IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 36 OF 2023

(Originating from the judgment of Criminal Case No. 169 of 2022 of the District Court of Babati at Babati)

SAMWEL SYLIVESTER..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

17th & 28th July, 2023

Kahyoza, J.:

The trial court convicted **Samwel Sylivester** (the appellant) with the offence of rape and imposed a custodial sentence of 30 years. Before the conviction, the prosecution alleged that the appellant had had sexual intercourse with a girl, who was aged 11 years old. The appellant denied the charge. After a full trial, the trial court found the appellant guilty and convicted him.

Aggrieved by both conviction and sentence, **Samwel Sylivester** appealed raising three grounds of appeal. The appellant's grounds of appeal raised three issues as follows-

1) Did the prosecution prove the appellant's guilty beyond reasonable doubt?
2) Did the trial court properly evaluate the evidence?

3) Did the trial court transgress the law?

At the hearing of the appeal, Mr. Mniko learned advocate appeared for the appellant and Mr. Kapera learned state attorney appeared for the respondent. I will refer to the parties' oral submissions while replying to the issues raised.

Did the prosecution prove the appellant's guilty beyond reasonable doubt?

The appellant raised general and specific grounds of appeal. The general ground of appeal is that the prosecution failed to prove the appellant's guilty beyond reasonable doubt. The Court of Appeal discourages a practice of raising general ground of appeal and specific ones. It stated that where the appellant raises the general ground of appeal together with specific it is proper for the appellate court to consider the general ground of appeal only to determine the appeal. The Court of Appeal took that position in **Rutoyo Richard vs Republic** (Criminal Appeal No. 114 of 2017) [2020] TZCA 298 (16 June 2020), 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 position in **Rutoyo Richard vs R.** (supra), I will consider only the general ground of appeal whether the prosecution proved that the appellant's guilty of the offence of rape beyond reasonable doubt. The appellant was convicted with the offence of rape of a girl under 18 years. That is why I am destined to consider whether there is sufficient evidence to prove the offence of rape. In doing so, I will consider the argument raised by appellant's advocate to establish the contestation that the prosecution did not prove the appellant's guilty beyond reasonable doubt.

The appellant was charged with offence of rape contrary to section 130 (1)(2)(e) of the Penal Code, [Cap. 16 R.E.2002, (2022)] (the Penal Code), commonly referred to as statutory rape. When the accused is charged with statutory rape, the prosecution is not required to prove that the accused had carnal knowledge of **the victim without consent**. In statutory rape consent is immaterial but the victim's age is paramount. Thus, in the present case the prosecution had a duty prove that the victim was below 18 years old and that the appellant had carnal knowledge with her. Thus, the prosecution was bound to prove that the victim's age, prove

penetration, however slight, and prove that it was the appellant who penetrated the victim.

A brief background of this matter is that, while the victim was grazing goats and sheep in bush away from their village, a person, she identified as the appellant, told her that he was there to look for their lost goat. She let him go around to search for the lost goat. At the time he finished searching, he was very close to her. He suddenly waylaid her, threw her down, lay her on back and raped her. The victim tried to shout for help in vain as the attacker blocked her mouth. The rapist finished and before leaving, threatened to stab her with a spear, if divulged the incident. She went home and kept the mum.

On second day in the evening, her mother found out that she was not herself and walked abnormally. She inquired what had happened, the victim told her mother that she was suffering from headache. The victim's mother gave her panadol pills to take and went ahead and examined her. She found that the some she had been carnally known. She notified the victim's grandmother who interrogated the victim. The victim told her grandmother that she was carnally known by Juru's son. As night had set in, they waited until the third day. On the third day, they reported to the village leaders who caused the appellant's arrest. Pw4 arrested the

appellant. The victim was taken to hospital, examined by Pw5. Pw5 prepared PF.3 and tendered it as exhibit P.1.

The appellant, who enjoyed the services of Mr. Paschal, learned advocate defended himself on oath denying to commit the offence and to be near the crime scene. He raised the defence of alibi.

