THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 15 OF 2021

(From District Court of Mpanda at Mpanda,
Criminal Case No. 83 of 2020)

JOHN s/o DINIZIO@ LUSAMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

26TH July & 16th August,2021.

NDUNGURU, J.

The appellant, John s/o Dinizio @ Lusambo was charged at the District Magistrate's Court of Mpanda at Mpanda with two counts the offence of Rape contrary to Section 130 (1), (2), (e) and Section 131 (1) of the Penal Code, Cap 16 (Revised Edition 2002 now R.E 2019). For the 1st count, it was alleged by prosecution that on 25th day of June, 2020 at Itenka B village within Mpanda District and Katavi Region the appellant had carnal knowledge to one **GG** a girl of 15 years of age. For the 2nd count it was

alleged that on the same date and place the appellant did carnal knowledge to one **GX** a girl aged 11 years old. Initials are used to protect identities of the victims.

Upon trial, the court was satisfied that the prosecution has discharged the duty of proving the case beyond reasonable doubt. The appellant was convicted and sentenced 30 (thirty) years imprisonment in jail for each count (1st and 2nd count). The court directed sentences to run concurrently.

Briefly, the prosecution case in which the appellant is conviction was grounded is as follows: On the fateful date PW1 and PW2 (the victims) and their fellows while on the way back home from fetching firewood met the appellant. That the appellant had a knife and stick on his hand. That the appellant accused them to have stolen firewood from his cow-shed. The appellant took the victims and their fellows to the bush/ forest where he divided them into groups. First group involved PW1 and PW2 and the second group included the PW5, PW 7 and PW8. That the appellant release the 2nd group and kept the first group under restraint. He dragged them to bush where he raped them.

The matter was reported to the village authority. The appellant was arrested and sent to the police station and then to the court. During trial, the prosecution discharged its duty by calling 10 witnesses and tendered some documentary exhibits. The appellant defended himself. He had neither witness nor exhibits. His defence could not assist him; eventually he was convicted and sentenced.

The appellant is now appealing to this court against conviction and sentence imposed upon him. In his memorandum of appeal, the appellant raised two grounds of appeal which I reproduce as hereunder:

1. *That, the trial court erred at law and fact to convicting and sentenced the appellant on the offence which was not proved beyond reasonable doubt.*
2. *That, the trial court erred at law and fact to convict and sentence the appellant by admitting the so called sperms testified before the court by PW 10(Medical officer) to be emitted by the appellant without scientific proof.*

When the appeal was called for hearing, the appellant appeared in person while Mr. Njoroyota Mwashubira learned State Attorney represented the respondent/Republic. The learned State Attorney

vehemently resisted the appeal. Arguing for his appeal, the appellant being a layman and unrepresented had nothing substantial in supporting for his appeal. He asked the court to adopt his grounds of appeal set forth in his petition of appeal. He further prayed the court to consider his grounds of appeal and allow his appeal.

Resisting the appellant's appeal Mr. Njoroyota Mwashubira, the learned State Attorney was very short and direct in his submission. The learned State Attorney was of the submission that the case against the appellant was proved beyond reasonable doubt as required by law.

The learned Attorney was of the submission that the evidence before the trial court was very direct. He said PW1 and PW2 were the victims of the offence. He said their evidence was very straight forward on how the appellant raped them. He argued that in sexual offences the best evidence is that of the victim. He referred the case of **Seleman Makumba v. Republic** (2006) TLR 379.

Mr. Njoroyota was of the submission that, the evidence of PW1 and PW2 was corroborated by the evidence of PW3, PW7 and PW8. Not only that the learned State Attorney was of the argument that, the

appellant confessed before PW9 who was a local authority leader that he had committed the offence and apologized.

The leaned State Attorney further argued to the effect that evidence of PW1, the medical officer proved penetration which is the prerequisite element for the offence of rape. Concluding his submission, he said the charge against the appellant was proved to the standard required by law. He thus urged the court to dismiss the appellant's appeal. In his rejoinder, the appellant denied to have confessed to have committed the alleged offence. He consistently prayed the court to adopt and take into consideration his grounds of appeal and allow his appeal.

After reviewing the evidence on record and the submissions by the appellant and the learned State Attorney, I am of the view that the whole appeal hubs on the issue of whether or not PW1 and PW2 were raped and whether it was the appellant who committed the rape. What needs to be considered is whether or not the evidence on record supports the allegation of rape.

The appellant being charged of rape contrary to section 130(1) (2) (e) of Penal Code, the role of the prosecution is to prove that the victim was raped. Under section 130(e) the prosecution has to prove that the

victim of rape is below 18 years where consent is immaterial, whereas section 130(4) (a) provides for proof of penetration however slight. See the case of **Edward Nzabuga v R**, Criminal Appeal No 136 of 2008 CAT (unreported

I appreciate from the judgment of the trial court that conviction of the appellant was based on the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9 and PW10. That the trial court, relying on the decision of the Court of Appeal in **Selemani Makumba vs. Republic** [2006] TLR 379 found that the evidence of PW1 and PW2, the victims, was crucial, clear reliable and credible on what transpired on the fateful date.

According to the charge the offence was committed on 25th June 2020. PW1 and PW2 were the victims of the alleged rape. Their evidence is very crucial to prove the case basing on the principle that in rape cases, the true evidence comes from the victim. This principle was promulgated in the case of **Selemani Makumba**(supra) and followed in a number of cases like the case of **Ndikumana Philipo vs. Republic**, Criminal Appeal No 276 of 2009(unreported) where the Court of Appeal of Tanzania stated;

> *"**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 women where consent is irrelevant that there was penetration"*

While I agree that the above is the correct position of law, but it does not mean that such evidence should be taken as conclusive, believed and acted upon to convict the accused person without considering the circumstances of the particular case. See of **Pascal Sele vs. The Republic**, Criminal Appeal No 23 of 2017 CAT (unreported). The evidence on record is that PW1 and PW2 gave the account of what transpired. Their testimony was supported by the testimony of PW5, PW7 and PW8 who testified to have been with PW1 and PW2 when coming from fetching fire wood. That while on the way back to their home met the appellant who had a knife and stick on his hand. That, the appellant lamented them to have stolen the firewood at his compound. That, the appellant dragged two to the bush. That at the bush the appellant directed them to go to the different directions. The testimony of PW1 is that; while at the bush, the appellant asked them" ***mpo tayari kufanya show na mimi"*** they denied. PW1 said the appellant pulled and undressed her and himself and told PW1 to close the eyes then had sexual intercourse with her.

PW1 went further saying having finished, the appellant went to PW1. He undressed her and started raping her. PW1 said, to have witnessed the

appellant penetrating his penis into PW2' vagina. Further PW1 said she ran to the road where she then stopped waiting for PW2. The evidence of PW1 is that PW2 having been raped, they went home where they met their fellows who were with them already arrived at home and were telling the parents what has happened. She told the court that the episode was reported to the police post the next date. They were given PF3 for medical examination.

While the evidence of PW2 was to the effect that on the fateful date being with her fellow including PW1 were coming from fetching firewood. On the way back, they met the appellant who had knife and stick on his hand. That, the appellant complained them to have stolen his firewood. That, the appellant allowed their mate to go. He remained with PW1 and PW2. She said the appellant dragged the two to the bush. He ordered them to go at different directions. That he commanded them to undress. PW2 said she undressed. She further told the court, the appellant commanded them to close the eyes. She said the appellant started raping PW1 then her. That when accomplished raping her she also ran. She and PW1 met their fellow at home narrating the fate to the parents. That, the

matter was reported to the police where PF3 was issued. They were sent to the hospital.

PW3 told the court that on the fateful date she was with PW1, PW2 and others coming from fetching firewood. That on the way they met the appellant who had knife and stick in his hands. She said the appellant released her with some of her fellow but retained PW1 and PW2 with him at the bush. PW3 told the court that suddenly as they were heading home saw PW1 running the then headed going home. That, they reported to their parents PW1 to have been raped by the Appellant.

