**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: KWARIKO, J.A., LEVIRA, J.A. And NGWEMBE, J.A.)**

**CRIMINAL APPEAL NO. 481 OF 2020**

**JOVIN DAUD ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania at Mwanza)**

**(Mgeyekwa, J.)**

**dated the 28th day of July, 2020**

**in**

**(RM) Criminal Appeal No. 55 of 2020**

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# JUDGMENT OF THE COURT

12th & 23RD February, 2024

## KWARIKO, J.A.:

Before the Court of Resident Magistrate of Geita at Geita (the trial court), appellant was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (2) (a) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2022]. The prosecution alleged that, on 9th June, 2019 at 18:00 hours at Nyaruyeye Village within the District and Region of Geita the appellant had carnal knowledge of one 'SJ' (name withheld to disguise her identity)

a girl aged sixteen years. The appellant denied the charge but at the end of the trial, he was convicted and sentenced to thirty years imprisonment.

Dissatisfied with that decision, the appellant appealed to the High Court of Tanzania at Mwanza Sub – Registry (the High Court) which, in the end, upheld the trial court's decision and dismissed the appeal for being devoid of merit. This present appeal is against that decision.

At this juncture, we find it appropriate to revisit the evidence from both sides as unfolded during the trial as follows: On 9th June, 2019 at around 16:00 hours, the victim (PW1) went to the bush to collect firewood. While in the process of collecting firewood, the appellant and Benjamin Shabani (PW2), her neighbours, were grazing cattle in the same locality. When she was ready to leave, the appellant grabbed and fell her down, pulled down her skirt together with underpants and started fondling her. Subsequently, he inserted his male organ into her vagina. While that was happening, PW2 just stood nearby watching and did nothing. After the appellant had satisfied his sexual urge, he left PW1 free and she headed to the appellant's home where she found the appellant's grandmother, one Mwanagalula. PW1 revealed what the appellant had done to her. Later, her father Tumaini Lameck (PW3) was also informed who in turn reported the matter to hamlet chairman. Consequently, the

appellant was arrested and sent to police station. Meanwhile, PW1 was issued with a Police Form No. 3 (PF3) and went to hospital where she was attended by Dr. Judith Thomas (PW4). According to PW4, the victim had already washed her body and she had no blood, bruises or fractures in her vagina. PW4 testified further that, the victim's vagina was enlarged signifying that she was used to sexual intercourse. Her findings were filled in the PF3 which was admitted in evidence as exhibit P1.

The appellant was the only witness in defence case. He denied the allegations and said that on the material day, together with PW2, they had gone to the farm at Ibondo area to look for cassava. While there, PW1 arrived and asked PW2 to wait for her. They headed home together where he found the said Mwanagalula, his employer who asked him to go to PW1's home. He complied. However, when he got there, he was beaten and sent to police station. On cross-examination, the appellant complained that this case was framed against him since he was claiming his wages from PW2's family.

Upon a full trial, the trial court found that the charge was sufficiently proved against the appellant. Consequently, he was convicted and sentenced as intimated above. The High Court upheld that decision.

Before this Court, initially, the appellant had filed a memorandum of appeal containing six grounds and on the day of hearing, he was granted leave to argue another eight additional grounds of appeal. We have paraphrased those grounds and come up with the following twelve points of complaints: **One,** that, the undisputed facts of the case were not read over to the appellant during preliminary hearing contrary to section 192 (3) of the Criminal Procedure Act; **two,** the defence case was not considered by the two courts below; **three,** the High Court erred to base its decision on sections 130 (1) (2) and 131 (2) (e) of the Penal Code contrary to the provisions of law under which the appellant was charged and convicted; **four,** the appellant was denied a right to be heard as he was not availed with complainant's statement, list of prosecution witnesses and exhibits; **five,** during the appellant's trial, witnesses did not endorse signatures at the end of their respective testimonies; **six,** the appellant's cautioned statement was not properly tendered and admitted in evidence; **seven,** the trial court did not comply with section 312 (2) of the Criminal Procedure Act when it omitted to mention the provision of law under which it convicted the appellant; **eight,** no witnesses were called to testify on the appellant's arrest and interrogation; **nine,** the prosecution evidence was contradictory regarding age of the victim; **ten,** the delay to examine the victim for two days casts doubt on the

prosecution case; **eleven,** the medical doctor's finding that there was no signs of sexual assault on the victim casting doubt on the prosecution's case and it was erroneously disregarded by the two courts below; and **twelve,** the High Court erred to base its decision on the unanalysed and unevaluated evidence by the trial court.

