IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

CRIMINAL APPEAL No. 1 OF 2019

(Originating from the District Court of Korogwe at Korogwe in Criminal Case No. 36 of 2014)

SALIMU ALPHAN ---------- **APPELLANT**

Versus

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

JUDGMENT

22.11.2021 & 26.11.2021

F.H. Mtulya, J.:

This appeal is a second attempt registered in this court by Mr. Salimu Alphan (the appellant) to challenge the conviction and sentence meted out on him by the **District Court of Korogwe at Korogwe** (the district court) in **Criminal Case No 36 of 2014** (the case) after having been found guilty of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the **Penal Code** [Cap. 16 R.E 2002] (the Code).

From the record available in this appeal, the appellant for the first time filed an appeal in this court vide **Criminal Appeal No 13 of 2015** whereby his conviction and sentence was upheld. He was further aggrieved and approached the highest court of the land, the Court of Appeal vide **Criminal Appeal No 547 of 2016** (the Appeal). In the course of hearing the Appeal, the Court discovered that the appeal in this court was filed without there being any

Notice of Intention to Appeal (the notice) lodged prior to the filing of the appeal. In its ruling on 18th April 2018, the Court struck out the appeal for want of the notice hence nullified all proceedings and judgment of this court in **Criminal Appeal No 13 of 2015**, hence this second attempt of appeal registered by the appellant.

In order to appreciate the gist of the appeal, it is necessary to recap although in brief on what transpired in the trial court where the appeal finds its roots. The appellant was charged and convicted with the offence of rape of a victim XXX (identity withheld for protection of the victim). According to the Charge Sheet, it was alleged that on 11th day of March 2014 at about 10:00 hours in Mtonga area within Korogwe District in Tanga Region, the appellant did have carnal knowledge of the victim, a girl of 15 years old (the victim).

The prosecution assembled a total of five (5) witnesses to prove its case. The victim (PW1), victim's brother (PW2), a neighbour to the appellant and victim (PW3), police investigator (PW4) and clinical officer who performed medical examination of the victim (PW5).

In summary it was the prosecution's narration from PW1 that on the 11th day of March 2014 the victim was with the accused person whom they lived together as her caretaker or *father* and at around 1000 hours, after she had served him with tea, the appellant pushed her to bed, undressed her and penetrated his

penis into her private parts. According to PW1, the appellant threatened her to remain silent without any voice of shouting. To the victim's narrations, it was the first time for her to be raped by the appellant but at one point in time, the appellant did put his fingers in her private parts.

The evidences registered in testimonies show further that PW3 met PW1 crying when she was on her way to the market to inform her brother on the incident. PW3 testified that she was told by the victim that the appellant had raped her. PW3 testified further that the appellant arrived thereafter and commanded the victim to go back home hence PW3 decided to report the matter to PW2 who hurried back home where he found the appellant and the victim.

According to PW2, PW3 reported to him the rape incident of the victim and reported the matter to the police station where Police Form Number 3 (PF3) was issued. The victim was then medically examined by PW5 who found out that the victim was neither bruised nor discharged sperms, but had a foul smell without any hymen. PW4 on the other hand conducted investigation of the complaint, recorded witness statements and initiated proceedings against the appellant on 14th March 2014, three (3) days after the purported incident.

The appellant protested his involvement in the crime when the charge was read to him, during giving evidence as a sole

defence witness and even in mitigation. His defence was that the whole saga was framed up against him by PW2 with whom they had grudges. PW2 who is the victim's brother was never happy with his living with the victim. According to the appellant on the date of the incident, he went to shamba leaving the victim at home and when he got back at around 0900 hours in the morning, he found the house dirty and unattended. The appellant then asked the victim as to why she did not clean the house, but the victim remained mute. According to the appellant, he decided to cane her and the victim ran away crying. The appellant stated further that he followed and found her with PW3 whereupon she took her back home and kept asking her why she did not do cleanliness, but she remained silent. According to the appellant, that is when PW2 arrived and accused him of raping the victim. The appellant insisted his innocence and that he never raped the victim.

After the trial was heard in full, the district court found the appellant guilty of the offence of rape and sentenced him to serve thirty (30) years imprisonment and suffer six (6) strokes of cane as well as to pay Tanzanian Shillings Three Hundred Thousand (300,000/=) as a compensation to the victim. This decision displeased the appellant hence preferred the present appeal which is founded on three (3) grounds, namely:

1. The trial court erred in law and in fact by failing to consider the evidence of PW5, the clinical officer, which reveals that the victim had no hymen, no bleeding, no bruises hence it appeared she was seasoned in sexual intercourse and not on the 11th March 2014 as alleged in the Charge Sheet;

2. The trial court magistrate erred in law and in fact by convicting the appellant basing on unreliable evidence of the victim; and

3. The trial court erred in law and in fact by failing to notice that the prosecution did not prove its case beyond reasonable doubt.

When the appeal was scheduled for hearing on 6th September 2021, the appellant appeared in person without any legal representation whereas the Respondent enjoyed legal representation of Mr. Paul Kusekwa, learned State Attorney. However, the parties agreed to argue the appeal by way of written submissions hence a scheduling order was set and complied with. In support of his grounds of appeal, the appellant joined and submitted all grounds of appeal together. In brief, he stated that the prosecution did not prove its case as per required standard of proof in establishing criminal cases, which is beyond reasonable doubt. In substantiating his submission, the appellant stated that the trial court erred in failing to consider evidence in

PF3 admitted in the case as exhibit P.A which displayed that the victim had no wound and had lost her hymen a long time before the date of the incident. The appellant submitted further that the trial court erred in believing the evidence of PW1 which was unreliable and ignored his defence that the whole case against him was fabricated. In general, the appellant prays this court to find him innocent as the case against him was not proved beyond reasonable doubt.

In replying the submission of evidence in exhibit P.A, Mr. Kusekwa for the Respondent stated that evidences show that sperms and bruises were not detected by PW5 during examination of the victim because the victim had already taken bath before the examination and in any case absence of the sperms and bruises do not vitiate that the victim was raped by the appellant. To the opinion of Mr. Kusekwa, the evidence in exhibit P.A is to be considered with other evidences registered in the case.

According to Mr. Kusekwa the law require every witness to be believed and his testimony accepted unless there are good and cogent reasons for not believing him as it was stated in the precedent of **Goodluck Kyando v. Republic [2006] TLR 363.** Mr. Kusekwa submitted further that in rape cases the best evidence comes from the victim and cited the authority in the celebrating precedent of **Selemani Makumba v. Republic [2006] TLR 379**. In finalising his submission, Mr. Kusekwa contended that the case

against the appellant was proved to the standard required by the law in beyond reasonable doubt.

In determining the present appeal, I have accorded this matter, the time it deserves. As the first appellate court, I am conferred with a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, to arrive at my own conclusion of facts (see: **Vuyo Jack v. Republic**, Criminal Appeal No. 334 of 2016). First things first, I will start with ground number one of the appeal. In this ground the appellant faults the trial court's decision for not being keen enough to the evidence registered in exhibit P.A which revealed that there was no rape. I have visited and scanned exhibit P.A and its procedure in tendering it in the trial court. Before I proceed in displaying its contents, I could not help myself noticing that the manner in which it was tendered in court was improper. At page 12 of the typed proceedings when PW5, a clinical officer from Magunga Hospital was giving evidence, the following transpired and for easy appreciation, I will quote the proceedings:

> *PW5: There was no bruises in her vagina, as I said because she appeared to be seasoned in sex, no bruises was found. I pray to tender the PF3 as exhibit.*
>
> ***Court**: Contents of PF3 read to accused in Swahili*
>
> ***Accused:** No objection, I will cross examined the doctor*

***Court**: PF3 admitted as exhibit P.A*

It is apparent that the PF3 was first read out loud in court before it was tendered as an exhibit. This practice is unentertained by the courts of law and renders the whole exhibit nugatory. The directives of the Court of Appeal as extracted in the precedent **Robinson Mwanjisi & 3 Others v. Republic**, [2003] T.L.R 218, is that:

> *Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out.*

This principle has been receiving support in many other cases of the same court (see: **Walii Abdallah Kibuta & 2 Others v. Republic**, Criminal Appeal No. 181 of 2006; **Stany Loidi v. Director of Public Prosecutions**, Criminal Appeal No. 466 of 2017; and **John Mghandi @ Ndovo v. Republic**, Criminal Appeal No. 352 Of 2018). This court too has not been hesitant in abiding with the practice of the Court of Appeal (see: **Mashaka Robison @ Chela @ Konya v. Republic**, Criminal Appeal No. 1 of 2021; and **Saidi Nguzele & Another v. Republic**, Criminal Appeal No. 7 of 2021). The commonly cited text in this subject is found at page 14 of the decision of **Stany Loidi v. Director of Public Prosecutions** (supra) which shows that:

Whenever it [the court] is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial. If the document is ultimately excluded, as happened in this case, it is difficult for the court to be seen not to have been influenced by the same.

In the present appeal, the record shows that the document in P.A was read before the court before its clearance. This evidence must be expunged from the record as it was improperly admitted and relied by the district court to convict the appellant. This is wrong and prejudiced the appellant. As if that was not enough, further perusal of the document depicts that the evidence in P.A contained no stamp of the relevant hospital which examined the victim.

I have asked myself whether it was safe for the trial court to ground a conviction basing on a document which was not stamped by the appropriate authority which alleged to have prepared it? The answer is definitely in the adverse. It was very risky to receive that document and believe its credibility without any official stamp from recognised hospital. Since I have found that first the document was improperly admitted before the court,

and its authenticity is in doubt, I remain with no option rather than to expunge it from the record. In that case, appellant's first ground of appeal succeeds.

Moving to the second ground of appeal, the appellant states that the evidence of PW1 was not credible. On the other hand, the respondent seeks indulgence of this court by stating that the best evidence of rape cases comes from the victim. As in the first ground of appeal, I have taken the evidence of PW1 into a closer contemplation. In giving her testimony PW1 stated, at page 5 of the typed proceedings, that: *alinivua na kuniingiza dudu lake huku chini mbele*. She further stated that she could not shout in defence of the incident as the appellant threatened her and that there were other days when Aunt Shufaa was away, the appellant did put his fingers in her private parts.

During cross examination, the victim stated that she had to tell lies to the appellant so that he would let her go. Surprisingly, according to PW5 this victim told her that she took shower after the act. Looking at the series of events, it is not suggested anywhere that the victim got time to shower so that the bruises and the sperms were removed from her private parts. The series of events are that after she was raped, she ran to the road, taken back home, PW2 appears and she was taken to the hospital. That she took shower seems to be made up so as to support the fact that nothing was seen in her private parts to suggest that she had

been forcefully penetrated in her private parts. I find this to be a mere lie and available precedents of our superior court, the Court of Appeal, is that a witness who tells a lie on an important point should hardly be believed on other important points (see: **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006; and **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017).

In my opinion the testimony by PW1 needed corroboration to be believed. Unfortunately, all other witnesses' evidences corroborated the evidence of PW1 which also needed to be corroborated. The position of the law in precedents is that evidence that requires corroboration cannot corroborate another (see: **Ally Msutu v. Republic** [1980] TLR. 1).

The respondent in order to persuade this court to dismiss the second ground of appeal, quoted the precedent of the Court of Appeal in **Selemani Makumba v. Republic** (supra), which states that the best evidence of rape comes from the victim. However, this position of the law has been adjusted by the same Court in the case of **Mohamed Said v. Republic** (Supra), sitting at Iringa on 23rd August 2019. In the precedent, the Court issued a warning on courts of the danger of taking the victim's words as gospel without testing it against the version given by the accused persons. The reasoning derived from Court of Appeal decision is that rape complaint is very easy to be registered and harder to be proved and harder to be defended by the party accused, though

never so innocent (see: **Abiola Mohamed @ Simba v. Republic**, Criminal Appeal No. 291 of 2017). Recently, on 15th July 2021, the Court sitting at Kigoma in the precedent of **Majaliwa Ihemo v. Republic**, Criminal Appeal No. 197 of 2020, required lower courts to adhere the principle in evidence of a victim cautiously. An inviting statement on the subject is found in the Court of Appeal decision in **Pascal Yoya @ Maganga v. Republic**, Criminal Appeal No. 248 of 2017, that:

> *The Court in **Selemani Makumba v. Republic** [2006] TLR 379 found that the evidence of PW1, the victim, was reliable and the best evidence in cases of this nature. While we agree that the above is the correct position of the law, we hasten to remark that, **the same does not mean that such evidence should be taken wholesome, believed and acted upon to convict the accused person without considering other evidence and the circumstances of the case.***
>
> (Emphasis supplied).

The circumstances of the present case is not positively inviting. The evidences of PW1 has several faults and in any case, anyone would wonder, after having committed such an evil act, if he did so, why would the appellant remain calm at his residence without fleeing from the authorities in fear of being caught? Why would a criminal stay calm at home waiting for arrest? There is

nowhere on record where it is suggested that the appellant acted criminally before or after being arrested.

In his defence at the trial court and in the appeal at hand, the appellant, a lay person, continued to deny his involvement in the crime. He attributed his prosecution to the existence of a prior conflict between him and PW2 who is the victim's brother. I have taken liberty to revisit his defence and found that his evidence is cogent and it ought to be believed. As stated in the case of **Goodluck Kyando v. Republic** [2006] TLR 363, at page 367

> *It is trite law that every witness is entitled to credence and must be believed and his testimony accepted* ***unless there are good and cogent reasons for not believing a witness.***
>
> (Emphasis supplied).

The appellant, being a layperson and as a sole witness of the defence case at the trial court, provided facts which made sense and built up a very firm defence which according to me is nothing but the truth. I find no good and cogent reason at all for not believing him. For instance, he provided reasons as to why PW1 was crying on the road, he testified to have canned her. This piece of evidence was not contested during trial.

In our societies parents or guardians may cane children when they have committed wrongs, and may not necessarily invite criminal act. In the present case, the appellant explained that he

found the house dirty and took steps to ask and cane the victim. Again, record show that the appellant had found PW1 and PW3 along the road and took her back home. This was also stated by PW3 and in defence the accused straightened as to why he took her back home.

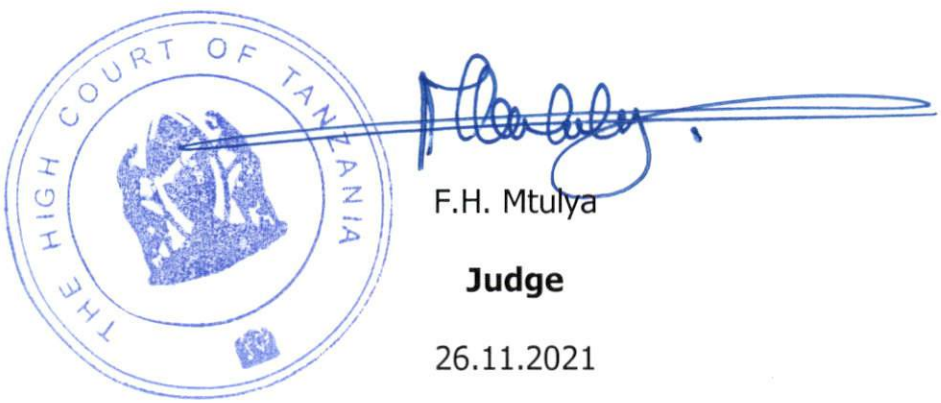
There is another important piece of evidence displayed at page 14 of the typed proceedings on existence of a fight between the appellant and victim's brother, PW2. In my considered opinion, the evidence registered by the appellant when compared with the prosecution evidence, proves that the appellant is innocent. While it might be true that PW1 had already lost her hymen, it was the duty of the prosecution side to establish beyond reasonable doubt that on 11th March 2014, the appellant did have carnal knowledge of PW1. From the registered materials in the present case, that is not displayed.

The Court of Appeal in the case of **Mariki George Ngendakumana v. The Republic**, Criminal Appeal No. 353 of 2014, held that: *it is the principle of law that in criminal cases the duty of the prosecution is in two folds, one to prove that the offence was committed, and two, that it is the accused person who committed it.* In the circumstances of the present case, I find that the materials registered are not concrete to render conviction to the appellant in the serious offence of rape.

For the foregoing reasons, I am satisfied that in the totality of the evidences registered in the present dispute, the case against the appellant was not proved beyond reasonable doubt as per required standard in section 3 (2) (a), 110 & 111 of the **Evidence Act** [Cap. 6 R.E. 2002] and precedents in **John Makorobela & Kulwa Makorobel v. Republic** [2002] TLR 296; **Jonas Nkize v. Republic** [1992] TLR 213 and **Horombo Elikaria v. Republic,** Criminal Appeal No. 50 of 2005). All the identified doubts in this appeal are resolved in favour of the appellant (see: **Mohamed Said Matula v. Republic** [1995] TLR 3. Accordingly, this appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from prison custody forthwith unless otherwise lawfully held.

Right of appeal explained.

Order accordingly.

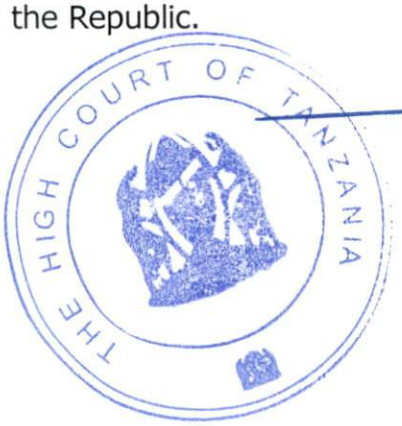


F.H. Mtulya

Judge

26.11.2021

This judgment is delivered in Chambers under the seal of this court in the presence of the appellant, Mr. Salimu Alphan and in the presence of learned State Attorney, Mr. Joseph Makene, for the Republic.



F.H. Mtulya

Judge

26.11.2021