THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

(DC) CRIMINAL APPEAL NO 54 OF 2021

(*Originating from Mufindi District Court Criminal Case No. 152 of 2020*)

ROBINI LUBIDA ---------- APPELLANT

VERSUS

REPUBLIC ---------- RESPONDENT

28/03/2022 & 21/04/2022

JUDGMENT

MATOGOLO, J.

In the District Court of Mufindi, the appellant one Robin s/o Lubida was charged with the offence of rape contrary to Section 130(1) and (2)(e), and 131 (1) of the Penal Code, [Cap. 16 R.E 2019].

It was alleged that the appellant had carnal knowledge to a girl of 15 years old. He was convicted and sentenced to thirty (30) years imprisonment. Aggrieved with both conviction and sentence the appellant has appealed to this court in which he filed a petition of appeal with six grounds of appeal as follows:-

1. That, the trial honourable court erred in law in relying upon the evidence of PW1 which was taken contrary to sections 198(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] read together with Section 4(a) of the oaths and Statutory Declarations Act [Cap. 34 R.E. 2019] in convicting your humble appellant.
2. The, trial court erred in law and fact in applying the quoted legal principle in the case of ***MARWA WANGITI & ANOTHER VS. REPUBLIC [2002] TLR 39*** against your humble appellant.
3. That, the trial honourable court erred in law and fact by failing to draw adverse inference against the prosecution for failure to call material witness(es) to give evidence as no reasons (s) was given for such failure.
4. That, the trial honourable court erred in law and fact in relying upon hearsay evidence of PW3 and PW4 in convicting your honourable appellant.
5. The trial honourable court erred in law and fact by convicting your humble appellant basing only on the evidence adduced by the prosecution without taking into account the evidence adduced by your humble appellant.
6. That, the trial court erred in law and fact in concluding that the case against your humble appellant was proved beyond reasonable doubt while the evidence on record does not so suggest.

The appellant prayed to this court to allow the appeal by quashing the conviction and setting aside the sentence of 30 years in jail and order his immediate release from the prison.

At the hearing the appellant was represented by Mr. Jally Mongo learned advocate while Jackline Nungu learned State Attorney appeared for the Republic. The learned State Attorney resisted the appeal. In arguing the appeal, Mr. Mongo abandoned third and fourth grounds. He argued 1st ground separately but grounds 2, 5 and 6 were argued together.

In respect of ground No. 1 he argued that on 26/08/2020 while PW1 testifying as shown at pages 5-7 of the trial court proceedings she was of the age of 15 years old, the age which was also confirmed by PW4. But she was not sworn before she gave evidence instead she promised to tell the truth as appears at page 15. The trial court recorded that, Section 127(2) of the Criminal Procedure Act (CPA) was complied with which also appears to be a slip of the pen as he must meant of the Evidence Act. He said as the witness (PW1) of the age of 15 years, she must have taken oath before she gave evidence as required under Section 198 (1) of the CPA, and Section 4(a) of the Oath and Statutory Declarations Act. He said only a witness of under the age of 14 years can give evidence without taking oath. Mr. Mongo argued that as PW1 did not take oath before her evidence was received her evidence lack legal force such that the court should not have convicted the appellant basing on her evidence. The learned counsel supported his argument by referring this court to the case of ***Nestory Simchumba vs The Republic***, Criminal Appeal No. 454 of 2017 Court of Appeal (unreported).

He therefore prayed for the evidence of PW1 to be expunged from the court record.

With regard to the 2nd, 5th and 6th grounds of appeal which he submitted in alternative he argued that rape cases should be conducted carefully as directed in several decisions of the Court of Appeal. He said the reasons is that it is easy to raise allegations but it is difficult to prove the allegations but it is very difficult for a suspect to defend himself as it was held in the case of ***Mohamed Said vs. The Republic***, Criminal Appeal No. 145 of 2017 CAT (unreported) at page 13-14. But in the same case the court insisted that the best evidence in rape cases is that of the victim of rape.

According to Section 127(7) of the Evidence Act, the court can convict even if the evidence of the victim of rape was not corroborated. But such evidence of the victim must be scrutinized carefully and the court must be satisfied that the evidence is only the truth for the court to rely on such evidence to convict.