The trial court believed the prosecution's story and convicted the appellant and sentenced him to a thirty years' custodial sentence. The appellant lodged the current appeal.

The task of this court is to find out if the prosecution proved the appellant guilty beyond reasonable doubt. The appellant's advocate raised several if issues to establish that the prosecution did not discharge their duty.

Was there penetration?

The appellant's advocate submitted that there is reasonable doubt if the victim was raped. She refused to narrate to her mother what had happened to her. When her mother asked, what was wrong she replied that she was suffering from headache. The victim testified that she was 10 years old while Pw4, the doctor deposed that he examined a girl who was 11 years old, hence the doctor was referring a person different from the victim. A person cannot have distinct ages at the same time. The doctor's report had no bearing to the case at hand. It did not show if there

was penetration. There were no bruises. The doctor indicated that there was blood clots and that hymen had raptured. The appellant's advocate submitted that blood clots may have been caused by something else including, menstruation period. The doctor did not state what was the cause of blood. He argued that it was not enough for Pw4, the doctor to state that the victim was raped.

The state attorney who appeared for the respondent, Republic opposed the appeal and submitted that the prosecution proved penetration. He argued that the difference as to the age stated by the victim and the doctor was a minor contradiction which did not go to the root of the matter. All in all, both witnesses stated the age which fall under the same age category according to law. The prosecution proved penetration by the doctor's evidence who deposed that the victim had no hymen, hence she was raped. He added that the doctor stated in his evidence that, the victim was raped.

In his rejoinder, the appellant's advocate argued that the doctor's testimony that there was penetration contradicted his report in the PF.3 which did not indicate that there was penetration. He added that the fact that the victim had no hymen, it may have been a result of some adolescence activities.

Having gone through the parties' argument, it is settled principal that, one of the elements required to establish the offence of rape is penetration, the prosecution must proof that the male organ penetrated victim's organ, however, slight. Prove of slight penetration is sufficient to constitute sexual intercourse, the ingredient necessary to prove the offence, as it was held in the case of Hassan **Bakari @ Mamajicho v R.**, Criminal Appeal No. 103 of 2012 (unreported). The victim deposed that she was raped, she narrated how the man threw her down, laid her on her back, put heavy stones to her hands, put off his trousers and pants up his kneels and pushed his male organ to her female organ. She felt pain. She cried for help and her assailant blocked her month. The trial court believed the victim's evidence as credible. I find no indication to hold otherwise. The victim was credible.

It is settled that the victim's evidence must not be taken as biblical truth, it ought to be analyzed and considered if it is credible. It is settled that in sexual offence cases, the best evidence is **that of the victim who is found to be truthful by the courts**. See **Selemani Makumba v. R.,** [2006] TLR 379 and **Vincent Ingi v. Republic**, Criminal Appeal No. 527 of 2015 (unreported).

In addition to the victim's evidence, the doctor, Chizua Tabu Mbigini (**Pw3**) deposed that he examined the victim found blood on her

underwear and with no hymen. He also deposed that there was fresh blood in victim's vagina and clotted blood outside. The girl was in severe pains, thus, Chizua Tabu Mbigini (**Pw3**) concluded that there was penetration. When the appellant's advocate cross-examined him, he responded that, there was blood in and outside the pelvic region. The doctor examined the victim on 1.11.2022 and gave evidence on 6.12.2022. The incident was still fresh to the doctor's mind. He (she) gave true account of events from his (her) fresh memory.

It is my considered view that, the prosecution established that the victim was penetrated by the evidence of the victim and the doctor. I do not find merit in the complaint that blood found to the victim's private parts may have been caused by any cause other than rape. The victim explained that it was man's organ which penetrated her vagina and the doctor corroborated her evidence.

There is also the evidence of the victim's mother, (Pw2) that she noted the victim walking abnormally. She inquired from her what was the problem. The victim told her that she was suffering from headache. She gave her painkiller pills. She was not satisfied. She examined her and found that the victim was penetrated. The victim's mother was not a specialist nonetheless, given her experience as any woman, she could differentiate bleeding due menstruation period from bleeding caused by

rapture of hymen. The evidence of the victim's mother corroborated the evidence of victim and of the doctor that the victim was raped.

