THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 10 OF 2023

1. **NICHOLOUS EXEXAVELY KINYAMAGOHA**
2. **OSMUND LUCAS KINYAMAGOHA** ..... **APPELLANTS**

VERSUS

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

(Appeal from the Judgment of the Resident Magistrates Court of Njombe at Njombe)

(Hon. L.M. Chamshama - PRM)

dated the 22nd day of September, 2022

in

Criminal Case No. 213 of 2020

JUDGMENT

Date of Last Order: 12/02/2024 &
Date of Judgment: 22/03/2024

S. M. Kalunde, J.:

This appeal has been filed against the judgment and order of the Resident Magistrates Court of Njombe dated the 22nd day of September, 2022 in Criminal Case No. 213 of 2020. In the said judgment and order of the trial court, the appellants were convicted for gang rape contrary to section 131A (1) & (2) of **the Penal Code [Cap. 16 R.E. 2019].** They were sentenced to life imprisonment.

The facts of the case are as under:

The victim, NGK (**Pw1**) (name and identity withheld in accordance with **CJ's Circular No. 2 of 2018**) is a young woman aged about 24 years and at the relevant time she was owning and running a restaurant business *"Mgahawa"* at Mduma Village in the District and Region of Njombe. The appellants were among her regular customers at the restaurant. The allegation against the appellants is that, on the 27th day od November, 2020, at around 21:00 hours, as the victim was about to close her restaurant, the appellants showed up for dinner. She served them and made arrangements for closure of the business. At the closure of business, they offered her a ride home on their motorcycle commonly known as *"Boda-boda"*.

Unbeknown to her, the appellants had ulterior motives. As they arrived at the victims house the appellants drove past her house at a high speed. Despite her lamentation, the appellant did not heed to her cries instead they continued riding their motor cycle to a nearby forest. At the forest, the appellants parked their motor cycle somewhere deep into the forest, dragged the victim down undressed her and themselves. Thereafter, they raped her one after the other. The victim

narrated that, as one of the appellants was doing the heinous act, the other grabbed her hands to make sure that she does not resist.

Once they were done with the victim, it was late at night so they started roaming around the night looking for a place to snooze. They initially went to their friend Moses, who refused them accommodation. Thereafter, they went to a nearby guest house but it was closed. All this time they were together with the victim. As they were still moving around, the victim managed to jump off of the motorcycle and ran away while raising an alarm. People responded to the alarm and managed to rescue the victim.

The same night, at around 01:00 hours, the good Samaritans took the victim to Thomas Mwinami (**Pw4**), the Village Executive Officer (VEO) for Kichiwa Village. At the VEO's office the victim narrated her ordeal and mentioned the appellants as the culprits. Pw4 informed the victim to proceed to the Kichiwa Dispensary for medical attention. The same night BYM (**Pw2**) the victim's mother was notified of the incident. Upon receipt of the sad news, Pw2, reported the matter to the Maduma Village Chairman. Upon consultation to the Kichiwa Village Chairman it was confirmed that the victim was raped. Pw2 proceeded to the crime scene and escorted the victim to Kichiwa Dispensary where

she was medically examined by Richard Martin (**Pw7**) a clinical officer who examined the victim and prepared the Medical Examination Report (**Exhibit 3**).

The prosecution case is further that, on the same day, Pw4, directed the local militias to arrest the appellants. Baraka Kiumbu (**Pw5**) was one of the local militias who participated in the arrest of the appellants. He narrated that, upon receipt of the information they went in search of the appellants and managed to arrest them at around 21:00 hours on the 28th day of November, 2020. Upon arrest, the appellants were kept at the village office until the next morning on the 29th day of November, 2020. The next morning the appellants were taken to Makambako Police Station.

The appellants arrived at Makambako Police Station between 12:00 – 14:00 hours on the 29th day of November, 2020. It is on record that, between 15:00 – 16:00 hours, F2579 DCPL Masoud (**Pw3**), a police officer from Makambako Police Station, recorded the cautioned statement of the second appellant (**Exhibit 1**). The cautioned statement of the first appellant (**Exhibit 2**) was recorded by WP 9910 DC Debora (**Pw6**) between 14:40 – 15:20 hours.

Upon conclusion of investigation, the appellants were arraigned in court being charged for contravening the provisions of section 131A (1) & (2) of the Penal Code. In their defence, they both flatly denied the charges. The first appellant (Dw1) testified that him and the victim were in a relationship in their secondary school days. He narrated further that the victim, a former girlfriend, became furious and angry with him when she realized that Dw1 was married to another woman. However, he was surprised that, despite absence of any quarrel between them, the victim named him as the culprit. The second appellant (Dw2) acknowledged that he knew the victim. He also did not comprehend why he was named as the culprit.

As it were, the appellants defense was of no help. The trial court believed the prosecution story and proceeded to convict and sentence the appellants as indicated earlier. In convicting the appellant, the trial court was satisfied that the victim was truthful and thus her testimony was satisfactory to ground conviction. The trial court placed reliance in the case of **Seleman Makumba vs. Republic** [2006] TLR 375 to justify its conclusions.

Unsatisfied with the decision of the trial court, the appellant have approached this court on an appeal. Their initial petition of appeal

contains seven grounds of appeal. However, on the 04th day of April, 2024, the first appellant orally supplemented the existing petition of appeal with five more complaints making the list to twelve. The comprehensive list as reflected in the appellants lay formulation is as follows:

> *(1). THAT- the trial court erred in law when convicted and sentenced the appellants without taking into account that none of the prosecution witnesses out of pw1 seen while Pw1 accompanied by the appellants by the fateful day;*
>
> *(2). THAT- the trial court erred in law when convicted and sentenced the appellants without taking into consideration that exhibit PE 1 and PE 2 were admitted there illegal since these documents violated section 50, 51, 57 and 58 of the CPA Cap. 20 RE 2019 now R.E 2022;*
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> *(3). THAT- the trial court erred in law when convicted and sentenced the appellants without regarding that no anywhere in her testimony Pw1 shows that she reported this allegation to Pw4 (VEO) and Pw4 referred her to be examined to the dispensary through a written documents to proof the same which in fact was not tendered before the trial court;*
>
> *(4). THAT-the trial court erred in law when convicted and sentenced the appellants without taking into account*

that none of the peoples who heard the alarm from pw1 and took her to the hamlet their man and the hamlet chairperson himself called to support a single witness Pw1 if she mentioned the names of her rapists before them;

(5). THAT-the trial court erred in law when convicted and sentenced the appellants without taking into account that the evidence of Pw7 a doctor who examined Pw1 didn't saw any penetration the major ingredients of rape as per section 130(4) (a) of the penal code cap 16 RE 2019 now 2022;

(6). THAT-the trial court erred in law when convicted and sentenced the appellants without evaluating deeply the prosecution witnesses and the defence in order to be reached in a good decision but he failed to do so and convicted the appellants unlawful;

(7). THAT- the defence of the appellants was not considered by the trial court as the prosecution failed totally to prove its case as per law."

(8). That, the appellants were not reminded of the charges before commencement of preliminary hearing.

(9). The prosecution case failed to read the facts of the case to the appellants and allow them to select the facts which they admit.

(10). The memorandum of undisputed and undisputed facts was both not readout to the appellants contrary to section 192(3) of Criminal Procedure Act.

(11). The trial court erred in convicting the appellant based on the testimony of PW4 who testified that the appellants confessed without tendering any proof or document.

(12). The trial court erred in law in convicting the appellant without considering the contradictory testimonies of PW3, PW4 and PW5.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas Mr. Sauli Makoli, learned State Attorney appeared for the respondent/Republic.

However, when they were required to submit in support of their grounds of appeal, the appellants urged the court to allow Mr. Makoli, learned State Attorney to respond first to their grounds and they would rejoin if necessary.

