IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 182 OF 2020

(Criminal Case No. 27 of 2019 of the District Court of Bunda at Bunda)

MWOGA WILLIAM ..... APPELLANT

Versus

THE REPUBLIC..... RESPONDENT

JUDGMENT

12th April & 14th June, 2021

Kahyoza, J.

The trial court convicted **Mwoga William** (the appellant) with the offence of rape sentenced him to serve 30 years imprisonment and to pay compensation of Tzs. 2,000,000/= to the victim.

Aggrieved by both conviction and sentence, the appellant appealed to this Court contending that the prosecution fabricated the evidence, that he had previously been acquitted of the same charge and that his defence was not considered.

The appellant's grounds of appeal raised the following issues-

1. Were key witnesses not summoned?
2. Was the appellant previously charged and acquitted of similar charges?
3. Was the PF3 is reliable?
4. Was the defence considered?

A brief background is that: The police arraigned **William Mwoga,** the

appellant, before the District Court of Bunda at Bunda with the offence of rape contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code, [Cap 16 R.E. 2019] (the Penal Code). The prosecution alleged that the appellant, on 5th day of November, 2019 at'Kasuguti village within Bunda District in Mara Region, had carnal knowledge of girl referred to as XX or the victim. The victim was thirteen (13) years old. The appellant is the victim's uncle.

The appellant pleaded not guilty to the charge. The prosecution lined up six witnesses namely, the victim **(PW1),** Boniphace Anthony Mrina **(Pw2),** Mkwaji Rabani **(Pw3),** Chumila Fyeka **(Pw4),** Jenipher James **(Pw5),** and Ibrahim Mguta **(PW6).** The victim narrated that she was on the 5th day of November, 2019 at their home place with her two younger sisters and his brother Ibrahim Mguta **(PW6).** The victim's parents had gone to mourn the death of their relatives. The victim and her sisters slept in the same room while her brother occupied his own room. At night while sleeping, the appellant woke up Ibrahim Mguta **(PW6)** to go for fishing. Ibrahim Mguta **(PW6)** woke up and called the victim to close the door. She closed the door. Later, the victim heard a person opening the door. She lit a torch to find out who opened the door. She saw the appellant. The victim asked the appellant why he returned. The appellant ordered her to keep quiet. The victim deposed that the appellant snatched her torch, squeezed her neck tightly, threw her on the bed and ravished her. The victim felt pains. After the appellant left, the victim went to Jenipher James **(Pw5),** her aunt and narrated the ordeal.

The victim and Jenipher James **(Pw5)** reported the incident to Chumila Fyeka **(Pw4),** the hamlet chairman. Chumila Fyeka **(Pw4)** asked them to go home and come back on the next day. Mkwaji Rabani **(Pw3),** got information that William Mwoga, the appellant had raped the victim. He returned home, examined the victim and confirmed that she was sexually abused. Mkwaji Rabani **(Pw3)** took the victim to police. The police gave them the PF3 and took the victim

to hospital. Boniphace Anthony Mrina **(Pw2),** a clinical officer at Kasahunga examined the victim and confirmed that she was raped. Boniphace Anthony Mrina **(Pw2),** tendered the PF3 without objection from the appellant.

This is a first appeal. This Court has a duty to apart from considering the grounds of appeal, re-evaluate the evidence to consider whether the prosecution established the appellant's guilt beyond reasonable doubt. The appellant fended for himself while Mr. Temba, the state Attorney represented the respondent. I will refer to their submissions while answering the issues.

Were key witnesses not summoned?

The appellant complained that the prosecution did not call to testify the victim's younger sisters who slept with her on the material night and the police to testify regarding the PF3. The appellant had nothing to substantiate his complaint.

The respondent's state attorney submitted that there was no need to call the victim's younger sisters as they did not identify the appellant. He added that a key witness in rape cases is the victim. He added that the victim lit a torch to find out who had opened the door, saw, and identified the appellant, who was her paternal uncle. He concluded that it is trite law that the victim of rape is the key witness.

