IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No.119 OF 2021

(*Arising from the District Court of Tarime at Tarime in Criminal Case No. 246 of 2020)*

ZAKARIA BENJAMINI KERARYO .... **APPELLANT**

Versus

REPUBLIC .... **RESPONDENT**

JUDGMENT

14.02.2022 & 22.02.2022
F.H. Mtulya, J.:

Mr. Zakaria Benjamin Keraryo (the appellant) was arraigned before the **District Court of Tarime at Tarime** (the district court) in **Criminal Case 246 of 2020** (the case) for the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code). It was alleged by the prosecution at the district court that the appellant had carnal knowledge of a girl child aged eleven (11) years (name withheld and for convenience of this appeal she shall be referred as the victim) on the 6th day of August 2020 at Kekohogoma street within Tarime District in Mara Region.

The appellant denied the allegations as a result the case proceeded to full trial where the prosecution called a total of four (4) witnesses and tendered one (1) exhibit to establish its case, whereas

the defence called a total of three (3) witnesses, including the appellant, and tendered no exhibits. At the close of prosecution case, the trial magistrate found out that the appellant had a case to answer. Having considered the evidence tendered at the trial, the district court found that the prosecution had sufficiently established that the appellant committed the offence of rape against the victim hence sentenced him to thirty (30) years imprisonment. Aggrieved by the decision of the district court, the appellant appealed to this court and registered nine (9) grounds of appeal.

In the grounds of appeal, the appellant is, briefly, protesting on: first, the commission of the offence on the alleged date and time; second, the appellant did not commit the offence of rape; third, prosecution based on cooked evidence of PW1, PW2, PW3 and PW4; fourth, the prosecution failed to call Baraka who was mentioned by PW3 to be present at the scene of the crime; fifth, the evidence of PW4 had doubts; sixth, the district court failed to consider *alibi* defence of the appellant which was supported by DW2 and DW3; seventh, the prosecution evidence was fabricated by victim's father caused by land dispute; eighth, the district court failed to evaluate the evidence on record; and evidences registered by the republic do not prove the case beyond reasonable doubt.

the defence called a total of three (3) witnesses, including the appellant, and tendered no exhibits. At the close of prosecution case, the trial magistrate found out that the appellant had a case to answer. Having considered the evidence tendered at the trial, the district court found that the prosecution had sufficiently established that the appellant committed the offence of rape against the victim hence sentenced him to thirty (30) years imprisonment. Aggrieved by the decision of the district court, the appellant appealed to this court and registered nine (9) grounds of appeal.

In the grounds of appeal, the appellant is, briefly, protesting on: first, the commission of the offence on the alleged date and time; second, the appellant did not commit the offence of rape; third, prosecution based on cooked evidence of PW1, PW2, PW3 and PW4; fourth, the prosecution failed to call Baraka who was mentioned by PW3 to be present at the scene of the crime; fifth, the evidence of PW4 had doubts; sixth, the district court failed to consider *alibi* defence of the appellant which was supported by DW2 and DW3; seventh, the prosecution evidence was fabricated by victim's father caused by land dispute; eighth, the district court failed to evaluate the evidence on record; and evidences registered by the republic do not prove the case beyond reasonable doubt.

The appeal was scheduled for hearing on 14th February 2022 and the appellant decided to abandon ground number two (2) of the appeal as it relates to ground number one (1) and argued eight (8) grounds of appeal in a very brief submission. In his submission, the appellant stated that: first, the prosecution stated the offence occurred on 6th August 2020 whereas the medical report was prepared on 11th August 2022; third, all evidences produced by witnesses PW1, PW2, PW3 and PW4 were fabricated by the prosecution; fourth, a person named Baraka was mentioned by PW3 to have seen the appellant committing the offence, but was not brought in the district court to testify; fifth, the victim was examined after three (3) days and no any hymens were found in the victims vagina.

On the sixth reason of appeal, the appellant contended that he pleaded *alibi* defence and was supported by evidence of DW2 and DW3, but the district court decline to consider and gave the weight it deserved. The appellant submitted further that the district court ignored the allegation of land dispute between the victim's father and the appellant which was reported to the Mtaa Chairman, but the Chairman failed to resolve. According to the appellant, the Mtaa Chairman was called in the district court as defence witness, but the district court ignored his evidence.

With the eighth ground of appeal, the appellant submitted that the district court did not evaluate the whole evidences available on record with regard to prosecution and defence hence arrived at wrong decision. To the appellant's opinion, the district court was moved by the prosecution evidence only. In the last ground, the appellant claimed that the prosecution failed to prove the case beyond reasonable doubt as there are several doubts raised by the appellant, but were not considered by the district court.

Replying the submission of the appellant, the Republic had marshalled Ms. Agma Haule to protest the appeal. In protesting the appeal, Ms. Agma decided to consolidate grounds number one (1) and (2), grounds three(3), seven (7), eight (8) and nine (9) and argued them together stating that they relate to each other. On the other hand, she decided to argue grounds number four (4), five (5) and six (6) separately.

Ms. Haule took the floor and started submission with ground number one (1) and two (2) and stated that the evidence of PW1, PW 2 and PW3 show that the event occurred on 8th August 2020 and the victim was examined on 11th August 2020. However, Ms. Haule submitted that the delay in examination was caused by the circumstances explained by PW2, as the appellant told the victims to hide the gift given to them by the appellant. According to Ms. Haule,

the victim's father got the information of the rape against his daughter on the 10th August 202 and the matter was reported to the leaders & police and the victim was examined on the 11th August 2020.

With regard to Baraka who was mentioned by PW3, Ms. Haule contended that the law in section 143 of the **Evidence Act** [Cap. 6 R.E. 2019] (the Evidence Act) does not require specific number of witnesses to establish facts in cases. In her opinion, the prosecution believed that four (4) witnesses were enough to establish the case against the appellant in the district court. In order to bolster her argument Ms. Haule cited the authority of the Court of Appeal in **Selemani Makumba v. Republic** [2006] TLR 379 contending that the best evidence in rape cases is that of the victim.

On three (3) days of the delay in examining the victim, Ms. Haule contended that the victim is credible and reliable witness who can be trusted as she stated the reality of what transpired on ground and the medical doctor (PW4) filled the dates in Police Form Number Three (PF.3) admitted as P.1 as from the facts presented to him by the victim. To Ms. Haule, the discrepancy of days from 6th August 2020 to 11th August 2020 is minor as it does not go to the root of the matter as per precedent in **Mohamed Said Matula v. Republic** [1995] TLR 3.

Ms. Haule also protested the defence of *alibi* registered by the appellant contending that it was raised without notice as required with the law in section 194(4), (5) and (6) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act) and was raised in this appeal as an afterthought to escape the liability in the offence.

With regard to the combined grounds number three (3), seven (7), eight (8) and nine (9), Ms. Haule submitted that they relate to fabricated evidence and land dispute. To her opinion, the ground has no merit as four (4) credible and reliable witnesses were brought before the trial court and the trial court had an opportunity to test their reliability and credibility as per requirement of the precedents in **Goodluck Kyando v. Republic** [2006] TLR 333 and **Saada Abdallah Rajabu & Another v. Republic** [1994] TLR 132. With regard to land conflict, Ms. Haule contended that the conflict was between Bhoke Gaini and appellant's mother and the appellant was not party to it.

In the opinion of Ms. Haule, the appellant did not cross-examine witnesses PW1, PW2 and PW3 on important materials which were registered by them and the practice of the Court of Appeal shows that failure to cross-examine witnesses in important facts entitles this court to draw an inference that the appellant agreed to what was said PW1, PW2 and PW3. In order to bolster her argument, Ms. Haule

invited this court to peruse the decision in **Martin Misara v. Republic**, Criminal Appeal No. 428 of 2016.

Finally Ms. Haule stated that the republic proved the case of rape against the appellant as witnesses who were brought in the district court testified on the truth of the matter and were not doubted by the learned magistrate at the district court and this court may dismiss the appeal as it lacked merit. Rejoining the submission of Ms. Haule, the appellant prayed this court to peruse the record of appeal as it says all and decide in favour of justice.

I have had an opportunity to scan the record of the present appeal. The record shows that on the 4th day of January 2021, the victim was marshalled at the district court, as depicted at page 10 of the proceedings, and briefly testified that:

...I know Zacharia Keraryo...on 06/8/2020 I went to school with my friend Mariam... I came back at 12:00hrs. Zacharia came at our home and told us to go and fetch water for him. We went to his home and fetched water for him twice. ***It was his mother that gave us buckets to fetch water.*** *Then he gave us bananas and maandazi after telling us to go inside. While inside, I and Mariam...then pulled me firsts, Undressed me my skintight and the put me on his bed. He inserted his penis to my dudu. I felt so much pain.*

*Thereafter, he pulled Mariam and laid her on bed and did the same to her. After that, he gave us oil...he told us not to show our parents...He said he loves us and in December he will take us to Mwanza and buy us clothes to cover our private parts. He opened the door for us and we went home...The next day, Zacharia's mother called Mama Serina followed us and told us to go and fetch for her water. We went and found Zacharia, her mother, Kuru and Kuru's wife who were seated...We fetched water...**Baraka, Mariam's young brother told Mariam's mother that Zacharia had raped us. Then Mariam's mother told my father**. My father asked us, we told him the truth that Zacharia had raped us...**we did not report it first because he threatened to beat us if we do so**...my father took us to school, the police and later to Bomani Hospital for examination...*

Baraka and Mariam's mother were not marshalled in the district court to testify on the victim's story. Similarly, a police officer who was involved in the investigation was not summoned to testify on investigation part of the story. However, the other victim at the scene of the crime was called to testify as PW3. On her part, PW3 stated that:

*My father is called Marwa Charles Gaini...I know Zacharia Benjamin Keraryo...on 6th August 2020, at noon Zacharia called me from my home and told me to go and call [the victim] so as to fetch him water. I called [the victim] and went to Zacharia's home and fetched him water, twice. Zacharia told us to go and get gifts from inside. It was banana and maandazi. We went inside...Zacharia pulled [the victim] to bed and undressed her. Then he took his penis and put into vagina. Then he pulled me and put me to bed. Then he took out his penis and put it in my vagina. He told us not to tell our parents, that he will give us money for school. He then opened the door, we ran to our home...**the next day his mother came and called us, we went again to Zacharia's residence... There was Kurwa's wife...**we fetched water for her. Then Zacharia told us to go inside so as to read bible. He then pulled [the victim] and took out his penis and inserted into her vagina. **Thereafter pulled me and did the same to me**. He told us that on December he will take us to Mwanza...We went back home...**My young brother Baraka reported to my mother that Zacharia did that act to us**...We were taken to Police Station and later to hospital...we did not shout*

and his mother was washing clothes outside... ***Baraka saw us from the window and is the one who reported to my mother.***

With regard to evidence in PF.3 which was tendered and admitted in the case as exhibit P.1, Mr. Masiaga Joseph Chacha was summoned as prosecution witness number four (PW4) to testify on what transpired to the victims. His testimony in brief, at page 16 of the typed proceedings of the district court that:

...I recall on 11th August 2020, I was at work.., I received a child called [the victim]. She was accompanied by her parent and police officer. They complained that she was raped three past days. ***I examined the child and found out that she was raped because her vagina had expanded. She had no hymen, and it was an act which was done repeatedly for long time****...I examine her and she had no infections...After examining her, I filled PF.3 on my findings.*

However the record is silent with regard to investigation and medical reports of the second victim, Mariam, who also alleged to have been raped two times with the appellant in the presence of the victim. The record shows that the criminal matter was reported to the appropriate authorities in criminal investigation and medical examination, the police and Bomani Hospital.

On the other hand, the defence led by the appellant contended that: *on 10/08/2020...I went to [the victim's] home...I asked [victim's] father about accusations of raping her daughter [the victim]...he did not want to hear me, he said we shall meet in court...Bhoke Gaini, the one who accused me is my neighbor...she has a long time conflict with my mother. They have conflict of land since then, even her son once stole my mother's trees. The same was reported to our local authority leaders who used to resolve those conflicts...my local street authority knows me very well.*

In support of his testimony, the appellant called Mussa Nehemi, a Street Chairman (DW2) and Mbusiro Keraryo (DW3) to testify for him. In their brief materials registered at the district court, DW2 testified, as depicted at page 23 of the proceedings at the district court, that:

> *I am aware that Bhoke Gaini and Zacharia's mother had a long time conflict. Our office did the best to resolve their conflict that involves the land boundary...this case was therefore cooked...The truth is these people have conflicts...Zacharia did not commit that offence.*

On his part, DW3 testified as displayed at page 24 of the proceedings at the district court, in brief, that:

...normally Zacharia goes to church and comes back home at 16:00hours. The children said they were raped on 09/02/2020 on Sunday...there are many people at the scene area.

It is unfortunate in the present case Baraka and Bhoke Gaini were not marshalled to corroborate the materials registered by the victim and PW3. The two persons were the source of information of rape as per evidence of Bernard Wambura Mwita (PW1), PW2 and PW3. For instance, the source of all saga started from Baraka who passed it to Bhoke Gaini and finally to PW1, who reported the matter to several authorities. In brief, his evidence as depicted at page 7 of the proceedings conducted at the district court on 15th November 2020, PW1 testified that:

...on 10/08/2020 at around 19:00hours, I received an information from my neighbor Bhoke Gaini that my daughter [the victim] and her daughter called Mariam were raped by the Pastor called Zacharia Benjamin Keraryo. The incident took place on 06/08/2020 at Zacharia's home place...WEO wrote a letter to Police Station in order to issue a PF.3 for the victims treatment...I, the victim and Mama Bhoke gave our

statements and we were given PF. 3 for the treatment of the victim...We then went to Tarime Government Hospital.

From this record, it is PW1 who initiated the proceedings at the police station to the district court, from the facts extracted from Bhoke Gaini who received it from Baraka. However, as I stated at the outset, neither Baraka nor Bhoke Gaini who was marshalled by the prosecution to corroborate materials registered by the victim and PW3. It is unfortunate that immediately after reporting the matter to the police and examination of the victims, record is silent on where-about the evidence of Bhoke, who was recorded statement at police station and report of medical examination on part of Mariam. The record is silent on those crucial facts and findings of the investigation team from the police, which was also not summoned in the district court to testify on their investigation.

I understand Ms. Haule contended that the best evidence in proving sexual offences is that of the victim, and I entirely subscribe to that school of thought. There is large family of precedent on the subject (see: (see: **Selemani Makumba v. Republic** [2006] TLR 376; **Yohana Said @ Bwire v. The Republic** (supra); **Bashiri John v. The Republic, Criminal Appeal** No. 486 of 2016 **Abasi Ramadhani v. Republic** (1969) HCD 226; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; **Abdallah Kondo v. Republic**, Criminal Appeal No.

322 of 2015; and **Mkohi Gagiri Matiko v. Republic**, Criminal Appeal No. 105 of 2021).

I am also aware that no particular number of witnesses is required for proof of any fact in criminal cases as per interpretation of section 143 of the Evidence Act from the precedents in **Selemani Makumba v. Republic** [2006] TLR 376 and **Yohana Msigwa v. Republic** [1990] TLR 148. What is important is the weight of materials the evidences tendered in court to substantiate the prosecution's case.

However, in a situation where Bhoke Gaini is depicted on the record to have: first, land dispute with the appellant's mother and the appellant was associated; and second, received the facts on rape incident of her daughter Mariam from Baraka, and remained with it for more than four (4) days, beginning noon hours of the 6th day of August 2020 to the evening hours of the 10th day of August 2020, to inform the father of the victim, PW1. This is very surprising and is against the Swahili sayings: *Uchungu wa Mwana Aujuae Mzazi.* Any reasonable person would be astonished by the conduct of Bhoke Gaini who had received serious information in a serious offence committed against her daughter by the appellant and remained silent in pain to her husband, Mr. Marwa Charles Gaini, his neighbors, local leaders or police authorities. In a similar note, Baraka was not summoned and

still is said to have witnessed the rape incident on 6th August 2020 between the appellant, victim and Mariam.

It is unfortunate that both Bhoke Gaini and Baraka were not called by the prosecution to assist the district court in arriving justice. I understand the victim and Mariam testified to have been threatened by the appellant, but facts are silent on Baraka's shout after seeing the incidents of rape. Similarly, the prosecution remained silent on what transpired to Mariam after the incident and her medical examination report. Such practices are discouraged by this court and our superior court as they produce doubts in criminal trials.

The courts in this State have been saying in a number of times that failure to bring material witnesses or name a known suspect at the earliest available and appropriate opportunity renders the facts produced by that person or witness highly suspect and unreliable. There is a large family of decisions on the subject (see: **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39; **Joseph Mkumbwa & Another v. Republic**, Criminal Appeal No. 64 of 2007; **Sungura Athumani v. Republic**, Criminal Appeal No. 291 of 2016).

Similarly, on the same course, if persons who have witnessed criminal incidents are not called to testify without plausible explanations, courts may draw adverse inferences to the prosecution cases (see: **Azizi Abdallah v. Republic** [1991] TLR 71; **Sungura**

Athumani v. Republic, Criminal Appeal No. 291 of 2016; **Godson Hemedi v. Republic** [1993] TLR 241; **R v. Gokaidas Kanji & Another** (1949) EACA 116 and **Robert John v. Republic**, Criminal Appeal No. 70 of 2020). In **Azizi Abdallah v. Republic** (supra), the full court of the Court of Appeal resolved that:

> *The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which as evidence is sufficient and satisfactory and credible...the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.*

In the present case, Baraka and Bhoke Gaini are material witness who were supposed to be called by the prosecution to support the evidence of PW1 and PW2 and since were not called this court is entitled to draw inference adverse to the prosecution's case.

I also have had an opportunity to scan the sequence of events and the scene of the crime. The sequence of events shows that the

victim and Mariam went at the scene of the crime twice and were raped in two different days. However, the facts on record are silent as to when Baraka saw them. I understand the victims were promised clothes and visitation to Mwanza, but in my considered opinion, that alone in absence of other facts cannot hold the appellant responsible for serious crime of rape.

On the other hand, the scene of crime, as from the materials registered by PW1, PW2 and DW1 show that there were several people at the scene of the crime, namely: appellant's mother Mama Serina, PW2's young brother Baraka, Kuru, and Kuru's wife. Any reasonable person would be astonished to hear the possibility of rape offence to be committed to two (2) victims under such circumstances.

I am also aware the victim and PW3 said they were threatened to remain silent, but the facts display promise to be the factor of silence. Another surprise would be from the fact that the victim and Mariam were raped and threatened by the appellant on the first day, that is 6th August 2020, but they went again on the second day for the second rape incident. The materials registered by the prosecution in themselves leave a lot of doubts that cannot be entertained in this court. This is a court of record and would not remain silent when there is breach of the law. It has additional duty of ensuring proper application of the laws by the courts below (see: **Diamond Trust**

Bank Tanzania Ltd v. Idrisa Shehe Mohamed, Civil Appeal No. 262 of 2017).

In present appeal, record shows that the appellant registered his defence and invited DW2 and DW3 to display what has been in place between Bhoke Gaini and the appellant. The appellant's protest in this regard is associated with land dispute and was reported to appropriate authority DW2 who was marshalled in the district court and stated that he was aware of the conflict for long time and tried to resolve the matter unsuccessfully. To his opinion, the case was fabricated and the truth is that the appellant, appellant's mother and Bhoke Gaini had conflicts. This piece of evidence was not well evaluated by the district court.

The district court when considering the defence case, on its part thought that the prosecution has established its case against the appellant beyond reasonable doubt and reasoned at page 12 of the judgment that: *Both PW2 and PW3 were credible witnesses as they testified to what they saw and they remained competent, reliable and consistent throughout their testimonies*. On defence case, the district court stated that:

> *I have considered the accused person's defence and found that the same does not raise any doubt into the evidence of PW2 and PW3, because the accused person contention,*

which supported by DW2, that the case was cooked by one Bhoke Gaini because of land dispute she had with his mother was not supported by any logic as the accused person himself agreed that he has no any conflict with PW1.

Finally, the trial court cited the authority in **Selemani Makumba v. Republic** (supra) and stated that the true evidence of rape has to come from the victim. I entirely agree with the trial court on consideration of the defence case and citation of precedent in **Selemani Makumba v. Republic** (supra) which was supported by learned State Attorney, Ms. Haule. However, the consideration declined to evaluate available materials on record, particularly transactions of events and evidences produced by the prosecution witnesses on the source of the dispute.

I am aware that the true evidence of rape is that of the victim. That is the established practice in this court and Court of Appeal. There is a bundle of precedents on the subject (see: **Selemani Makumba v. Republic** (supra); **Yohana Said @ Bwire v. The Republic** (supra); **Bashiri John v. The Republic, Criminal Appeal** No. 486 of 2016 **Abasi Ramadhani v. Republic** (1969) HCD 226; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; and **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015).

However, the words of victims of sexual offences cannot be taken as gospel truth, but their testimonies should pass the test of truthfulness (see: **Mohamedi Saidi v. Republic**, Criminal Appeal No. 145 of 2017 and **Alex Rwebugiza v. The Republic**, Criminal Appeal No. 85 of 2020). In the present appeal, I do not think, in my considered opinion that the victim has not passed the test of truthfulness. The victim and Mariam allege to have been raped in a circumstance which is difficult to believe their testimonies.

Following the scanning of the record in the present appeal, and circumstances of this case, I am satisfied that the prosecution evidence leaves shadow of doubts hence did not prove the case beyond reasonable doubt as against the appellant. In the event, I find this appeal to have merit and therefore brought in this court with sufficient reasons, and hereby allow the appeal and proceed to quash the conviction and set aside the sentence of thirty (30) years in jail meted to the appellant, and further order the appellant be released forthwith from prison unless he is held for some other lawful cause.

It is so ordered.

Right of appeal explained.

F.H. Mtulya

Judge

22.02.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Ms. Agma Haule and in the presence of the appellant Mr. Zakaria Benjamin Keraryo through teleconference.

F.H. Mtulya

Judge

22.02.2022