On the day the appeal was called on for hearing, the appellant appeared in person, without legal representation and adopted his grounds of appeal without more opting to hear first from the respondent. On behalf of the respondent Republic, Misses. Jaines Kihwelo and Naila Chamba, learned State Attorneys appeared and resisted the appeal.

It was Ms. Kihwelo who took the stage to reply to the grounds of appeal. As regards the first ground, she conceded to it and submitted that, although it is true that the undisputed facts of the case were not ready over to the appellant, he signed them. She argued that, the omission was not fatal, since the aim of the preliminary hearing is only to accelerate trial and the appellant fully participated in his trial. Having considered this ground and the submissions of the parties, we have found the issue which calls for our determination is whether non-compliance with section 192 (3) of the Criminal Procedure Act [CAP 20 R.E. 2022]

(the CPA) by the trial court was fatal to the proceedings. We find it apposite to let this provision speak as follows:

> *"At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and* ***the memorandum shall be read over and explained to the accused in a language that he understands,*** *signed by the accused and his advocate (if any) and by the public prosecutor, and then filed."* [Emphasis supplied].

This provision states that, in the course of the preliminary hearing, the court is required to prepare a memorandum of undisputed facts of the case, read and explain them to the accused in a language he understands and cause it to be signed by him and his advocate, if any. It is clear that this provision is couched in mandatory terms. Reverting to the case at hand, it is true that, the trial court did not read out the undisputed facts of the case to the appellant. The question to be asked is whether this omission vitiated the proceedings before the trial court.

The law is clear that, the aim of preliminary hearing is to accelerate criminal trials so that matters which are not disputed will be identified and thus, there will be no need to prove them; hence, saving court's time and costs. This has been the pronouncement by the Court in its various

decisions; including the case of **Kalist Clemence @ Kanyaga v. R,** Criminal Appeal No. 1 of 2000 (unreported). The law also goes on to state that failure or erroneous preliminary hearing only vitiates its proceedings and does not vitiate the proceedings of the trial. In the case we have just cited, it was observed that non-compliance with section 192 of the CPA, only vitiates the preliminary hearing proceedings, and not the trial proceedings. The omission does not vitiate trial proceedings because, like in the instant case, the trial was fully conducted where the prosecution called witnesses to support their case, the appellant cross-examined them and he was availed with an opportunity to give his defence. See also **DPP v. Jaba John,** Criminal Appeal No. 206 of 2020, **Mwita Nyamhanga Mangure v. R,** Criminal Appeal No. 130 of 2015 and **Hassan Said Twalib v. R,** Criminal Appeal No. 95 of 2019 (all unreported).

Consequently, on the strength of the cited authorities, we are settled in mind that the omission did not vitiate the trial court's proceedings. For this reason, we find this ground barren of merit.

In the second ground, the appellant's complaint is that the defence evidence was not considered by the two courts below. The learned State Attorney opposed the appellant's argument and she contended that the appellant's defence was considered by the trial court as it is shown at

page 32 of the record of appeal. She stated further that, even the claim by the appellant that this case was framed because he was demanding his wages was explained by the trial Magistrate in the sense that, the appellant did not cross-examine the witnesses on that issue. We have gone through the record of appeal and we join hands with Ms. Kihwelo that, this ground has no merit. This is because at page 32 of the record of appeal the trial Magistrate considered the appellant's defence of being implicated with those allegations due to his demand of wages from PW2's grandmother one Mwanagalula. It was the trial court's observation that the claim was not substantiated by the appellant and also, he did not cross-examine PW1 and PW2 on this matter. Likewise, at page 51 of the record of appeal, the High Court Judge considered the appellant's claim. It was stated thus:

> *"Concerning the second ground of appeal that the case is planted I have perused the court record and found that the appellant had an opportunity to cross-examine all prosecution witnesses but the appellant did not cross-examine them on the issue of grudges or ill motives. As rightly pointed out that there was no evidence on records which show that the appellant complained that they were not in good terms with PW2's grandfather/ grandmother. However, in his testimony, the*

*appellant insisted that the case was planted because he owed PW2's grandmother, but in this case, the one who was raped was PW1 therefore he wants to inform this court that he has grudges with PW1 too while the same is not proved?"*

Therefore, we find the second ground of appeal unmerited as we have stated earlier and we dismiss it.

Ms. Kihwelo did not specifically submit on the appellant's complaint under the third ground of appeal. On our part, having gone through the record, we have found that in its decision, the High Court quoted the provisions under which, the appellant was charged as sections 130 (1) & (2) (e) and 131 (2) (e) of the Penal Code, whereas the original charge stated sections 130 (1) (2) (e) and 131 (2) (a) of the Penal Code. It is our considered view that, while the High Court quoted different provisions, it's analysis of the grounds of appeal related to the offence charged of rape of a girl below eighteen years of age. After all, section 131 (2) (e) of the Penal Code which is featured above is non-existent. We take it as a slip of the pen as we find that the High Court Judge ought to have quoted section 131 (2) (a) of the Penal Code. Thus, this omission has no significant effect on the whole case.

In the fourth ground of appeal, the appellant has complained that he was not supplied with the complainant's statement, list of witnesses and exhibits. Responding to this complaint, Ms. Kihwelo argued that even if the appellant was not availed with the complainant's statement, still the complainant (PW3), (the victim's father) was called as witness, gave his evidence and was cross-examined by the appellant, hence no prejudice was occasioned. In her further submission, the learned counsel submitted that there is no legal requirement to avail the accused with list of exhibits and/or witnesses.

On our part, having considered this complaint, we propose to start our deliberation with the claim that the appellant was not supplied with the complainant's statement. This requirement is provided for under section 9 (3) of the CPA which states that:

> *"Where in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and of any statement made by him under subsection (3) of section 10, to be furnished to the accused forthwith."*

This provision is couched in mandatory terms, that where proceedings are instituted in a magistrate's court, the magistrate should cause a statement of the person giving the information and who has been named as a witness to be supplied to the accused person. The question which follows is what is the effect of failure to supply the said statement to the accused. As rightly argued by the learned State Attorney, failure to supply the appellant with the complainant's statement did not prejudice the appellant because the complainant who reported the incident to the police was the victim's father who testified as PW3. He gave his evidence in the presence of the appellant and he was cross-examined and ultimately the appellant gave his defence. This Court has dealt with the like scenario in many of its decisions, some of which are: **Daniel Kivati Monyalu v. Republic,** Criminal Appeal No. 224 of 2019 and **Abdallah Seif v. Republic,** Criminal Appeal No. 122 0f 2020 (both unreported). For example, in the former case, the Court observed thus:

> *"Taking into account all the circumstances obtaining, we agree with the learned State Attorney that the appellant was not in any way prejudiced by the said anomaly for the following reasons:* ***First,*** *is because the complainant (PW1) gave his evidence in the presence of the appellant and thereafter duly cross-examined by him. The*

*substance of complainant's evidence was thus known to the appellant at the time of his defence...."*

It follows that, although the trial court did not cause the copy of the complaint's statement to be supplied to the appellant as required under section 9 (3) of the CPA, the anomaly did not prejudice the appellant as he knew the complainant's evidence before he gave his defence. Therefore, the anomaly is curable under section 388 of the CPA.

Another complaint in the fourth ground is that the appellant was not availed with the list of witnesses and exhibits. We further agree with the learned State Attorney that the appellant has not backed up his complaint with any law. This requirement is not even provided under section 192 of the CPA which guides preliminary hearing. It follows thus, the fourth ground fails.

The complaint in relation to the fifth ground is that the witnesses did not endorse their signatures at the end of their respective testimonies. Again, we are in all fours with Ms. Kihwelo that, there is no provision under the CPA obliging the witnesses to endorse their testimonies. It is only section 210 (3) of the CPA where the trial magistrate is required to

read over witnesses' evidence at the end of their testimonies and endorse the same. This ground also has no merit.

As correctly argued by the learned State Attorney, the appellant's cautioned statement was not tendered in evidence. Hence, it is out of context for the appellant to complain in the sixth ground that the same was not properly tendered and admitted in evidence. In this case, there was not even a police witness in which such complaint might have arisen.

