in the house, the appellant undressed and forcefully had carnal knowledge of her without using any protection. She felt severe pain as a result of being raped.

The victim went on to adduce evidence to the effect that, she did not disclose the incident to anybody because the appellant warned him not to do so. Later on, she discovered that she had become pregnant and thus informed the appellant who decided to leave Dodoma and went to live in Dar es Salaam. While there, he continued to communicate with the victim and in November 2019, upon the appellant's arrangement, she joined and stayed with him at Chanika, Dar es Salaam.

On 23/4/2020 she returned to her grandmother's home and on 24/4/2020 she delivered a baby boy. In May, 2020 after the matter had been reported to the police, she was taken to Bahi Health Centre where she was examined by Dr. Amina Ally Hamis (PW3) and thereafter, her statement was recorded at Bahi Police Station.

The prosecution relied also on the evidence of PW2 the said Theresia Laurent Maganga. It was her evidence that, she became aware of the relationship between the victim and the appellant after the former had become pregnant and absconded from school. The witness testified

further that; she was given the appellant's photograph by the victim who later on went to Dar es salaam to stay with the appellant on the promise that they would get married. When the victim returned to Dodoma and after she had delivered, PW2 reported the matter to the police and the appellant was consequently arrested and charged.

The case was investigated by WP 2265 D/C Mgeni (PW4). In the course of her investigation, she recorded the statements of the victim and the appellant. She also conducted investigation at Bahi Secondary School where, according to her, she confirmed that the victim was a student. She prepared the charge and the appellant was taken to court.

In his defence, the appellant, who as stated above, denied all the three counts, disputed the prosecution evidence. He defended himself to the effect that, the evidence of PW1 did not establish that he was the one who impregnated her. This, he said, is apparent from the fact that, no medical examination was conducted to prove that allegation. He added that, there was no cogent evidence because the victim and PW2 did not tender any exhibit to show that the former had cohabited with him as alleged by the said witnesses. He stressed that, the prosecution evidence did not prove the case against him beyond reasonable doubt.

In its judgment, the trial court found that the prosecution did not prove the second and third counts. It thus acquitted the appellant of those counts. The learned trial Resident Magistrate was however, satisfied that the first count had been proved beyond reasonable doubt. He believed the evidence of PW1 as corroborated by the oral evidence of PW3 as being credible and relying on *inter alia,* the case of **Selemani Makumba v. Republic,** [2006] T.L.R 379, found that it had proved the offence of rape against the appellant.

As shown above, the appellant was dissatisfied with the decision of the trial court and thus preferred an appeal against his conviction. The learned SRM-Ext. Jur. who heard the appeal concured with the finding of the trial court that the evidence of the victim to the effect that the appellant forcefully had carnal knowledge of her after he had dragged her into his house was credible and therefore, proved the offence charged in the first count. Like the trial court, the first appellate court held that, even though the medical report contained in the PF3 (exhibit P1) is silent on whether or not the victim was penetrated, relying on the case of **Magina Kabilu @ John v. Republic,** Criminal Appeal No. 564 of 2016 (unreported) held that, the oral evidence of PW1 sufficiently

proved that she was penetrated. On that finding, the first appellate court dismissed the appeal.

In this appeal, the appellant has raised a total of eight grounds of complaint contained in two memoranda of appeal. The first memorandum filed by his advocate on 3/1/2022 consists of two grounds while the second memorandum filed by the appellant in person on 10//1/2022 contains five grounds.

On the date of hearing, the appellant was represented by Mr. Leonard Haule, learned counsel while the respondent was represented by Ms. Lina Magoma, learned Senior State Attorney assisted by Ms. Rose Ishabakaki, learned State Attorney. Before the appeal could proceed to hearing, Mr. Haule informed the Court that he was abandoning the grounds of appeal contained in the memorandum filed by the appellant and thus would argue the grounds filed by him on 3/1/2022.

The two grounds are to the following effect:

> *"1. That, both the trial and the first appellate courts erred in law and fact by convicting the appellant basing on weak, incredible, contradictory and implausible evidence of the prosecution witnesses which did not prove the charged offence beyond reasonable doubt.*

2. That the first appellate court erred in law and fact by failing in its duty to re-evaluate the entire evidence hence arrived at unjust decision."

Further to the two grounds above, the learned counsel made a prayer under rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 to argue an additional ground of appeal, the prayer which was not opposed by the learned Senior State Attorney. The Court granted the prayer to argue that ground which constituted the 3rd ground of appeal, that:

"3. The trial and the first appellate courts erred in law and fact in convicting the appellant in the case in which there was variance between the charge and evidence."

Starting with the 3rd ground of appeal, Mr. Haule argued that, according to the charge, the offence was committed at Bahi Sokoni but in her evidence, PW1 said that it was committed at Mwanachugu. He argued further that, whereas it is stated in the charge that, the offence took place in August, 2019, from the evidence of the victim, the incident happened in July, 2019. According to the learned counsel, since the charge was not amended to rectify the variance on the date and place at which the offence was committed, the appellant was improperly

convicted. In support of his argument, Mr. Haule cited the case of **Francis Fabian @ Emmanuel v. Republic**, Criminal Appeal No. 261 of 2021 (unreported).

Responding to the submissions made by the appellant's counsel on that ground of appeal, although she admitted that there is variance between the charge and the evidence as regards the place where the offence was committed, Ms. Magoma argued that, the discrepancy is not fatal. She cited s. 234 (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA) to bolster her argument. On the variance of the date, she argued that, the month of July mentioned by PW1 is the time when the appellant started to seduce her and since from her evidence, a reasonably long time passed before he raped her coupled by the fact that, she delivered a baby on 24/4/2020, the offence was obviously committed in August 2019.

Having considered the nature of the discrepancies complained of, to start with the time of commission of the offence, we agree with the learned Senior State Attorney that, the variance is minor such that the amendment of the charge was not necessary. Section 234(3) of the CPA cited by Ms. Magoma states as follows:

"234 – (1)....

(2) ....

(3) variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof"

Since the time of institution of the proceedings was not an issue, this complaint is devoid of merit.

With regard to the place at which the offence was committed, we do not, with respect, find the variance to be significant. According to PW1's evidence, the offence was committed in the appellant's house situated at Mwanachugu. It was not disputed that Mwanachugu is not in Bahi Sokoni Village within Bahi District. Furthermore, even if that would have been the case, since it was alleged that the offence was committed in the appellant's house, the misdescription of the location of the house is, in the circumstances, not a fatal discrepancy. We thus find that; this complaint is also without merit.

On the 1st and 2nd grounds of appeal which Mr. Haule argued them together, it was the learned counsel's contention that, the appellant's conviction was based on insufficient evidence. He argued that, the allegation by the prosecution that the appellant did have carnal knowledge of the victim was not proved. This, he said, is because the victim mentioned the appellant after about 10 months from the time when the offence was allegedly committed and also because she did not report any of the incidences from the time when the appellant seduced her to the time of the alleged offence. Relying on the case of **Issa Mfaume v. Republic**, Criminal Appeal No. 128 of 2017 (unreported), the learned counsel argued that such delay tainted the victim's credibility thus rendering the case unproved.

In reply, Ms. Magoma submitted that, the evidence of the victim proved that she was raped by the appellant. According to the learned Senior State Attorney, the victim gave a true account on how the appellant seduced the victim and later raped her at his home, followed by his act of inviting her to Dar es Salaam where he cohabited with her. Ms. Magoma stressed that, in her evidence, the victim stated that the appellant pulled her in his house, undressed her and forcefully inserted his penis into her vagina thereby causing her to suffer severe pain. The

learned Senior State Attorney cited the case of **Selemani Makumba** (supra) and **Charles Yona v. Republic**, Criminal Appeal No. 79 of 2019 (unreported) which the Court observed that, the best evidence in a sexual offence is that of the victim. In the circumstances, she argued, the evidence of PW1, the victim of the sexual offence, proved the ingredients of the charged offence of rape beyond reasonable doubt.

We have duly considered the submissions of the learned counsel for the parties in the 1st and 2nd grounds of appeal. It is noteworthy to state that, this being a second appeal, as a matter of principle, the Court cannot interfere with concurrent findings of the two courts below on matters of facts unless there has been a misapprehension of the substance, nature and quality of the evidence, misdirection or non-direction thereto or violation of some principle of law or procedure resulting into miscarriage of justice. – see for instance the cases of **Salum Mhando v. Republic,** [1993] T. L.R 170, **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 and **Jama Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (both unreported).

In the case at hand, the trial court believed PW1 as the witness of truth and relied on her evidence to found the appellant's conviction. That finding was upheld by the first appellate Court. It found that

whereas the age of the victim was proved by her birth certificate, her evidence that she was raped by the appellant was credible and therefore, proved the offence beyond reasonable doubt.

Indeed, as observed by the two courts below, the best evidence in sexual offences is that of the victim. Such evidence of the victim alone may be acted upon without corroboration once the court is satisfied that the same is credible. This is in terms of s. 127(6) of the Evidence Act, Chapter 6 of the Revised Laws which states as follows: -

> *"127(1)....*
> *(2) ....*
> *(3) ....*
> *(4) ....*
> *(5)....*
> *(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving a sexual offence 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 the sexual offence is telling nothing but the truth."

Mr. Haule has challenged the credibility of PW1's evidence contending **first**, that she mentioned the appellant after about 10 months from the date of the alleged offence, **secondly**, that she did not report to any person or authority when the appellant started to entice her and **thirdly**, that she did not prove that it was the appellant who raped her. In our considered view, since the trial court, which was best placed to assess the credibility of the witnesses, had found her credible, the finding which was upheld by the first appellate court, we are, with respect, of the settled view that the challenge on her credibility is without merit.

Furthermore, the fact that the matter was reported after 10 months from the date of the incident is, from the evidence, due to sufficient reason. After having impregnated the victim, the appellant moved her to Dar es Salaam. It was after the victim and the appellant had returned to Dodoma that PW2 reported the matter to police. For these reasons, we are unable to agree with the arguments made by the learned counsel for the appellant.

In the final analysis and on the basis of the above stated reasons, we find that this appeal is lacking in merit and hereby dismiss it.

DATED at **DODOMA** this 15th day of February, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 16th day of February, 2024 in the presence of Mr. Leonard Haule, learned counsel for the Appellant and Ms. Patricia Mkina, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL