IN THE COURT OF APPEAL OF TANZANIA
AT SUMBAWANGA

(CORAM: WAMBALI, J.A., KENTE, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 352 OF 2019

DONAD MWANAWIMA ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Mashauri, J.)

Dated the 24th day of June, 2019

in

Criminal Appeal No. 157 of 2018

JUDGMENT OF THE COURT

29th September & 6th October, 2023

MURUKE, J.A.:

Donad Mwanawima, the appellant, was charged before the District Court of Sumbawanga at Sumbawanga in Criminal Case No. 151 of 2018 for the offence of rape contrary to section 130(1) and (2)(e) and section 131(2) of the Penal Code (Cap 16 R.E. 2002 now R.E. 2022).

The victim of the sexual abuse was a form two student at Mzindakaya Secondary School aged 16 years, when she revealed the ordeal. To protect her identity, we will refer to her as "the victim" or

"PW3". Upon hearing the prosecution and defense case, the appellant was convicted and sentenced to a jail term of thirty (30) years. Aggrieved, he unsuccessfully appealed to the High Court. Still aggrieved, he has preferred the present appeal.

Briefly, the facts underlying the conviction of the appellant can be gathered from three prosecution witnesses. Khadija Lukasi (PW1), resident of Muze Village, married with her three children, the first born being the victim. PW1 testified that on 19/06/2018 she received a telephone call from the school administration regarding the date of closure of the victim's school. She was therefore asked to go and collect her daughter (the victim). Unfortunately, she was sick. PW1, therefore, requested them to use an alternative means and sent fare through M-pesa and requested them to allow the victim to travel alone as it was just two hours' drive by bus from school to Muze Village. However, PW1 did not receive her daughter until late on that day and, she thus inquired from the teacher, only to be told that the victim had left long time. PW1 tried to call her relatives at Sumbawanga to inquire about her daughter, but they had no information on her whereabouts.

PW1 raised suspicion, because the appellant's former wife had earlier on complained to her on the appellant's relationship with her

daughter, while she was staying with them in 2016 in the course of attending pre-form one tuition at Sabato. On the following day, that is 21/06/2018, PW1 went straight to the appellant's kiosk at Sumbawanga, where she found the victim sitting together with the appellant in one of the kiosk room. On finding them together, PW1 called the police who arrested the appellant and sent him to the police station. Upon the victim's interrogations, she admitted to have spent the whole night with the appellant.

G.4376 D/C Khatibu (PW2), a Police Officer stationed at Central Police Sumbawanga investigation department by then, testified that, he recorded the appellant's cautioned statement in which he admitted to have done sexual intercourse with the victim at his home, after having taken her from the bus stand on 20/06/2018. PW2 tendered the cautioned statement and was admitted as exhibit P1.

PW3 was the victim herself. Her evidence was just like that of the PW1 her mother with regard to the closure of the school and being found with the appellant at his kiosk on 21/6/2018. She testified that on 20/06/2018, while at bus stand heading home after closure of school, she met appellant who convinced her to go with him at his home and in the absence of the appellant's wife, they had sexual intercourse. She spent

the whole night until 21/06/2018, when appellant took her to his own kiosk for breakfast, and ultimately, she was found by her mother (PW1). While at kiosk, she explained to her mother, how she spent a night at the appellant's home doing sexual intercourse. She was taken to police station together with appellant, in which she was given PF3 for examination. She tendered the PF3 that was admitted as exhibit P2.

In his defense at the trial court, the appellant denied to commit the offence charged. He testified that on 21/06/2018 he was at his kiosk. At around 10:00 a.m, three girls came in his working place and asked to be served with a cup of tea and chapati. He served them and continued with his duty of preparing chapati. After a short while, one woman came and started to quarrel with the said girls. He intervened to stop the quarrel with the said girls but the woman was angry and abused him. He tried to chase her but she resisted. Finally, an assistance of the police was sought who arrested and took him to central police station. He further testified that, at the police station, he was interrogated as to whether he knew the woman and the girl but denied. That was forced to sign the document that he did not know its content. Later, he came to know that her former wife had close relationship with the victim's family. He completely exonerated himself from the offence.

After a full trial, the trial court was satisfied that PW3 was raped by the appellant. It is also on record that, both the trial and first appellate courts reached a concurrent finding that the appellant had sexual intercourse with PW3. That was after the two lower courts believed the evidence of PW1, PW2 and the victim (PW3). Accordingly, the first appellate court went on dismissing the appellant's appeal. The appellant was not satisfied and has preferred the present appeal raising five grounds, which are conveniently paraphrased thus:

1. *The learned first appellate Judge erred in law and fact to dismiss the appellant's appeal basing on the belief that the prosecution side had proved the case beyond reasonable doubt.*
2. *The learned first appellant Judge misdirected himself to dismiss the appeal against conviction and sentence for statutory rape while the prosecution failed to tender the certificate and school attendance register to establish that the victim (PW3) was sixteen years old.*
3. *The learned first appellate Judge erred in law and fact to dismiss the appellant's appeal despite the contradictory testimonies of PW2 and PW3 regarding the date when the school was closed and the date when the victim of crime was found at the appellant's kiosk.*

4. *The learned first appellate Judge erred both in law and fact by dismissing the appellant's appeal while the prosecution failed to prove that PW3 entered and spent the whole night at the appellant's home.*
5. *The learned first appellate Judge grossly erred in law by requiring the appellant to prove his innocence instead of just raising reasonable doubt in the prosecution case.*

At the hearing of the appeal the Respondent the Director of Prosecutions (the DPP) was represented by Ms. Irene Godwin Mwabeza and Ms. Marietha Augustine Maguta, learned State Attorneys, while the appellant was in person, unrepresented.

When the appellant was invited to expound on his grounds of appeal, he in the first place prayed the Court to consider his grounds in the memorandum of appeal and opted to hear the response from the learned State Attorney and reserved his right to rejoin later.

In response to the appeal, Ms. Irene Mwabeza at the outset declared her stance that the respondent, the DPP supported the appeal.

In the course of her submission, the learned State Attorney joined grounds one, four and five to form one ground, the complaint being lack of sufficient evidence to ground conviction of the appellant. However, she argued grounds two and three separately.

On ground two, the learned State Attorney submitted that the appellant was charged with an offence of rape of a girl aged 16 years and thus below 18 years. She submitted that to prove the case, the age of the victim and penetration were necessary ingredients. In her submission, according to the evidence of PW1, the victim's mother, testified and proved that the victim was 16 years of age when she encountered the ordeal. She submitted further that age can be proved by the victim herself, parents, teachers or by way of a certificate of birth if any. To support her argument, she cited the case of **Isaya Renatus v. The Republic,** (Criminal Appeal No. 542 of 2015) [2016] TZCA 218 (26 April 2016 TANZLII). The learned State Attorney then urged the Court to dismiss ground two for lack of merits.

Submitting on the conjoined ground one, four and five of the appeal, the learned State Attorney intimated to the Court that, basically in these grounds the complaint is on deficiency of evidence to prove the prosecution case. She thus submitted that the PF3 had no evidential value because it was received in court without following prescribed procedures. She stated that the victim is the one who tendered the PF3 and was admitted as exhibit P2. However, the same was not read out in court and, indeed PW3 could not be in a position to elaborate on the contents

because she was not the author. She added that the trial court ought to have called the Doctor who examined the victim and prepared the PF3 to tender it and be cross – examined by the appellant as required by section 240(3) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (the CPA).

With regard to the cautioned statement (exhibit P1), Ms. Mwabeza submitted that, though the same was admitted by the trial court, the trial magistrate evaluated it and retrained from relying on it to ground the conviction of the appellant. She therefore submitted that though the first appellate judge considered and applied it to confirm the conviction of the appellant, he did not assign sufficient reasons to discount the reasoning of the trial magistrate on its relevancy. She therefore implored us to disregard the PF3 and the cautioned statement in deciding the appeal and instead consider the remaining oral account of PW1 and PW3. However, she was of the view that because of the apparent contradiction, the prosecution case remains unproved.

On ground three, though the appellant's complaint is that there is contradiction between the evidence of PW2 and PW3 with regard to the date when the victim's school was closed and whether the victim was found at the appellant's kiosk, Ms. Mwabeza submitted that the contradiction was between the evidence of PW1 and PW3. She stated that

while PW1 stated that the school closed on 21/6/2018, PW3 testified that it was on 20/6/2018. In this regard, the learned State Attorney was content that the contradiction diminished the credibility of PW1 and PW3 and thus the prosecution case was weakened. When she was prompted by the Court on whether the evidence of PW3 could not be solely relied to ground conviction, Ms. Mwabeza emphasized that, though the best evidence comes from the victim, that evidence must be scrutinized to ensure that it is credible. She firmly believed that PW3 was not and thus her evidence cannot ground conviction of the appellant.

