IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 268 OF 2020

(Originating from Criminal Case No. 229 of 2018 of Kilombero District Court, At Ifakara)

PAUL KALEMALILA..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

19.07.2021 & 02.08.2021

CHABA, J.

The appellant, Paul Kalemalila appeared before the District Court of Kilombero, at Ifakara to answer a charge of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Edition 2002; now (Revised Edition 2019). The particulars of the offence states that on 24th day of October, 2018 at or about 08:00hrs at Songambele area within Kilombero Region, the appellant did have sexual intercourse with a woman aged 67 years old without her consent. The appellant denied the allegations by pleading not guilty to the charge after which a full trial ensued. After a full trial, he was found guilty, convicted and sentenced to serve a term of

thirty (30) years imprisonment. For purposes of concealing her identity in this judgment, I will refer her as SL, the victim or PW2.

The facts upon which the appellant's conviction was grounded can be gleaned from the prosecution evidence. Three witnesses were paraded by the prosecution to prove their case. The only eye witness being the victim. As hinted above, the prosecution alleged that the appellant raped SL on the date and place without her consent. What actually happened on the fateful date as gathered from SL testimony, is that; while she was searching firewood, unexpectedly he saw the appellant moving towards her place and upon reached there, the appellant/accused person without color of right attacked and undressed her by force and then raped.

After being attacked, she cried for help and some people responded after which the appellant was apprehended. According to SL, the appellant was arrested on the same day and taken to the police station in connection with the offence of rape where he confessed to have committed the offence. On the other hand, the victim was rushed to the hospital for medical examination and treatment as well. Thereby she was administered with some medicines.

It is evident from court record that at hospital, the victim was attended by one Clinical officer namely Halidi Ndulu who filled the PF3. However, Halidi Ndulu did not appear before the trial court as witness. His medical report was described in court by Dr. Horogo (PW3) his fellow medical practitioner whom they used to work together at St. Francis hospital. The PF3 was tendered in evidence by the public prosecutor where it was marked as exhibit

PE1. According to PW3, the medical report showed that there was no any venereal disease or HIV. But SL was found with some bruises in her vagina, swellings and hematomas. In general, the medical results concluded that SL was raped.

On his part, the police officer No. G. 7210 D/CPL Mhina herein PW3 who involved to investigate this case, testified that on 05th November, 2018 was assigned with the police case file to mount investigation of the matter. In the course of reading the statements of key witnesses, he was satisfied that the victim was carnally known. He also noted that there was one witness called Riziwani who wrote a statement at police in connection with this case, but his whereabouts was unknown. He therefore took the said statement, read it and satisfied that the statement was relevant in the circumstance.

From Riziwani's statement which was tendered in evidence by PW3 for identification purposes, Riziwani and Mama Zai while they were talking about the progress of his business regarding the sale of cassava, suddenly the victim appeared while in a state of anxiety and fear. When he asked SL what happened, she replied that while in the course of searching firewood, she met the appellant who asked her some questions and then he moved away. However, to her surprise, some few minutes later, she was attacked by the appellant and she stumbled down on the ground meanwhile the appellant pressed her down with his feet. Upon receiving this information, Riziwani asked the victim to take him to the scene of crime. On the way, they found the appellant while standing on a road. Thereby, the victim pointed the appellant to be the wrongdoer. Upon interrogation, the appellant said he

came from one area called Kalingakelo and was in search of a woman to marry.

PW3 upon recognized the statement of Riziwani in court, he told the trial court that since all reasonable steps to trace Riziwani ended in vain, he therefore prayed to tender the said statement for identification purposes so as to substantiate the prosecution case. The statement was received by the trial court, filed and it formed part of prosecution testimonies.

In his defence, the appellant denied to have committed the offence in question. He told the trial court that on the material date was at home in the village called Kalingakelo. Thereafter, he went to Mlimba area to buy a hoe. While at one place near TAZARA Quarters he saw the victim (SL) while in company of two young men and other people who were busy in motion (moving). One person asked SL to this effect; "Huyu ndiyo kakubaka?". SL replied to this effect; "Ndiyo". Those people agreed that the appellant had to be taken to the Chairman in the locality. Though he denied to commit the offence, but he was taken to the nearest police station. At police he was interrogated, threatened, searched and afterwards detained at police lock up. Later on, was arraigned before the Resident Magistrate in the District Court of Kilombero, at Ifakara facing the offence of rape. In cross examination, the appellant admitted that he was caught at or about 10:00 am and that at the material time there was sufficient light to identify any person. He denied to have known the said Bibi herein the victim. He further said, had no quarrel with the victim. He further told the trial court that the victim was raped while in a bus.

As hinted above, upon considered the prosecution evidence, the trial court was satisfied that the prosecution side proved their case beyond reasonable doubt. He then, found the appellant guilty, convicted him with the offence of rape under sections 130 (1) (2) (e) of the Penal Code [Cap.16 R. E. 2002] now [R. E. 2019] and sentenced to suffer thirty (30) years imprisonment.

Discontented, the appellant has preferred the instant appeal which is predicated upon seven (7) grounds of grievances as reproduced hereunder:

1. *That, the learned trial RM erred in law and fact to convict and sentence the appellant when penetration was never proved by PW2 (the victim) during the alleged act as required by law in regard to rape offence;*
2. *That, the learned trial RM erred in law and fact to convict and sentence the appellant based on invalid testimony of PW1 which was illegally admitted in contravention of section 34 B (c), (d) and (e) of Tanzania Evidence Act [Cap.6 R.E. 2002] (As amended);*
3. *That, the trial learned RM erred in law and fact to convict and sentence the appellant based on Exh. PE1 (PF3) which was illegally tendered by the prosecutor instead of the witness who could have been cross examined and the same PF3 was not read aloud in court so as to enable the accused person/appellant to know its contents and hence subjected to unfair trial;*
4. *That, the learned trial RM erred in law and fact to convict and sentence the appellant based on invalid testimony of PW3 who tendered the statement of the witness called Riziwani, which he never recorded but admitted in contravention of section 34 (c), (d) and (e) of TEA Cap.6 R.E. 2002 (as amended);*

5. *That, the learned trial RM erred in law and fact to convict and sentence the appellant when the appellant was charged upon the defective charge sheet as THE STATEMENT OF THE OFFENCE was invalid;*
6. *That, the learned trial RM erred in law and fact to convict and sentence the appellant when the prosecution failed to tender any cautioned statement so as to prove whether the appellant confessed at police station as alleged by the victim PW2 (victim); and*
7. *That, the learned trial RM erred in law and fact to convict and sentence the appellant when the case was never proved beyond reasonable doubt against the appellant contrary to the procedure of law.*

When the appeal was called on for hearing, the appellant appeared in person unrepresented, whereas Mr. Ramadhani Kalinga, Learned State Attorney entered appearance for the respondent Republic.

Availed an opportunity to fortify his grounds of appeal, the appellant fully adopted his grounds of appeal and pleaded the court to consider the same, allow the appeal and set him free so that he could join his family.

On the other hand, Mr. Kalinga did not resist the appeal. Indeed, he declined to support the conviction and sentence imposed against the appellant. He conceded that grounds Nos. 2, 3 and 4 of this appeal have merits and further underscored that grounds Nos. 2, 3 and 5 are grounded on a point of law. Indeed, his stance on supporting the appeal centred on the following predicaments; **One;** he contended that the PF3 was tendered by the public prosecutor instead of the witness contrary to the law. **Two;** he accentuated that the PF3, which was admitted by the trial court as an Exhibit PE1, was

never read aloud in court. **Three;** he stressed that the statement of Riziwani was admitted by the trial court wrongly as the same contravened the provisions of section 34 B (2) (c), (d) and (e) of the Evidence Act [Cap.6 R.E. 2019] (the TEA).

In his eloquent elaboration, Mr. Kalinga highlighted that the appellant ought to have been notified by the respondent in respect of the usage of the said statement as evidence at least ten (10) days before hearing date as the law requires. But that was not done. Moreover, the prosecution did not advance sufficient explanations why the witness (Riziwani) was not traced. He argued that the trial court relied just on a mere statement by the police investigator (PW3) who told the trial court that the witness was nowhere to be seen. Basing on those discrepancies, the learned brother prayed that the PF3 and the Statement of Riziwani be expunged from court record.

