

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MANYARA  
AT BABATI**

**CRIMINAL APPEAL NO. 02 OF 2023**

*(Arising from the judgment of Criminal Case No. 59 of 2022 of the District Court of Babati at Babati)*

**PASCHAL ANTHONI @ NIKI ..... APPELLANT**

**Versus**

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

**JUDGMENT**

*14<sup>th</sup> & 21<sup>st</sup> February, 2023*

***Kahyoza, J.:***

The trial court convicted **Paschal Anthoni @ Niki** (the appellant) with the offence of rape and imposed a custodial sentence of 30 years. The prosecution alleged that **Paschal Anthoni @ Niki** had carnal knowledge of **XX**, a woman who was 87 years old. The trial found **Paschal Anthoni @ Niki** guilty, convicted and sentenced him to serve an imprisonment of thirty years.

Aggrieved by both conviction and sentence, the appellant appealed raising four grounds of appeal. The appellant's grounds of appeal raise four issues as follows-

- 1) Whether the prosecution proved the appellant guilty beyond reasonable doubt;

- 2) Whether the trial court considered the appellant's defence of *alibi*;
- 3) Whether the trial court relied on contradictory evidence to convict and sentence the appellant; and
- 4) Whether the trial court did properly evaluate the evidence.

The Court heard the appeal orally. Mr. Godfrey learned advocate represented the appellant and Ms. Blandina, learned state attorney who appeared for the respondent.

**Did the prosecution prove the appellant guilty beyond reasonable doubt?**

The appellant raised general and specific grounds of appeals. The general ground of appeal is whether the prosecution proved the appellant guilty beyond reasonable doubt. The general ground of appeal covers the third and fourth grounds of appeal, thus, it covers the issues whether the trial court relied on contradictory evidence to convict and sentence the appellant and whether the trial court did evaluate the evidence properly. The Court of Appeal dejects a practice of raising a general ground of appeal together with specific ground(s) of appeal. It observed in **Rutoyo Richard vs R.**, (Cr. Appeal No.114 of 2017), published on the website, [www.tanzlii.org](http://www.tanzlii.org) [2020] TZCA 298, where it stated that: -

*"Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance."*

Given the above position in **Rutoyo Richard vs R.** (supra), I will consider only the general ground of appeal, which is whether the prosecution proved that the appellant was guilty of the offence of rape beyond reasonable doubt. I will answer the third and fourth grounds of appeal in the course of determining the general ground of appeal.

The appellant was charged with offence of rape contrary to section 130 (1)(2)(a) of the Penal Code, [Cap. 16 R.E.2019, now (2022)] (the Penal Code). The prosecution alleged that the appellant raped XX, an adult woman aged 87 years old, hence, the prosecution was duty bound to prove two elements of the offence of rape; **one**, penetration and **two**, lack of consent on the part of the victim. See the decision of the Court of Appeal in **Selemani Mkumba v. R.** [2006] T.L.R. 23 where the pronounced itself that-

*"The evidence of rape has to come from the victim, **if an adult, that there was penetration and no consent**, and in case of any other woman, consent is irrelevant that there was penetration'...." (emphasis added)*

In addition, section 130 (4) (a) of the Penal Code, stipulates categorically that penetration is one of the essential ingredients of rape thus-

*"130 (4) For the purposes of **proving the offence of rape-**  
(a) **penetration however slight is sufficient** to constitute  
the sexual intercourse necessary to the offence ...  
(Emphasis is added)*

Reading the section 130 (4) (a) of the Penal Code, it is obvious that in proving rape, evidence establishing penetration of the male's manhood into the female organ is necessary and such penetration, however slight is sufficient to constitute sexual intercourse. It is a settled position of law that slight penetration is sufficient to prove the offence of rape. See, the case of **Hassan Bakari @ Mamajicho v R.**, Criminal Appeal No. 103 of 2012 CAT (unreported).

The appellant's advocate argued that the prosecution did not prove penetration as the element of rape. He argued that to prove rape there must be unshakable evidence of penetration. To support his contention he referred this Court to the case of **Samwel Stanley v. R.**, Criminal Appeal No. 67/2022 High Court Morogoro Sub-registry –unreported) where this Court (*Ngwembe, J.*) quoted the decision of the Court of Appeal

in **Mbwana Hassan v R.**, Criminal Appeal No. 98/2009 where the latter held that-

It is trite law also that for the offence of rape there must be unshakable evidence of penetration.