To support her submission, she relied on the decision of the Court in **Mohamed Said v. The Republic**, (Criminal Appeal No. 145 of 2017) [2019] TZCA 252 (22 August 2019, TANZLII), in which a reference to the holding of the Supreme Court of Philippines in **People of the Philippines v. Benjamin A. Elmancil**, G. R. No. 234951, dated March 2019 was cited. She therefore urged the Court to allow the appeal in respect of grounds one, three, four and five because the prosecution case was not proved to the required standard.

In rejoinder, the appellant also emphasized that there was contradiction in the evidence of PW1 and PW3 on the date of closure of the school, though, according to ground three, his complaint was on PW2

and PW3. He thus joined hands with Ms. Mwabeza to pray that the Court should allow his appeal, quash the conviction, set aside the sentence and then set him at liberty.

Having heard the submissions of the appellant and the learned State Attorney, the main issue for consideration is whether the charge of rape was proved against the appellant.

It is worth noting that this is a second appeal. It is a settled position of the law that, the Court will not interfere with concurrent findings of the courts below, unless there has been misapprehension of the nature and qualify of the evidence occasioning miscarriage of justice. For this position, see for instance, **Isaya Mohamed Isack v. The Republic**, Criminal Appeal No. 38 of 2008 (unreported), **DPP v. Jaffar Mfaume Kawawa** [1981] T.L.R. 149 and **Seif Mohamed E. L. Abadan v. The Republic**, Criminal Appeal No. 320 of 2009 and **Wankuru Mwita v. The Republic**, Criminal Appeal NO. 219 of 2012 (both unreported). In the latter case, the position was emphasized thus:

> *"...The law is well-settled that on second appeal, the court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly*

unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; a violation of some principle of law or procedure or having occasioned a miscarriage of justice."

It is also settled law that, although assessing the credibility of a witness basing on demeanor is the exclusive domain of the trial court, it can still be determined by the appellate court when assessing the coherence and consistency of the witness and when such witness is considered in relation to the testimony of other witnesses including that of an accused person. For this position, the cases of **Shaban Daudi v. The Republic**, Criminal Appeal No. 28 of 2001(unreported) and **Daniel Malogo Makasi & Others v. The Republic** (Consolidated Criminal Appeals No. 346 of 2021) [2022] TZCA 230 (2 May 2022, TANZLII) are relevant. In this regard, the assessment of the credibility of a witness is crucial because, every witness is entitled to be believed unless the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses.

The other principle relevant to this case is that, in sexual offences, the best evidence is that of the victim (see **Selemani Makumba v. The Republic**, [2006] T.L.R. 379). Moreover, in terms of section 127 (6) of

the Evidence Act Cap. 6 R.E. 2019, the court can ground conviction based on the victim of sexual offence if it forms an opinion that her evidence is credible. Besides, it is settled that every witness is entitled to credence of his/her evidence unless there are good and cogent reasons to hold otherwise as expounded by the Court in **Goodluck Kyando v. Republic** [2006] T.L.R. 363.

It is common knowledge that in cases involving statutory rape like the one at hand, it is very necessary that the age of the victim must be proved, and this is the appellant's complaint in ground two of his appeal. In the case of **Alex s/o Ndendya v. The Republic**, (Criminal Appeal 340 of 2017) [2020] TZCA 201 (6 May 2020, TANZLII), the Court stated that:

> *"...in a situation where the appellant was charged with statutory rape then, age of the victim must specifically be proved before convicting the appellant".*

The issue to be resolved in ground two of the appeal, therefore, is whether the age of the victim was proved in terms of the evidence on record.

At page 11 of the record of appeal, the victim's mother (PW1) testified that:

> *"I am the resident of Muze. I am married and I am staying with my husband. I have three children the first one is a girl called Debora Elisha, she is now aged 16 years old. She is now schooling at Mzindakaya Secondary School".*

The evidence of PW1 therefore left no doubt that the victim was 16 years old. There was no any other evidence to the contrary. More so, the appellant did not contradict the evidence of PW1 on the issue of age of the victim. Thus, as correctly submitted by learned State Attorney relying in the case of **Isaya Renatus v. The Republic** (supra), even without the certificate of birth or school register, PW1 was better placed to prove the age of the victim. In the circumstance, ground two lacks merit and is accordingly dismissed.

The appellant's complaint on ground 3 is on the contradiction between PW2 and PW3 on the date the school was closed. As intimated above, in this ground though the complaint is the contradiction in the evidence between PW2 and PW3, nonetheless, both the appellant and the learned State Attorney submitted on the contradiction between PW1 and

PW3. This was despite the fact that there was no request to amend the complaint in ground three.

