IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 62 of 2022

(C/F Criminal Case No. 249 of 2021in the District Court of Rombo at Rombo)

ALOYCE MRONDA ASSENGA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

Date of Last Order: 11.09.2023
Date of Judgment: 16.10.2023

MONGELLA, J.

The appellant herein was arraigned at the District Court of Rombo at Rombo on two counts being: one, rape contrary to s**ection 130 (1) (2) (e)** and **131 (1) of the Penal Code** Cap 16 R.E. 2019 and; two, impregnating a school girl contrary to **section 60 A (3) of the Education Act** Cap 353 as amended by Act No. 4 of 2016. The particulars of the offence were that, on 13.08.2020 at Mengwe Chini Village in Rombo District and Kilimanjaro Region, the appellant had carnal knowledge of the victim (name intentionally withheld) a girl aged 17 years and form three student at Ngareni Secondary School and impregnated her.

To prove the case; the prosecution paraded 6 witnesses. PW1, the victim; PW2, Esta Dagaro Sanga, a teacher at Ngareni Secondary School; PW3, Zabdiel Kawiche, a Doctor at Huruma Hospital; PW4, WP 3175 D/SGT Selestina; PW5, G 3229 D/CPL Abtwalib and; PW6, Ally Omary Kanenda.

Brief facts of the prosecution's case are as follows: that due to her parent's separation the victim, a 17-year-old and student at Ngareni secondary school faced difficulties in her life. At first, she resided at her teacher's home from standard four to form three. The said teacher however wanted to rape her causing her to run away. She then sought shelter at her fellow student's house. The said student lived with her mother. The next morning her fellow student's mother told her not to go back there anymore until she went there with her mother so that they agree on her stay at their place. Then her own mother went to fetch her and started living with her. However, things never went smoothly and her mother started to mistreat her by beating her and quarrelling with her neighbours, something that hinders from studying smoothly.

She then moved to live with her aunty, DW2. Her aunty is the appellant's daughter in law, married to his son. While she lived with DW2, the appellant lived in his shop at the same place. On the fateful day, that is, on 13.08.2020 around 05:00hrs, the victim went to the shop intending to purchase an exercise book. The appellant told her to get inside so she can take the book. While inside, the appellant told her to sit on his bed and to have sexual intercourse

with him. He told him that if she denied he would chase her from his home. The appellant then undressed her skintight and pants and undressed himself and thereafter inserted his male organ into her female organ.

The victim did not menstruate since the fateful day. She informed the appellant in November 2020 and he told her that he cannot impregnate a woman. DW2 and one Kalista noticed that she showed signs of pregnancy. Kalista took her to Kingu Dispensary where she tested positive for pregnancy. The victim again informed the appellant who told her to tell people that she was impregnated by one Teacher Saidi. One of her teachers, Ms. Agatha, noticed that she was pregnant and informed the headmaster. The victim was thus summoned by the headmaster the next day and she told the headmaster that it was Teacher Saidi that had impregnated her. The headmaster advised that the matter be reported to Mkuu police station on Monday, but the appellant went with the victim to report the same on Saturday.

The police took them to Huruma Hospital where the victim was attended by one Dr. Renald Tarimo. She took an ultrasound test which disclosed that she was 20 weeks pregnant. Dr. Tarimo, filed a PF3 form which was tended by PW3, a fellow doctor and admitted as Exhibit PII. They went back to the Police on Monday and Teacher Saidi was arrested. However, they had to wait until the child was born for the DNA test to be conducted.

On 03.05.2021, the victim gave birth to a baby girl one CC (name withheld) and she disclosed to her mother and PW4 that the appellant was the father of the child. A week later, PW5 escorted the victim, the victim's child, one Hamad Saidi and the appellant to Government Chemist Office at Arusha for DNA testing. On 26.05.2021, PW6, a Government Chemist at Dar es Salaam office received the DNA samples from Government Chemist office at Arusha and conducted the DNA test. He then sent the results to the government office at Arusha zone. On. 08.06.2021, PW5 received the DNA results from the Government office at Dar es Salaam which disclosed that CC was fathered by the appellant and not Hamad Shezua. The appellant was interrogated by PW4 but denied to have impregnated the victim. He was however arraigned in court for the offences of rape and impregnating a school girl.

In his defense, the appellant testified as DW1 and called two witnesses; DW2, one Sekunda Justine, his daughter in law and aunty to the victim, and DW3, one, Lucia Alloyce Assenga, his wife.

The appellant's defence was that; the victim resided at his home with his daughter-in-law, DW2. On the fateful day of 13.08.2020 at around 08hrs, while at his shop, one Beata, DW2 and Kalista came and informed him that the victim was pregnant and that she had mentioned one Said Hamad as the one responsible for her pregnancy. He then went with her to the police station to report the incident whereby the victim was examined at Huruma hospital and found to be 4 weeks pregnant. Thereafter, at another day at

04:45 hrs., PW1, one Beata and DW2 came to his home and reported that there were people who wanted to perform abortion on the victim. He then asked one Steven Mshanga's wife to accommodate her.

He said that, one day in 2021, he was summoned by Mkuu Police station whereby he was informed that the victim had changed her statement and named him as the father of the child. He readily paid T.shs. 2,000,000/- for the DNA testing whereby they went to Arusha and samples were taken. After 7-8 months, he was arraigned. He maintained that he did not rape or impregnate the victim as he was unable to due to an operation that removed his testicles.

DW2, testified that in 2020 at around 14hrs at Beata's house, their neighbour came with his friend and wanted to perform abortion on the victim. That, they refused to do so, hence they went to the accused's home and informed him on what had transpired. He too refused. Then they went back home. DW3 testified that the appellant, her husband, underwent operation in 2009 and due to the said operation, he could function sexually. In the premises, DW3 had the view that the appellant did not rape the victim.

Following the appellant's defence, the trial court called one witness CW1, Mary Magdalena Bahati, who gave expert opinion that a person with a single testicle could still impregnate a woman.

After considering the evidence of both parties, the trial court found the appellant guilty of both counts, convicted him and sentenced him to serve 30 years imprisonment term for the first count of rape and 5 years sentence for the 2nd count of impregnating a school girl. Aggrieved, the appellant filed this appeal on the following grounds:

1. *That, the learned trial Magistrate erred in both law and fact in making findings that the charge was proved beyond reasonable doubt against the appellant.*

2. *That, the trial Magistrate erred in both law and fact by wrongly convicting the Appellant without considering the principle which have to take into account in respect to the chain of custody and preservation of the sample for DNA from the time taken from the suspects until such time submitted to the government chemist in Dares Salaam showing the parking, custody, control, transfer and analysis of the samples.*

3. *That, the learned trial Magistrate grossly erred in law and fact by finding the appellant guilty by relying on inconsistency, unreliable, contradictory and uncorroborated evidence from PW1, hence she is unbelievable witness.*

4. *That, the learned trial Magistrate grossly erred in both law and fact when she fails* (sic) *to become a trustee in law for allowing PW3 to testify on behalf of her fellow doctor, this was a very serious violation of the law which was done by the trial court in relation to its duty of adhere ring with natural justice.* (sic)

5. *That, the learned trial Magistrate erred in law and tact by failing to assign reasons for her dissent of not considering the defence of the appellant.* (sic)

6. *That, the learned trial Magistrate erred in law and fact by failed* (sic) *to consider that the evidence must be incapable of more than one interpretation, cogent, compelling and convincing that upon no rational hypothesis can the facts be accounted for.*

The appeal was argued in writing whereby the appellant was unrepresented while the respondent was represented by Mr. Ramadhani Kajembe, learned state attorney.

The appellant generally submitted on all grounds of appeal. He challenged the prosecution evidence on the ground that it failed to discharge its duty to prove the case beyond reasonable doubt. First, he claimed that the victim's evidence was wholly inconsistent and unreliable because the said witness altered her statement. That, at first, she mentioned one Teacher Said, then changed her statement at the police station and named one Hemed Said as her ravisher and later changed again her statement and mentioned the appellant. He was of the considered view that the victim manifested the intention to lie so as to attain a certain end which is why without showing any signs of being threatened, she still changed her statement and eventually named the appellant as the rapist and father of her child.

The appellant challenged the victim's testimony on the ground that the victim failed to name the culprit at the earliest stage. He cemented his stance with the case of **Marwa Wangiti Mwita and Another vs. The Republic** (Criminal Appeal 6 of 1995) [2000] TZCA 4 TANZLII. He averred further that the court has the duty to resolve contradictions in evidence of witnesses, a stance he supported with the case of **Toyidoto s/o Kosima vs. Republic** (criminal Appeal No.525 of 2021) [2023] TZCA 17305 TANZLII.

He added that while he was charged with statutory rape, the age of the victim was never proved. He argued that the victim never mentioned her actual age before the court until the court questioned her on her age. He contended that the same was an afterthought which ought to have been disregarded by the court. Arguing the implications for failure to disclose the age of the victim, he cited the case of **Genes Arisen Tarimo @ Kaputi vs. Republi**c (Criminal Appeal No.337 of 2019) [2023] TZCA 17423 TANZLII.

Addressing the second count of impregnating a school girl, the appellant challenged that the evidence of the victim was inconsistent in that she first named one teacher Saidi as the one that impregnated her and later named him as the one that impregnated her leading into DNA test being conducted, as explained by PW4. He contended that strangely PW5 and PW6 mentioned one Hemed Shezua as one whose sample was taken at the Arusha government Chemist office. That, it is unknown as whether the said Teacher Said was the same Hamadi/ Hemed Said

or Hemed Shezua. He was therefore of the considered view that the omission to explain on the names was fatal. He cited the case o**f Victor Goodluck Munuo vs. Republic** (Criminal Appeal No. 357 of 2019) [2023] TZCA 17389 TANZLII to support his stance.

He further challenged the DNA results alleging that there was a chance that the samples were mishandled by the Police. He reasoned that there were four individuals from whom samples were taken; himself, one Hemed Said or Hemed Shezua, the victim and the child, but there was no account on who extracted the samples at the Government Chemist's office at Arusha, under whose custody the samples were kept from 20.05.2021 to 26,05.2021 when they were received and observed by the Dar es Salaam Government Chemist's office and who transported the samples to Dar es Salaam Government Chemist office. In the premises, he alleged that there is a possibility that the samples of the said Teacher Said were mixed with his leading to him being found to have fathered the child instead of the alleged Teacher Saidi.

The appellant finally argued that CW1, the expert witness only gave her opinion of possibility of a person with one testicle impregnating a woman. That, the witness did not testify on whether while impotent due to the operation he underwent, he could have impregnated the victim. He finalized his submissions by praying that the court quashes his convictions and set aside the sentences against him and set him at liberty.

The appeal was opposed by the respondent's counsel. In reply, Mr. Kajembe jointly addressed the first and third grounds of appeal and addressed the rest individually.

On the first and third grounds of appeal he averred that to prove the offence of rape under **section130 (1), (2) (e) of the Penal Code,** the prosecution ought to prove Penetration of the accused's penis into the victim's vagina and since the offence was under statutory rape, age was an essential element. He supported his averment with the case of **Essau Samwel vs. Republic** (Criminal Appeal 227 of 2021) [2022] TZCA 358 TANZLII. He further submitted that stating merely that penetration took place is not enough. That, one must elaborate what took place and it is the duty of the prosecution to ensure that the witnesses adduce relevant evidence which proves the offence against the accused.

Commenting on the quality of the prosecution evidence, he averred that the victim gave a clear narration of the events on how the appellant raped her. Thus, she proved penetration. Citing decisions in **Nyamasheki Malima @ Mengi vs. Republic** (Criminal Appeal 177 of 2020) [2022] TZCA 326 TANZLII and **Paschal Aplonal vs Republic** (Criminal Appeal 403 of 2016) [2019] TZCA 356 TANZLII, he contended that the best evidence in sexual offences comes from the victim. On those bases he had the view that the trial court properly evaluated the evidence of the victim in its judgment and correctly concluded that the appellant raped the victim.

Regarding the issue of age of the victim, he contended that the victim's age could be proved by the victim as held in the case of **Jacob Yusuph @ Dude vs. Republic** (Criminal Appeal No. 248 of 2019) [2023] TZCA 16 TANZLII. In that respect he averred that the victim clearly stated that she was born on 02.04.2004 and the incident took place on 13.08.2020 placing the victim at the age of 16 years when the incidence took place. He therefore had the stance that the victim proved her age.

Arguing further, he alleged that the issue of age was not contested by the appellant in his defence nor did he cross examine the victim when she testified. Explaining the position of the law in the circumstances, he contended that it is trite law that failure to cross examine a witness connotes admission to her testimony. He referred the case of **Nyerere Nyague vs. Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 TANZLII. In conclusion on this issue, he had the considered view that the offence of rape was proved beyond reasonable doubt.

As to inconsistencies in the victim's evidence whereby she first mentioned one teacher Said as the man that raped her and later changed her statement and mentioned the appellant and while at the police station mentioned one Hemed Said; Mr. Kajembe averred that the victim mentioned the appellant alone at the court as the man who raped her and not teacher Said. He added that the victim further explained why she mentioned teacher Said whereby she said it was because she was influenced by the

appellant to do so and she maintained the same story before the police. In the circumstances, he had the view that there was no contradiction on the evidence of the victim that ought to have been resolved by the trial court. In those bases he found the case of **Toyidoto Kosima vs. Republic** (Supra) distinguishable.

As to the failure to name the appellant at the early stage, Mr. Kajembe was of the considered view that the same was immaterial in this case as the question of identification was never at issue in the trial court as the victim knew the appellant and was living with him. Hence, he distinguished the case of **Marwa Wangiti vs. Republic** (supra) on those grounds.

Mr. Kajembea averred that to prove the offence of impregnating a schoolgirl contrary to **section 60 (3) of the Education Act** the prosecution had to prove that the victim was a schoolgirl at the time she got pregnant and it was appellant that impregnated her. He had the view that there was ample evidence that the victim was a student at Ngareni secondary school and that after being raped on 13.08.2020 she started missing her menstrual period and eventually found out she was pregnant. That, PW2 proved that she was a student at Ngareni secondary school with registration No. 2317 and had attended school from 2018 to 2020 when she stopped due to pregnancy.

On the second ground of appeal in which the appellant complains that the trial magistrate did not consider the chain of custody of samples collected by the government chemist at Arusha; Mr. Kajembe contended that it is trite principle of law that DNA test is not mandatory in proving paternity. That other evidences on record could be used to prove paternity. He cited the case of **Peter Bugumba @ Cherehani vs. Republic** (Criminal Appeal 251 of 2019) [2023] TZCA 221 TANZLII, to cement his argument.

He maintained that in even in the absence of DNA results there is still ample evidence on record which shows that the victim was impregnated by the appellant. Explaining such evidence, he said that the doctor testified that upon examining the victim it was found that she was 20 weeks pregnant and tendered the PF3 to prove the same. He challenged the appellant for failure to cross examine the victim on the pregnancy results or to challenge the same. As to the consequence thereof, he argued that failure to cross examine connotes admission of the facts alleged. He cited the case of **Nyerere Nyangue** (supra) to buttress his point. He reiterated his argument that even if DNA test results would be disregarded, there's still ample evidence proving that the appellant impregnated the victim.

On the 4th ground of appeal, Mr. Kajembe contended that PW3 did not testify on behalf of the doctor that examined the victim but rather, she testified as an eye witness and a person with knowledge on what transpired on 14.12.2020 when they received the victim.

He averred that according to **section 61 of the Evidence Act**, all facts except contents of a document may be proved by oral evidence and **section 127(1)** of the same Act provides that all witnesses are competent to testify unless declared by the court to be incompetent to do so. He considered PW3 being a competent witness.

As to the 5th ground, Mr. Kajembe contended that the defence evidence was well analysed and considered by the trial court. He added that the trial court further raised an issue on whether one testicle can render a person impotent and resolved that the argument did not hold water.

Concerning the 6th ground, he was of the view that the appellant did not submit on the ground thus rendering it hard to understand what he meant. However, he contended that the trial court did raise issues for determination and considered the said issues to decide whether the appellant was guilty of the offences he was charged with. That, eventually the trial court found that the case was proved against the appellant beyond reasonable doubt. He thus prayed for the appeal to be found without merit and be dismissed.

Upon considering the submissions from both parties and the trial court record, I am of the considered view that the issue as to whether the case was proved against the appellant beyond reasonable doubt suffices to dispose of the entire appeal.

Therefore, I will resolve this appeal basing mainly on this issue, but in the course of doing that I shall address other issues advanced in other grounds of appeal.

To start with, I find the following facts uncontested in the matter at hand: **one**, that DW2 is the victim's aunt and the appellant's daughter-in-law; **Two**, that the victim resided in the appellant's home before and after the she got pregnant; **Three**, that the victim was a student at Ngareni secondary school up to 2020 and **four**; that the victim was impregnated in 2020 and gave birth to CC in May 2021. What is disputed therefore is; **one**, the age of the victim and **two**, whether the victim was raped and/or impregnated by the appellant.

It is settled that the prosecution is bestowed with the duty to prove the case against the accused beyond reasonable doubt. This duty, is twofold in that the prosecution need not only prove that the offence was committed, but that the same was committed by the accused person. This was well expounded by the Court of Appeal in the case of **Malik George Ngendakumana vs. Republic** (Criminal Appeal 353 of 2014) [2015] TZCA 295 TANZLII whereby the Court held:

> "The principal of law is that in criminal cases the duty of the prosecution is twofold. One, to prove that the offence was committed, and two, that the accused person is the one who committed it."

In the case at hand, the appellant was charged with the offence of statutory rape whereby the age of the victim was a material aspect in the case. The reason behind being that in statutory rape, consent is immaterial. This was well explained in the case of **George Claud Kasanda vs. DPP** (Criminal Appeal 376 of 2017) [2020] TZCA 76 TANZLII, in which the Court of Appeal explained:

> "As highlighted above, the appellant was being accused of carnally knowing a girl aged 16 years. On account of that, the learned State Attorney was of the view that the offence section ought to have cited section 130(I)(2)(e). In essence that provision creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that, it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence. The prosecution is duty bound to establish among other ingredients, that the victim is under the age of eighteen so as to secure conviction."

Upon observing the records, it is well stated in the charge and it was also mentioned in the statement of facts read to the appellant during preliminary hearing that the victim was 17 years of age. further, when testifying on 17.03.2022, the victim (PW1) had in her particulars mentioned that she was 17 years old. When questioned by the court, she disclosed that she was born on 02.04.2004.

It is indeed well settled that evidence on the victim's age can be given by the victim, parent, guardian, relative, teacher or by birth certificate. The Court of Appeal has held in multiple cases that facts mentioned in the charge, preliminary hearing or during *voire dire* examination on a child's age do not suffice as proof of the child age. See; **Solomon Mazala vs. Republic**, Criminal Appeal No. 136 of 2012 (unreported), **Alex s/o Ndendya vs. Republic** (Criminal Appeal 340 of 2017) [2020] TZCA 201 TANZLII.

Despite the restrictions, the Court of Appeal has also allowed room for courts to presume existence of other facts as provided under **section 122 of the Evidence Act**. Such facts are drawn from among others, the logical aspects surrounding the case, example the level of education of the victim at time the offence took place as testified by the parties and the practice of the trial court opting to perform a *voire dire* examination as it then was, or a rather current compliance with the requirement under **section 127(2) of the Evidence Act**. See, **Issaya Renatus vs. Republic** (Criminal Appeal 542 of 2015) [2016] TZCA 218 TANZLII, and; **Barnaba Changalo vs. Director of Public Prosecutions** (Criminal Appeal 165 of 2018) [2021] TZCA 53 TANZLII.

In the case at hand, apart from the court itself questioning the victim on the date of her birth, there was no doubt that the victim was a student at Ngareni secondary school. I am further of the considered view that the appellant was able to understand the offences on which he was charged and the seriousness thereof

since the offence involved a child alleged to be under 18 years. Still, the appellant did not cross examine the victim on her age nor did he address the issue that her age was unproved while adducing his evidence. I am of considered view that the victim successfully proved her age. As opposed to the charge which read that she was 17 years old, the victim was 16 years old when the alleged incidence took place. This is because it was proved that she was born on 02.04.2004. When the appellant was arraigned on 21.10.2021, the victim had already reached 17 years old and when she gave her testimony on 17.03.2022 she was still 17 years old.

The remaining question is whether the victim successfully proved that she was raped. As explained by Mr, Kajembe, proof of the offence of rape requires proof of penetration. This position has been emphasized by the Court of Appeal in its plethora of authorities. See: **Godi Kasenegala vs. Republic** (Criminal Appeal 10 of 2008) [2010] TZCA 5 TANZLII; **Jaspini s/o Daniel @ Sikwaze vs. Director of Public Prosecutions** (Criminal Appeal 519 of 2019) [2021] TZCA 58 TANZLII; **Essau Samwel vs. Republic** (supra) and; **Amani Yusuph vs. Republic** (Criminal Appeal No. 124 of 2019) [2023] TZCA 48 TANZLII. It is also trite law that the best evidence in sexual offences is that of the victim. This principle was established in **Selemani Makumba vs. Republic**, [2006] TLR 379 and has been maintained over the years.

In the case at hand, the only evidence of rape was given by the victim who narrated that, on the material day at around 5:00hrs, she went to the appellant's shop with intent to purchase an

exercise book. That, the appellant called her in and she thought he was calling her to take the exercise book from inside but instead, of handing the book over, the appellant wanted her to sit on his bed and she refused. The appellant then threatened to chase her away from his home if she refused to have sexual intercourse with him causing her to accept. The appellant then undressed her, entered his manhood into her female organ. When he finished, he gave her water to bath. Thereafter, she went to school. For ease of reference, I will produce this part of her testimony as appears on the record:

> "On 13/08/2020 at 05 hrs I went to the accused shop to buy an exercise book, I was at form three by then, I bought it, the accused told me to enter the shop, I did, he didn't give me the exercise book I thought he will give it inside, when I entered he told me to sit on his bed, I didn't and asked him why all this; he said if you don't sleep with me I will chase you out of my place…" (sic)
>
> "…Thus, I agree to sleep with him as I do not have any other place to live; he took off my under pant and he took off his; I was in uniform so he took off only skin tight and pant and he was only with a boxer; he came over me naked he took his penis and entered my vagina; he had sex with me and I saw white liquid from him like mucus; it took like an hour from 05 hrs to 06 hrs. He gave me water I cleaned up, wore my clothes he give me Tsh. 5,000/= and I went school." (sic)

I find the testimony of the victim questionable. The victim claimed that she agreed to have sexual intercourse with the appellant on

the threat of being chased from the appellant's home, however, she testified that the appellant did not live at the home she also lived with her aunty, but used to sleep at his shop.

The credibility of the victim's testimony is also questionable for the fact that she mentioned different people to have fathered her child. At first, she mentioned one teacher Hemed Said and later, after the child was born, she mentioned the appellant. The mentioning of different people in fact caused the investigations to pause to await the birth of her child so that a DNA test could be conducted.

As testified by PW4, the investigator, upon finding that the alleged Hemed Said denied to have fathered the victim's child and the victim mentioning the appellant as the child's father, they decided to wait for the birth of the child for a DNA test to be conducted. PW5 escorted the appellant, one Hemed Shauza, PW1 and the child to the Government Chemist Office at Arusha for collection of samples. PW4 testified to have received the DNA report vide post Mail addressed to Mkuu Police Station on 08.06.2021. PW6 testified that on 26.05.2021 the received a parcel enclosed with rubber stamps, accompanied with a letter from the Government Chemist Office in Arusha, attached with a letter from the OCCID's office at Rombo district requiring him to perform the DNA test.