I reviewed the evidence and found that there was ample evidence that the victim was raped. Boniphace Anthony Mrina **(Pw2),** Mkwaji Rabani **(Pw3),** Chumila Fyeka **(Pw4),** and Jenipher James **(Pw5),** had an opportunity to examine the victim and confirmed that she was raped. The victim reported immediately to Jenipher James **(Pw5),** that the appellant had raped her she was bleeding and walking legs aprart. The victim's sisters were very younger to appreciate what took place at night. One was nine years old and the other one five years old. They were not key witnesses. I agree with the prosecution that a key witness in

rape cases is the victim, see the case of **Selemani Mkumba v. R.** [2006] T.L.R. 23, where the Court of Appeal held that in a rape case, the best evidence comes from the victim.

In the case at hand the victim explained in details how she identified the appellant and how he raped her. There was no need to call evidence from the victim's sisters who were very younger and asleep at the time commission of offence. All the prosecution's witnesses corroborated the victim's allegation that she was raped.

I did not appreciate the complaint that the prosecution failed to call a police to testify regarding the PF3. The PF3 was filled by the Boniphace Anthony **(PW2).** That witness was competent to tender the PF3. Thus, there was no need to call the police to tender or testify regarding the PF3. For that reason, I dismiss the first and fifth ground of appeal for want of merit.

Was the appellant previously charged and acquitted of similar charges?

The appellant complained without substantiating that he was previously charged, acquitted and charged again based on the same particulars of the offence. He did not specify the case number.

The respondent's attorney dismissed the appellant's complaint a baseless.

I agree with the respondent that the appellant's complaint that the prosecution re-charged him, after the court acquitted him on similar particulars of offence is unfounded. The record shows that the offence was committed on the 5/11/2019 and the appellant appeared before the trial Court for the first time on the 7/11/2019. I am unable to believe the appellant's contention that he was charged on 5/11/2019 and acquitted and fresh charges preferred on the 7/11/2019. It is for that reason coupled with the fact the appellant did not mention the case number of the first case, I find the complaint baseless and I dismiss the second ground of appeal.

Was the PF3 is reliable?

The appellant appealed on the ground that Kasuguti was a nonexisting health centre as a result it could not issue the PF3. Thus the trial court received the PF3, from a non-existing health centre. He also complained that the police was not summoned to testify on the issue of the PF3.

The respondent submitted that the doctor tendered the PF3 without reading the contents to the appellant. He prayed the same to be expunged from the record. He prayed the doctor's evidence to be considered.

The record shows that Boniphace Anthony Mrina **(Pw2)** a clinical officer working at Kasahunga Helath Centre is the one who examined the victim and prepared the PF3. I wonder where did the appellant acquire information that a clinical officer working at Kasunguti is the one who filled the PF3. All in all, I leave that issue at that because on examining the record I found, like the state attorney, that the contents of the PF3 were not read to the appellant. I expunge the PF3 from the record. See **Sunni Amman Awenda v R.,** Criminal Appeal No. 393 of 2013 (CAT unreported), where the Court of Appeal held that-

> ***"the omission to read the contents of the cautioned and extra judicial statement out was a fatal irregularity as it deprived the parties to hear what they were all about.*** *It was therefore improper for the trial court to rely on it. It is expunged from the record, "(emphasis supplied).*

After I expunge PF3 the only remaining evidence is that of Boniphace Anthony Mrina **(Pw2).** It is settled that the Court may reply on the evidence the witness, whose exhibit was expunged from the record if the evidence covers the contents of the document. See the case of **Issa Hassan Uki v. R** [2018] TZCA 361 at www.tanzlii.org., where the Court of Appeal expunged the exhibit and relied on the evidence of the witness who tendered the document to convict.

In the instant case, Boniphace Anthony Mrina **(PW2)** gave a detailed account of what he observed so much that in the absence of the PF3 his evidence

can be relied upon to establish that the victim was raped.

Was the defence considered?

The appellant complained that the trial court did not consider the evidence of Dw2, Dw3 and his defence of *alibi.*

The respondent submitted that the trial court considered the defence as shown at page 10 of the judgment. He contended that should this Court find that the trial court did considered the defence, he prayed the Court to consider it. As to the appellant's contention that the trial court did not ponder on his defence of *alibi,* the respondent contended that the appellant gave his defence of *alibi* without following the procedure.

The respondent stated further that the defence of *alibi* evidence was too weak to raise a reasonable doubt. He submitted that Dw2 and Dw3 deposed that they did not know when the offence was committed.

