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

**(TABORA DISTRICT REGISTRY)**

**AT TABORA**

**DC CRIMINAL APPEAL NO. 79 OF 2021**

*(From the decision Nzega District Court, Criminal Case No. 259 of 2018)*

**MICHAEL S/O PETRO ..... APPELLANT**

**VERSUS**

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

# JUDGMENT

*Date of Last Order: 15/05/2023*
*Date of Judgment: 22/05/2023*

**KADILU, J.**

In the District Court of Nzega, the appellant was convicted of rape contrary to Sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R. E 2002]. It was alleged by the prosecution that on the unknown date in October, 2018 during night hours at Bukumba area within Nzega District in Tabora Region, the appellant had unlawful sexual intercourse with one Winfrida d/o Fredrick, a girl aged 14 years. When the charge was read over to the appellant, he pleaded not guilty. The prosecution paraded five (5) witnesses and tendered two (2) exhibits in an effort to prove that the appellant committed the alleged offence. On his part, the appellant testified himself and called one witness in his defence.

The prosecution contended that in the evening of 4/11.2018, the victim's father gave her Tshs. 10,000/= for her hair cut in the neighbouring saloon. She was directed to return the change. She stayed in the saloon for

a long time and went back home on about 21:00hrs. She told her mother that she was at the saloon where she was attended by one, Andrea Simon. When she was asked about change, she gave back the whole Tshs. 10,000/= with explanations that Andrea did not charge her any amount of money. The victim's mother looked for Andrea to inquire about what had happened that he attended the victim for free. Andrea denied to have attended the victim.

He explained to the victim's mother that it was the appellant who attended the victim. The matter was reported to the Village Executive Officer where after the interrogation with the appellant, he is said to have admitted that he was with the victim. The incident was thereafter reported to Ndala Police Station. On 17/11/2018, the victim was taken to the hospital whereby after the examination, it was found that there was easy penetration of the victim which is an indication that she had experience to do sexual intercourse. The accused was arrested on the same date of 17/11/2018 and was charged with the offence of rape.

At the conclusion of the trial before the District Court of Nzega, the appellant was convicted as charged and sentenced to serve thirty (30) years imprisonment. Aggrieved with both the conviction and sentence, he preferred the present appeal based on eight (8) grounds as follows:

i. *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*
ii. *That, PW3 who was the victim of the crime did not name the appellant at the earliest possible time.*

*iii. That, PW3 being a child of tender age did not make prior promise of telling the truth to the court and not to tell lies as required by the law.*

*iv. That, the prosecution failed to summon the VEO and one Andrea Simon who attended the victim in the barber shop, being material witnesses in the circumstances of this case.*

*v. That, the trial court erred when it simply ignored the credible and concise evidence of the appellant in his defence.*

*vi. That, there was evidence from PW4 that the victim played habitual sexual intercourse and that the victim did not mention the appellant as her only sexual partner.*

*vii. That, there was an unexplained delay in reporting the matter to the police.*

*viii. That, the PF3 was not read out loudly in court in order to reveal its contents to the appellant.*

When the appeal was called for hearing, the appellant appeared in person, unrepresented. He restated his grounds of appeal and prayed the court to allow the appeal, quash the conviction, set aside the sentence and order his release from prison. The respondent was represented by Mr. Steven Mnzava, learned State Attorney. The appellant being a lay person, he restated his grounds of appeal and maintained that he did not commit the charged offence rather, Andrea Simon who was mentioned by the victim. Throughout the hearing of the appeal, the appellant was wondering why the said Andrea is still at large despite being mentioned as the perpetrator in this case.

Mr. Steven started to argue the 2nd ground of appeal in which the appellant contended that the victim of the crime did not name him at the earliest possible time. The learned State Attorney submitted that the victim

of the crime (PW3) named the appellant to her mother on the same day of the incident and that is why the appellant was arrested in connection with the offence. On the 3rd ground of appeal in which the appellant claims that PW3 being a child of tender age did not make prior promise of telling the truth to the court and not to tell lies as required by the law, Mr. Steven argued that at page 11 of the trial court's proceedings, PW3 promised the court to tell the truth before she started to testify.

Mr. Steven prayed this ground of appeal to be dismissed as it is baseless. On the 4th ground of appeal, the learned State Attorney told the court that the best evidence in rape cases is that of the victim herself. He thus, submitted that it was the appellant who raped PW3 and he did it three times before he was caught in the last incident.