The appellant's advocate complained that the difference in age of the victim as accounted by the victim and doctor implied that the doctor referred to person different from the victim of his case. It is true that the victim deposed that she was eleven (11) years old and the doctor deposed that he examined a girl who was ten years old. I wish to state at the outset that I am less moved by the argument that difference in the age meant that person the doctor examined was different from the victim. I say so, firstly, the doctor was not called to prove the victim's age. Secondly, the doctor did not depose that the victim told her that she was ten years old. The doctor deposed that *"I did attend one girl who had ten years."* The doctor may have estimated the victim's age. Thirdly, the difference in age between the two witness was one year. It is very minor. It may be a result of arithmetic. All in all, as submitted by the respondent the contradiction was minor did not go the root of the matter. The vital issues were; **one**, whether the victim was a child of tender age; and **two**, whether a man carnally knew her. Lastly, a difference of one year would not imply that the victim of this case was a person different from the victim referred to by the doctor, Chizua Tabu Mbigini (**Pw3**).

In the end, I find that, the prosecution proved beyond reasonable doubts that the victim was penetrated or that a man carnally knew her. Thus, one of the ingredients of rape was proved.

Was the appellant properly identified?

The appellant's advocate deposed there was no evidence to connect the appellant with the offence. The victim mentioned a person who carnally knew her as Juru's son (*mtoto wa kwa Juru*). She did not mention his name. He added that the prosecution did not tender evidence to show how many children did Juru had. The prosecution did not tender evidence to prove that the appellant was Juru's son. He argued that the person before the court may have been a different from the one who committed the offence. It was critical for the prosecution to bring the evidence to prove that the appellant was Juru's son and that he was the only son, since the appellant denied to commit the offence and raised the defence of *alibi*. To make the identification or recognition evidence weak, the victim did not name the appellant at the earliest opportunity when she met her parents. To support his contention, he cited the case of **Marwa Wangiti Mwita and Another vs Republic** [2002] TLR,39, where the Court of appeal held that-

> *"The ability to name the suspect at the earliest opportunity is an important assurance of his liability."*

He concluded that the trial court was required to consider the victim's failure to name the suspect to her parents until the third day as fact raising reasonable doubt to her identification or recognition evidence.

The respondent's state attorney replied that the prosecution evidence explained why the victim delayed to name the suspect. The victim deposed at page 5 of the typed proceedings that the appellant threatened to stab her if she divulged what happened to anyone. He added that given the victim's age and the threats she received from the appellant, the victim refrained from reporting the incident to her parents.

He submitted that, the victim mentioned that it was Juru's son who raped her. The victim lived in the same village with the appellant, hence, she knew him before the incident. He added that the victim identified the appellant as after the report was made to the village leaders, Hamisi Hussein (**Pw4**) was directed to arrest the appellant.

I wish to state that the prosecution's evidence considered as whole, one would found that the appellant was properly identified. I will commence with the evidence of Hamisi Hussein (**Pw4**), the arresting office. He deposed that on 1.11.2022, the village chairman called and directed him to arrest a suspect for committing the offence of rape. He went to the office and found two women. One of the women accompanied him to Mansaa area to arrest the suspect. On reaching Mansaa area, they

met two people one on a cart driven by bulls and another one walking. A woman who accompanied Hamisi Hussein (**Pw4**), identified a suspect to Hamisi Hussein (**Pw4**), as the person who was on a cart. Hamisi Hussein (**Pw4**) arrested that person, who happened to be the appellant.