In his submissions, Mr. Makoli opted to consolidate grounds one, five, six, and twelve as they all related to the question whether the prosecution proved the case against the appellants beyond reasonable doubts; he also consolidated, grounds four and eleven on the one part;

and grounds eight, nine and ten on the other. Grounds two and seven were argued separately.

Submitting in respect of the consolidated grounds one, five, six, and twelve, Mr. Makoli argued that to prove the charges against the appellants, the prosecution was supposed to prove beyond reasonable doubts that there was penetration without the victims' consent and that that it was the appellants who penetrated the victim together or with one aiding and abetting the other. The learned counsel argued that, the victim, Pw1 narrated in clear terms how the appellants took her from the restaurant and proceeded to commit the rape incident. He added that the victim explained how she knew the appellants a fact which was also confirmed by the appellants themselves. The learned state counsel submitted that the victim intimated that the sexual encounter was without her consent. According to Mr. Makoli, this being a sexual offence, evidence of a victim was sufficient in itself to ground conviction. In support of this, the learned counsel cited the case of **Frank Kinambo Frank s/o Kinambo vs The Director of Public Prosecutions** (Criminal Appeal 47 of 2019) [2022] TZCA 548 (1 September 2022) TANZLII, which quoted the case of **Selemani**

Makumba vs Republic [2006] T.L.R. 379 [CA]; (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) TANZLII.

The learned state attorney added that the testimony of the victim was corroborated by that of Pw7 a medical practitioner who examined the victim and resolved that she was sexually active. Regarding the identity of the appellants, Mr. Makoli argued that the victim mentioned the appellants to Pw4 and Pw2 immediately after the incident. In support of this contention, he cited the case of **Efeso Wasita vs Republic** (Criminal Appeal No. 408 of 2020) [2023] TZCA 42 (22 February 2023) TANZLII.

Regarding inconsistencies in the prosecution witnesses, the learned state attorney submitted that there was no any material inconsistency or discrepancies in the prosecution case. Regarding the timelines the learned counsel argued that the victim was picked by the appellants at around 21:00Hrs, on the 27th November, 2020. He added that the rape incident happened late at night between the 27th - 28th day of November, 2020. According to the learned state attorney, it was on record that the victim reported the matter to Pw4 at around 01:00Hrs, on the 28th November, 2020. As for the arrest of the appellants, Mr. Makoli argued that they were not arrested during the

day time on the 28th day of November, 2020. Instead, they were arrested later at night at about 21:00Hrs on the 28th day of November, 2020. In view of these submissions, Mr. Makoli concluded that there were no inconsistencies or contradictions in witness testimonies. The learned counsel concluded that the appellants complaint in the first, fifth, sixth and twelfth grounds lacked merits.

Mr. Makoli consolidated the third, fourth and eleventh grounds as they all related to the testimony of Pw4. He submitted that there was no rule of law or evidence requiring a village chairman or VEO to issue a written document or instrument for a victim of rape to be medically examined. The learned counsel argued that it was only the police who are mandated to issue a Request for Medical Examination through Police Form No. 3 (PF3). As for the appellants admission before Pw4, Mr. Makoli argued that Pw4 did not have a duty or obligation to record their confession. He added that it was the police who recorded their statement. Alternatively, Mr. Makoli argued that the appellants were not convicted and sentence on the basis of their confession before Pw4. To him, the testimony of Pw4 was only to corroborate the victim's story regarding reporting the incident.

Mr. Makoli also took a view that it was not necessary for the prosecution to parade the members of public who escorted the victim to Pw4. According to him, it was sufficient for the prosecution to parade the necessary witness and evidence to prove the ingredients of the offence. He cited the case of **Furaha Alick Edwin vs Republic** (Criminal Appeal No. 410 of 2020) [2023] TZCA 46 (23 February 2023) TANZLII, where the Court of Appeal held that, under section 143 of the Evidence Act, no particular number of witnesses is required for the proof of any fact.