In ground seven, the appellant claims that the trial court did not mention the provision of law under which he was convicted, thus, contravened section 312 (2) of the CPA. This provision states thus:

> *"In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

This provision clearly states that when an accused is convicted, the court should specify the offence and the section of the Penal Code or any other law in which he is convicted and punished. It is true that the trial Magistrate did not state the provision under which the appellant was convicted. It only mentioned the offence charged and punishment. However, as rightly argued by the learned State Attorney, this is not fatal

omission as the Magistrate indicated that the appellant was convicted as charged. This is so because, at the beginning of his judgment, the Magistrate indicated the offence and the provisions of law under which the appellant was charged. Therefore, the appellant was not at all prejudiced by this omission and thus the complaint fails.

The complaint in the eighth ground relates to failure by the prosecution to call arresting team and investigator of the case as witnesses. It is a position of the law that, there is no specific number of witnesses ought to be called to prove any fact consistent with section 143 of the Evidence Act [CAP 6 R.E. 2022]. It is entirely in the domain of the prosecution to call those witnesses it thinks that they will prove the charge. However, the appellant has not said how he was prejudiced on the failure by the prosecution to call those witnesses. It is not disputed that when the complaint was lodged, the appellant was sent to police station and then arraigned in court. Further, the law is clear that, it is not necessary to call the investigator of the case where other evidence is sufficient to prove the charge; See for instance, the Court's decision in the case of **Khatibu Kanga v. Republic,** Criminal Appeal No. 290 of 2008 (unreported). This ground has no merit.

The appellant's complaint in the nineth ground relates to differences regarding the age of the victim. It is true that the victim (PW1) said in 2019 she was aged sixteen years while her father (PW3) said she was aged seventeen years. However, both said that the victim was born in February 2003 and therefore at the material time June 2019, she was sixteen years old. Therefore, when PW3 said that the victim was aged seventeen years, in our view, it was just a missed calculation of numbers. The differences did not affect the age of the victim and the appellant was not prejudiced. This ground too has no merit.

In the tenth ground the complaint by the appellant is that, there was delay to take the victim to hospital. We have gone through the record of appeal and we agree with the learned State Attorney that the delay was explained by PW3. This witness testified that upon reporting the incident on 9th June, 2019 to the police where a PF3 was issued, the victim was forthwith sent to Nyashishi hospital, but she was transferred to Geita hospital where she was examined by PW4 on 11th June, 2019 and the PF3 (exhibit P1) was filled. However, delay to take the victim to hospital is not fatal so long as evidence on the alleged offence is sufficient. See **Director of Public Prosecutions v. Daniel Wasonga,** Criminal Appeal No. 64 of 2018 (unreported). Whether or not the evidence regarding the offence of

rape in this case is sufficient to ground conviction, is the discussion that will feature before we conclude this judgment.

In his eleventh ground, the appellant has faulted the decision of the two courts below for disregarding the evidence of the medical doctor (PW4) who said that, there were no signs that the victim was sexually assaulted which casts doubt on the prosecution case. It was the contention of the learned State Attorney that, even if PW4 did not detect any signs of sexual intercourse on the victim as she was used to it, PW1 proved that the appellant had raped her. Having considered this ground, we are of the view that even without medical evidence, the offence of rape can still be proved by other evidence like we have stated in our previous decision in **Lazaro Kalonga v. Republic,** Criminal Appeal No. 348 of 2008 (unreported), where it was stated thus:

> *"We are mindful of the fact that lack of medical evidence does not necessarily, in every case, mean that rape is not established where all other evidence point to the fact that it was committed (See for example* ***Prosper Mjoera Kisa v. Republic,*** *Criminal Appeal No. 73 of 2003 and* ***Salu Sosoma v. Republic,*** *Criminal Appeal No. 31 of 2006 (both unreported)."*

Therefore, it is true that PW4 said the victim's vagina had no signs that it was sexually assaulted and that the victim was used to sexual intercourse. However, being used to sexual intercourse is not a ticket for one to be subjected to unlawful sexual intercourse. What we are supposed to find out here is whether there is sufficient evidence to prove that the victim was raped on the material day. This question will be considered later in this judgment. This ground, too, fails.

In the last ground of complaint, the appellant challenges the High Court for upholding the trial court's judgment which did not analyse and evaluate the evidence. We agree with the learned State Attorney that, the complaint has no merit since at page 32 of the record of appeal, the trial court evaluated the evidence from both sides and found that the prosecution evidence was strong enough to ground conviction. Whether or not this conclusion was correct, will be determined later in this judgment.

Having considered all grounds of appeal, the issue which we are supposed to determine is whether the prosecution case was proved to the standard required in law, that is, proof beyond reasonable doubt. The learned State Attorney has maintained that the conviction against the appellant was properly grounded. In order to determine this issue, we

have found it imperative to examine the evidence of the two key witnesses, PW1 and PW2.

Starting with PW1, we are mindful of the trite law in our jurisdiction that in sexual offences, the best evidence is that of the victim of the offence. For instance, in the Court's celebrated case of **Selemani Makumba v. Republic** [2006] T.L.R. 379, it was held that:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."*

See also: **Kanaku Kidari v. Republic,** Criminal Appeal No. 326 of 2021 and **Victor Goodluck Munuo v. Republic,** Criminal Appeal No. 357 of 2019 (both unreported). Now, even if the best evidence in sexual offences comes from the victim, the same is not free from scrutiny by the court. It should pass the usual test of its self-coherence, credibility and/or its veracity in comparison with other available evidence. In so doing, we have decided to let the evidence of PW1 speak for itself as extracted from page 9 of the record of appeal:

> *"When I was gathering firewood ready to leave, Jovin Daud did attack me and held me then fell*

*down and Benjamin Shabani was standing beside and watching, then he did pull my skirt upward, then he began fondling me, then he inserted his penis into my vagina. My underpant was pulled aside while all that continued,* ***I made noise and Benjamin who was just there watching did not do anything. ....***" [Emphasis added].

While that was the victim's crucial part, PW2 who is the purported eye witness had this to say at page 11 of the record of appeal:

*"When she finished fetching firewood, she said let me get the ropes from up there, at the trees then Jovin followed her, and* ***then I heard Suzan shout she was about 60 meters approximately. She was crying. I did not do anything. I was far from Suzana.*** *Thereafter Suzana came down crying and then carried her firewood..."* [Emphasis added].

Therefore, as can be seen above, there is sharp contrast of evidence from the two persons who purported to have witnessed the rape incident. While PW1 said she was raped in full view of PW2 who just stood beside there watching and did nothing; PW2 said the appellant followed up the victim where she had gone to fetch ropes and only heard her crying about 60 meters away. He did not say he witnessed the actual rape. This

material discrepancy from the key prosecution witnesses renders their evidence incredible; [see also; **Bahati Makeja v. Republic,** Criminal Appeal No. 118 of 2006 (unreported)]. The said contradiction in this case connotes that, the alleged incident might not have happened the way the prosecution claimed.

Further, where there are contradictions and inconsistencies in the evidence, the court has to decide whether they go to the root of the matter (see **Mohamed Said Matula v. Republic** [1995] T.L.R. 3. Having considered the inconsistencies we find them creating reasonable doubt in the prosecution case which should be resolved in favour of the appellant.

Another thing we have considered is the failure by the prosecution to call the said Mwanagalula, PW2's grandmother, to whom the information of rape was first reported by PW1 who in turn informed PW3. Although the prosecution has mandate to decide which witness to call, the said Mwanagalula, in our view, was crucial witness to explain how she received the news from the victim about rape incident and how she transmitted them to the victim's father. This would enable the Court to gauge the coherence and consistence of PW1's testimony about what had befallen her. As we observed, the prosecution did not call Mwanagalula

and did not give any reason for that failure. In the circumstances, we thus draw adverse inference to the prosecution for its failure to call the said person.

From what we have discussed above, we are settled in our mind that the prosecution case was not proved beyond reasonable doubt against the appellant. We thus, allow the appellant's appeal, quash conviction, set aside the sentence imposed on him and proceed to order his immediate release from custody unless otherwise lawfully held.

**DATED** at **MWANZA** this 22nd day of February, 2024.

M. A. KWARIKO.
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

P. J. NGWEMBE
**JUSTICE OF APPEAL**

Judgment delivered this 23rd day of February, 2024 in the presence of the appellant appeared in person, unrepresented, and Ms. Brenda Mayalla, learned State Attorney for the respondent /Republic, is hereby certified as a true copy of the original.

C. M. MAGESA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**