However, surprisingly, there was no accurate details on how the samples were handled. It is unknown as to who extracted the samples and how the same were sorted and labelled considering that they were taken from two suspects. There are also no details as to how the samples were handled after being taken on 20.05.2021 to 26.05.2021 when PW6 received the same and analysed the same at the Government Chemist office in Dar es Salaam. There are also no sufficient details as to when the report was issued and eventually sent back to Arusha Government Chemist office. In fact, there are contradictions as to how the DNA report made its way to PW5. While PW5 averred that the same was sent via post office from the Government Chemist Office at Dar es Sallam to Arusha, PW6 averred that the same was sent from the Dar es Salaam office to Rombo. So, it is questionable as to which of the two witnesses' accounts was the accurate one. In short, the chain of custody was not explained at all.

In **Paulo Maduka & Others vs. Republic** (Criminal Appeal 110 of 2007) [2009] TZCA 69 TANZLII, the Court of Appeal stressed that the prosecution ought to exhibit the chronological account through documentation and/or paper trial or through an oral account on seizure, custody, control, transfer, analysis and disposition of the evidence. A similar stance was maintained in **Moses Mwakasindile vs. Republic** (Criminal Appeal 15 of 2017) [2019] TZCA 275 TANZLII.

In **Joseph Leonard Manyota vs. Republic**, Criminal Appeal No. 485 of 2015 (unreported), the Court of Appeal offered an exception to

that general rule averring that where the exhibit does not change hands easily then the court can accept the same. In the said case. the Court held:

> "...it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence regardless of its nature. We are certain that this cannot be the case, say where the potential evidence is not in the danger of being destroyed or polluted, and/or in any way tempered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken, of course, this will depend on the prevailing circumstances in every particular case."

See also: **Stephano s/o Victor @ Mlelwa vs. Republic** (Criminal Appeal 257 of 2021) [2023] TZCA 152 TANZLII; **Issa Hassani Uki vs. Republic** (Criminal Application 122 of 2018) [2019] TZCA 372 TANZLII and; **Kadiria Said Kimaro vs. Republic, Criminal Appeal** No. 301 of 2017 (CAT, unreported).

I am of the considered view that the modified departure of the general strict rule under **Paul Maduka** (supra) would still not shield the DNA test results in the case at hand. Even if I was to ignore the lack of explanation as to how the DNA test results sent by PW6 to Arusha Office made their way via post mail to Rombo from Dar es

Salaam office as PW6 stated, there is still a missing link on how the samples were handled, including the fact as to who took the said samples, how was each sample labelled, how were they stored and transferred to Dar es Salaam Chemist office and from whom PW6 received the samples, how long was the test conducted and how was the storage of the samples handled at the time the same were being analysed.

In my considered view, the DNA results and the evidence of PW5 and PW6 as to the same was greatly unreliable and failed to prove the custody of the samples. This was a crucial issue on this case given that there were two suspects whose samples were taken on the same day and sent to the Government Chemist in the same package labelled Lab. No. NZL/1518/2021. There could be a possibility that the samples could be mixed at any time either intentionally or otherwise. As such, the appellant cannot be let to bear the liability basing on the DNA results. The exhibit is therefore expunged from the record.

After expunging the DNA results, there stands no other proof that the appellant is the father of the child. Considering the diminished credibility of the victim for mentioning two different people, and considering that the allegations levelled against the appellant were very much connected to the victim's pregnancy, the offence of rape is also found not to have been proven beyond reasonable doubt.

In the circumstances, the appeal is hereby allowed. The convictions and sentences by the trial court in both counts are hereby quashed. The appellant should be released from prison custody with immediate effect, unless held for some other lawful cause.

Dated and delivered at Moshi on this 16th day of October 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA