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

**MUSOMA – SUB REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 64 OF 2021**

*(Arising from Serengeti District Court at Mugumu in Criminal Case No. 215 of 2019)*

**WILLIAM S/O CHACHA @ MAKENA ..... APPELLANT**

***VERSUS***

**THE REPUBLIC ..... RESPONDENT**

# JUDGMENT

13th September & 1st November, 2021

**F. H. MAHIMBALI, J.:**

The appellant William Chacha @ Makena is aggrieved by the decision of the trial court (Serengeti District court) where he was charged and convicted of rape contrary to section 130(1), (2) ( e) and section 131 (3) of the Penal Code, Cap 16, R.E 2019.

It has been alleged by the prosecution that on 3rd June, 2020 at Sedeco Street Mugumu Township within Serengeti District in Mara Region, unlawfully the appellant knew one HP a girl aged 4 years carnally.

It has been the prosecution testimony that on the 3rd June, 2020 around 19.00hrs, the PW1's daughter (the victim – PW1) was missing at her home. In search of her daughter, she had reached one unfinished house where she saw the appellant having seated the daughter on his thighs while his zip is open and the victim's pants were down and the appellant was raping the said girl. She raised an alarm for help whereby the appellant ran away. She took her baby girl (the victim) to her home where she noticed blood coming from the victim's vagina and sperms. She immediately reported the incidence to police station where PF3 was issued for the victim's examination.

In her unsworn testimony, the (victim) girl stated that she was raped by the appellant. That the appellant rented in the same house the victim and her mother were staying. On the material date of the incident, the appellant had called the victim and taken her to the unfinished house where the appellant raped her after he had undressed her and inserted his penis into her private parts. She felt pain and started crying and that blood came out from her private parts.

PW3, who is the mother of PW1 and thus grandmother of the victim girl, testified that the appellant is the co – tenant in the same house they are staying at Mugumu. That on the date of the incident,

PW1 called her and informed her that PW2 had been raped by the appellant as she had just seen them at the unfinished building near the home. The said girl was then crying and blood was coming out from her private parts. After PW1 had reported the incidence to police station, they took the girl to hospital for her examination and medication.

PW4 - John Mororo, a clinical officer testified that on 4th June, 2020 while on duty at night time (at DDH – Mugumu Hospital), he had received the victim girl being accompanied by her mother and a police woman where he examined her private parts (vagina) and found the hymen ruptured, and the vagina having bruises. In his findings, the vaginal bruises were caused by a blunt object and in the presence of the spermatozoa fluid, it was due to penis penetration. He tendered PF3 which was admitted as PE1 exhibit.

E75 D/Sgt Titus, testified as PW5. His testimony is to the effect that he was assigned investigation of this case. In his investigation he established that PW1 and the appellant are housemate as they rented the same house, each having separate rooms. That, the two are familiar to each other including the victim girl.

In his defence testimony, the appellant just testified that in his recollection, on the 3rd June, 2020 during night time while asleep in his

room, he heard people knocking his door. When he opened, he saw police who then arrested him and took him to police station. On the next day, he was interrogated and sent to court on allegation of rape charges. When cross examined by police, he stated that it is true that he rented in the same house where PW1 resides and that they know each other and that there are other people living in the same house. Nevertheless, he didn't know the reason why he was arrested and charged with this offence as he knew about it.

Upon hearing of the case, the trial court convicted him of the rape offence and accordingly sentenced him to life imprisonment. Undaunted with both conviction and sentence, the appellant has knocked the doors of the High Court contesting for his innocence. He is armed with a total of six grounds of appeal in his petition of appeal which can be paraphrased as follows:

1. That the trial magistrate erred in law and fact in convicting and sentencing the appellant relying on unreliable testimony of the prosecution witnesses.

2. That the trial magistrate erred in laws and fact in convicting and sentencing the appellant without giving him a chance to call his witnesses during his trial.

3. That the trial magistrate erred in law and facts in convicting and sentencing the appellant without according him with the right to be heard.

4. That the testimony of PW1 is unreliable as she had testified that she had raised an alarm when she saw her daughter being raped by the appellant, but there is no any evidence in record showing if there was such an alarm and who attended to it.

5. That the testimony of PW3 is unreliable and dangerous to act on it.

6. That the evidence of clinical officer is unreliable and conflicting thus dangerous to act upon.

During the hearing of the appeal, the appellant fended for himself whereas the respondent was represented by Mr. Isihaka, learned state attorney. The appellant in his appeal, prayed that the grounds of his appeal in the petition of appeal be adopted to form part of his appeal's submission and that he had no more to add.

The respondent on the other hand, resisted the appeal. Responding to the first ground of appeal, Mr. Isihaka, learned state attorney submitted that it is not true that PW1 had not testified on oath.

PW1 testified on oath and narrated the whole story how the appellant was spotted being with the victim girl on that unfinished building. Nevertheless, the appellant didn't cross examine her/contradict her on that testimony. Considering the fact that the said prosecution witnesses were not implicated with any perjury charge in connection with this case, thus, it is illogical how did they tell lies in court on account of the appellant's argument that the prosecution testified wrong evidence in court. It is the appellant himself who didn't contradict /cross examine on that issue if so.

As regards to the second ground of appeal that he was not accorded with his right to call witnesses is not true. On page 28 of the typed proceedings, it is clear that he called one Bhoke as his witness. As per pages 28 – 30 of the typed proceedings, it is clear how he exercised his right of calling witnesses and on page 32 he prayed to close the evidence as he had no witness to call. While giving his judgment, the trial magistrate considered the testimony of both sides (see page 4/7-8 of the typed judgment) where it was clear how the whole case was summarized and eventually evaluated for basis of reaching the court's verdict.

In consideration to the third ground of appeal, the learned counsel submitted that, it is clear that the appellant was given the right to be heard. On page one, he was given the right to plead to the charge, on pages 4-5 of the typed proceedings shows how at preliminary hearing stage the accused person had responded on the facts by the prosecution where disputed and undisputed facts were known and he dully signed thereat.

Furthermore, all the prosecution witnesses were cross examined by the appellant. Even at the admissibility of exhibit PE1 (PF3) by PW4, the appellant is recorded to have no objection. Thus, it is a wonder, why this argument is raised as ground of appeal. When it was ordered that the appellant had a case to answer, he pointed that he had one witness. He testified on oath, but failed to bring his witness upon his request. Thus, it is not true that he was not accorded the right to be heard, as submitted by Mr. Isihaka.

With the fourth ground of appeal, it has been countered that so long as the number of witnesses is not at issue (section 143 of TEA), the Republic was not compelled to bring a particular number of prosecution witnesses so long as the relevant facts are proved even by one witness. It was not necessary that there should have been other witnesses to call

if the facts in issue was already proved. The evidence by the two witnesses (PW1 and PW2) was sufficient to prove the case against the appellant. The testimony of PW2 (victim's evidence) was of high quality and that the same was not cross examined to establish any contradiction. Thus, what she testified remains unchallenged. By the way it is not a legal requirement that upon an alarm being raised, then there ought to have been a reply to it. It may, depending with the nature of the crime/circumstances of the case, it is not necessary that there is a reply of it by the caller of "Mwano".

With the fifth ground of appeal, the judgment of the trial court is not propped on the testimony of PW3 but on PW1 and PW2. Nevertheless, the testimony of PW3 is not hearsay evidence per se as alleged. What PW3 did was not hearsay but that her involvement into the said attendance, commenced from first being informed by PW1 and then in her arrival there, she personally attended the victim (PW2) by inspecting whether she was injured and that was carnally known. Nevertheless, even if the testimony of PW3 is hearsay as alleged, yet as the testimony of PW2 passed without being cross examined, then appellant has not been affected by it.

In the case of **Seleman Makumba Vs Republic** (2006) TLR 37, *"The best evidence has to come from the victim"* thus as the testimony of PW2 is unchallenged by the appellant, then it is by itself incriminating against the appellant.

With the sixth ground of appeal, he reiterated what has been submitted in the first ground of appeal. That if the testimony of PW4 is not incredible it was the appellant's duty to establish the untruthfulness of PW4's testimony by cross examining him. Failure to do that, he being clinical officer, is a competent witness to testify as per law.

Responding to the question posed by the Court whether the duty to tell the truth (promise to tell the truth as provided under section 127 (2) of the TEA has been complied with by the trial court, the learned state attorney responded by making reference to the case of **Selemani Moses Sotel @ White VS Republic**, Criminal Appeal No. 385 of 2018 CAT Mtwara at page 12. He submitted that the Court of Appeal in this case, considered the following factors as relevant in determining the duty of promise to tell the truth in respect of the testimony of the child of tender age. Age, religion, whether he/she understands the nature of oath, whether or not the child promises to tell the truth and not lies. In consideration of this, he submitted that in the case at hand it is clear

that this legal requirement was not adhered to. Thus, he humbly prayed that the testimony to PW2 be expunged.

Despite the expunge of the testimony of PW2, the learned state attorney submitted that yet the testimony of PW1 stands incriminating against the appellant. That in his digest to the testimony of PW1, his further scrutiny drives him to the point that there was no clear features of identification as per case of **Waziri Amani.** Though those features were not stated, yet in the circumstances of this case, the appellant was properly identified. In the case of **Makende Samson Vs Republic** Criminal appeal NO. 412 of 2017, CAT at Mwanza (at Page 12) where the Court held;

> *"the guideline stated in Waziri Amani Case are not exhaustive and that each case has to be considered on its own circumstance"*

To this case at hand, though the guideline were not stated, the appellant was properly identified because of the following reasons:

1. The appellant and Respondent lived in one house (rented in the same house).
2. The appellant was found at the scene by PW1 with her daughter.

3. The appellant during cross examination, didn't question any on the issue of identification (see **Proches Christian Kavisha Vs Republic** Criminal 145 of 2020 High court at Musoma at page 9).

With these arguments, he is satisfied that in this case, the appellant was fully identified and that rape has been proved. Considering all these, he prayed that this appeal be dismissed as it is bankrupt of any merit.

In his rejoinder submission, the appellant insisted in his prayer that his appeal be allowed as per stated reasons and other issues raised by the court and that he be acquitted as the prosecution case is weak against him.

Having heard the parties' submission, the point of determination in this appeal is whether the appeal is meritorious. I have gone through the parties' submissions, digested them and also gone through the trial court's records; I am satisfied that this appeal is bankrupt of any merit. I say so because the prosecution case is fully proved that the appellant committed the said offence against the victim girl of 4 years age.

Responding to the first ground of appeal that the trial magistrate erred in law and fact in convicting and sentencing the appellant relying on unreliable testimony of the prosecution witnesses. The appellant has failed to establish in court how PW1 and PW4's testimonies are

unreliable. PW1 is the mother of the victim who saw the appellant at the scene with the victim girl having put her on his thighs, unzipped and the daughter undressed and that the appellant had inserted his penis into the victim's vagina. PW4 is the clinical officer, who then examined the victim girl, he found the vagina's hymen ruptured, and also found bruises in the vagina. As he encountered some sperms therein, he established that the victim's vagina must have been penetrated by penis. PW4 being a clinical officer, was a competent witness to testify on his evidence as per law. On what is raised as unreliability of these witnesses, it was expected to have been elaborated by the appellant in his submission but also at cross examination. None is recorded in the trial court. There has been no any material cross examination by the appellant during trial against these witnesses so as to shake their credibility on the raised concerns. I find none.

The second grief by the appellant is this, that the trial magistrate erred in law and fact in convicting and sentencing the appellant without giving him a chance to call his witnesses during his trial. As rightly argued by Mr. Isihaka, learned state attorney, that the trial court's records are not supportive on what he is alleging. The records are vividly clear that on page 28 of the typed proceedings, the appellant named

one Bhoke as his witness. As per pages 28 – 30 of the typed proceedings, it is clear how he exercised his right of calling witnesses and on page 32 he prayed to close his evidence as he had no witness to call.

On the third ground of appeal to the petition of appeal, that the appellant was not accorded with a right to be heard, the trial records are also not supporting him. He was given the right of making a plea to the charge, replied to the facts of the case and signed on the memorandum of undisputed facts (pages 4-5 of the typed proceedings). Furthermore, all the prosecution witnesses were cross examined by the appellant. Even at the admissibility of exhibit PE1 (PF3) by PW4, the appellant is recorded to have no objection. When it was ordered that the appellant had a case to answer, he pointed that he would testify on oath and that had one witness to call, but failed to bring his witness. He then closed his case. Thus, this ground of appeal is bankrupt of any merit.

Considering the submission in ground number four, that the testimony of PW1 is unreliable simply because when she saw her daughter being raped by the appellant, she had raised an alert call for assistance but there is no any evidence in record showing if there was such an alarm and who attended to it. I shake hands with the

respondent's counsel that responding to an alert call (mwano – traditional call) depended on the availability of people around and their readiness to that response. Otherwise, one's reliability is not dependent on response to such traditional call as the same is dependent on many material factors around.

With the fifth ground of appeal, the appellant is questioning on the strength of the testimonies of PW3 in this case. He considers her as a hearsay witness. What PW4 testified in the trial court is to the effect that she is the grandmother of the victim. Upon being informed by the PW1 that the said PW2 has been raped by the appellant and her private parts have been damaged following the penis penetration, she took charge of first aid in seeing the extent of injuries and then escorted PW1 together with the victim to hospital (DDH – Mugumu) for examination and medication. I agree with the Mr. Isihaka, learned state attorney that the PW1's testimony is not purely hearsay as alleged. Materially, her testimony centres on how she assisted the victim and escorted her to hospital. This is not hearsay in my findings.

On the last ground of appeal, the appellant is challenging the competence and significance of the clinical as witness in this case. He says that the evidence of the clinical officer (PW4) is unreliable and

conflicting thus dangerous to act upon. The appellant could not elaborate as to how the witness is unreliable and has conflicting testimony/evidence. In his testimony, PW4 testified that on 4th June, 2020 while on duty at night time (at DDH – Mugumu Hospital), he had received the victim girl being accompanied by her mother and a police woman where he examined her private parts (vagina) and found the hymen ruptured, and the vagina having bruises. In his findings, the vaginal bruises were caused by a blunt object and in the presence of the spermatozoa fluid, it was due to penis penetration. He tendered PF3 which was admitted as PE1 exhibit. I share similar views with the respondent's counsel, that if the testimony of PW4 is not incredible it was the appellant's duty to establish the untruthfulness of PW4's testimony by cross examining him. Failure to do that, he being a clinical officer, is a competent witness to testify as per law. This ground of appeal equally fails.

Lastly, in the course of digesting the evidence of the whole trial court in respect of this case, I wanted to satisfy myself whether the testimony of PW2 met the legal test of admissibility she being witness of tender age. According to the trial court record, she is recorded to have stated the following on the introductory part:

*"Mwajuma Mjafukoga (pseudo name), 4 years, a student at Kibeyo nursery school, she doesn't know meaning of oath but she promises to tell the truth"*

Whether these above mentioned particulars have saisfied the legal requirements under section 127(2) of the Tanzania Evidence Act, Mr. Isihaka responded relying to the case of **Selemani Moses Sotel @ White VS Republic**, Criminal Appeal No. 385 of 2018 CAT Mtwara at page 12, he submitted in negation. He submitted that the Court of Appeal in this case, considered the following factors as relevant in determining the duty of promise to tell the truth in respect of the testimony of the child of tender age. Age of the victim, his/her religion, whether he/she understands the nature of oath, whether or not the child promises to tell the truth and not lies. In consideration of this, he submitted that in the case at hand it is clear that this legal requirement was not adhered to. Thus, he humbly prayed that the testimony of PW2 be expunged.

Despite the expunge of the testimony of PW2, the learned state attorney submitted that yet the testimony of PW1 stands incriminating against the appellant. That in his digest to the testimony of PW1, his further scrutiny drives him to the point that there were no clear features of identification as per case of Waziri Amani. Though those features

were not stated, yet in the circumstances of this case, the appellant was properly identified. In the case of **Makende Samson Vs Republic** Criminal appeal NO. 412 of 2017, CAT at Mwanza (at Page 12) where the Court held;

> *"the guideline stated in Waziri Amani Case are not exhaustive and that each case has to be considered on its own circumstance"*

To this case at hand, though the guideline were not stated, the appellant was properly identified because of the following reasons:

1. The appellant and Respondent lived in one house (rented in the same house).
2. The appellant was found at the scene by PW1 with her daughter.
3. The appellant during cross examination, didn't question any on the issue of identification (see **Proches Christian Kavisha Vs Republic** Criminal 145 of 2020 High court at Musoma at page 9).

With these arguments, he is satisfied that in this case, the appellant was fully identified and that rape has been proved. Considering all these, he prayed that this appeal be dismissed as it is bankrupt of any merit.

I am totally in agreement with Mr. Isihaka learned counsel that in the circumstances of this case, the description of the PW2 were not sufficient to warrant her give testimony as witness of the court. The trial magistrate didn't discharge her duties satisfactorily in the ambit of section 127(2) of TEA. Legally speaking, there ought to have been a clear description of the statements by the PW2 prior to her testimony as asked by the trial court. There is nothing of that in court record. In that stance, the testimony of PW2 is legally speaking unworthy of any legal action. The same is hereby expunged from the court record.

Having expunged the testimony of PW2, the remaining valuable testimony is that of PW1 and PW4. Are they sufficient to mount conviction against the appellant? Mr. Isihaka strongly supports conviction capitalizing on the manner the appellant failed completely to shake the testimony of PW1 – the mother of the victim. As she testified how she saw the appellant sexing the victim with his penis in the victim's vagina having thighed her up, his zip open and the victim's part being down, she cried for help. None showed up, the appellant then ran. She picked her daughter to PW3 (mother of PW1), then reported the incidence to police and later took the girl to Mugumu DDH (Hospital). The only question posed by the appellant against this witness as

recorded is this *"what did you see from the victim if I raped her? It was responded that, I found sperm from the victim's vagina".* Failure to examine how he was identified by the PW1 as it was a night of 19.00hrs, the same are familiar to each other and neighbours as they have rented in the same house, suggests that his identity at the scene is not questionable. It is now an established position of law in this jurisdiction that where a point is not cross examined upon, it cannot later be challenged, (see **Nyerere Nyegue v Republic, Criminal Appeal no 67 of 2010** (Court of Appeal unreported)) where it was held that;

> *"as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

I am guided by the Court of Appeal's holding in the above case as well restated by Hon. Galeba, J (a.h.w) in the case **Proches Christian Kavisha Vs Republic** Criminal 145 of 2020 High court at Musoma at page 9. To this case at hand, though the guideline as per case of **Waziri Amani** (supra) were not stated, the appellant was properly identified because of the following reasons:

1. The appellant and Respondent lived in one house (rented in the same house).

2. The appellant was found at the scene by PW1 with her daughter.

3. The appellant during cross examination, didn't question any on the issue of identification.

In fact, I am aware that in rape cases or sexual offences, the best evidence comes from the victim herself/himself (see the case of **Seleman Makumba Vs Republic** (2006) TLR 37,) however, depending on the circumstances of each case, a third party can give an incriminating evidence as in the circumstances of this case.

That said, in totality the appeal is bankrupt of any merit, the same is dismissed. Conviction and sentence meted out by the trial court are hereby upheld and enhanced respectively.

It is so ordered.

DATED at MUSOMA this 1st day of November, 2021.

THE HIGH COURT OF TANZANIA
MUSOMA

F.H. Mahimbali
JUDGE
01/11/2021

**Court:** Judgment delivered this 01st November, 2021 in the presence of the appellant in person, Frank Nchanila, state attorney for the respondent and Mr Gidion Mugoa – RMA.

Right of appeal is explained.

F.H. Mahimbali

JUDGE

01/11/2021