Be that as it may, we do not see any material contradiction between PW1 and PW2. This is because; first, PW1 was clear that she sent the fare to the school on 19/6/2018 meaning that the expected date of closure was 20/6/2018 as testified by PW3. PW1 also testified that on the expected date of arrival of PW3, she did not see her and after inquiring from relatives and the school and still her whereabouts was not known, she travelled on 21/6/2018 to Sumbawanga and found the victim with the appellant at his kiosk. Consequently, the appellant was arrested on the same date. Thus, the testimony of PW1 that the school closed on 21/6/2018 was inadvertent, if her evidence is to be read and consider as a whole with that of PW3 in view of the sequence of events. Besides, during cross – examination by the appellant, PW1 emphasized that he was arrested on 21/06/2018 and sent to police station on the same day. Indeed, in his defense the appellant testified that PW1 visited her place at 10:00 am on 21/6/2018 and that he was later arrested by the police.

The appellant also admitted in his defense that the victim was found in his canteen and that he served her and other two girls with a cup of tea and chapati. The evidence of DW1 on the issue of PW1 going

to his canteen and the presence of three girls on 21/6/2018 was supported by the evidence of Steven Mwalukasa (DW2) who he summoned to strengthen his defense. Though both insisted to have not known the victim before, during cross – examination, the appellant (DW1) stated:

> ***"...it is quite true the girl was found sitting to my canteen she was in the company of two others...".***
> *Later he stated:*
> ***"...I don't know the reason as to why I was arrested. I had known the victim before".***
> *For his part, DW2 stated:*
> ***"...I was not present at the time the accused doing sexual intercourse with the girl. I did see the girl on the material date by the first time it was on 21/6/2018...".***

Therefore, from the reproduced extract of the evidence, it was not the first time that the appellant knew PW3. Besides, the appellant did not cross – examine both PW1 and PW3 on the controversy regarding the date of closure of the school. On the issue of arrest, when the appellant cross – examined PW1, she stated:

> *"It was on 21/6/2018 when the accused got arrested, the accused was at his cafe and there were other girls*

inside another room but the accused and my daughter were together in a room".

During his evidence in chief, the appellant admitted being arrested on 21/6/2018. Form the foregoing, we respectfully disagree with the learned State Attorney that, there is material contradiction between the evidence of PW1 and PW3 in view of what we have potrayed above. In the result, we accordingly dismiss ground three of the appeal.

The major complaint in grounds one, four and five is that the case for the prosecution was not proved beyond reasonable doubt. Ms. Mwabeza contended that the evidence of PW3 is not credible and her story cannot be believed. Unfortunately, apart from alleging contradiction between the evidence of PW1 and PW3 on the issue of arrest and date of closure of the school, which we have dealt at length above, Ms. Mwabeza did not point out other major shortfall(s) on the part of PW3's evidence which can lead us to disbelieve her and come to a different finding of facts with the two courts below. To appreciate the evidence of PW3, we better reproduce hereunder:

"PW3: DEBORA ELISHA aged 16 years Christian sworn and states...:
"I am a student schooling at Mzindakaya Secondary school, form two. That on the year

2016 immediately after completion of my primary education I joined a tuition pre form one at Sabato, that I was staying with the wife of the accused as she had been known my mother, the accused is called Donad Mwanawima that we used to stay at Malangali area within Sumbawanga Municipal town. Our place of resident is Muze is where I used to stay with my mother.

That at the time staying with the accused, I recall to have practiced sexual Intercourse with the accused it was in the year 2016. The sexual intercourse was done inside the accused home ***(nakumbuka tulifanya naye mapenzi siku moja tu mwaka 2016 tulifanya ndani nyumbani kwake).***

That at the time doing sexual intercourse the accused wife was at her kiosk (coffee kiosk). I recall in 2018 on 20/06 we did close our school and, I did meet with the accused at the bus stand and ask me to go with him at his home we had not pre arranged, I only find him at the bus stand. I did spend the very night at the accused home I did spend the night with the accused ***(niiilala naye usiku mzima)*** *and we did have sexual intercourse with him.*

That on the following morning the accused did take me to his kiosk on where my mother found

me while with the accused ***(asubuhi yake alinipeleka mgahawani kwake na ndiko mama alitukuta pale).*** *The accused had already separated with his wife that is why I did spend the very night in the room of the accused.*
My mother did come at the accused kiosk whilst was in accompany of police officer we were arrested and taken to the central police.
At the central police I was given PF3 and I was taken to the hospital for medical examination, the same PF3 was filled and given back to me, I pray to produce the same PF3 as exhibit".

PW3 evidence is very clear that, the appellant met her at the bus stand on 20/06/2018 and took her to his home where she spent the whole night until 21/06/2018 when she was found by her mother (PW1) sitting together with the appellant in one of his kiosk room.

