**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DISTRICT REGISTRY OF MBEYA**

**AT MBEYA**

**CRIMINAL APPEAL NO. 128 OF 2020**

**(Originating from the District Court of Mbozi District, at Vwawa, in Criminal Case No. 349 of 2015)**

**ALIKIBA BRAYSON ---------- APPELLANT**

***VERSUS***

**THE REPUBLIC ----------RESPONDENT**

**JUDGEMENT**

*Date of Last Order: 05.07.2021*

*Date of Judgement: 06.08.2021*

**EBRAHIM, J:**

The Appellant herein was charged and convicted for the offence of rape **c/s 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 RE 2002** and he was sentenced to serve prison term of 30 years. It was alleged by the prosecution that the Appellant on the 1st Day of August 2015 at about 2300hrs at Sante Village Kamsamba within Momba District in Mbeya Region, had a canal knowledge of a 13

years old school girl who for the purpose of this judgement shall be referred as PW1.

After considering the evidence from both sides, the trial court found the Appellant guilty, ultimately convicted and sentenced the Appellant to thirty years imprisonment.

Aggrieved, the Appellant lodged the instant appeal raising two grounds of appeal that the case was not proved beyond reasonable doubt; and that the trial court did not make a thorough analysis, evaluation and consideration of the defence evidence.

The hearing of this appeal was conducted virtually. The Appellant appeared in person, unrepresented and the Respondent was represented by Ms. Zena James, learned State Attorney.

The Appellant prayed for the State Attorney to begin while reserving his right to re-join.

Submitting on the 1st ground of appeal, Ms Zena explained to the court that they managed to prove the girl was under 18 years old and the Appellant penetrated her. To prove her contention, she referred to the case of **Selemani Makumba V R** [2006] 384 on the

principle that true evidence of rape has to come from the victim. She asserted also that in terms of **section 127(7) of the Evidence Act, Cap 6, RE 2019,** the court may proceed to enter conviction on uncorroborated evidence of the victim much as in the instant case, the evidence was corroborated by PW2 who saw the Appellant taking the victim and left with her. She referred the court to the proceedings on records and added that the victim explained on how she identified the Appellant from the moonlight and that she knew him before as he was their neighbour. She added also that PW2 also recognised the Appellant as their neighbour and came from the same village.

As for the second ground of appeal, Ms. James submitted that the trial court found that the Appellant's defence was on arrest. She however urged this court being the 1st appellate court to re-visit the evidence and come up with its own findings of facts. She prayed for the appeal to be dismissed for lack of merits.

In rejoinder, the Appellant contended that the trial court did not do justice to him and urged this court to consider his grounds of appeal and allow the appeal.

This is the first appeal. The first appellate court is obliged without fail to subject the "*entire evidence to an objective scrutiny and arrive to its own findings of facts*". The principle was held in the case of **Charles Mato Isangala and 2 Others V The Republic**, Criminal Appeal No. 308 of 2013.

The Appellant claims that prosecution case was not proved to the hilt and that the trial court did not make a thorough analysis and evaluation of the defence evidence.

This prompted me to go thoroughly through the proceedings on record.

At the trial, the Republic paraded five witnesses including the victim and the Appellant who adduced his own evidence. Going by the testimonies of the prosecution witnesses, it can be deduced that on the night of 1st day of August 2015, **PW1** was sent to the shop by her mother to buy slippers. PW1 was accompanied by PW2. On their way, they met with the Appellant who threatened them with a knife and took PW1 on his shoulders. He took PW1 on the bushes where he raped and left her. PW1 testified to have felt great pain in such a