Mr. Mongo submitted further that matters to be looked at is the evidence of the victim together with the evidence of other witnesses including that of the accused person. He said the trial magistrate in her judgment explained that the evidence of the victim was reliable because he mentioned the accused immediately after the commission of the offence and supported her position by citing the case of ***Marwa Wangiti and Another vs. Republic, (2002) TLR 39***.

Mr. Mongo argued that what was explained by the trial magistrate in her judgment is contrary to the court record. There is nowhere in the court

record PW1 said after being raped she immediately reported to any person. What PW1 said is that after rape she felt pains, she went to inform her aunt that she was feeling stomach pains. She did not tell her that she was raped by the appellant apart from saying she know the appellant properly before. But also at the time she was called by her teacher and asked as to why she stolen money of her co-student, she replied that she was given the money by her friend Lubida. There is no where she explained that she was raped by the appellant. PW3 in her evidence found at page 13 of the trial court proceedings she stated that, on 29/07/2020 she asked the victim (PW1) why she did steal money of her co-student. But the charge sheet reveals that the victim was raped on 01/05/2020. In her evidence PW1 did not state and mention the appellant to be the one who raped her. Even on 29/07/2020 about three months later, PW1 had not mentioned the appellant to be the one who raped her. The appellant was arrested on 30/07/2020. He therefore challenged the trial magistrate by stating in her judgment that, PW1 is reliable and mentioned the appellant immediately after the incident is against the court record. Another thing Mr. Mongo said is that the charge sheet disclosed that the victim was raped on 1st May, 2020. But there is nowhere in the trial court proceedings where PW1 said she was raped on 1st May, 2020. What she said is that on 2nd May, 2020 she was also raped by the appellant. He posed a question that if there was also rape on 2nd May, 2020 why the charge sheet did not disclose that. But also why PW1 did not disclose to any person that she was also raped on 02/05/2020 by the appellant. Mr. Mongo argued that it is trite that the act of the victim reporting immediately what happened to her is all important

but failure to do so creates doubt on the credibility of that evidence as it was held in the case of ***Emmanuel Kabelele vs. The Republic***, Criminal Appeal No. 536 of 2017 CAT (unreported) Another point Mr. Mongo raised is the variance between the evidence of PW1, PW3 and PW4. He said while evidence of PW1 shows that she never disclosed to any person what appellant did to her, PW3 in her evidence said she was told by PW1 on 29/05/2020 that the victim had sexual intercourse with the appellant. He said this evidence is contrary to what PW1 told the court. She never stated that she told her teacher that she was raped by the appellant. He said another contradiction is that PW3 said was told by the victim that she had sexual intercourse with the appellant three times. But in her evidence there is no where she told PW3 that she had sexual intercourse with the appellant three times. But PW1 in her evidence said she was raped twice by the appellant. But where such information come from. He questioned as to who is to be trusted between PW1 and PW3. The learned counsel submitted further that another contradiction is between PW1 evidence and PW4. PW4 testified that he was informed by the aunt of the victim that PW1 was raped. She said after such information she asked her daughter (PW1) who said she was raped by the appellant. What PW4 told the court was not stated by PW1 in her evidence. PW4 did not state as to where she got such information from PW1.

Mr. Mongo said the variance and contradiction of evidence between prosecution witnesses was not discussed and resolved by the trial court. Even in her judgment the trial magistrate did not consider the appellant's defence. He relied only on the prosecution evidence. He said there are

doubts in the prosecution evidence which ought to be resolved in favour of the appellant. He supported his argument by citing the case of ***Seleman Yahaya @ Zinge vs. Republic***, Criminal Appeal No. 533 of 2019 CAT (unreported) and the case of ***Emmanuel Kabelele*** (supra).

Mr. Mongo asked this court also to consider the habit of the victim while reevaluting her evidence. She had the habit of stealing as she confessed to her teacher. The victim's conduct should be considered while the court determining the victim's credibility. Mr. Mongo prayed to this court to allow the appeal.

In her reply submission Ms. Jackline Nungu responding to the 1st ground of appeal she conceded that Section 198(1) of the Evidence Act was not considered while PW1 testifying as the victim does not fall in the category of tender age. She was supposed to take oath before she gave evidence but that was not done the act which reduce strength of her evidence. The learned State Attorney argued that even if PW1 did not take oath still her evidence can stand provided that there is independent evidence corroborating her evidence as it was held in the case of ***Wilson Mussa @ Jumanne vs The Republic***, Criminal Appeal No. 109 of 2018 CAT (unreported). She said the evidence of PW1 was corroborated by the evidence of PW3 the victim's teacher. That the victim told PW3 that she was raped by the appellant. But the evidence of the clinical officer corroborated the victim's evidence as is the one who examined the victim and found her without hymen. She filled PF3 which was tendered and admitted in evidence. She said the corroborating evidence is strong as was not challenged by the appellant by cross-examining prosecution witnesses

which implied that he agree with her on what she told the court and support her argument by citing the case of ***Nyerere Nyague vs. The Republic***, Criminal Appeal No. 67 of 2011 CAT (unreported). The learned Advocate claimed to have contradictions between the evidence of PW1 and PW3. She said the allegation that PW3 said the victim (PW1) had sexual intercourse with the appellant three times which was not stated by PW1 but she said they believed while PW1 testifying she could not remember everything. She could not be expected to have been remembered everything while testifying. She said whether or not PW1 had sexual intercourse with the appellant two or three times that is irrelevant. What is important is that she was penetrated the act which was proved. On the issue that victim did not state that she was raped on 01/05/2020 as indicated in the charge sheet, the learned State Attorney said the victim did not mention the date in her evidence. But she said "on that date". But again she stated that on the following date on 02/05/2020 she was also raped. The previous day impliedly was on 01/05/2020. But she stated further that the contradiction complained of if any is minor which does not go to the root of the case.

Ms. Jackline Nungu also conceded that the trial court did not consider the appellant's defence. But she prayed to this court as first appellate court to step in the shoes of the trial court and re-evaluate the evidence received and come to its own findings as it was held in the case of ***Prince Charles Junior vs. The Republic***, Criminal Appeal No. 250 of 214 CAT (unreported). Ms. Jackline Nungu also concede that the victim did not mention the appellant to be one who raped her. She mentioned her after

the lapse of three months. But she said what PW1 told the court is credible because while testifying she said she wanted to shout but the appellant stopped her and threatened to do bad thing to her if she shouts. She said with such threats there is no doubt that the victim feared to tell any person. Due to her age of 15 years she could not have rational thinking and decision that is why she continued to receive presents from the appellant Tshs. 5,000/= for each act of sexual intercourse. Her act of naming the appellant after a prolonged period has no any problem. But PW1 maintained consistency by mentioning the appellant to have raped her. On the allegation that the prosecution failed to prove the case against the appellant beyond reasonable doubt. Ms. Jackline Nungu contended that the charge was proved against the appellant beyond reason doubt by the evidence of PW1 which was corroborated by the evidence of PW2 and PW3. What the witnesses said is what were told by PW1 that the appellant is the one who raped her. That evidence was also corroborated by the clinical officer (PW4). The learned State Attorney prayed to this court not to judge the victim that she had the habit of theft and condemn her. The learned State Attorney prayed to this court to dismiss the appeal.

In rejoinder Mr. Jally Mongo started with the cited case of ***Wilson Mussa @ Jumanne vs. Republic*** (supra), in which he said the victim in that case was aged six years. Under Section 127 of the Evidence Act what she was required is to promise to tell the truth and not lie. The circumstance of that case is therefore distinguishable. Mr. Jally Mongo argued that there is no evidence corroborated victim's evidence as corroborating evidence must be independent and which support another

evidence. The learned State Attorney mentioned PW3 to have corroborated evidence of PW1 but there is nowhere PW3 said the victim was raped. But there is nowhere also PW1 told PW3 that she was raped by the appellant nor did she tell her teacher the date she was raped. He argued that the evidence of PW1 and that of PW3 has inconsistency unlike in the case of ***Wilson Mussa @ Jummanne*** where the victim narrated the whole incident and named the culprit. Mr. Mongo said he does not agree with the learned State Attorney that the clinical officer corroborated the evidence of PW1, PW2 examined the victim on 30/07/2020 while the rape incident is said to have occurred on 01/05/2020.