Regarding the appellant's 5th complaint that his credible and concise evidence was ignored by the court, Mr. Steven stated that on page 3 of the judgment, the trial court showed how it considered evidence of the appellant, but found evidence of the prosecution side more credible and watertight. On the 6th ground of appeal, Mr. Steven argued that it no defence on part of the appellant that the victim (PW3) played habitual sexual intercourse since it was the appellant who made her experienced in sexual intercourse. It was the testimony of PW3 that she had sexual intercourse with the appellant three times before the complained incident.

The appellant's other complaint is that there was unexplained delay in reporting the incident to the police since the report was made in the 10th day after the date of the alleged rape. The learned State Attorney argued that the appellant failed to cross examine PW1 on this point so, by implication he admitted the truth in that witness's evidence. He referred to the case of ***Nyangwile Mwaikwaja v R.***, Criminal Appeal No. 455 of 2017. On the last ground of appeal, the learned State Attorney conceded that it is true the trial court's record is silent as to whether or not the PF3 was read out in court after it was admitted. As such, he implored the court to expunge it. He stated however, that the remaining evidence was sufficient to justify conviction of the appellant. Mr. Steven prayed for the court to dismiss the appeal for lack of merit.

The point for determination before me is whether the appeal is meritorious or not. In resolving this question, I will not discuss the 1st and 8th grounds of appeal as I consider the 1st ground to be the conclusion of the appeal itself. On the other hand, the parties are in agreement with regard to the 8th ground of appeal. The prosecution conceded that the PF3 was not read out aloud after it was admitted. This was a clear contravention of the law as was held in the cases of ***Huang Qin & Another v R.,*** Criminal Appeal No. 173 of 2018, ***Robinson Mwanjisi & 3 Others v. R.,*** [2003] TLR 218 and ***Anania Clavery Beteia v R.,*** Criminal Application No. 46 0f 2020, the Court of Appeal of Tanzania at Dar es Salaam, to mention a few.

Concerning the 3rd ground of appeal, I will let the proceedings of the trial court to speak. On page 11 of the proceedings before PW3 (the victim) testified, the court addressed her as follows:

*Court: Do you know the meaning of oath?*
*PW3: I know the meaning of oath. It is to speak the truth.*
*Court: What happens if we speak lies?*
*PW3: God wants us to speak the truth.*
*Court: The witness knows the duty to speak the truth and the meaning of oath.*

Then, PW3 was sworn and testified. Section 127 (2) of the Evidence Act is very clear about evidence of a child of tender age like PW3. It provides:

*1. N/A*
*2. A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.*

Based on the excerpt above, PW3's evidence was properly received by the court so, I find this ground of appeal devoid of merit.

The appellant raised a complaint in his second ground of appeal that PW3 who was the victim of the crime did not name him at the earliest possible time. From page 7 to 8 of the trial court's proceedings, PW1 who is the mother of the victim testified that her daughter told her that she was attended by Andrea in the saloon, but after being insisted, the girl mentioned Michael (the appellant). That was also the testimony of PW2, father of the victim of the crime. In the case of ***Marwa Wangiti Mwita & Another v.***

***R.***, [2002] TLR 39, it was held that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability.

In the same way, delay or complete failure to do so should put a prudent court to enquiry. In the present case, the victim of rape did not only mention the accused at the later stage but also, she was inconsistent in mentioning a person with whom she had sexual intercourse. The Court of Appeal stated in ***Jaribu Abdallah v. R.***, [2003] TLR 271 that, in matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is reassuring though not a decisive factor.

A credible witness would be expected to name a suspect at the earliest possible opportunity. To the contrary the victim in this case managed to walk away painlessly and properly back home without letting anyone know of her ordeal until her parents questioned her seriously. The act of being raped is unacceptable, shameful, painful and unforgettable yet as tender as the victim was, she remained peacefully silent without telling anyone. It is thus unconceivable for the victim to have hidden the truth for such an unexplainable delay. I find this ground of appeal meritorious and I allow it.

In the seventh ground of appeal, the appellant alleges that there was an unexplained delay in reporting the matter to the police. As depicted in

the proceedings, the offence was committed on 4/11/2018, but it was reported to the police on 17/11/2018 whereby the appellant was arrested and the victim was taken to the hospital. There is no dispute that there was delay in reporting the offence to the police and there was no clarification from any of the prosecution witnesses as to why there was such a delay. I think in rape cases, thirteen (13) days is a very long time to remain without arresting and charging the appellant. Such a delay is a serious and fatal omission on the part of the prosecution, weakening the credence of their case. For that reason, this ground of appeal is found to have merit.