way that she could not walk until she was found by her family. In her testimony, PW1 explained that the Appellant had a white knife with red handle and termed it as a "Maasai Knife". She stated also that she knew the Appellant before as they were staying in the same village and there was moonlight. **PW2** who was accompanying PW1 testified that on the night of 01.08.2015 around 2100hrs the Appellant took PW1 to the area called Kikorongo at Mwendakalenga where there is a forest. She said the Appellant threatened them with a knife. Afraid she would be killed by the Appellant, she ran back home and did not tell anybody. She was confronted on the next day by her mother and told PW1's mother that Alikiba took her. She later went to record her statement at the police. PW2 said she knew the Appellant because he was their neighbour at home. **PW3 E6859** Detective Corporal Charles testified before the court that he received information from VEO around 2100hrs of 02.08.2015 on the disappearance of the girl suspected to have been kidnapped and received another call at around 0830hrs of 02.08.2015 of the next day that the girl has been found, raped and in bad condition. The girl was brought to the police around 1100hrs of 02.08.2015 before

she has taken bath and thereafter sent to Kamsamba hospital. **Dr. Leons Mwanda PW4**, examined PW1 on 02.08.2015 at Kamsamba Hospital and discovered sperms cells in PW1's vagina and bruises indicating that PW1 has been penetrated by an object. He tendered PF3 which was admitted as exhibit PF1 following an objection raised by the Appellant. **PW5 WP 5323** investigated the case and took the Appellant to court.

On his defense, the Appellant testified before the court that he was arrested at home on 02.08.2015 and taken to Kamsamba Police Post where he denied the charge offence.

Before I proceed to address other issues on the case in determining as to whether the case was proved beyond reasonable doubt, I find it important to firstly direct my mind on whether the Appellant was favourably identified/recognised by PW1 and PW2.

Admittedly, when coming to the issue of identification/recognition prosecution case greatly relies on the evidence PW1 and PW2. Court of Appeal said in the case of **Mengi Paulo Samweli Luhanga and**

**Another V Republic**, Criminal Appeal No. 222 of 2006 (unreported) that:

> *"eyewitnesses testimony can be a very powerful tool in determining a person's guilt or innocence".*

From that position of the law and on the basis of the powerful nature of eyewitness, Court of Appeal again in the case of **Salim S/O Adam @Kongo @ Magori V Republic**, Criminal Appeal No. 199 of 2007 illustrated the salutary principles of law on eyewitness identification that among other principles in a case where its determination depends on the identification such evidence must be water tight even if it is evidence of recognition **(Hassan Juma Kanenyera V Republic** (1992) T.L.R 100).

Going by the evidence on record, it is obvious that the key witnesses in this case are PW1 and PW2 who testified that it was the Appellant who took PW1. PW1 testified before the trial court that the Appellant took her at night when she was together with PW2 and threatened them with a knife. She said she recognised the Appellant because she knew him before as he was their neighbour and there was moonlight. She also said that the Appellant was wearing a white shirt

and a green trouser. The fact that the Appellant was a neighbour and living in the same village with PW1 was corroborated by PW2 who also said that she knew the Appellant because he was their neighbour at home (see the cited case of **Hassan Juma Kanenyera (supra)** on the requirement for corroboration). This fact was also corroborated by the Appellant himself when he was responding to cross examination questions that he knows the victim as she was from his village. The sequence of events explained by PW1 suffice to show that the Appellant stayed with PW1 for a reasonable amount of time easily to recognise a person you know. Court of Appeal had in the case of **Abdallah Rajab Waziri V R**, Criminal Appeal No. 116 of 2004 upheld the evidence on identification by a match box light following the fact that the witness knew the accused before. The same stance was also taken by the Court of Appeal in the case of **Fadhili Gumbo Malota and 3 Others V R**, Criminal Appeal No. 52 of 2003 where the witness knew the accused by name. In the same spirit, considering the recognition by PW1 and PW2 corroborated by the evidence of the Appellant himself, I am of the firm view that the Appellant was positively recognised by the prosecution witnesses.

Of-course, I am not oblivious of the issue of credence of the witnesses. More – so, I am also aware that credibility of a witness is a monopoly of a trial court in so far as demeanour is concerned. However, the appellate court can determine the credibility of a witness by considering the testimony of the witness in relation with the evidence of other witnesses including that of the accused person; and when examining the coherence of the testimony of the said witness. This principle was well illustrated in the case of **Siza Patrice V R**, Criminal Appeal No. 19 of 2010. In this case, PW1 clearly testified before the court on how the Appellant took him to the bush at Mwanakamenga Village where they crossed the river, threatened raped and left her there.