Regarding the validity of the confession statement of the second appellant, Mr. Makoli conceded that the admission of the said statement violated the provisions of section 50,51, 57 and 58 of **the Criminal Procedure Act [Cap. 20 R.E. 2022].** He thus advised the court to expunge the said statement. That notwithstanding, Mr. Makoli insisted that there was sufficient evidence to ground conviction against the second appellant. As for the cautioned statement of the first appellant (Exhibit P2), Mr. Makoli insisted that the same was properly admitted in evidence.

Mr. Makoli then turned to grounds eighth, nineth and tenth grounds. He argued that there is not legal requirement to remind an

accused person of their charges before preliminary hearing is conducted. The learned state attorney added that there was no evidence on record that the appellants requested to be reminded the charge as an indication that they had forgotten. His view was that the appellants were not prejudiced in any way.

As to whether or not the facts of the case were read. Mr. Makoli argued that the evidence on record shows that the facts were read to the appellants and the memorandum of undisputed facts was noted. Alternatively, Mr. Makoli submitted that even assuming that the facts or memorandum of undisputed facts were not read to the appellants that would only vitiate the proceedings in the preliminary hearing and not the entire trial. For this, he cited the case of **Boniface Thomas Mwimbwa and Another vs Republic** (Criminal Appeal 325 of 2019) [2023] TZCA 192 (19 April 2023) TANZLII and **Francis Fabian @ Emmanuel vs Republic** (Criminal Appeal No. 261 of 2021) [2023] TZCA 17936 (12 December 2023) TANZLII.

Lastly, Mr. Makoli argued that it was not correct that the appellants defence was not considered. To amplify his contention, the learned counsel referred to paragraph 2 of page 5 of the typed judgment for evidence that the appellants defence was considered.

Otherwise, the learned counsel advised the court to consider the defence and make its own conclusions. In bolstering his position, the learned counsel cited the case of **Wambura Kiginga vs Republic** (Criminal Appeal 301 of 2018) [2022] TZCA 283 (13 May 2022) TANZLII and **Erick Maswi & Another vs Republic** (Criminal Appeal 179 of 2020) [2022] TZCA 339 (14 June 2022).

As the prosecution concluded their reply submissions the appellants decided to unleash their wrath on the prosecution case. Each of the appellants took to the floor to rejoin and explain, in their own terms, the grounds of appeal.

The first appellant argued that a restaurant was an open place accessible to everyone. However, he was surprised that the prosecution failed to parade an independent witness that would confirm that the appellants were seen at the victim's restaurant on the fateful day. He also complained that the prosecution failed to parade the person who is alleged to have seen them with the appellants on that night. He also questioned why a person called Moses was not called to testify on whether the appellants took the victim to his house.

Regarding his cautioned statement, the first appellant argued that the statement was recorded out of the limitation period provided by

law. He narrated that during trial within trial the Prosecution witness one DC Debora (Pw6) failed to establish the specific date when he was arrested and brought to the police station. He added that while he was arrested on the 28th day of November, 2020, the witness stated that his statement was recorded on the 29th day of November, 2020 which was beyond the requirement of law.

Regarding medical evidence adduced by Pw7 and contained in the Medical Examination Report, the first appellant argued that the evidence was inconclusive to prove penetration. He argued that presence of semen or fluid in the victims' private parts was not conclusive evidence of rape. The appellant contended further that there were no bruises in the victim's vagina indicating that she was not raped. In his view, in absence of medical evidence of penetration the victim's story was not corroborated.

The first appellant questions the credibility of the victim in identifying the appellants. He contended that the victim failed to provide a description of the identification conditions at the restaurant and the entire night. According to the first appellant, in absence of identification parade, the appellants were not properly identified as the culprits of the incident.

It was also his contention that the prosecution case was questionable for failure to parade the individuals who took the victim to Pw4. On another limb, the first appellant argued that the hamlet chairperson to whom the matter was reported first was not called. Lastly, the first appellant faulted the trial court for failure to properly evaluate and analyze the evidence on records and thereby arrive at an erroneous conclusion.

