IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: LEVIRA, J.A., ISSA, J.A. And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 306 OF 2022

DAMIAN MANYIKA @ BABU TANGA..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-Salaam)

(Masabo, J.)

dated the 23rd day of February, 2022

in

Criminal Appeal No. 43 of 2021

JUDGMENT OF THE COURT

29th May & 13th June, 2024

ISSA , J.A.:

The appellant, Damian Manyika @ Babu Tanga was tried and convicted by the Kibaha District Court for the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 R.E. 2019. Upon convicting the appellant, the trial court imposed a sentence of 30 years imprisonment. The appellant's arraignment before the trial court was a result of an accusation that, on diverse dates between August and September 2019, at Mwendapole area within Kibaha District in Coastal

Region, he had carnal knowledge of an 11 year old girl whom we shall call AB or the victim to hide her identity. The appellant pleaded not guilty to the charge. The prosecution fielded six witnesses to prove the charge, and after a full trial he was convicted as charged and sentenced to 30 years imprisonment, as stated earlier.

The brief facts of the case were that, the victim (PW3) was living with her mother (PW2) and a younger brother in a rented house whose other occupants included the appellant and four other persons. PW2 was occupying one room and she used to leave the room very early in the morning in order to attend to her business. It was alleged by the prosecution that in the early hours of 2nd September 2019, after PW2 had left the house, the appellant took advantage and knocked at the door of the victim's room. When the victim opened the door the appellant took her to his room and intruded on her modesty. He removed her clothes, laid her on his bed and had carnal knowledge of her. After satisfying his lust, he asked her to go and wash herself and rewarded her with TZS 4,000. The appellant repeated the same act on 25th September 2019 and again rewarded her with TZS 4,000. The victim proceeded to school with the money in her school bag.

While in class, the victim discovered that the money was missing, hence, during class-break she reported to her teacher, Sophia Juma Kimweri (PW4) who announced the loss of the victim's money when the classes resumed. The money was recovered but out of curiosity she inquired about why the victim was in possession of such big amount of money. After probing the victim revealed that she was given the money by Babu Tanga. She also revealed that, Babu Tanga used to give her gifts and food and that he was abusing her by kissing her on her mouth, touching her breast and inserting his finger into her vagina and anus, and had already raped her six times. PW4 reported the matter at Mji Mdogo Police Station and the appellant was arrested on 26th September 2019.

On the same day of the arrest, the victim was taken to Tumbi Referral Hospital where she was attended by Dr. Zakia Ally Kilima (PW1). After the examination, PW1 filled PF3 (exhibit P1) which showed there were bruises in her vagina suggesting she was carnally known. She concluded that, the victim was carnally known a week before examination.

The mother of the victim, Maua Sultan (PW2) was called at the victim's school on the same day and was informed that, the victim was

found with the money which she was given by Babu Tanga. She was not told about the rape incident. It was not until 26th September 2019, when she went to school for the second time that she was informed that, her daughter had been taken to hospital and the victim herself informed PW2 that she had been raped by Babu Tanga on several occasions. PW2 stated in her testimony that, she did not see anything suggesting that her daughter was raped.

Ally Said Shomari (PW5) is the police officer who arrested the appellant in his room on 26th September 2019 and took him to Mji Mdogo Police Station. G. 1183 D.C. Omary (PW6) is the investigation officer who interrogated the appellant as well as the doctor (PW1). He also visited the crime scene which is the house in which the victim and the appellant were residing. He also inspected a tollet where the offence was allegedly committed.

The appellant, in his defence, distanced himself from the accusation. He denied committing the offence in those early hours during which there are a lot of movements in that house. Further, he contended that, he used to go to work early in the morning and come back at night. In addition, he said, on 25th September 2019 he was not at home. He attended a send-off ceremony at his friend's house and

tendered an invitation card as a proof. The appellant's friend, Paul Francis Kobelo (DW2) confirmed that, he had a send-off ceremony on his house on 25th September 2019 and that, the appellant attended the ceremony.

The trial court found that the prosecution evidence was sufficient to sustain the charge. Its findings were supported by the evidence of the victim, AB which was corroborated by the evidence of her teacher (PW4) and the doctor (PW1). The trial court convicted and sentenced the appellant on the strength of the evidence of those three witnesses, which it found to have proved the case against the appellant beyond reasonable doubt.

The appellant's appeal to the High Court did not succeed. The first appellate Judge was satisfied that, the victim gave her testimony on oath. Hence, she was not only competent, but also a trustworthy witness. She also found that, the evidence of the victim was corroborated by her teacher (PW4) and the doctor (PW1). There was also PF3 (exhibit P1) which proved that the victim had been carnally known. Lastly, she made her findings that the prosecution was able to prove its case beyond reasonable doubt. As a result, she sustained the appellant's conviction and sentence, and dismissed the appeal.