In addition, it is on record that, after Hamisi Hussein (**Pw4**) arrested the appellant, he took him to the village office where they found the victim. The victim identified the appellant as the person who raped her. Hamisi Hussein (**Pw4**) deposed that-

> *"At the office we [found] the victim another people. The victim told our chairman that this is the one who raped her. (she points out accused). We were directed to take him to police station at Mwada, then to Magugu."*

Much as the victim did not mention, the appellant's name, she gave enough description that led to the appellant's identification by the arresting officer and his team. I considered the victim's evidence, which was that it was Juru's son who raped her. She did not mention his name to her parents but while giving evidence she deposed that she met Samwel Sylivester in the bush. She was not cross-examined as to how and when she came to know the appellant's name. Failure to cross-examine on an important evidence means acceptance. The defence accepted the victim's evidence that she knew the appellant as Samwel Sylivester. That apart, the victim testified during cross-examination that,

she knew the appellant right from the time he was schooling at Ngolei primary school.

The victim's mother (**Pw2**) testified that during interrogation, the victim told them that it was Samweli Silvester and that she identified him on 1.11.2022. The evidence shows that the victim did not mention the appellant's name at first to her parents. It was after interrogation, when she disclosed the appellant's name. Like, the respondent's state attorney, I see nothing wrong with the victim to hesitate to name the suspect given her age and threats she had received from the culprit.

Lastly, the appellant's advocate complained that the victim's failure to name the suspect at the earliest opportunity weakened her credibility that she identified her assailant. I concur with him. It is settled that t*he ability to name the suspect at the earliest opportunity is an important assurance of his liability.* That is a general rule, the Court of Appeal explained an exception to that general rule in relation to sexual offences. It stated in **Selemani Hassani vs Republic** (Criminal Appeal No. 203 of 2021) [2022] TZCA 127 (22 March 2022) that delay in reporting an incident of rape due to death threats and shame does not affect the credibility of the complainant nor undermine her charge of rape. It stated-

> *"We think that while it can apply fairly unrestrictedly in respect of, say, cases involving property offences, it will not apply with*

equal force in cases concerning sexual offences where immaturity of the victim, death threats or shame associated with such offences may dissuade the victim from reporting the matter with promptitude. In this regard, we wish to quote, with approval, the observation by the Supreme Court of the Philippines in the People of the ***Philippines v. S PO I Arnulfo A. Aure and S PO I Marlon H. Ferol, G.R.*** *No. 180451, October 17, 2008: "Delay in reporting an incident of rape due to death threats and shame does not affect the credibility of the complainant nor undermine her charge of rape. The silence of a rape victim or her failure to disclose her misfortune to the authorities without toss of material time does not prove that her charge is baseless and fabricated. It is a fact that the victim would rather privately bear the ignominy and pain of such an experience than reveal her shame to the world or risk the rapist's making good on his threat to hurt or kill her."*

In the circumstance of this case, I find the victim's delay did not affect her credibility. She delayed trying avoid the stigma and due to threats. The victim is credible. I am of the decided view that the appellant was properly identified.

Was the victim's credibility weakened by her delay to report?

I wish to re-state my position that delay in reporting an incident of rape due to death threats and shame does not affect the credibility of the complainant nor undermine her charge of rape. I have discussed this

position as an exception to the general rule pronounced in the famous case of **Marwa Wangiti Mwita and Another vs Republic** [2002] TLR. 39, where the Court of appeal held that the ability to name the suspect at the earliest opportunity is an important assurance of his liability. The victim's delay due to threats from the appellant to stab her did not make her incredible witness.

Were the prosecution proceedings vitiated by non-compliance with section 231(1) and 210(3) of the CPA?

The appellant complained that the trial court failed to comply with the law. To support the appeal, the appellant's advocate submitted that trial court violated Section 231(1) of the CPA as it did not address the appellant that he had the right to defend himself on oath or without and the right to call witness. He concluded that section 231(1) of the CPA was mandatory and that non-compliance with the section vitiated the proceedings. To support his contention, the appellant's advocate cited the case of **Maneno Mussa vs Rupublic**, (Criminal Appeal No. 543 of 2016) [2018] TZCA 242 (19 April 2018) where the Court of Appeal held that failure to comply with section 231(1) of the CPA was fatal omission.

The respondent's state attorney submitted that section 231(1) of the CPA was complied with and the trial magistrate indicated that he did comply with the section. He added that the case cited is distinguishable

as in that case the magistrate did not indicate that he did comply with the law.

Are the proceedings vitiated by nonconformity with section 231(1) of the CPA?

Indisputably, section 231(1) of the **CPA** is mandatory provision. The omission to comply with it is fatal. This is the position held by the Court of Appeal in **Maneno Mussa vs Rupublic,** (supra) where it sated that-

> *"Indeed, as submitted by the learned State Attorney, the trial court's failure to comply with the provisions of S. 231(1) of the CPA is a fatal omission. In the case of **Richard Malima & 4 Others v. The Republic,** Criminal Appeal No. 183 of 2010 (unreported), the Court emphasized the duty bestowed on trial magistrates of strictly complying with the provisions of 5.231(1) of the CPA, particularly where an accused person is not represented by a counsel. It cited the case of **Juma Limbu @ Tembo v. The Republic,** Criminal Appeal No. 120 of 2005 (unreported) in which the Court stated as follows:*
>
> > *"...to avoid miscarriage of Justice in conducting trials/ it is important for the trial court to be diligent and to ensure without fail that an accused person is made aware of all his rights at every stage of the proceedings..."*

As submitted by the state attorney, the present case is different from **Maneno Mussa vs Rupublic,** (supra). In the latter, the trial

magistrate did not comply with section 231(1) of the CPA while in the instant case, the trial magistrate indicated that he complied with the section. In addition, the answer given the appellant's advocate is another evidence that the trial magistrate complied with the law. The record shows that after the trial magistrate complied with section 231(1) of the CPA, the appellant's advocate submitted that they were read to give the defence on oath and that they will call three witnesses. The answers given by the appellant's advocate implies that he was replying to the trial magistrate's address as per section 231(1) of the CPA. For clarity's sake, I produce what the advocate stated-

> *"**Mr. Peter Paskal**: Your honour [,] we are ready for defence on oath. We will have three witness. We pray for defence hearing date."*

The Court of Appeal held that, in compliance with section 231(1) of the CPA, a trial magistrate must state categorically what rights he has informed an accused. However, if the trial magistrate omits to record what he informed the accused person but the answer given by the accused person suggests that he was addressed in terms of that section 231(1) of the CPA, the omission is not fatal. I wish to cite the case of **Abdallah Kondo vs Republic** (Criminal Appeal No. 322 of 2015) [2016] TZCA 836 (28 September 2016) that to comply with section 231 of the **CPA**, a trial

court must **to record what it informs the accused and his answer to it.** It held-

> *"Given the above legal position, it is our view that strict compliance with the above provision of the law requires the trial magistrate to record what the accused is informed and his answer to it. The record should show this or something similar in substance with this.*
>
> *"**Court**: Accused is informed of his right to enter defence on oath, affirmation or not and if he has witnesses to call in defence.*
>
> ***Accused response**: ... '[record what the accused says)."*

The Court of Appeal was of the position that if the trial court indicates that section 231(1) of the CPA was complied with, there is no injustice caused to the accused person. It declined to take its position in **Maneno Mussa vs Rupublic,** (supra).

It is obvious that the trial court did not comply with the directive of the Court of Appeal in **Abdallah Kondo vs Republic** (supra). However, given the appellant's advocate's response quoted above, I am of the considered view that the trial court did comply with the requirements of section 231(1) of the **CPA**. That notwithstanding, I find that the trial court's failure to record what it informed the appellant in terms of section 231(1) of the **CPA**, did not occasion miscarriage of justice. The court properly addressed the appellant regarding his rights under section 231(1)

of the **CPA**. I would add that in cases where the appellant is represented by an advocate who knows an accused person's rights under section 231(1) of the CPA, the omission to expound the accused person's rights under section 231(1) of the CPA is not fatal.

Are the proceedings vitiated by violation of section 210(3) of the CPA?

The above done, now I will consider whether the trial court violated the provisions of section 210(3) of the **CPA**. The appellant complained that the trial court transgressed the law including section 210(3) of the **CPA.** In support of the ground of complaint, appellant's advocate submitted that, section 210(3) of the **CPA** bestows a duty to a trial magistrate to inform a witness after his testimony, that, he has a right have the evidence read to him and act according to the witness's answer. The trial magistrate did not record the question(s) put to the witnesses and their replies for that reason he did not comply with the law, the appellant's advocate submitted. He cited the case of **Issa Saidi Sady v. R.**, Criminal Appeal No. 70/2021.

The state attorney replied that the trial magistrate complied with the section 210(3) of the **CPA.** He argued that the proceedings indicated that the magistrate after recording the testimony of the witness that section 210(3) of the **CPA** complied with.

In his rejoinder, the appellant's advocate submitted that to indicate that section 210(3) of the **CPA** complied with was not a proof of compliance. He invited the Court's attention **Issa Saidi Sady v. R.**, (supra).

I wish to state that nonconformity with section 210(3) of the CPA vitiates the proceedings. However, the present case the trial magistrate complied with section 210(3) of the **CPA.** The trial magistrate indicated categorically that he complied with section 210(3) of the **CPA.** I was not moved by the appellant's advocate that the trial court's indication that he complied with section 210(3) of the **CPA** was not a proof of compliance.

It is trite law that the court record accurately represents what happened. It should not be lightly impeached or parties be allowed to lightly impeach the court record. The Court of Appeal in number of cases held that court record is sacrosanct including **Iddy Salum @ Fredy v. Republic**, Criminal Appeal 192 of 2018 (unreported) and **Halfani Sudi v. Abieza Chichil** [1998] TLR 527, a few to mention. In the latter as cited by the respondent's state Attorney held that-

> *"(i) A court record is a serious document; it should not be lightly impeached;*
> *(ii) There is always a presumption that a court record accurately represents what happened."*

The appellant's advocate may be permitted to impeach the court record if, and only if he has evidence to that effect or else if we assured the court record to be easily impeached the result will be cause anarchy. This is not to say the court record cannot be tendered with but a person alleging breach must adduce evidence. The appellant's advocate has not adduced any. I, therefore, find the allegation that despite the trial court indicating that section 210(3) was complied with, the magistrate did not comply with the section baseless. I dismiss it.

Was the victim's age proved to below 18 years?

There is no complaint as to the victim's age. Since, the appellant complained that the prosecution did not prove the case beyond reasonable doubt, it is vital to look at the victim's age as it is one of the elements of rape under consideration. The victim deposed that she was ten years old and a STD V pupil. The victim's mother testified that the victim was eleven years and she gave birth of the victim on 6.6.2011. I find it proved by that evidence that the victim was below 18 years old.

It is settled that age of the victim of rape may be proved by evidence of the victim, relative, parent, medical practitioner or where available by production of a birth certificate. The Court of Appeal observed in **Issaya**

Renatus v. R., Criminal Appeal No. 542/2015 (CAT) published https://tanzlii.org/tz/judgment/court-appeal tanzania/2016/218, that

> *We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate.*

It is established by the Court of Appeal stated in **Issaya Renatus v. R.,** (supra) that there may be cases, where the court may infer the existence of any fact including the age of a victim on the authority of section 122 of TEA which goes thus:-

> *"The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

The fact the victim was a STD V pupil even if, there was no evidence it could be inferred that the victim's age was below 18 years old when the offence was committed.

Basing on the victim's evidence, whom, I have found to be credible, it is my considered view that the prosecution proved the appellant's guilty beyond reasonable doubt. I have pointed out in sexual offences the

evidence of the victim is key in proving the offence of rape. I find that the appellant raped the victim, for the reason he was properly convicted and sentenced.

In the end, I dismiss the appeal in its entirety and uphold the appellant's conviction and sentence.

It is ordered accordingly.

Dated at **Babati** this 28th day of July, 2023.

J. R. Kahyoza
JUDGE

Court: Judgment delivered in the presence of the appellant and Mr. Kapera, State Attorney for the respondent. B/C Fatina Haymale (RMA) present.

Right of appeal explained by lodging a notice within 30 days explained.

J. R. Kahyoza
JUDGE
28.7.2022