For the above reasons, the first appellant urged the court to allow the appeal by declaring that the prosecution failed to prove the charges against the appellants and thereby quash the conviction and set aside the sentence.

For his part, the second respondent submitted that the procedures for preliminary hearing (PH) were violated in contravention of requirements of law. In pointing out the irregularities, he argued that the trial court did not remind them their charges before PH was conducted. He also argued that there was no evidence that the prosecution read and explained the facts of the case to the appellants. Additionally, the second appellant contended that the memorandum of undisputed facts was not read out to the appellants in violation of section 192(3) of the CPA.

The second appellant also contended that the trial court erred in relying on the testimony of Pw4 who failed to produce a confession statement made to him by the appellants. He argued that, in absence of a documentary evidence witnessing their confession to him, the testimony of Pw4 lacked credibility. Dw2 contented further that, there were discrepancies between the charge sheet and prosecution witnesses regarding the date when the incident took place.

Dw2 complained further that there no documentary evidence that the victim reported the matter to Pw4 and that, thereafter, she was issued with an approval to proceed to the hospital for medical examination. In his view, failure to produce documentary evidence showing that Pw4 authorised the victim to be examined dented the persecution case.

That concludes the summary of evidence obtainable during trial and submissions of the parties for and against the appeal.

It is now my task to embark on a determination whether the order of conviction and sentence recorded by the trial court suffers from any such infirmity as is mentioned above so as to justify interference with the same in exercise of this courts' appellate jurisdiction.

I stated earlier in this judgment that the learned trial magistrate believed that the victim was a credible witness. The trial court relied in **Seleman Makumba's** case (supra) for a position that the best evidence in rape cases must come from the victim. Admittedly, the cited case is a leading authority on that position. It is also common ground that the decision in that case was followed by the Apex Court in several subsequent decisions including the case of **Nasibu Ramadhani vs Republic** [2019] TZCA 389 (8 November 2019) TANZLII where the Court (Juma, C.J), at page 14, having quoted the decision in the case of **Seleman Makumba's** case (supra) observed as follows:

> *"We similarly agree that the evidence of the victim of sexual offence can stand on its own feet to secure a conviction. As this Court referred to the import of section 127 (7) of the Evidence Act in BAKARI HAMISI VS. R, CRIMINAL APPEAL NO. 172 OF 20C5 (unreported), a conviction may be founded on the evidence of the victim of the rape if the court believes, for the reasons to be recorded, that the victim witness is telling nothing but the truth."*

The position is rape cases is also similar in gang rape cases. The view was stated by the Court in **Jafari Mohamed vs Republic** (Criminal Appeal 112 of 2006) [2013] TZCA 344 (15 March 2013) where the Court (Rutakangwa, J.A), at page 11, stated:

> *"We are saying so deliberately because* ***no better direct evidence could have been produced by the prosecution to prove the alleged gang rape than that of PW1 Penina, an adult victim of the offence,*** *as Mr. Wambali correctly argued before us."*

In the case under consideration, Mr. Makoli submitted that through the testimony of the victim (Pw1) the prosecution successfully established all the constituents of the offence of gang rape under section 131A of the Penal Code. On this I agree with the learned State Attorney that the evidence of the victim, in the instant case, disclosed the necessary ingredient of rape. It is on record that, in her testimony before the trial court, at pages 10 to 11 of typed proceedings, the victim (Pw1) narrated in clear and succinct terms how the appellants raped her one after the other with each aiding and abetting the other in the process. For this, I will let the records speak for itself:

> *"Then Osmund asked Nicolaus where are we going, Nicolaus replied straight, we then went to another village, in the mid of the forest Osmund stopped the bodaboda, he then said that,* ***"mbuzi amefia kwa muuza supu",*** *Nicolaus told Osmund that don't joke let us go, as we were left Nicolaus told Osmund to drive, at that time they covered my month with cloth, we proceeded with the journey on the way the bodaboda got a mechanical defect,* ***then Osmund took it to the bush. They laid me down. Osmund then held me Nicolaus removed my tight and underpants, he then removed his trouser and boxer, he took his penis in my vagina without using protection. He then had sex with me***

without my consent. When he finished, he dressed and hold me, Osmund then took off his trouser and boxer, he took his penis and inserted it into my vagina without protection. When he finished, he dressed.