Undaunted, the appellant has instituted the instant appeal predicated on four grounds of appeal:

1. *That the learned first appellate judge erred in law for failure as a first appellate court to re-hear and re-adjudicate the appellant's appeal as its obligation in law, and hence failed to find that in totality the prosecution evidence as a whole did not prove its case beyond reasonable doubt.*

2. *That the learned appellate judge erred in law to upheld the appellant's conviction and sentence basing on sole evidence of a girl of 11 years (PW3) who before giving evidence did not promise to tell the truth to the court, and not to tell lies or testified on oath alleged in the judgment of the trial court.*

3. *That the learned appellate judge erred in law to upheld the appellant's conviction and sentence basing on evidence of a victim (PW3) which is contradictory and inconsistent to that of a medical doctor (PW1) who had revealed in cross-examination, while it was the evidence of PW3 that she was medically examined the next day after the incident.*

4. *That the learned appellate judge erred in law to upheld the appellant's conviction and sentence basing on prosecution evidence which is highly suspicious,*

implausible and improbable as how a girl of tender age can be raped on 25-9-2019 and medically examined on 26-9-2019 but found scar (healed bruises) instead of fresh bruises and discharge.

When the appeal was called on for hearing, the appellant appeared in person and fended for himself. He relied on his memorandum of appeal and his written submissions he had earlier filed, and had nothing of substance to add. The respondent Republic was represented by Ms. Aurelia Makundi, learned Senior State Attorney assisted by Ms. Agness Ndanzi, learned State Attorney. Ms. Makundi appraised the Court that, they were resisting the appeal, adding that they would argue the 1st, 3rd and 4th grounds of appeal together, while the 2nd ground would be argued separately.

In disposing of this appeal, the Court will follow the same sequence as taken by the respondent Republic, but it will start with the 2nd ground of appeal in which the appellant faulted the first appellate judge for her failure to resolve the controversy surrounding the testimony of the victim on whether she testified on oath or she promised to tell the truth. The appellant submitted that, at page 56 of the record of appeal, the learned first appellate judge was of the view that the

victim testified on oath while the proceedings of the trial court reveal that, the victim promised to speak the truth.

The appellant added that, the evidence of the victim was recorded in contravention of section 127 of the Evidence Act, Cap. 6 R.E. 2019. He argued that, if it was recorded on oath then *voire-dire* test was required to be conducted to determine if the victim understood the meaning of oath or not. He buttressed his argument by citing our decision in **Hassan Yusuph Ally v. The Republic**, Criminal Appeal No. 462 of 2019 [2021] TZCA 472 (14 September 2021, TANZLII). Further, he contended that, if the victim did not understand the meaning of oath, then her testimony could have been recorded upon her promise to speak the truth and not to tell lies, but in the instant case, the promise was incomplete, he said. The victim (PW3) promised only to speak the truth and the promise was recorded in reported speech. Therefore, the testimony of the victim had no evidential value. He fortified his argument by referring us to our decision in **John Mkorongo James v. The Republic**, Criminal Appeal No. 498 of 2020 [2022] TZCA 111 (11 March 2022, TANZLII) and **Mohamed Ramadhani @ Kolahili v. The Republic**, Criminal Appeal No. 396 of 2021 [2023] TZCA 81 (2 March 2023, TANZLII).

Responding to 2nd ground of appeal, Ms. Makundi submitted that the record of appeal shows that the victim did not testify on oath but she promised to speak the truth. The only problem is that the trial court recorded the promise in reported speech: "she promised to speak the truth". She said that this is not fatal and did not prejudice the appellant. She bolstered her argument by our decision in **George Janas Lesilwa v. The Republic**, Criminal Appeal No. 374 of 2020 [2024] TZCA 269 (16 April 2024, TANZLII). Further, she submitted that, following the amendment of section 127 of the Evidence Act made in 2023, the victim's statement was not affected by the failure to comply with section 127. She prayed for the dismissal of this ground for lack of merit.

From the above submissions, it is clear that Ms. Makundi did not align herself with the statement of the first appellate judge found on page 56 of the record of appeal that: "*PW3 a girl of 11 years old testified on oath, having satisfied that she knows the meaning of oath, but also possessed of sufficient intelligence to justify the reception of her evidence.*"

The Court cannot agree with her more, the proceedings of the trial court on page 11 are crystal clear that, the victim did not understand the nature of oath and hence she testified upon promising to speak the

truth. Therefore, the statement of the first appellate judge was a misdirection on her part and was not supported by the proceedings of the trial court.