He argued that the victim deposed that the appellant penetrated her, ejaculated and that she bled. She went to the doctor for medical examination. He contended that the doctor did not find bruises or spermatozoa in the victim's private parts. Given the variance in the evidence of the victim and the doctor's report the trial court ought to have taken the evidence of the victim with caution. He submitted that he was alive of the position of the law that the best evidence in sexual offences is that of the victim. He however, cautioned this Court that some victims of rape have been telling lies leading to innocent accused persons to be convicted. To support his position that alleged victims of rape unjustifiably incriminate otherwise innocent persons, he cited the case of **Samwel Stanley v. R.**, (supra), where a decision of the Court of Appeal in **Hamis Halfan Dauda Vs. R.**, Criminal Appeal No. 231/2019. In that case, the Court of Appeal held that-

*"We are alive however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The*

*reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s)."*

Ms. Blandina, the learned state Attorney who appeared for the respondent opposed the appeal and supported the conviction. She argued that the prosecution proved the offence beyond reasonable doubt. She argued in support of the position that the best evidence in sexual offences is the victim's evidence. She argued that the prosecution proved the elements of the offence of rape which are penetration and lack of consent. She submitted that the victim who was an adult 87 years old proved that she did not consent to the act of penetration. She submitted that narrated that while grazing her goats in Pori la Mzungu bush, the appellant approached and asked her why she was grazing to area. She pleaded for pardon. The appellant gave condition to kneel before he could accept her apology. She kneeled and the appellant took the advantage of pushing her down, sleeping on top of her and penetrating her. She felt pains and after the appellant left, she walked home with difficulties.

The state attorney stated that there was the evidence of Noela Daniel (Pw2), an eye witness whose evidence was not properly recorded. She prayed the evidence to be expunged as the trial court recorded the evidence in contravention of section 127(2) of the Evidence Act, [Cap. 6

R.É. 2022]. She added that there was the evidence of Maria Judisi (**Pw3**), who witnessed the victim walking with difficulties from the scene of the crime. Maria Judisi (**Pw3**) deposed that after she got information she went to the scene of the crime. She met the victim walking home with difficulties.

As to the submission that the evidence of the doctor did not support the victim's evidence that the appellant penetrated her vagina, raped her until he ejaculated, and caused her to suffer bruises, she submitted that the incident occurred on 30.3. 2019 and the doctor examined the victim on 1.4.2022. As time had passed, it was not likely for the doctor (**Pw5**) to find spermatozoa.

She argued that Titus Kiyeyen (**Pw4**)'s evidence referred to the date he got in formation and that the victim was raped and not the date of rape.

I totally agree with both, the appellant's advocate, and respondent's state attorney that the best evidence in sexual offences is the victim's evidence. I also agree that the Court before lying on the evidence of victim to convict it must be satisfied that the victim is telling nothing but truth. The victim must be a reliable witness before the court can convict. To say the least, the evidence of the victim must be credible and reliable. The

trial court considered it and found it reliable. This being the first appellate court my task is to reconsider the evidence. It is on record that the appellant raped the victim on the 30.3. 2022 at 17:00 pm when she was grazing her goats in the bush. The victim and the appellant knew each other.

The victim narrated that the appellant probed her why she was grazing in the pori la mzungu. She apologized and the appellant ordered her to kneel, she obeyed. The appellant pushed her on the ground and put off his trousers and underpants inserted his manhood into the victim's vagina. She deposed that she had no underpants, thus after the appellant put off his clothes he simply lifted the victim's clothes and started having sexual intercourses. She deposed that, as quoted by the trial court, "alinitomba" (he carnally knew me).

She added that she bled. As she was going home after the incident she met people who were informed by her granddaughter. Maria Judisi (**Pw3**), was one of people who received information that the victim was raped and went to the scene of the crime. She narrated that she met the victim walking home with difficulties. The victim deposed that upon arriving home she applied petroleum jelly. The following day, she obtained a PF.3 from police and went to hospital. She did not state as to when she



went for medical examination. The doctor, Neemaeli (**Pw5**) deposed that he attended the victim on 1.4.2022 at 13.00 pm. Neemaeli (**Pw5**)'s physical examination and laboratory test revealed nothing. He added that result was negative due to passage of time.

On 31.3.2022 Titus Kiyeyen (**Pw4**), the village executive officer got information from hamlet chairperson that victim was raped and that the appellant was responsible. He promised to arrest him. On the same day at 22:00 pm he arrested the appellant and took him to Galapo police station.

The appellant's advocate submitted that there was contradiction between the evidence of Titus Kiyeyen (**Pw4**), on one hand side and the evidence of (Pw1), (Pw2) and (Pw3) on the other as to the date when the offence was committed. He submitted Titus Kiyeyen (**Pw4**)'s evidence was that the offence happened on 31.3.2022 and that the evidence of (Pw1), (Pw2) and (Pw3) was that the offence occurred on 30.3.2022. With due respect to the appellant's advocate, I am of the view that there is no contradiction between Titus Kiyeyen (**Pw4**)'s evidence and the evidence of the victim (**Pw1**), (Pw2) and Maria Judisi (**Pw3**). The appellant's advocate misapprehended the evidence. Titus Kiyeyen (**Pw4**)'s evidence was that on 31.3.2022 at 14.00 hours the hamlet

chairperson called him and informed him that the appellant raped the victim. He did not testify as to when the offence was committed but the date and time he received information of commission of the offence. The evidence of the victim (**Pw1**), (Pw2) and Maria Judisi (**Pw3**) referred to the date the offence was committed, which was on 30.3.2022 at 17.00 hours.

The appellant's advocate submitted further that there was contradictions between evidence of the victim (**Pw1**) and Neemaeli (**Pw5**). He submitted that the Neemaeli (**Pw5**)'s examination did not reveal that there was penetration or sperms while the victim (**Pw1**) deposed that she sustained bruises and bled and that the appellant ejaculated. There are no contradictions. The examination was not conducted on the day the offence was committed. The offence was committed on 30.3.2022 and Neemaeli (**Pw5**) examined the victim on 1.4.2022. Neemaeli (**Pw5**) deposed that the negative result may have been contributed for by passage of time.

I agree with Neemaeli (**Pw5**) that the examination revealed negative results due to passage of time. It was not expected to find evidence after three days. In addition, the victim deposed that after she was raped, she applied petroleum jelly to her private parts, thus, it was

likely for Doctor Neemaeli (**Pw5**) to find the evidence he was looking for. As submitted by the respondent's state attorney, there are no contradictions. I agree that where there are contradictions in any of the testimonies, it is the duty of the trial court to determine whether they are material going to the root of the case or just minor which may be disregarded. The Court of Appeal emphasized the position that minor contradictions must be disregarded in **Marando Slaa Hofu and 3 others v R.**, CAT Criminal Appeal No.246 of 2011 where it held-

*"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case."*

I strongly hold that the contradiction in the testimonies, if any, was minor and did not affect their evidence.

The appellant raised a defence of *alibi* during his defence. He deposed that on 31.3.2022 he was at home with a task of collecting water from Galapo using a power tiller and that he did not go home up to 2.4.2022. The appellant's witness Paulo (**Dw2**) deposed that he was at

Gallapo/ Gademara village with the appellant on 31.3.2022 who was the power tiller driver. Their power tiller got a breakdown they took it for repair on 1.3.2022 and came back on 2.3.2022. Whereas Elizabeth (**Dw3**) deposed that on 30. 3. 2022 she instructed the appellant to get water using a power tiller. She went on that the power tiller broke down so they went home on 1.4.2022.

The appellant's advocate complained that the trial court did not consider the defence. This being the first appellate court, among its duty is to re-evaluate the evidence on record. Thus, if the trial did not consider the appellant's alibi, I have to consider it.

The law regarding the defence of *alibi* is well settled. First, the law requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the hearing of the case. See section 194(4) of the CPA. If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the *alibi* at any time before the prosecution closes its case s. 194(5) of CPA. Should the accused person raise the defence of *alibi* much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (s.194 (6)).