They took me and ordered me to wear the tight and my underpants. I rejected, they took the tight and the underwear wrapped them in a cloth. They took me in a bodaboda, Osmund then drove the bodaboda, I was crying. On that time, they had conversation. Osmund told me that your uncle impregnated my sister, today we have revenged, I kept quiet. On that time, I had a relation with their brother called Elieza, they used to tell me that Elieza is a womanizer, they mentioned the names of the women who had relation with Elieza."

[Emphasis is mine]

The above testimony of the victim was not shaken or challenged in any way during cross-examination by the appellants. As it stands the testimony is sufficient and compelling to prove the offence of gang rape under section 131A of the Penal Code. It is trite that failure to cross-examine or contradict a witness on material facts entails admission to those facts. The victims testimony remains unchallenged.

I am aware that for conviction to be solely based on the testimony of the victim, her credibility is of paramount importance. In the instant case, the appellants have questioned the credibility of the victim. It was their contention that the victim was not credible and her

story is not believable. They allege that she concocted the story because she was angry after the first appellant deserted her and got married. They also contend that her evidence was not trust worth as it was not corroborated by any other prosecution witness.

It is trite law that credibility is an issue of fact, and the trial magistrate or judge is the best judge of this fact. It is also common knowledge that, an appellate court, like this one, will only interfere with the trial courts' findings on credibility only if it is satisfied those findings that *"are on the face of it unreasonable or perverse"* leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law. See **Jafari Mohamed vs Republic** (supra).

It is also common ground that 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 where it is a rule that the best evidence must come from the victim. See **Charles Yona vs Republic** [2021] TZCA 339 (TANZLII) (Mwandambo, J.A) at page 20.

In the case under reflection, the learned Principal Resident Magistrate (P.R.M) evaluated the victim's evidence and made a

conclusion that she was credible. His evaluation of the victim, at page 4 of the typed judgment, is as follows:

> *"It is clear that, the victim and the accused were familiar to each other, in his defence, 1st accused said he knows the victim also 2nd accused said he knows the victim* ***.This court has been convinced by the evidence of PW1 that she is a credible witness, she narrated on how the incidence occurred,*** *she was familiar with the accused person, further her evidence is supported by that of PW6* ***RICHARD S/O MARTIN (doctor)*** *who told the court that he is the one who examined the victim, he tendered the PF3 which was marked as P3, in his remarks he wrote that* ***"the victim was sexual active girl, perforation of hymen noticed but seen the mucus fluid, sperms that support she was raped."***
>
> [Emphasis is mine]

The learned P.R.M, concluded further that the evidence of the victim that she was gang raped was corroborated by Pw7 who narrated that he examined the victim on the 28th day of November, 2020 at around 14:00 and prepared the Examination Report the next day. Relying on the above testimony, the learned P.R.M concluded:

> *Therefore, the first point as to whether she was raped, he has been proved by herself and her evidence was further supported by PW6, a doctor who examined the victim and filled the PF3 which was tendered and marked as P3. As it now a settled principle that in sexual offences the best evidence is that of the victim see the case of* ***SELEMANI MAKUMBA v. REPUBLIC*** *[2006] TLR."*

[Emphasis is mine]

For my part, I have undertaken a critical scrutiny of the evidence on record, I have also read the entire evidence. Having done so, I must say that there is hardly anything in the cross-examination of the witnesses which may cast a doubt on the truthfulness of her testimony. She narrated clearly and coherently on how she knew the appellants. All of them confessed that they knew her very well.