From the reproduced evidence of PW3, with due respect to the learned State Attorney, we disagree with her submission and stance that PW3 is not credible witness. We are of the view that PW3 was correctly believed by the two courts below. This is because: **one**, PW3's evidence was so clear, consistent and coherent. PW3 mentioned the appellant to her mother (PW1), to be the person who raped her and did so at the police station immediately after his arrest. The appellant being mentioned

at the earliest opportunity by PW3 is a proof of reliability of her evidence, more so that she was found at his place of work on 21/6/2018 which was hardly a day after the school closed on 20/6/2018. **Two**, PW3's evidence was not shaken at all during cross - examination by the appellant before the trial court as reflected above. It was expected that the appellant would have cross - examined the victim on such vital evidence she testified to incriminate him with offence charged. But that was not done. It is settled that a party who fails to cross examine a witness while testifying is deemed to have accepted that piece of evidence and will be estopped from asking the trial court to disbelieve what the witness said. This stance was emphasized by the Court in the recent case of **Patrick s/o Omary @ Richard v. The Director of Public Prosecutions (the DPP)** (Criminal Appeal No. 236 of 2019) [2023] TZCA 17646 (25 September 2023, TANZLII).

Three, both courts below believed PW3 as a truthful and credible witness and we agree with that finding. As intimated above, both the appellant and the learned State Attorney did not provide us with any plausible reason to interfere with the concurrent findings of the two courts below, neither have we seen any. Besides, there is no legal requirement for corroboration where the evidence of the victim can stand on its own

to support conviction particularly in sexual offences like the case at hand, where it is a rule that, the best evidence comes from the victim. PW3 gave the account of what transpired with regard to sexual intercourse in 2016 and from the time she was picked by the appellant and sent to his home on 20/6/2018 and, how they had sex the whole night until they were found at his canteen on 21/6/2018. On the contrary, the appellant completely failed to weaken the victim's evidence through cross examination as intimated above. However, had corroboration been needed, the evidence of PW1 sufficiently corroborated PW3's evidence with regard to being found together on 21/6/2018 and the arrest of the appellant by police officer.

Four, initially, the appellant denied to have separated with his wife. However, during cross-examination, he admitted to have separated with her. This rendered credence to PW3's testimony that, it was easy for her to spend the whole night at the appellant home in the absence of his wife. If anything, his admission of separating with his wife and the victim being amongst the person that were at his kiosk corroborated the evidence of PW3 and PW1 respectively on previous sexual relation with the victim.

Five, though the appellant during his evidence in chief denied to have known the victim and PW1 and their relation to his former wife, later,

during cross-examination, he conceded to been aware of the said relation and knowing PW3 before. This gave support to PW3's evidence that she knew the appellant since 2016 when they had sexual intercourse once at his home and later on the night after the school closed until 21/6/2018 when they were arrested together in his canteen. Therefore, from the oral account of the evidence of PW3, penetration, an important element of rape was proved.

In the circumstances, we are not inclined to the argument of the learned State Attorney that PW3's evidence was suspect because she is not a credible witness. We do therefore find the decision of the Court in **Mohamed Said v. The Republic** (supra) distinguishable with the circumstances of this case and inapplicable.

It follows that even if we discount, as we hereby do, the medical evidence (exhibit P2) for failure of the trial court to comply with the provisions of section 240(3) of the CPA, and that of PW2 and the cautioned statement (exhibit P1) because though it was admitted, no inquiry was conducted after the appellant objected to it for not being recorded voluntarily, the remaining oral evidence of PW3 and PW1 on record suffices to prove the prosecution case as found by the two court below.

We are therefore satisfied that the appellant was properly found guilty as charged, convicted and sentenced, contrary to the contention of the appellant and the learned State Attorney. In this regard, we dismiss grounds one, four and five of appeal.

In the end, we have no hesitation to dismiss the appeal for being devoid of merit.

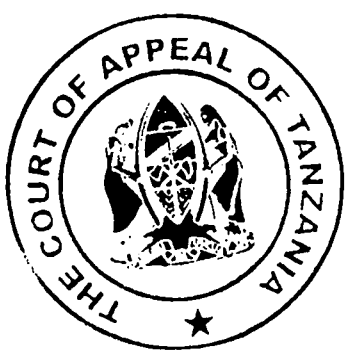
DATED at **SUMBAWANGA** this 5th day of October, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 06th day of October, 2023 in the presence of appellant in person and Ms. Marietha Augustine Maguta, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
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