Reverting to the issue of promise made by the victim, section 127(2) of the Evidence Act provides:

> *"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."*

In light of this provision, we agree with the appellant that the way the said promise was recorded was irregular. In **John Mkorongo James** (supra) the Court stated that, the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete. Therefore, the promise given by the victim was in contravention of section 127. It is to be noted, however, that section 127 was amended in 2023 by Act No. 11 of 2023 and a new subsection (7) was added which provides:

> *"Notwithstanding any other law to the contrary, failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible".*

Therefore, this new subsection (7) has cured the said anomaly raised by the appellant. The testimony of the victim is, therefore, admissible and the ground of appeal lacks merit and we dismiss it.

With respect to 1st, 3rd and 4th grounds of appeal the appellant in his written submission has faulted the first appellate judge for her failure to discharge her obligation in re-evaluating the facts afresh, hence failed to correct the errors of the trial court. In support of his argument the appellant relied on Court's decisions in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (1981) T.L.R. 149, **Dr. D.R. Pandya v. R.** [1957] E.A. 336 and **Salum Mhando v. The Republic** [1993] T.L.R. 170.

The appellant added that penetration, which is one of the ingredients of the offence of rape was not proved beyond reasonable doubt. The evidence of the prosecution is to the effect that, the victim was raped for the last time on 25th September 2019 and that the rape was detected on the same day by PW4, but when the victim was medically examined by PW1 on the second day, 26th September 2019, the examination report (exhibit P1) revealed that the penetration was done a week before examination. Further, the report reveals that the victim was found with healed scars on her vagina which was inconsistent

with the evidence that she was raped a day before. Lastly, the appellant submitted that, the learned first appellate judge did not assess the credibility of the victim whether she was telling the truth or not. He concluded that, the prosecution did not prove its case beyond reasonable doubt.

Responding to these grounds of appeal, Ms. Makundi started by citing our decision in **Selemani Makumba v. The Republic** [2006] T.L.R. 329 wherein the Court stated that the best evidence of rape should come from the victim. She then took us to page 17 of the record of appeal where the victim narrated about the acts constituting rape, allegedly committed on her on 2nd September 2019, and on page 18 she narrated about the acts which were committed on 25th September 2019. On both occasions, the victim was given TZS 4,000. She added that, the victim named the tormentor to her teacher on the same day which is 25th September 2019. Further, the doctor (PW1) examined the victim on the second day, 26th September 2019 and explained her findings on pages 45-46 of the record of appeal which confirmed that the victim was raped. She concluded that, the evidence of the victim, PW4 and PW1 was sufficient to prove the guilty of the appellant.

Responding on the issue of contradictions, Ms. Makundi denied the existence of contradictions between the evidence of the victim and PW1. She argued the offence of rape was committed in two different dates, 2nd September 2019 and 25th September 2019. The statement was recorded by PW1 after examining the victim on 26th September 2019, and that, the penetration was done a week before examination was consistent with her findings that there were fresh bruises while others healed. This proved that the rape was committed in two occasions.

When Ms. Makundi was probed by the Court regarding the clinical card of the victim (exhibit P2), she conceded that exhibit P2 was tendered in evidence to prove the age of the victim, but the exhibit was not read out in the trial court. She asked the Court to expunge this exhibit from the record. Nevertheless, she submitted that the age of the victim was 11 years and this was proved by the victim as well as PW2. She concluded that, the issue of age was never in contention. She prayed for the appeal to be dismissed for lack of merit.

In his brief rejoinder, the appellant submitted that, he succeeded to show that there was a contradiction between PW1 and PW3 regarding the date of the incident. Therefore, this contradiction should be resolved in his favour. Further, he said that the mother of the victim knew

nothing about the rape and was informed by the teacher. This shows that there was a game played by the teacher, and the mother played along with her. Lastly, he said it was alleged by prosecution that, he gave TZS 4,000 to the victim which was found in the victim's class on 25th September 2019, but the money was not tendered in evidence and the prosecution did not call even one student to testify on what happened. He prayed to be set free as he did not commit the offence.

The epitome of these grounds of appeal centred on the issue of whether the prosecution was able to prove its case beyond reasonable doubt. Section 130 (2)(e) of the Penal Code under which the appellant was charged and convicted provides:

> *"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following descriptions:*
>
> *(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

This provision creates an offence of statutory rape. What is required to be proved are two facts: **One**, that the accused had sexual intercourse with a girl, with or without her consent. The sexual intercourse is proved by penetration of her vagina, even a slight penetration is sufficient to constitute sexual intercourse. **Two**, it must be proved that, the girl is under 18 years of age and that, if she is 15 or more years of age, it must be shown that she is not his wife.