PW4 was the mother of PW1. Her testimony was to the effect that PW1 was fifteen years as she was born in 2005. She tendered affidavit as exhibit (PE1) trying to prove that PW1 was fifteen years old. Her testimony was that on 25/6/2020 she was phoned by the village chairman who informed PW1 to have been raped. That she rushed to the call at Iteka Police post where she met PW1. That having inspected PW1 she found her to have been raped. That PW1 names the appellant to be the rapist. She said they were referred to Mpanda police station and were sent to Katavi Regional hospital for medical examination.

PW5 was the father of PW2. His testimony was that PW2 was 11 years old as she was born in 2009. He tendered affidavit of proving age as exhibit ((PE2) His further evidence was that on 25/6/2020 at about 18.00 hours he was at Mpanda. While there he received information that PW2 has been raped. PW5 told the court that he communicated with the village chairman who made effort to arrest the appellant.

PW6 the investigator, he told the court that on 26/6/2020 he was assigned to interrogate the appellant. PW6 said during interrogation the appellant confessed to have committed the alleged offence. That he recorded the cautioned statement of the appellant. His testimony was that the appellant confessed to have had sexual intercourse with PW1 and PW2. It was this witness who tendered cautioned statement as exhibit (**Exh.PE3**)

PW7 told the court that she was standard four. That on the fateful date she was with her fellows including PW1 and PW2 went to fetch some fire wood. While on the way back home met the appellant. The appellant had a knife and stick on his hands. The appellant accused them to have stolen firewood at his cowshed. The appellant released some of them but retained PW1 and PW2. He took them (PW1 and PW2) to the bush. That

she and the follows having been released ran away. PW7 said PW1 then joined them running she had no clothes, they covered her. That PW1 told them to have been raped by the appellant. They then reported to PW2's mother.

PW8 told the court that she was with PW1 and PW2 and others when coming from fetching the fire wood. On the way they met the appellant who took PW1 and PW2 to the bush. That having left PW1 ran and joined them at the road. PW1 told them to have been raped by the appellant and has left PW2 being raped by the appellant. They reported the matter to their parents.

PW9 was a village chairperson. His evidence was that on 25/6/2020 he was informed by the hamlet chairperson on the event of rape. That he went to the home of the parents of the victims. Those parents of the victims inspected the victims and found them to have been raped. He said the victims named the appellant to be the rapist. He arrested the appellant and when interrogated he admitted to have committed the offence. That on 26/6/2020 he sent the appellant to the police station. PW10 was the medical officer who examined the victims. PW10 said in his examining PW2 found bruises and sperms in the vagina. That he also examined PW1 where

he found some bruises two fingers penetrated but no sperms were seen. It is this witness who tendered PF3 of the victims as exhibits (PE3 AND PE5).

In his defence the appellant strongly denied neither to have raped the victims nor to have confessed to have committed the alleged offence. The appellant told the court that while at police custody he was seriously beaten. That due to the beating he sustained he admitted to have raped

The evidence on record reveals that apart from the word of PW1 and PW2 the victims; there was no eye witness to the incident of rape. Neither of the prosecution witnesses claimed to have seen the appellant carnally knowing PW1. The same was the second ground of appeal. It follows therefore that while PW1 claims to have been raped by the appellant, the appellant denies to have committed the offence. The credibility of PW1 is therefore very paramount.

As I have stated earlier, the trial court having observed the PW1 and PW2 was satisfied them to be credible witnesses. But it is not reflected in the record of the trial court which had opportunity to observe the demeanor of PW1 and PW2 at the dock and so reached a conclusion that they were credible witnesses and thus convicted the appellant basing on their evidence, (see stated in **Yusuf Simon vs. Republic**, Criminal Appeal

No 240 of 2008 (unreported).This being the first appeal this court had no opportunity to observe PW1 and PW2 at the dock but still can employ ways for which credibility of the witness can be deduced. Such as: accessing coherence of the testimony of such witnesses, considering the testimony of that witness in relation with other witnesses including that of the accused person. See **Rashidi Shabani vs. Republic,** Criminal Appeal No. 310 of 2015 (unreported). This court had an opportunity to re visit and re assess the evidence of PW1 and PW2. This court is satisfied that PW1 and PW2 were not credible witnesses. This is due to the fact that the witnesses were not accurate, coherent and their evidence was departing from each other of relevant material worth of credit. While PW1 said the appellant pulled her and undressed her, PW2 was of the version that the appellant commanded them to undress and they undressed. PW2 did not tell the court that the appellant asked them ***"mko tayari kufanya show na mimi?"*** as testified by PW1. Further, PW1 told the court that having been raped she witnessed the appellant raping PW2. She said she saw the appellant penetrating his penis into the vagina of PW2. While the evidence available is that the appellant commanded them to go to different directions. How could she see the penis of the appellant penetrating into

the vagina of PW2 while they were at different directions and it was in the bush? But again, PW2 told the court that PW1 having been raped ran away to the road. Thus due to the above inconstancies raised by the two witnesses who alleged to be at the scene and the victims of crime, their evidence lacks credence and cannot be believed.

The other piece of evidence is that of PW2 PW3, PW7 and PW8. These are witnesses who were with PW1 and PW2 coming from fetching firewood. The record shows that these witnesses were children of tender age. The law on recording evidence of the children of tender age is provided under section **127 of the Evidence Act** (Cap 6 R.E 2019).it provides

> ***127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.***
>
> ***(2) 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.***

From the wording of the above reproduced provision, sub section 1 articulates that every person is competent to testify unless where the court

finds the contrary by reasons of age or state of mind. Therefore the court must test whether the witness is competent to testify or not. That can only be done by the court by imposing some questions to the witness. From the answers given the court arrives into supposition whether a witness is competent to testify or not. See **Godfrey Wilson v. Republic,** Criminal Appeal No 168 of 2018 CAT (unreported). The trial court's proceedings show that questions were asked but neither the alleged questions nor answers are reflected in the record. Page 10 of the proceedings speaks loudly;

> "**Court:** *Pili Martin appeared to be a girl of a tender age. She is eleven years of age, upon my been examination of the questions and answering put to her, it is clear that she demonstrate the highest intelligence and understood however she didn't understood the meaning of oath, for not understanding the nature of oath, however she promised to tell the further to court and not a lie, this being so this court find her not competent to testify under oath.*"

Then PW2 started testifying. The record does not show the promise made by the witness apart from the words of the trial magistrate that the witness

ɔ tell the truth and not lies. The same is revealed at page 12

of the proceedings when PW3 testified, page 23 when PW7 and page 25 testified. In the circumstances their evidence is not worth of being accorded credence.

The piece of remaining evidence is that of PW4 and PW5. These were parents of the victims. In their testimony no one testified to have seen the appellant raping the victims. Their testimony basically was of proving age of the victims. For instance, PW4 told the court that she inspected PW1 and found her to have been raped. PW4 did not tell the court the way she inspected her and the way she arrived into finding actually PW1 was raped. The remaining piece of evidence is that of PW6 and PW9. This is the evidence on confession. Starting with the evidence of PW9, he was a village chairman. I am aware that confession made before local leader is acceptable and can warrant conviction. The law on confession is very clear. Confession to warrant conviction must be made voluntarily by the maker. This is requirement under **section 27 of the Evidence Act Cap 6 R.E 2019.** PW9 told the court that having arrested the appellant when asked denied and later when taken to WEO then the appellant admitted to have committed the offence and apologized. The question is why when asked, the appellant denied and later admitted? The evidence of PW9 is to the

effect that, when he went to arrest the appellant he was with hamlet chairman, and auxiliary police. To my view the circumstances could not warrant voluntary confession. As far as confession statement recorded by PW6, the evidence available is that the appellant was arrested on 25/6/2020 and was sent to the police post and next date he was sent Mpanda Police Station but his statement was recorded at about 17.00 hours which is more than four hours the law dictates. The evidence of PW10 is an expert opinion which actually could corroborate the evidence of the victims which I have accorded no evidential value. Therefore the evidence of PW10 alone cannot sustain conviction.

Being said and done, I find there is no reason to convince me to uphold the decision of the trial court. I hereby allow the appellant's appeal. I further quash conviction and set aside sentence meted against the appellant. I further order the appellant be released from the prison immediately unless otherwise lawfully held.

It is so ordered.

D.B NDUNGURU

JUDGE

16/8/2020