Again, as correctly stated by the learned state attorney, in rape cases the best evidence comes from the victim as illustrated in the cited case of **Selemani Makumba V R [supra]**. Moreover, in terms of **section 127(7) of the Evidence Act, Cap 6, RE 2019**, the court may proceed to enter conviction on the uncorroborated evidence of the victim if it believes that the victim is saying the truth. **Section 127(7) of the Law of Evidence Act, Cap 6 RE 2019** read as follows:

> *"S.127 (7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving 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****" (emphasis supplied).*

As alluded earlier, PW1 despite her age when she was giving her testimony, she was firm and consistent despite the cross-examination questions leveled to her to test her credibility on what happened. She was firm and did not volunteer on the information that she did not know e.g., when asked about the distance between her village to Kitatu. The coherence of her testimony makes this court to believe her credence and reliability of her testimony as illustrated in the Court of Appeal case of **Goodluck Kyando VR**, Criminal Appeal No 118 of 2003, since there was no cogent reason for not believing her. Furthermore, the testimony of PW1 was corroborated by the testimony of PW2 who saw the Appellant taking PW1. Moreover,

PW3 told the Court that the night of 02.08.2015, around 0900hrs, VEO went to report on the lost girl believed to be abducted and the next day of 02.08.2015 the said girl was brought to the police and they took her to the hospital. One might point out the irregularity on the date mentioned; however, it is clear that the said irregularity is on the slip of the tongue/ pen because, PW3 stated that PW1 was brought to the police on 02.08.2015. The same is supported by the testimony of PW1, PW2, PW4 and exhibit PF1. Coming to the testimony of PW4, he explained that he examined PW1 on 02.08.2015 and found high sperm cells in her vagina and he observed bruises from PW1's vagina to her anus indicating that she has been penetrated by an object i.e., penis.

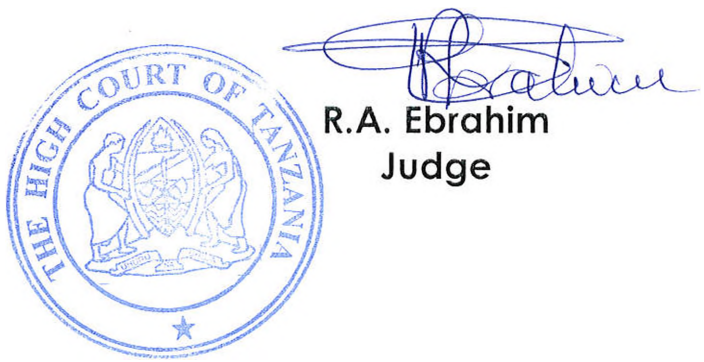
Insisting on his innocence, the Appellant gave his evidence that on 02.08.2015 he was arrested while at home with two auxiliary police and taken to Kamsamba Police Post. At the police the charge of rape was filed against him and he disputed it. He admitted knowing the auxiliary police and that he had no bad blood with them. He also admitted knowing the victim and not having bad blood with her

parents. This shows that the case has not been fabricated against him.

I am aware that the Appellant had no duty of proving his innocence, but I find no difficult in disbelieving his defence as his defence has not shaken prosecution case at all. He could not even say where he was or what he was doing on the fateful night considering the grave offence he was facing.

From the above background, I find that prosecution managed to prove their case to the required standard by law i.e., beyond reasonable doubt. Therefore, this appeal is devoid of merits and I dismiss it in its entirety.

Ordered accordingly.




**R.A. Ebrahim**
**Judge**

**Mbeya**
**06.08.2021**

**Court:** Right of appeal explained.

**R.A. Ebrahim**
**Judge**
**06.08.2021**