It is also the appellant's complaint that the prosecution failed to summon the VEO and Andrea Simon who was firstly named by the PW3 as the offender. I should state here that, in terms of Section 143 of the Evidence Act, [Cap. 6 R.E. 2019], evidence is usually weighed, not counted. The prosecution was not bound to call any particular number of witnesses for it to prove its case. Since it is a duty of the parties to prosecute their case, the appellant was free to call any witness who he considered material in his defence.

To the contrary, the appellant has not shown that he prayed to call the VEO and Andrea as defence witnesses, but the court denied the prayer. When the appellant was called to defend his case, he told the court that he had three witnesses namely, Mathias Kasale, Kaseka Katalamila and Joseph Makono. He did not mention the VEO or Andrea as among his witnesses. In the circumstances, he cannot raise this point at an appellate stage as this

would amount to the abuse of court process. This ground of appeal is thus baseless hence, it is dismissed accordingly.

The appellant further raised his concern in the 5th ground of appeal that, the trial court erred when it simply ignored his credible and concise evidence. Perusal of records reveals that indeed, the appellant's testimony is reflected in the proceedings, but not much can be deduced from the trial court's judgment. In ***Hussein Idd & Another v R.,*** (1986) TLR 166, the trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence. The Court of Appeal found it as a serious misdirection since it deprived the accused of having his defence properly considered. It stated:

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

The same position was stated in the case of ***Kaimu Said v R.,*** Criminal Appeal No. 391 of 2019 (CAT). The appellant herein informed the court in his defence that he returned the Tshs. to PW3 because he failed to get change since most of the shops were already closed. He stated further that at the police station, PW3 was asked by her mother three times if she had sexual intercourse with the appellant but she denied. Then her parents took PW3 outside and when she came back, she said she was raped by the

appellant. In the circumstances, it is my finding that this ground of appeal is meritorious as well and I allow it.

In the 6th ground, the appellant contended that, there was evidence from PW4 that the victim played habitual sexual intercourse and that the victim did not mention the appellant as her only sexual partner. On this point I hasten to agree with the learned State Attorney that it cannot be a defence on part of the appellant that he was not mentioned as the only sexual partner of the girl victim. I wish to remark here that, it is absurd that the appellant is blaming the law and the trial Magistrate for protecting a fourteen years old child. The finding that the victim was experienced in sexual activity is difficult to be dissociated with the appellant as PW3 was not seriously contradicted on her assertion that she had sexual intercourse with the appellant previously. Therefore, it can in no way be a ground of appeal to the appellant, I thus dismiss it.

Coming to the question whether or not the case against the appellant was proved beyond reasonable doubt, it is the finding of the court that the prosecution had managed to prove that the girl was raped, but still it was its burden to prove cogently that it was the appellant who raped the girl. *See* the case of ***Maliki George Ngendakumana v R.***, Criminal Appeal No. 353 of 2014, Court of Appeal of Tanzania at Bukoba, in which it was held that the prosecution's duty to prove the offence is two folds, first to prove that the offence was committed, and second to prove that it was the accused who committed that offence.

The law is settled that, conviction in sexual offences can be grounded on the uncorroborated evidence of the victim if the court is satisfied that the victim speaks the truth. PW3 in this case was a girl of tender age. Throughout her testimony as can be deduced from the proceedings, she was contradictory and very inconsistent in her evidence. On page 7 of the proceedings, PW1 who is the mother of PW3 testified that PW3 said she was attended by Andrea at the saloon, but in the subsequent page, she said she was attended by Michael (the appellant). Again, PW3 told her father in the next day that it was Andrea who attended her at the saloon.

On page 9 of the proceedings, it is shown that PW said she had sexual intercourse with the appellant once, but on page 11 she stated that she had sexual intercourse with the appellant three times. Notwithstanding, the trial Magistrate was convinced that, PW3 was telling the truth. It was held in the case of ***Mohamed Said v. R.***, Criminal Appeal No. 145 of 2017, that:

> *"It was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness."*

As I have shown, the testimony of PW3, the victim in this case was surrounded by contradictions which makes it unreliable. Coupled with other weaknesses in the prosecution evidence as I have endeavoured to illustrate, I hold that the case against the appellant was not proved beyond reasonable doubt. I allow the appeal, quash the conviction and set aside the sentence

against the appellant. I order his immediate release from prison unless held for some other lawful cause.

**Order accordingly.**

**KADILU, M.J.,**
**JUDGE**
**22/05/2023**

Judgement delivered in Chamber on the 22nd Day of May, 2023 in the absence of the appellant and in the presence of Ms. Joyce Nkwabi, State Attorney, for the Respondent.


**KADILU, M. J.**
**JUDGE**
**22/05/2023.**