I will pinpoint out some basic principles which apply in assessing credibility of witnesses. **One,** it is trite law that in assessing a witness' credibility, his or her evidence must be looked at in its entirety, to look for inconsistencies, contradictions and/or implausibility; or if it is entirely consistent with the rest of the evidence on record: See, for instance, **Shabani Daudi v. R.,** Criminal Appeal No. 28 of 2000 (CAT unreported).

Two, contradictions are inevitable in the evidence of two or more persons, the contradictions which go to the root of the matter are the ones which affect the credibility of the witness(es). See **Chrisant John v R** CAT Criminal Appeal No. 313 of 2015 (CAT unreported) where the Court of Appeal held that-

> ***"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case.*** *However, in considering the nature, number and impact of contradictions,* ***it must always be remembered that witnesses***

do not always make a blow by blow mental recording of an incidence. *As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case. (Emphasis added)*

The Court with a duty to determine the credibility has to consider the evidence as whole and it should not consider pieces of evidence in isolation. See **Elia Nshambwa Shapwata and another v R** Criminal Appeal No. 92 2007 (CAT unreported). It stated-

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

Given the principles pointed out above, my task is to consider whether there are material contradictions and inconsistences, and whether they went to the root of the matter. The evidence of the prosecution was consistent and to say the least the prosecution proved beyond all reasonable doubt that the victim was raped. The issue to consider is whether the appellant was properly identified by the victim, the victim deposed that the appellant is her paternal uncle. She knew him very well before the indent. Not only but also, she deposed that the appellant went to their home place to wake up Ibrahim Mguta **(PW6).** The appellant and Ibrahim Mguta **(PW6)** had plans to go for fishing. Ibrahim Mguta **(PW6)** corroborated the appellant's evidence. Ibrahim Mguta **(PW6)** added that the appellant awoke him, they started their journey to the lake, before they reached the lake shore, the appellant told him that he left a boat pad home and went back for it. The appellant came back after one hour and took bath.

Ibrahim Mguta **(PW6)** testified further, after the appellant took bath he did not get involved in the fishing, which proved that he had had sex that night.

He deposed that they had a belief that it was a bad practice to engage in fishing after one had had sex. There were watertight evidence that the appellant was present that night and he did visit the victim's home place. Ibrahim Mguta **(PW6)** accompanied him to go for fishing The appellant's defence of alibi did not raise a reasonable doubt. Further the defence of *alibi* was an afterthought; **one,** it was given without giving the notice as provided by law; **two,** the defence was raised for the first time during the appellant's defence. The Court of Appeal held in **Hamisi Barakari Lambani V. R,** Cr. Appeal No. 108/2012 that-

> *The second issue for our consideration is the defence of alibi. The law on this subject is well settled. First, the law requires a person who intends to rely on the defence of* ***alibi*** *to give notice of that intention before the hearing of the case (5. 194(4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with particulars at any time before the prosecution doses its case.*
>
> *Should the accused person raise the alibi much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (5.194 (6)).*

The trial court had justification not accord any weight to appellant's defence of *alibi.* It was given after the prosecution had closed the its case and it did not raise doubt.

In the end, I find that the victim properly identified the appellant. She knew him before and she deposed that she lit a torch to find out who opened the door. She saw the appellant and asked him why had he returned home. She explained that the appellant snatched the torch and held her neck and drag her on the bed. In addition, the victim reported immediately to Jenipher James **(Pw5)** that the appellant had raped her. The Court of Appeal in **Evance Nuba and Tegemeo Paul V. R,** Criminal Appeal No. 425 of 2013 had this to say:

> *" this Court has persistently held that failure on the part of the witness*

to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."

In the case at hand, the victim named the appellant immediately as the person who raped her. I have no doubt that the victim identified the appellant properly. I do not find merit in the appellant's complaint that the trial court did not consider his defence. I dismiss the forth, six and seventh grounds of appeal.

The last thing I will do is to review the prosecution's evidence to find out if it proved the appellant's guilt beyond doubt. I will consider the following issues.

Was the victim's age proved?

The prosecution had a duty to prove the victim's age. Mkwaji Rabani (Pw3) deposed that the victim was 13 years old. Mkwaji Rabani **(Pw3)** was of the victim's parents.