I am alive of the position of law that when an accused person puts forward an *alibi* as an answer to the charge or information, he does not thereby assume a burden of proving the defence throughout on the prosecution. This position of the law was pronounced in the case of **Jumanne Juma Bosco & Mohammed Jumanne v.R**, Criminal Appeal No. 206/2012 CAT (Unreported) and **DPP v. Chibago Mazengo & Another**; Criminal Appeal No. 109 of 2019 (CAT Unreported). That notwithstanding, I examined the appellant's defence, and found that it is outright fabricated and worthless; **first**, he said he was not at the scene of the crime on 31.3.2022 while the offence is alleged to have been committed on 30.3.2022. Thus, on the 30.3.2022 may have been on the crime scene; **two**, there are noticeable contradictions in the defence evidence regarding the date the appellant was at Gallapo and the day he returned home.

Kiyeyen (**Pw4**)'s evidence was that he arrested the appellant on 31.3.2022 at 22:00 pm and the appellant deposed that he stayed at Gallapo from 31.3. 2022 until 2.4.2022 when he returned home. The appellant's evidence that he stayed at Gallapo until 2.4.2022 contradicted Elizabeth (**Dw3**)'s evidence who deposed that the appellant went home on the 1.4.2022.

It is settled that if the accused raises a defence of *alibi* belatedly it casts doubts on its authenticity. In addition to the fact that the appellant's defence of *alibi* is doubtful because it was raised belatedly, the appellant's defence of *alibi* is worthless and fabricated. It is a self-defeating defence as shown above, it referred to date different to the date the offence was committed. Thus, it did not cast doubt in the evidence prosecution's watertight evidence of recognition. I find the appellant's defence of *alibi* an afterthought. I accord it no weight.

Having in mind the victim's evidence, I am of the firm view that the victim was raped as narrated. Unlike in the case of **Hamis Halfan Dauda Vs. R.**, (supra) where the offence was committed at night and the victim did not mention the culprit name immediately to police, the victim in the current case, named the appellant immediately and the offence took place during the day light. She saw and recognized the appellant. The appellant and the victim knew each other before the date of commission of the offence. I did not see any reason to doubt the victim's evidence. The evidence of the victim was credible. It was proper for the trial court to convict the appellant after it found the victim's evidence credible. The Court of Appeal of Tanzania in the case of **Akwino Malata Vs. R., Criminal Appeal No, 438 OF 2019. (CAT-Unreported)**, had this to say regarding the evidence of the victim;

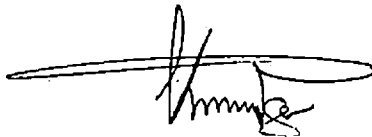
*"This is a principle of law to the effect that the evidence of sexual offence has to come from the victim **and if the court is satisfied that the victim is telling the truth it can convict without requiring any corroborative evidence.**" (emphasis added)*

I am alive of the observation in **Mohamed Said Rais v. R.**, Criminal Appeal No. 167/2020 observed, rape is an accusation which is easily made, hard to be proved and harder to be defended by the party accused, though never so innocent. In the circumstance of this case, I find that there was evidence against the appellant and there is no reason to discredit the victim. I find no merit in all four grounds of appeal. Consequently, I hold that the prosecution proved beyond reasonable doubt that the appellant raped the victim.

In the end, I find the appeal without merit, dismiss it and uphold the appellant's conviction and sentence of 30 years of imprisonment.

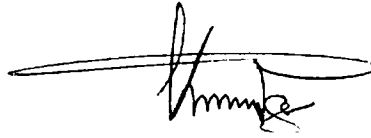
It is ordered accordingly.

**Dated at Babati**, this 22<sup>nd</sup> day of February, 2023.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', with a long horizontal stroke extending to the left.

**J. R. Kahyoza,  
JUDGE**

**Court:** Judgment delivered in the presence of the appellant and Mr. Godfrey Mlingi, the appellant's advocate one part and Ms. Blandina Msawa assisted by Peter Utafu State Attorneys for respondent, on the other. B/C Ms. Dora (RMA) present.

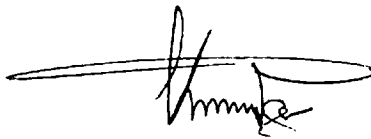


**J. R. Kahyoza,**

**JUDGE**

**22 /02/2023**

**Court:** Right to appeal explained to the appellant.



**J. R. Kahyoza,**

**JUDGE**

**22 /02/2023**