Four, Mr. Kalinga submitted further that the evidence by PW2 who is the victim, was too weak to establish the identity of the appellant even though he was apprehended not far away from the scene of crime. On the basis of his submission, Mr. Kalinga urged this court to allow the appeal, quash the conviction and set aside the sentence imposed against the appellant on the grounds that there was no sufficient evidence to warrant conviction of the appellant.

In his rejoinder, the appellant had nothing to add rather than reiterating what he had submitted briefly in chief and highly supported by the respondent Republic.

Upon heard both parties, I have objectively considered the grounds of appeal, submissions of both parties and the trial court record. Having so done, the central issue for consideration, determination and decision thereon is whether the trial court's findings were faulty against the appellant.

I propose to start with the first ground of appeal. The appellant complained that the learned trial Magistrate erred in law and fact by convicting and sentencing him while SL did not advance any evidence showing that she was raped on the material date and that there was no penetration of a male organ into her vagina. On this aspect, the prosecution heavily relied on the evidence of SL (PW2) who was the only eye witness. The prosecution also placed reliance on the testimony of PW1, a Doctor who appeared before the trial court and described the PF3 - Exhibit PE1 which was filled by another Clinical officer namely Halidi Ndulu who actually medically examined the victim. More so, the prosecution trusted the evidence adduced by the PW3, the police investigator who dealt with the statement of a witness namely Riziwani. As PW3 recognized the statement of Riziwani, he asked the trial court to receive it for identification. The trial court received it and filed to form part of prosecution evidence.

From the above pieces of evidence, the testimony of the victim shows that on the fateful date was raped. She further told the trial court that the culprit was the appellant. The PF3 tendered by the public prosecutor also suggests to that effect. On the other hand, the statement of Riziwani which was identified by PW3 corroborates the evidence of SL. As the victim told the trial court that she was raped as envisaged at page 9 of the trial court

proceedings, it means she made sexual intercourse with a man. the Apex Court of our Land had an occasion to address the issue of speaking the word sexual intercourse in criminal trials. In the case of **Hassan Bakari @ Mamajicho vs. The Republic**, Criminal Appeal No. 103 of 2012 (unreported) the Court of Appeal made the following observation:

> "... **it is therefore common knowledge that when people speak of sexual intercourse, they mean the penetration of the penis of a male into the vagina of a female.** It is now and then read in court records that the trial courts just make reference to such words as sexual intercourse or male/female organs or simply to have sex, and the like. **Whenever such words are used or a witness in open court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina".** (Emphasis added).

It is settled principle of law that in sexual offences the best evidence is that of the victim as expounded in the case of **Selemani Makumba vs. Republic** (2006) T.L.R., 379. However, this principle has been extended by the Court of Appeal in her recent decision in the case of **Majaliwa Ihemo vs. Republic,** Criminal Appeal No. 197 of 2020 (Unreported), where their Lordships held among other things that:

> "...In **sexual related trials, the best evidence is that of the victim** as per our decision in **Selemani Makumba vs. R**, [2006] TLR 379. **We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point...**" [Emphasis added].

Considering the above guiding principles articulated by our Apex Court, I now turn to the evidence on record. As gleaned from the testimony of SL and upon a close scrutiny on the court record, I have noted that the evidence given by the SL who is an eye witness and corroborated by the evidence of PW3 and the exhibit PE1, in my opinion, left a lot to be desired. Starting with the victim's allegation that she was raped, in my opinion, her claim should not be taken lightly and without due weight as the triumph of justices demands that the court has to believe and trust a witness or witnesses from different angles. It follows therefore that care must be taken to avoid danger or mistakes in arriving to unjust decision

Further, although there is no hard and fast rule as to who should tender the exhibit as it was explicated by the Court of Appeal in the case of **Majid John Vicent @ Mlindamgabo & Abdul Selemani Hamisi @ Miburo vs. R,** Cr. Appeal No. 264/2006 CAT at Mwanza, but for the witness PW1, I think he adequately dealt with the exhibit and described it accordingly. The only challenge is, the PF3 - Exhibit PE1 was tendered in evidence by the public prosecutor who in real sense was not a witness and could not be cross examined in terms of Section 198 (1) of the Criminal Procedure Act [Cap.20 R.E. 2019]. In addition, PW3 - a police officer who investigated this case and established the identity of Riziwani's statement, gave evidence which contradicts the evidence of PW2. Upon this, the question arises here is whether the evidence of PW3 and the Exhibit PE1 have evidential value or otherwise. This will bare of soon.