It settled law that the evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's age. See the cases of **Edson Simon Mwombeki v. Republic,** Criminal Appeal No. 94 of 2016 (unreported) wherein the Court of Appeal cited the observation from our previous unreported decision in **Edward Joseph v. Republic,** Criminal Appeal No. 19 of 2009 and **Mustapha Khamis V. R.** Cr. Appeal No. 70/2016. Mkwaji Rabani **(Pw3)** deposed that-

> *"It was on 3/11/2019 we started our journey to Ukerewe, we left the vctim at home aged 13 years old"*

Given Mkwaji Rabani (Pw3)'s evidence as to the victim's age, I find it proved that the victim's age was 13 years at the time the offence was committed.

Did the prosecution prove the appellant's guilt beyond reasonable doubt?

I had a cursory look at the whole evidence to find out if there was enough and if the law was complied with. I examined the evidence to find whether the evidence of the victim was procured in accordance with the law. It is clear from the record that the victim promised to tell the truth before she testified. Thus the law was complied with.

I also considered whether section 210(3) of the Criminal Procedure Act,

[Cap 20 R.E. 2019] (the CPA) was complied with. The record shows that each time the witness gave evidence and after re-examination in chief the trial court read the evidence to the witness and indicated so. However, on further scrutiny, I found that the trial court found the appellant to have a case to answer and made a finding to that effect. I found that before the court addressed appellant in terms of section 231 of the CPA, the appellant replied that he will give his evidence on oath and call his witness. The record reads-

> ***"Accused person:*** *I will adduce my evidence (on) oath. I will have my witnesses.*
>
> ***Court:*** *The accused has been addressed his rights in terms of section 231 of the CPA Cap. 20 R.E. 2002.*
>
> ***Sgd by B.C.*** *Sokanya-RM"*

The law is settled that failure to comply with the mandatory provisions of section 231 (1) of the CPA vitiates subsequent proceedings. See the case of **Cleopa Mchiwa Sospeter v. R.,** Criminal Appeal No. 51/2019. Section 231 (1) of the CPA states that-

> *231.-(1) At the dose 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, ***(emphasis provided).***

On reading the excerpt from trial court's record, I got an impression that the appellant was addressed in terms of section 231 of the CPA after he made a reply. However, on further reading I found that the appellant was informed of his rights under section 231 of the CPA as part of the ruling of the case to answer. Part of that ruling on case to answer reads-

"After the prosecution close (sic) its case and as per evidence adduced, this court find (sic) that the prima facie case has been established and the accused person is required to adduce his evidence in accordance with section 231 of the CPA Cap. 20 R.E. 2002"

Indeed, the appellant gave his evidence on oath and called two witnesses. It is therefore, true that the appellant was addressed in terms of terms of section 231 of the CPA. I find the error of recording that section 231 of the CPA was complied with after the appellant had expressed himself how he will present his defence, not fatal in the circumstances of this case. It is curable. It should be noted that a good practice ought to be as explained in the case of **Abdallah Kando V. R.** Cr. Appeal No. 322/2015 CAT (unreported). It stated that;

"The record should show this or something similar in substance with this-

Court: *Accused is informed of his right to enter defence on oath/affirmation or not and if he has witness to call in defence.*
Accused response …… *"(record what the accused says)"*

In the upshot, I find the prosecution proved the appellant's guilty beyond reasonable doubt. Consequently, I dismiss the appeal in its entirety and uphold the conviction and sentence imposed by the trial court of thirty imprisonment under section 130 (1) (2) (e) and 131(1) of the **Penal Code,** [Cap 16 R.E. 2019].

I order.

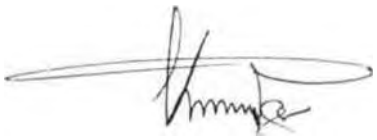
J. R. Kahyoza, JUDGE 14/6/2021

Court:-Judgment delivered in the presence of the appellant and Mr. Temba S/A via video link. B/C Catherine present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza,
JUDGE
14/6/2021

Court: Right of further appeal explained, lodging a notice within thirty days from today.



J. R. Kahyoza, J

JUDGE.

14/6/2021