In this appeal, the victim, presented herself at the trial as an 11 year old girl. The victim's mother, PW2 testified on the victim's age which was 11 years and that her date of birth was 9.6.2008. These facts were not challenged in cross-examination or in evidence by the defence. The law is settled on how to prove the age of the victim, see - **Issaya Renatus v. The Republic**, Criminal Appeal No. 542 of 2015 [2016] TZCA 218 (26 April 2016,TANZLII), and **Rutoyo Richard v. The Republic**, Criminal Appeal No. 114 of 2017 [2020] TZCA 296 (16 June 2020) . In the latter case, the Court stated:

> *"We reiterate that cogent evidence relating to age from the victim, parent, close relative, close friend, teacher in which she was schooling or any person who knew well the victim was required."*

We are, therefore, satisfied that her age was sufficiently established.

With respect to the second ingredient which is penetration, the victim narrated how she was carnally known by the appellant in two occasions and she was given TZS 4,000 each time. PW1, the doctor examined her and he found healed scars and bruises on her vagina which suggested that she has been carnally known. Therefore, gauging from the evidence of PW1, PW4, and PW3 together with exhibit P1 there is no doubt that the offence of rape was committed against PW3 as the age and penetration was proved. However, the crucial issue is: who was responsible for the offence of rape?

To support the conviction and sentence of the appellant, the learned State Attorney cited to us the case of **Selemani Makumba** (supra). In this case the Court stated that: "the true evidence of rape should come from the victim". The victim in the case at hand narrated how the offence against her was committed. On the other hand, the appellant denied committing the offence and faulted the first appellate court for not assessing the credibility of the victim before sustaining the conviction and sentence.

On our part, we still hold that the true evidence of rape should come from the victim as laid down in **Selemani Makumba** (supra) and **Godi Kasenegali v. The Republic**, Criminal Appeal No. 10 of 2009 [2010] TZCA 5 (2 September 2010,TANZLII). However, the conviction should be the result of assessment of the evidence, credibility of the victim and other circumstances of the case. In fact, in **Selemani Makumba** (supra) the Court said:

> *"We are of the firm view that once the two witnesses **were believed** and the question of mistaken identity eliminated **and there were no circumstances or evidence which could give rise to doubt** in the mind of the Triai Court, we can find no justification for interfering with the concurrent findings of the two Lower Courts that Ayes was raped and that the person who raped her was the appellant."*
>
> *(Emphasis supplied).*

Further, the Court in **Mohamed Said v. The Republic,** Criminal Appeal No. 145 of 2017 [2019] TZCA 252 (22 August 2019, TANZLII) clarified the position of law, thus:

> *"We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence*

*comes from the victim [**Magai Manyama v. Republic** (supra)]. We are also aware that under section 127(7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded soiely on the uncorroborated evidence of the victim. However, we wish to emphasise the need to subject the evidence of such victims to scrutiny in order for Courts to be satisfied that what they state contain nothing but the truth".*

In addition, the Court stressed that:

"It was never intended that the word of the victim of sexual offence be taken as gospel truth but that her or his testimony should pass the test of truthfulness".

Therefore, the evidence of the victim should be credible and should not be taken whole sale without considering matters on coherence, reliability and other circumstances (see - **Majaliwa Ihemo v. The Republic**, Criminal Appeal No. 197 of 2020 [2021] TZCA 304 (15 July 2021, TANZLII) and **Straton s/o Steven Mboya v. The Republic**, Criminal Appeal No. 576 of 2020 [2024] TZCA 349 (10 May 2024, TANZLII).

In the case at hand, which is a second appeal, we are alive to the general practice that a second appellate court would not easily disturb or interfere and undo the concurrent findings of two lower courts unless the two courts completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction or where there was misdirection on evidence (see - **Salum Mhando v. The Republic** [1993] T.L.R. 170, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (supra)).

In the instant case, several doubts have been raised by the appellant which touched on the credibility of the victim and the surrounding circumstances corroborating the evidence of the victim. **One**, the victim failed to report the incident at the earliest opportunity. PW1 testified that she was raped by the appellant six times; the first time was on 2nd September 2019 and the last one was 25th September 2019. PW1 never reported the incidents to anyone. The last one was found by accident when she was found with a large amount of money and the teacher (PW4) wanted to know where she got the money. The victim revealed she was given the money after she was raped by appellant. The inability of the witness to disclose the name of the perpetrator at the earliest time following the commission of the offence

adds doubt to her evidence. (See - **Swalehe Kalonga and Another v. The Republic**, Criminal Appeal No. 45 of 2001 (unreported) **Jaribu Abdulla v. The Republic** [2003] T.L.R. 271).