Another vital question garnered from the above observations is whether or not the evidence of PW2 was credible and reliable in the circumstance. Considering the evidence of PW2 in line with the principle laid down in the case of **Selemani Makumba** (Supra) it is settled that the best evidence in sexual offences is the victim. But, it is evident from the record that the victim failed to disclose to Riziwani and Mama Zai being the first persons she met as to what exactly happened to her. The victim didn't tell (them) the truth that she was raped. According to the statement of Riziwani, the victim was attacked by the appellant and pulled down on the ground meanwhile the appellant pressed her down with his feet. As it can be noticed from the trial court record, PW2 did not give any explanations or descriptions of the heinous crime she faced after that sorrowful incidence. Taking into account that the victim is an old woman, in the circumstance of this case, it is expected that PW2 could have firmly explained to the above-mentioned persons in particular Mama Zai as to what actually happened when was invaded by the appellant. In my view, failure by SL to state what actually transpired at the scene of crime, that is an indication that SL is not a credible witness and her testimony on this facet cannot be safely relied on.

In respect of the 2nd and 4th grounds of appeal, the appellant is complaining that he was convicted and sentenced based on an invalid testimony of PW3 who tendered the statement of the witness called Riziwani, which he never recorded and the statement was tendered and admitted in contravention of sections 34 (c), (d) and (e) of the Tanzania Evidence Act [Cap.6 R.E. 2019] (the TEA). The learned State Attorney submitted that the

statement of Riziwani was admitted by the trial court wrongly as the provisions of the law under sections 34 B (2) (c), (d) and (e) of the TEA [Supra] was contravened. He underscored that the appellant ought to have been notified by the respondent in respect of the usage of the said statement at least ten (10) days before hearing date. He buttressed that as the prosecution did not assign good cause why the witness (Riziwani) was not traced, then the court should not accord weight to this piece of evidence. He contended that the trial court only relied on a mere statement given by the police investigator herein PW3 that the witness was nowhere to be seen. To bolster his argument Mr. Kalinga submitted that on those discrepancies the statement of Riziwani has no evidential value.

From the foregoing, I have the following observations in connection with the manner in which the statement of the purported witness namely Riziwani was handled at trial under sections 34 B (2) (c), (d) and (e) of the TEA [Supra]. In essence, section 34 B of the TEA is an exception to the general provision pertaining to receiving of evidence *viva voce* from witnesses. The section caters for witnesses who for one reason or another could not appear in court and testify. The statement of such a witness can be admitted in court as evidence provided that the conditions stipulated under Section 34 B (1) and (2) of the TEA (Supra) are cumulatively complied with. The section reads thus:

> ***"Section 34 B** (1) - In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions or this section, be*

admissible in evidence as proof of the relevant fact contained in it, in lieu of direct oral evidence.

(2) A written statement may only be admissible under this section:

(a) Where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to call him as a witness, or ***if all reasonable steps have been taken to procure his attendance*** *but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*

(b) If the statement is or purports to be signed by the person who made it;

(c) If it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to the true;

(d) If before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender, on each of the other parties to the proceedings;

(e) ***if none of the other parties, within ten days from the service of the copy of the statement, serves a notice of the party to proposing objection to the statement being so tendered in evidence****;*

Provided that, the court shall determine the relevance of any objection;

(f) *If, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read".* [Emphasis supplied].

The Court of Appeal in the case of **Juma Ismail and Rolacos Cosmas vs. Republic,** Criminal Appeal No. 501 of 2015 (Unreported) at page 12 gave an interpretation regarding the circumstances in which the above provisions of the law can be applied. Indeed, it made it clear that in order for the court to admit a statement of a witness who cannot appear and testify after reasonable steps have been taken to secure his attendance, all conditions contained in Section 34 B of the TEA must be cumulatively complied with. In another case of **Mhina Hamisi vs. R,** Criminal Appeal No. 83 of 2005 CAT (Unreported) the Court held *inter-alia* that:

> *"Of course, as this Court stated in **Goodluck Maganga vs. Republic**, Criminal Appeal No. 50 of 1999 (unreported) citing this Court's decision in 1. **Swalehe Kalonga @ Swale** 2. **Makoye Zeni Zongolo vs. Republic,** Criminal Appeal No. 46 of 2001 (unreported), the provision of S. 34 B of the Evidence Act 1967 are cumulative and all the paragraphs have to be satisfied and none can stand on its own."*

In as much as this appeal is concerned, I am convinced and satisfied that there is no evidence to substantiate that the prosecution implored all reasonable steps to secure the attendance of the witness (Riziwani) whose whereabout could not be found. At this juncture, it is prudent to state that Riziwani's statement was improperly received by the trial court and filed to

form part of a trial court record. It is thus hereby expunged from court record.

On the 3rd ground, the appellant complained that he was convicted and sentenced on the basis of the Exhibit PE1 (the PF3) which was illegally tendered by the prosecutor instead of the witness who could have been cross examined. He further underlined that upon admission of Exhibit PE1 the same was not read aloud in court so as to enable the appellant understand the contents thereof and hence was subjected to unfair trial. As the records stands, I am in agreement with both the appellant and Mr. Kalinga. As alluded to earlier, it is apparent from the court record that Dr. Horogo (PW1) appeared before the trial court to give his testimony in respect of the PF3, but at the end of the day the public prosecutor tendered it as an Exhibit. The Clinical Officer who attended the victim and filled the PF3 exhibit PE1 was not called as a witness for reasons not exposed by the prosecution. Even the trial court at pages 7 and 8 is silence on this issue. As complained by the appellant, Exhibit PE1 truly tendered by the public prosecutor and was not read aloud in court to allow the appellant understand its contents. In my opinion, there is no doubt that such anomaly was contrary to the legal requirements, in particular section 240 (3) of the CPA. In the case of **Thomas Ernest Msungu @ Nyoka Mkenya vs. Republic**, Criminal Appeal No. 78 of 2012 (Unreported), the court made the following pertinent observations, thus:

> *"A prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect that was wrong because in the process the prosecutor was*

not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined."

As the court records speaks for itself, I subscribe to the above principle of law as the same cuts across instant appeal. As stipulated under section 198 (1) of the Criminal Procedure Act [Cap.20 R.E. 2019]; the prosecutor who tendered Exhibit PE1 (the PF3) was not a witness as envisaged by the law under this provision of the law.

Accordingly, upon comprehending such flouting of procedures in tendering and admission of Exhibit PE1 (the PF3) it is obvious that such an Exhibit ought to be, and I do hereby, proceed to expunge it from the court record.

With regard to the 5th and 6th grounds of appeal, I see no need to be labour on it as the same have no merits. Concerning the 7th ground, the appellant is complaining that he was convicted and sentenced whereas the offence of rape was not proved beyond reasonable doubt. This proposition was conceded by Mr. Kalinga who actually did not seek to challenge the appellant's appeal on belief that this case was not proved beyond reasonable doubt, which I subscribe.

That done and said, this appeal has merits and it is hereby allowed. The conviction and sentence meted out against the appellant, Paul Kalemalila are quashed and set aside. The appellant should be released from prison

forthwith unless is detained for some other lawful cause. **Order accordingly.**

Dated at **Dar es Salaam** this **2nd August, 2021.**

M. J. CHABA

JUDGE

02/08/2021

Judgment delivered under my hand and Seal of the Court in Chambers this 2nd day of August, 2021 in the presence of the appellant in person and Mr. Ramadhani Kalinga, learned State Attorney for the respondent Republic.

M. J. CHABA

JUDGE

02/08/2021

Right of Appeal fully explained.

M. J. CHABA

JUDGE

02/08/2021