In her evidence the clinical officer did not form opinion as to when rape incident occurred. The fact that PW1 was raped on 01/05/2020 was not corroborated. And from 01/05/2020 to 30/07/2020 there is no evidence to show impossibility of PW1 being penetrated by any other person. He said the evidence of PW4 cannot corroborate evidence of PW1 there is no where PW4 said when victim was raped. Also PW4 did not say as to when he get the information for PW1 to be raped. He said unlike in the case of ***Wilson Mussa***, after discover that the victim was raped her mother examined her private parts and found feaces coming out. The victim mentioned the culprit immediately, that is within a spell of five days from the date of incident. Even the medical doctor corroborated the testimony of the victim. What the medical doctor observed after examining the victim is what her mother observed. Those facts are different to the facts of the present case. While PW4 testifying did not say that she also told PW4. That is where inconsistency of the prosecution evidence arise. Mr. Mongo

learned advocate argued that by saying that a witness cannot remember all it is not correct the act of rape was committed to her but she remembered to have been given money and had her stomach pain. He said the contradictions are not minor as put by the learned State Attorney, but go to the root of the case. He did not agree with the learned State Attorney that the victim did not name the one who raped her because she was threatened if she name him he will do bad thing to her. The fact which is contrary to the court record as can be seen at page 7 paragraph 1 4th line to 5th line that what the victim was told is not to scream but not to disclose the incident to any person. On the argument that the prosecution case was not challenged only on the ground that the appellant did no cross examine the witness, Mr. Mongo said failure by the appellant to cross-examine the witness does not mean that what the prosecution witnesses told the court remains intact. He said each case must be decided according to the circumstances of that case. He said the charge against the appellant was not proved.

Having read the submissions by the learned counsel from both sides, the issue for determination in this case is whether the charge against the appellant was proved to the required standard and this appellant was properly convicted. It is a settled principle of law in criminal cases that burden of proof lies on the prosecution side throughout the same never shift to the accused person as it was held in the case of ***Nathanael Alphonce Mapunda and Another vs. Republic*** **[2006] TLR 395.**

What the accused need to do is just to raised doubt to the prosecution case. The complaints by the appellant in this appeal are canvassed in six grounds of appeal as presented to this court.

But in arguing the appeal Mr. Jally Mongo abandoned third and fourth grounds thus, he remained with four grounds of which 1st ground was argued separately the rest that is 2nd, 5th and 6th grounds were argued together. The complaint in the 1st ground is that the trial court erred in law in relying on the evidence of PW1 which was taken contrary to the requirements of Section 198(1) of the Criminal Procedure Act. The victim PW1 who at the time she was testifying she was of the age of 15 years thus above 14 years but she was not sworn before her evidence is received Jackline Nungu learned State Attorney conceded to this ground and said as the victim (PW1) did not take oath before her evidence is received, her evidence is of less strength Section 198(1) of the CPA has a requirement that before a witness gave evidence must take oath unless he falls in the category of witnesses who are 14 years and below.

Section 198(1) provides:-

> *Every witnesses in a criminal case or matter shall, subject to the provision of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the oath and statutory Declarations Act.*

Section 4(a) of the oaths and Statutory Declarations Act provides:-

> *"4(a) subject to any provision to the contrary contained in any written law, an oath shall be made by*
>
> *(a) Any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court".*

That is what the two provisions provide. The victim PW1 did not take oath before she gave her evidence. What is the effect of that, the Court of Appeal of Tanzania in the case of ***Nestory Simchimba vs. The Republic***, Criminal Appeal No. 454 of 2017 (unreported) at page 10, while referring to the case of ***Mwami Ngura vs. Republic***, Criminal Appeal No. 63 of 2014 (unreported) has this to say:-

> *"... this means that, as a general rule every witness who is competent to testify must do so under oath or affirmation, unless, she falls under the exceptions provided in the written law. As demonstrated above one such exception is section 127(2) of the Evidence Act. But once a trial court, upon an inquiry under Section 127(2) of the Evidence Act, finds that the witness understands the nature of an oath, the witness must take oath or*

> *affirmation.* ***If this is not done, such evidence must be visited by the consequences of no-compliance with Section 198(1) of the CPA, And, in several cases, this court has held that if in criminal case, evidence is given without oath or affirmation, in violation of Section 198(1) of the CPA such testimony amounts to no evidence in law (see eg. MWITA SIGORE @ OGORA VS. REPUBLIC,*** *Criminal Appeal No. 54 of 2004 (unreported). The question of such evidence being relegated to "unknown" evidence does not therefore arise (Emphasis provided)*

Since PW1 gave her evidence without being affirmed, on the authority cited above her evidence received by the trial court was no evidence at all. I therefore agreed with Mr. Jally Mongo learned advocate that such evidence ought not to be relied upon in convicting the appellant. That evidence is therefore discarded. As to the 2nd, 5th and 6th grounds Mr. Jally Mongo has argued them in the alternative.

His argument is that rape cases must be conducted carefully as it was simple for the victim to allege against a person but it is difficult for it to be proved but is more difficult for the accused to defend himself and that best evidence on rape cases comes from the victim of rape. See case

of ***Mohamed said vs. The Republic*** (supra), and ***Seleman Makumba vs The Republic, (2006) TRL 329.*** The evidence of the victim alone if believed suffices to sustain a conviction, we have seen above that the evidence of the victim (PW1) is no evidence at all as it was taken without oath, the same was disregarded. Then if so what is any evidence remained which connect the appellant with the charged offence. Ms. Jackline Nungu has contended that although evidence of PW1 was taken not on oath, but such evidence is corroborated by the evidence of PW2, PW3 and PW4.

It should be noted that the evidence of PW1 is no evidence at all. I don't think if Ms. Jackline Nungu is correct to assert that such evidence was corroborated by the evidence of PW2, PW3 and PW4. The testimonies of PW2, PW3 and PW4 if at all is credible cannot corroborated nonexistence evidence. What PW2 and PW3 told the trial course is hearsay evidence it is the information they received from the victim (PW1), it is the general principle of law that hearsay evidence inadmissible.

Mr. Jally Mongo has challenged the judgment of the trial court in which the trial magistrate held that the victim named the appellant immediately after the commission of offence and supported her position by citing the case of ***Marwa Wangiti vs Republic (2002) TLR 39.***

It was correctly argued by Mr. Jally Mongo that what the learned trial Magistrate stated and supported her position with the above cited case is not born by the court record. If the victim named the appellant, it was not immediately after the commission of the offence. But she did so mention him after lapse of three months. That cannot be "immediately" in the spirit of the cited case of ***Marwa Wangiti Marwa*** (supra). In actual fact the

trial court ought to have drawn inference adverse to PW1 as to why it took her such a long time to name the appellant. This also applies to the fact that PW1 did not tell her aunt that she was raped instead told her that she was feeling abdominal pain. The begging question is why the victim (PW1) did not want to disclose to her aunt what happened to her. This therefore creates doubt to her credibility.

In the case of ***Marwa Wangiti Mwita and Another vs Republic*** (supra) at age 43 the court held that:-

> *"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry".*

The victim, did not mention the appellant as the one who raped her immediately after the alleged rape. But it took her three months to do so, this is more serious as there is no good reasons assigned for her failure to mention the appellant as early as possible. The contention by Ms. Jacline Nungu learned State Attorney that she was threatened by the appellant that if she mentioned him he will do bad thing to her is baseless as the same is not supported by the court record as it was submitted by the Mr. Jally Mongo. It is therefore questionable, for a girl of 15 years old to keep quite for such a long time of three months without disclosing to her parents that she was raped by the appellant.

But she also lied to her aunt that she had stomach pain instead of telling her the truth that she was raped by the appellant. The act of lying

also creats doubt to her credibility. There is also variance the between what was disclosed in the charge sheet and what PW1 told the trial court. The charge sheet discloses that the victim was raped on 1st May, 2020 but in her evidence she stated that she was raped twice on 01/05/2020 and second time on 02/05/2020. The facts in the charge sheet are therefore at variance to what was stated by the victim. What was supposed to be done is to amend the charge sheet so as to conform to the evidence adduced as it was held in the case of ***Kondela Paul @ Kadala vs. The Republic***, Criminal Appeal No.61 of 2017, CAT (unreported). (See also the case of ***Emmanuel Kabelele vs. The Republic***, Criminal Appeal No. 536 of 2017 CAT (unreported) (unreported). In this case at page 17 it was held:-

> *"a number of cases in the past, this court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in term of Section 234 of the CPA.* ***If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal. Short of that failure of justice will occur***".
>
> (Emphasis added).

In his submission in support of the four grounds of appeal, Mr. Mongo alleged contradiction on the prosecution evidence by PW1, PW3 and PW4. That while PW1 never disclosed to any person that she was raped by the appellant. PW3 in her evidence said was told by PW1 that on 29/05/2020 she had sexual intercourse with the appellant. The victim PW1 never told the trial court that. Another contradiction is that PW3 told the court that she was told by PW1 that she had sexual intercourse with the appellant three times. But PW1 in her evidence stated that she was raped by the appellant two times. Again PW4 testified that she was told by the aunt of the victim that PW1 was raped. After such information she said she asked her daughter (PW1) who said she was raped by the appellant. What PW4 told the trial court was not stated by PW1 in her evidence. PW4 did not state as to where, she got such information from PW1. Mr. Mongo argued that such variance of evidence was not resolved by the trial court. It was held in the case of ***Mohamed Said Matula vs. The Republic (1995) TLR 3***. That:-

> *"where the testimonies by witnesses contain inconsistence and contradiction, the court has a duty to address the inconsistences and try to resolve them where possible, else the court has to decide whether this inconsistencies and contradictions are only minor, or whether they go to the root of the matter".*

Ms. Jackline Nungu in her reply submission argued that the inconsistencies pointed out by Mr. Mongo are minor but on his part Mr. Mongo has refused and said they are not minor as they go to the root of the matter. I agree with Mr. Mongo that the inconsistencies and contradiction mentioned are not minor as the court is unable to take which is which such that they go to the root of the matter. For instance, for the victim to be raped twice or three times while the charge sheet discloses that the victim was raped once. I therefore find merit in this complaint as the trial court did not address them and resolve them. Another complaint is that the trial magistrate did not consider the appellant's defence in her judgment. She only relied on the prosecution evidence. Jackline Nungu conceded to that but only asked this court to step in the shoes and reevaluate the evidence and reach at its own findings. Importance of a trial court to consider the accused defence while analyzing evidence in the judgment was emphasized by the Court of Appeal in the case of ***Seleman Yahaya @ Zunga vs. The Republic*** (supra). It is therefore not enough to analyze prosecution case in isolation of the accused defence omission to consider accused defence vitiates proceedings. This complaint therefore has merit.

Lastly is whether the prosecution managed to prove the charged offence against the appellant beyond reasonable doubt. The answer to this question is in the negative. It is cardinal principle of law that the best evidence in rape cases comes from the victim of the offence. The short coming of the victim's evidence renders it no evidence at all. But also the presence of contradictions of the prosecution witnesses. Taking the

prosecution case in its totality it cannot be safely said that the prosecution managed to discharge their burden of proving the charge against the appellant beyond reasonable doubt. It fall short of so proving, I therefore find merit in this appeal, the same is hereby allowed. The conviction against the appellant is quashed and sentence of thirty (30) years imprisonment set aside. The appellant is to be released from the prison forthwith unless held for other lawful causes.

DATED at **IRINGA** this 21st day of April, 2022.

F.N. MATOGOLO

JUDGE

21/4/2022.

Date:	21/04/2022
Coram:	Hon. F. N. Matogolo – Judge
Applicant:	Present
Respondent:	Hope Masambu – State Attorney
C/C:	Charles

Hope Massambu – State Attorney:

My Lord I am appearing for the Respondent Republic. The appellant is present and represented by Mr. Jally Mongo learned advocate who is also present. The appeal is for judgment we are ready.

COURT:

Judgment delivered.

F. N. MATOGOLO

JUDGE

21/04/2022