Two, the victim never raised alarm before, during or after the rape was committed against her on all occasions. Further, there is no evidence that, the victim was under any threat from the appellant not to report the matter.

Three, the mother of the victim (PW2) did not suspect anything or seen anything different from the victim. In her own words at page 16 of the record of appeal she said:

> *"When we left school on 25/9/2019 I was informed not to ask her anything. I complied and did not ask her anything. I did not go to hospital with my child. I was informed the result and the story of what happened to her, I was informed by my daughter while we were at school... I have never witnessed anything different from my daughter which suggest that she was raped. I have never witnessed my daughter given money by Babu Tanga. I remember one time my child told me that she was given clothes and shoes by one Babu Tanga.*

What I have testified is what I was informed and I didn't participate on the process of proving them."

It was very strange that, the school did not even inform the mother on what happened to the victim when she went there on 25th September 2019. Instead the school teacher (PW4) lodged complaint to the police and took the victim to the hospital. Furthermore, the mother did not enquire under the pretext that, PW4 warned her not to ask the victim anything and she obeyed. This is very strange for a mother to keep quiet on such a situation. What we gather is that this whole incident was an affair which wholly rested in the hands of PW4 with little or no involvement of PW2.

Four, it was alleged that the victim was found with TZS 4,000 at school and this is what triggered the interrogation of the victim. But the money was not tendered in the trial court and not even a single student was called to testify on what happened at school on 25th September 2019. In addition, it is on record that six tenants occupied the house where the victim was residing, but none of the four tenants was called to testify in the trial court. This would have entitled the trial court to draw adverse inference against the prosecution.

Five, the appellant has forcefully argued about the contradictions between the victim and the doctor (PW1). It is worth to examine exhibit P1 where PW1 wrote:

> *"The inner parts of the labia have darkened (scared) revealing healed bruises. The labia minora and external parts of the vaginal (orifice) is red and inflamed with clear discharge. The orifice is more patent than expected."*

When PW1 testified in the trial court as seen on page 11 of the record of appeal, she said:

> *"On my observation on her vagina the inner part of the vagina has scars caused by bruises and on the outer part of the vagina had reds which is a proof of the penetration, but also the vagina was not intact. And in the laboratory tests there were no proof of sperms but there was a lot of epithelial cells which is the sign of penetration which cause them to come out of uterus. Final what I can say is that the victim had penetration with the blunt object."*

PW1 concluded that the penetration was done between a week before examination. From these accounts, we agree with the appellant

that this testimony is inconsistent with the fact that the victim was raped a day before examination as the prosecution case suggests. Lastly, PW6, the investigator testified that he visited the crime scene which is a house where the appellant and the victim were residing and he inspected the toilet where the offence of rape was committed. This, again, is inconsistent with the testimony of the victim who testified that, in both two occasions he was raped inside the appellant's room.

All these issues undermined the credibility of the prosecution case. It has been the position of this Court that in order to base a conviction on the evidence of a sole eye witness, his or her evidence must be absolutely watertight (see - **Ramadhan Said Omary v. The Republic**, Criminal Appeal No. 497 of 2016 (unreported)). The word watertight has been described by the Court in **Nhembo v. The Republic**, Criminal Appeal No. 33 of 2005 (unreported) as follows:

> *"In law ... for evidence to be watertight, it must be relevant to the fact in issue, admissible, credible, plausible, cogent and convincing as to leave no room for a reasonable doubt."*

Considering the evidence on record, we cannot say with certainty that, the prosecution proved the case beyond reasonable doubt.

Consequently, on the face of these doubts, we quash the conviction and set aside the sentence of 30 years imprisonment on the appellant. We order the immediate release of the appellant from prison unless he is being held there for another lawful cause.

It is so ordered.

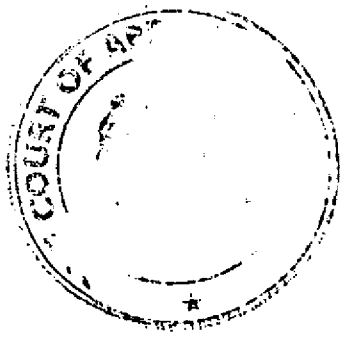
DATED at **DAR ES SALAAM** this 11th day of June, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 13th day of June, 2024 in the presence of the appellant in person via video facility from Ukonga Prison, and Ms. Laura Kimario, learned State Attorney from Kibaha NPS Office for the Respondent/Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL