THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 110 OF 2021
(Originating from Criminal Case No. 37 of 2021 of the Chunya District Court)

Between

CHRISTOPHER MSELEWA.....................................APPELLANT
VERSUS
THE REPUBLIC ....RESPONDENT

JUDGMENT

Dated: 28 February & 16th May, 2022

KARAYEMAHA, J

Before the District Court of Chunya sitting at Chunya in Criminal Case No. 37 of 2021 the appellant was prosecuted with and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R: E 2002] (now 2019). The indictment is that on unknown date February, 2021 at Mazimbo Village within Chunya District and Mbeya Region the appellant had carnal knowledge of a pupil (girl) aged 15 years who, for the sake of modesty and privacy, I shall refer to as "BB" or simply as PW1, the codename by which she testified at the trial. The appellant pleaded not guilty to the charge after which a full trial ensued. After a full trial during which the prosecution fielded

four witnesses and one documentary exhibit and in defence the appellant presented four witnesses and tendered no exhibit, he was found guilty, convicted and sentenced to a statutory minimum sentence of 30 years. He was aggrieved and thus filed the instant appeal.

To add flavour to the present judgment, I find it appropriate to narrate in a nutshell the factual background to the appellants' arraignment and appeal as can be discerned from the trial court's record. By 2021 PW1 was a primary school girl at Mazimbo Primary School aged 15 years. At the material time she was living in the house of the appellant and his family of seven (7) people including the appellant's wife (Neema Edwin Katindile) DW4 at Mazimbo Village in Chunya District even before she started her studies. PW1 being related to the appellant was used to calling him uncle.

The incidents which befell on PW1 are captured well in her testimony. The first incident of rape according to her occurred on Saturday when PW1 was in standard four and her aunt was in the farm, she was at home with Flora, who perhaps was still very young, and the appellant who by that time was sleeping inside. The appellant used that opportunity to call her and accused her sleeping with men. He then ordered her to undress her shirt to see and test the breasts. After obliging, the appellant touched them and went further to order her

undress her underpants to verify whether or not she was sleeping with men. According to PW1, the appellant had only a towel. No sooner had she removed her underpants than the appellant told her to lie on the bed and inserted his penis into her vagina. After the bestial act, the appellant let PW1 to leave and warning her not to tell anyone but to take a shower. PW1 testified that out of the appellant's room she saw blood oozing from her private parts and was feeling some pains from her vagina. She however, took a shower and later narrated the ordeal to Dada Vero. Vero told her to keep mum because he had raped her too. Conversely, later Vero reported the incident to their mother that the appellant was sleeping with her. Their mother promised to investigate the matter.

The second incident occurred in 2019 when PW1 was in STD V. The date she didn't remember, she was watching a TV at night. While her aunt was asleep, the appellant called her while holding a red plastic cup whose contents were beans, maize and groundnuts and after switching off the security lumps to go with him at the cross road to throw those seeds. After throwing seeds and having walked for a distance as was the usual case for them, the appellant asked her to have sexual intercourse on promise that he would pay her June tuition

fees. Unhesitatingly, she undressed and lied down allowing the appellant to insert his penis into her vagina.

Early February, 2021 while her aunt went to Mamba village for a burial ceremony and the appellant went to the pomble club at Mazimbo, she was at home with Flora and Chrispine. The appellant returned home when they were watching the TV and went directly to his room. He then called PW1 and gave her money to buy cassava on the next day at school and asked to have sex with her and she accepted. According to PW1, the appellant once again inserted his penis into her vagina.

PW1 informed the trial court further that when she got sick and went to the hospital, she saw posters with mobile phone numbers on the hospital walls inviting victims of gender violence. According to her she called and was attended by one Solo and reported the ordeal to him. She was later called by one Mbise and was promised that they would visit her. She also informed her mother of the report she made to the social welfare.

PW1 narrated further that on Wednesday, 2021 when her aunt went to maendeleo for a funeral and being left at home with Dada Joy (21 years old), Chrispine and Angel, the appellant arrived from Mbeya and woke her up asked her to his room and had sexual intercourse. It

appears that on the following day she went at school at 9:00 am and met the police officers sent by Mr. Mbise. The officers recorded her statement and shortly after they arrested the appellant. Later at 19:00hrs Babu Seleman, Gilian Mbuke her uncle, Seleman's wife and her mother met her. After narrating to them what happened they told her to go to Police and change the story. She was later examined at Chunya District Hospital. **PW2, Dr. Flora Lesion Lota,** examined her external genitalia and saw whitish fluid oozing from her vagina which was found out to be pulse meaning she had contracted venereal diseases to with, gonorrhoea. On internal examination, she discovered that PW1 was penetrated hence raped. She tendered the PF3, she received and filled in on 22/02/2021, in evidence which was marked exhibit PE1.

F3661 D/CPL Mohamedi (PW3), a police investigator testified on various aspects of investigations. It was him who issued a PF3 to PW1 on 22/02/2021 to ascertain whether she was raped and basing on PW2's he certified that she was raped. He also interrogated the appellant who denied commission of the offence.

PW4, Komboa Joackim Ngoli, is a Mazimbo Primary School head teacher. She told the trial court that PW1 was his pupil and that she was born on 04/08/2006 hence 15 years by 09/06/2021. He denied to have been told by PW1 that the appellant raped her.

In his defence, the appellant whose codename was DW1 denied the accusations levelled against him. It was his defence that the case was fabricated one because PW1 was promised assistance from a certain aunt. She had to implicate the appellant and get help from a certain aunt who was given money to help girls who were victims of gender violence. He lamented that he was arrested on 16/02/2021 but PW1 was medically examined on 22/02/2021. He told the trial court while responding to cross questions that his wife never travelled in February, 2021.

Seleman Charles Manyanza (DW2) after was informed that the appellant was arrested, he concerted PW1's parents and the appellant's wife but didn't know anything about what was going on. He and Moris Saimon Mwapili (DW3) a ten cell leader, convened a meeting with PW1 and her parents. According to their story which relates to DW4's (Neema Edwin Ismail) evidence, PW1 told them that she had to implicate the appellant so that she could be assisted to pursue her education. DW4 testified further that she never travelled in February, 2021.

The learned trial Magistrate took a view that the defence case didn't cast doubt in the prosecution case and the striking issues were mainly two: one, whether BB was a child of 15 years and two, whether the accused committed the offence of rape against BB. In determining

the 1st issue, the learned trial Magistrate believed PW1 and PW4 and in determining the 2nd issue the he gave full credence to the testimony of PW1 and PW2. While accepting PW1's account as sufficiently establishing that the appellant had sexual intercourse with her, he found she was materially corroborated by PW2's testimony that she was penetrated by a blunt object.

The learned Magistrate apart from agreeing with the appellant that he was arrested on 16/02/2021 and PW1 was medically examined on 22/02/2021, he was of the settled view that that fact didn't shake the credibility of PW1. He also rejected the defece evidence of DW1, DW2, DW3 and DW4 on the reason that it was tainted with discrepancies. Accordingly, he convicted him and sentenced to 30 years imprisonment as I said earlier above. Aggrieved, the appellant has filed the current appeal.

The appellant is challenging the trial Court's decision on 9 grounds, namely;

1. *That the trial Magistrate erred in law and fact in convicting the appellant while the prosecution case was not proved on the required standard set by the law.*

2. *That the trial Magistrate erred in law and fact by convicting appellant while erroneously failure to assess, evaluate and analyse the evidence hence arrived at wrong decision for relying o shaky and contradicting evidence.*
3. *That the trial court grossly erred in law and fact basing its conviction on the prosecution unreliable, incorrect and contradictory evidence.*
4. *That the trial court erred in law and fact in constructing reasonable doubt raised by the accused person and opted to rely on them in favour of the prosecution side.*
5. *That the trial court grossly erred in law and fact failing to consider the appellants strong and reliable defence adduced at trial and erroneously held that the respondent prove their case against the appellant beyond reasonable doubt.*
6. *That the trial court grossly erred in law and fact in failing to draw adverse against respondent upon their failure to call material witnesses.*
7. *That the trial court grossly erred in law and fact in failing to draw adverse against victim (PW1) upon her failure to report the incidence at the possible earliest moment.*

8. *That the trial court grossly erred in law and fact in failing to properly evaluate the evidence adduced at trial instead it glossed over it to justify the conclusion reached.*
9. *That the trial courts erred in law and fact by convicting the appellant basing on extraneous matters and not the evidence on record.*

When the appeal was called on for hearing, the appellant was represented by Ms. Irene Mwakyusa assisted by Mr. Godwin Mwakyusa, learned Advocates whereas the respondent Republic was represented by Ms. Sarah Anesius, learned State Attorney.

Prior getting to the nitty gritty of her submission, Ms. Mwakyusa intimated that she was combining the 1st and 9th grounds; 5th and 8th; the 3rd, 4th and 7th grounds and argue them together and would argue 2nd separately.

Ms. Mwakyusa's complaint in respect of the 1st and 9th grounds was that the charge sheet didn't disclose the date the offence was committed. it was her submission that the in rape cases the law requires the charge sheet must indicate the date when the incident was committed. she cited cases of **Christopher Raphael Maingu vs. Republic**, Criminal Appeal No. 222 of 2004 to explain her position that when the date of commission of the offence is not indicated the charge

shall remain unproved hence benefiting the accused. She also relied on **section 135 (f) of the Criminal Procedure Act, Cap 20 R.E 2019**. She argued that since the trial magistrate failed to comply with the law, Ms. Mwakyusa lamented that he was led by emotions and personal feelings to convict and sentence the appellant.

Arguing in respect of the 2nd ground, Ms. Mwakyusa complained that material witnesses were not called. She submitted that Vero who was mentioned by PW1 as the 1st person she reported the incident was to be called to testify. The learned advocate was convinced that Vero had material evidence to tell the court on the victim's situation by the time she was reporting the incident of rape. To buttress her position, she cited the case of **Azizi Abdallah vs. Republic**, [1991] TLR 71.

The learned Counsel argued the 3rd, 4th and 7th grounds conjointly to the effect that the prosecution was full of doubts. She highlighted the doubts to emanate from the failure by PW1's failure to report the rape incidences at earliest time. She submitted that PW1 fall a victim of rape incidents since she was in STD IV. By the fact that she was very young and couldn't endure those acts and failed to report to anybody, that raised doubts. To illustrate her point, Ms. Mwakyusa cited the case of **Joseph J. Makune vs. Republic** [1986] TLR 44. The second highlighted doubt was to the effect that PW1 reported the incidents to

the social welfare but didn't disclose the one who assisted her because she was mere village girl.

Arguing in respect of the 5th and 8th grounds, Ms. Mwakyusa submitted that the defence evidence was partially considered. She said that the 18 paged judgment concentrated on the prosecution evidence of PW1 and PW4 but didn't but didn't give the defence evidence a deserving analysis. To her the trial Magistrate failed to comply with the law as was emphasized in **Leonard Mwanashoka vs. Republic,** criminal Appeal No. 226 of 2014 (unreported) which was cited in the case of **Bahati Kabuje vs. Republic,** Criminal Appeal No. 252 of 2014 (unreported).

Replying Ms. Sara stated at the wake that she supported the conviction and sentence by the trial court. Arguing in respect of the 2nd, 5th and 8th ground, Ms. Sara stated that the evidence of both sides was duly considered. She indicated further that the defence evidence was summarized at page 5-6 and analysed at page 9-13 of the judgment. Finally the trial court gave reasons why it found it weak. In alternative if this court finds the defence evidence was not considered, Ms. Sara urged this 1st appellate court to re-evaluate it and reach to its

conclusion. She was guided by the principle enunciated in the case of **Prince Charles Junior vs. Republic,** Criminal Appeal No. 250 of 2014.

Responding on the observation by Ms. Mwakyusa that material witnesses were not called, Ms. Sara submitted that although the mentioned persons were Vero, PW1's mother and the social welfare, they were only to corroborate her evidence because rape incidents were committed in secrete. She held the view that PW1's evidence was credible and trustworthy. She sought aid in the case of **Seleman Makumba vs. Republic** (2006) TLR 384.

Ms. Sara submitted that PW1's age was not contested during the preliminary hearing thus there was no need to produce witnesses to prove it. Therefore, even if PW4 didn't tender any exhibit, by virtue of his position as a head teacher should be trusted, she zealously submitted.

The counsel for the Republic dismissed the allegations that PW1 was coached to implicate the appellant and stated that there was no such possibility. She argued that the trial court considered that allegation and rejected it on the reason that it was weak.

Submitting in respect of ground 6, the learned State Attorney stated argued that they procured witnesses who could prove the

offence. She took a stand that even if Vero, who was mentioned by Ms. Mwakyusa, was brought to testify, her evidence would be hearsay as rape incidents are secretly committed. She submitted leaning on section 143 of the Evidence Act, Cap 6 R.E 2019 that there is no number of witnesses is required to prove the case. In this case she was contented that the produced witnesses were enough to prove the case.

Regarding grounds 3, 4, and 7 Ms. Sara submitted that the prosecution case was tainted with lingering doubts. In respect of reporting the incident, the counsel stated that the appellant always warning her not disclose to anyone. She, however, submitted that PW1 reported to Vero and her mother but no one backed her up. The second reason for delay to report the incident as pointed out by Ms. Sara was a procedure that had to be complied with before the appellant was arrested. She referred this Court to page 13 of the typed judgment. She slashed the contention that rape incidents commenced when PW1 was still young so she could not endure them. She said that she tried to get out of the incidents in vain until when she went to hospital for treatment and saw the posters embedding the social welfare phone number and called. Her efforts made her get assistance. The contention that she was to mention a person who assisted her was, according to Ms. Sara,

unfounded because gender violence incidents are reported by anyone as PW1 did.

She argued further that PW1 is a credible witness. She was strengthened by the notion that the trial gauged her deminour and being better placed it found her credible.

Responding on grounds 1 and 9 the Counsel for the Republic negated the contention that the appellant was convicted on emotions and feelings. Responding on the issue whether the charge mentioned the date, Ms. Sara admitted that the charge sheet didn't mention the specific date but referred to "unknown date in February". She argued that the appellant was to be charged as such because PW1's evidence talks about February rape incidents but didn't remember the exact date. She argued further that in terms of **section 135 (f) of the Criminal Procedure Act, Cap 20 R.E 2019** the description of place, time, thing, matter, act or omission was sufficient to inform the accused of his act. She argued that the section does not provide that when the specific date is not mentioned the charge sheet is defective. She was therefore contented that by mentioning the offence to have been committed on the unknown date, the appellant was not prejudiced to the extent of failing to defend himself. Commenting on the cited cases, the learned

Counsel argued that they intend to insist that a date must be mentioned in order to enable the accused to know when the crime was committed. Reverting to this case, Ms. Sara submitted that the charge shows that the crime was committed in February, 2021 on unknown date.

Having submitted as such, Ms. Sara urged this court to dismiss the unmerited appeal.

In her short rejoinder Ms. Mwakyusa reiterated her submission in chief. She however insisted that the want of mentioning a date when the crime was committed is a requirement of the law. She observed that failure to include a specific date in the charge sheet makes the same defective. Aided by the case of **Christopher Raphael Maingu** (supra) and section 135 (f) of the CPA, she urged this case to acquit the appellant because lack of date makes the charge unproved.

Regarding the issue of failure by prosecution to call material witnesses, the learned Counsel held the view that since PW1 involved Vero on what befell on her being the first was better placed to corroborate her (PW1) evidence. She cemented the position that the prosecution must produce material witnesses by citing the case of **Azizi Abdallah** (supra).

Having dispassionately considered the arguments from either side, I propose to first address the issue whether the prosecution proved the case beyond reasonable doubt. This is the appellant's complaint in the second ground of appeal which is clustered with ground 5 and 8.

In answering the above raised issue I shall conform to the guiding principle that this being a first appeal, it is in the form of rehearing. In that regard, this Court is enjoined to re-evaluate the entire evidence on record by reading the evidence and subjecting it to a critical analysis before making a decision of upholding the trial court's decision or arriving at its own conclusion. This fabulous principle was lucidly stated in the case of **Napambano Michael @ Mayanga vs. R,** Criminal Appeal No. 268 of 2015 (unreported) in which the Court of Appeal held:

> *"The duty of first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court's decision or may be different altogether."*

My contemplation of the material facts before me, I must confess from the wake, is that the prosecution did not prove the case beyond reasonable doubt. The legendary cardinal principle clearly dictates that in criminal cases like this one the burden is on the prosecution to prove

beyond reasonable doubt that the Accused had sexual intercourse with PW1. It is not upon him to prove his innocence unless the law expressly requires him to do so. It is the law of our land that in cases of this nature the accused can only be convicted of the offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case. Even suspicions, however ingenious or strong can never be a basis of a criminal conviction or a substitute for proof beyond reasonable doubt. This is equally true even where an accused person is proved to have told lies either in Court or prior to that in connection with the facts in issue.

I have keenly meditated on the evidence adduced by PW1. It digested from her evidence that the appellant is her niece. Her mother is Rosemary Gabinos Mselewa, and her father is Msogoti Mbila who resides in Matwiga. PW1, the appellant and her mother reside in Mazimbo Village in Chunya District. This means PW1 lived close to her mother and had access to her parents any time from the moment the appellant started raping her. It is also in her evidence that she lived in the same house with Neema Edwin Katindile, the appellant's wife (aunt). It is not indicated anywhere in PW1's evidence that her aunt was hard and never listened to her. She lived in the same house with Joyce Christopher Ngamangya who was older than her and Chrispine Dando. According to

her the family comprised 7 people. All these people did not note, hear or smell anything all the time the appellant was raping her.

Let us consider the incidents when PW1 was in standard IV at Mazimbo Primary School. According to her evidence the first rape incident was committed on Saturday when her aunt went to the farm and instructed her to take Flora to clinic. It appears she did not take the child to clinic because the appellant called her in his room and started accusing her of having love relations with men. In the course of inspecting her breasts and private part, he inserted his penis in her vagina and started raping her. PW1 testified further that after they had finished, the appellant first warned her not to tell anyone and secondly asked her to take shower. She felt pains and blood was oozing from her vagina. On that day she reported to Vero who warned her not to tell anyone because similar acts happened to her. So she remained quiet. As observed above, when her aunt returned, PW1 did not give her a report and the aunt did not ask any thing. Similarly, PW1 did not state in her evidence where Vero had gone and where other three family members were at the time the appellant called her in his room. It is also not clear whether the rebuking was made at the lower voice and whether the other family members did not become suspicion of PW1 staying long in the appellant's room.

Again, PW1 informed the trial court that after three days Vero who had warned her not report to anyone changed her mind and disclosed the raping incident to their mother. Probably, she reported to Rosemary. Their mother promised to conduct her own investigation warning herself on the probability of them deceiving her. It appears that she did not investigate or say anything about it. But there is no evidence indicating that their mother called them and warned them of giving false accusations against the appellant.

The second incident occurred when she was in STD V in 2019 at night hours when PW1 was watching a TV. Her aunt was in the house sleeping. When she wanted to go to sleep the appellant who had seeds in the red plastic cup requested her to go with her to throw those seeds on the cross road. In the course, the appellant who wore only a towel again raped her. After they had sexual intercourse they went back to the house. Apparently, nobody in the family noted this incident. It is also doubtful that that day she was the only one watching the TV and others were asleep already. Worse still PW1 did not report this incident to Rosemary, Vero, aunt or any one. I say so because this time the appellant did not threaten her. Another aspect which arouses my curiosity is why nobody questioned her late getting in bed.

I have again anxiously meditated on the third rape incident that took place in February, 2021 when her aunt had gone to the funeral ceremony at Mimba Village. According to PW1 the appellant went to the pombe club. So, she remained with Flora and Chrispine in the house. PW1 testified that the appellant returned at night when they were watching the TV and went straight to his room. A moment later, he called her in his room. He gave her money to buy cassava at school in the following day and wanted to have sexual intercourse with her. Indeed they had it. What troubles me is that Vero who had prior knowledge and knew that PW1 did not like being raped kept watching the TV. She never became suspicious and never informed any one to come witness what the appellant was doing. She never bothered to ask her what she was doing with appellant all that time.

Apart from that I am troubled by the conduct of PW1 reporting the incident to the social welfare not to her mother, father or aunt. As I said earlier her mother was making investigation. In order to get thorough information, I think, PW1 and Vero were to be the ones to feed her. I doubt PW1's decision of hiding the incidents to her mother and close relatives and report to the social welfare who did not turn up in court to confirm whether PW1 actually made a report to them. In view of PW1's

evidence she reported to her mother after disclosing the events to the social welfare and after the appellant's arrest.

It also seems that after reporting the incidents to the social welfare and her mother, the appellant raped her again on Wednesday in February, 2021 when her aunt had gone to attend the funeral ceremony at Maendeleo. That day the appellant had travelled to Mbeya and she remained with Joyce, Chrispine and Angel. This time the appellant returned home late. He woke her up and requested her to follow her in his room and raped her. It is in evidence that she was sleeping with Joyce (21), Angel and Chris. She did not testify on whether the appellant woke her up in a lower voice so that Joyce could not hear.

Undisputedly, when the appellant was calling her to the room, there were people in the house. But all the time these people did not smell anything and become curious on the appellant's habit of calling and spending some time with PW1 in his room when his wife was not around. All the time the appellant wanted her all members of the family were always asleep except her. She was sometimes the only one watching the TV giving the appellant a room to call her and eventually rape her.

A close look at the evidence demonstrates that after the last rape incident, the police went to school on 16/2/2021 and interrogated her from 9:00hrs. At 19:00hrs the appellant was arrested. That is when all their relatives got news that the appellant was all along raping her. This is vivid in the evidence of PW1, DW2, DW3 and DW4. According to PW2 and PW3, PW1 was examined on 22/2/2021 six days after the appellant was arrested. The question is why she was not examined on 16/2/2021. The prosecution evidence is silent. In my view there was no impediment and after all, the doctor would be able to see if she had bruises. But that failure made her to generally state that she was penetrated.

My attention has also been attracted by PW1's response to cross-examination questions that she was getting home late and the appellant was always warning her. She explained further that she was once caught in the bush with Mbuke, Mwapi and Anthony and one day didn't sleep at home. She candidly responded that Rudisha was seducing her. And further that the head teacher was assigning her some tasks. Her response shows that the appellant was a stumbling block to her freedom. Therefore, PW2 findings that PW1 was penetrated are true but the evidence before me gives me many options as to who penetrated her was having sexual intercourse with her. The evidence shows that PW1 was being seduced by Rudisha, once did not sleep at home and

was once caught in the bush with a man. My take of these events is that PW1 had many men in love affairs. My suspicion is that since the appellant was unhappy with her deeds, he had to suffer.

My findings correspond to DW3's testimony that she did not travel in February, 2021. This is a serious doubt in the prosecution case. The prosecution had to produce Vero, Joyce and Chrispin. These people in my view could corroborate PW1's evidence especially on the aspect of DW4's absence from home and the appellant's tendency of calling her in his room and spending some time with her. An inference would be drawn that that tendency should be connected to rape incidents. If so, I am inclined to observe that there is no dispute that statutory rape is a very serious offence which upon conviction attracts a sentence of 30 years and above. That being the case, it is always expected that its investigation and eventual prosecution would always be done with great care and seriousness. True to this disposition, it does not need extra-ordinary thinking to know that this case was poorly investigated. In the similar vein, the prosecution of it is doubtful if not poor. I say so because in the absence of plausible explanation that Vero, Joyce and Chrispin could not smell anything and why PW1 did not complain to her mother and father in the first place before approaching the social welfare creates lingering doubts. Similarly, Verok knew that PW1 was

being raped and sometimes was in the house when she was being called in the appellant's room but kept quiet creates doubts.

In the same spirit, in the absence of any other evidence on which the prosecution case would stand or fall on the word of PW1 on the exact date she was raped but remembering well the red cup, throwing of seeds, promise to pay school fees, money to buy cassava, the names of social welfare and hours she was called in the head teachers' office and arresting of the appellant but forgetting dates she was raped, I think the prosecution case becomes weak. Taking on board all what PW1 said, I think, in this case prudence demanded that the Vero, Joyce, Chrispin and Rosemary ought to have been summoned with the aim of hearing their versions on whether DW4 travelled in any date of February, PW1 was being here and then called by the appellant to go in his room when DW4 was away and whether Vero had reported to Rosemary that the appellant was raping PW1.

In the absence of the evidence of these people it is not safe to believe wholeheartedly that conviction was sounding. I am aware that in rape cases the best witness is the victim as per the case of **Seleman Makumba** (supra). But the victim should be reliable. Also the prosecution is not forced to bring any witness. They have to bring

witnesses from their connection with the transaction in question, are able to testify to material facts. In this position I need only to pay homage to what the Court of Appeal stated in the decision of **Aziz Abdallah vs. Republic** [1991] TLR 71 at page 72 which was quoted in the case of **Mashimba Dotto @ Lukubanija** (supra): where holding (iii) speaks as follows:

> *"(iii) The general and well known rule is that prosecution is under prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within the reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

This is no doubt good principle from which we can draw inspiration. Aware of this principle Ms. Sara submitted aided by **section 143 of the Evidence Act [Cap 6 R.E. 2019]** that they only needed three witnesses to prove the case and specific number of witnesses is needed. I absolutely agree with him. Nevertheless, if there are facts that need more witness who from their connection with transaction in question are able to testify to those material facts, the prosecution is under prima facie duty to call them. In the instant case I agree with Ms.

Mwakyusa that more witnesses were needed to corroborate some aspects of PW1 in order to intensify her credibility.

I am equally aware that in rape cases the evidence of the victim is crucial, of a decisive effect and sufficient to base conviction on, without any need of corroboration. This is consistent with the plethora of decisions of this Court and Court of Appeal of Tanzania. In **Bakari Hamis vs. Republic**, CAT – Criminal Appeal No. 172 of 2005 (unreported) it was held that:

> *"...conviction may be founded on the evidence of the victim of rape if the Court believes for reasons to be recorded that the victim witness is telling nothing but the truth."*

This position was underscored in **Godi Kasenegala vs. Republic**, CAT-Criminal Appeal No. 10 of 2008 (unreported) in which it was stated;

> *"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence".*

I have endeavored to demonstrate in this case how the evidence of PW1 created lingering and substantial doubts. In view of the case of **Bakari Hamis** (supra) I need to emphasis that this Court doesn't

believe her to have told the truth. That is why I held and concluded that some other witnesses were needed in order to add value to her testimony. Ideally, those witnesses' versions could shed light to some incidences/circumstances which, in my opinion, could link the appellant with the commission of the offence. Short of that I am afraid that conviction cannot be safely grounded on PW1's incredible evidence. I therefore find no cogent evidence to sustain conviction of the appellant.

For reasons I have endeavored to demonstrate, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I order that he should be released from prison forthwith unless otherwise held for other lawful cause.

DATED at **MBEYA** this **16th** day of **May, 2022.**

J. M. Karayemaha
JUDGE