It is also on record that, the victim narrated lucidly how the appellants went to her restaurant on the fateful day and stayed late until when she was closing the restaurant. They took her went past her house and had canal knowledge of her without her consent. Though young in her life, she was grown enough to present a true account of what transpired on the night. Her credibility has not been impeached. My re-evaluation of her testimony leads me to a conclusion that she was a natural witness and have deposed in a forthright manner. For that reason, I see no reason for me to interfere with the findings recorded by the learned trial magistrate on this regard.

Responding to the question whether the victim consented, the trial court was satisfied that there was no consent from the victim. On this, the learned P.R.M made the following observations:

> *"Therefore, there is doubt that the accused person together had sexual intercourse with the victim, as I said earlier, the issue is whether she consented because she is a girl above eighteen years, this court is convinced that there was no consent due to the following reasons; why did the accused persons drive the victim to the forest and had sexual intercourse with her in the bush, second, why the accused persons abandoned the victim in the night after they had sexual intercourse. It is clear that what was stated by the victim that they took her on the bodaboda, covered her with cloth is true and her evidence was credible. Thus, the accused persons had sexual intercourse with the victim without her consent."*

Having considered the findings of the learned P.R.M in relation to the evidence on record, I must say that, there is, in my opinion, no reason much less a compelling one for me to take a view different from the one taken by the learned trial magistrate. The prosecution case that these appellants had carnal knowledge of the victim without her consent stands satisfactorily proved.

Before winding up on this I wish to observe that, evidence of a victim of sexual assault, be it rape, molestation or unnatural offence, stands almost at the level with the evidence of an injured victim or witness; and to some extent may be even more reliable. For that matter just like a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit,

the evidence of a victim of a sexual offence is entitled to great weight, despite absence of corroboration. It is important to note that, corroborative evidence is not a domineering component of judicial credence in every criminal trial involving rape or sexual offences. It is not a requirement of law but a guidance of prudence under given circumstances.

I am also of a firm view that, if a victim is an adult and of full understanding such as was the case herein, in absence of circumstances appearing on the record revealing that the victim has a strong motivation to falsely involve the accused person(s), the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy.

In the instant case, my careful analysis of the testimony of the victim has fashioned an impression on my mind that she is a reliable and truthful witness. In accordance with the evidence on record, her testimony suffers from no infirmity or blemish whatsoever. Like the trial court, I would have no hesitation in acting upon her testimony alone without looking for any corroboration. However, as argued by Mr. Makoli and correctly so in my opinion, in this case there is ample

corroboration available on the record to lend further credence to her testimony.

This takes me to Mr. Makolis' contention that the victim's story was corroborated by Pw7, Pw3, Pw4 and Pw5. In his testimony, Pw7 narrated that he examined and treated the victim on the night of the event and thereafter prepared a medical examination report (Exh. P3). The medical expert's conclusions were that there was *"mucous fluid + sperm that supports she's raped"*. The witness, obviously, concluded that there was no injuries or bruises. I say obvious because Pw7 did also observe that the victim was sexually active.

Regarding the reporting and arrest of the appellants, the victim's story was consistent with what was narrated by Pw3, Pw4 and Pw5. The records demonstrates that the appellants offered the victim a lift at around 21:00Hrs, on the 27th November, 2020. As they arrived to her house they quickly drove past the house and proceeded to a nearby forest where they raped her whilst folding her mouth. The victim did not have a recollection of the specific timelines but I agree with Mr. Makoli that it was on the night between the 27th - 28th day of November, 2020.

The evidence on record is also clear that after the incident the victim escaped from the appellants and reported the matter to Pw4 at around 01:00Hrs, on the 28th November, 2020. Pw5 informed the court he was directed to arrest the appellants by Pw4. He contended that they managed to arrest the appellants at around 21:00Hrs on the 28th day of November, 2020. The appellants were kept at the village office until the next morning, on the 29th day of November, 2020, when they were taken to Makambako Police Station. For these reasons, the appellants contention that there were material inconsistencies in witness testimonies regarding the date of the incident is also unfounded.

The appellants questioned their identification on two fronts, firstly that the persons who assisted the victim and took her to the hamlet chairperson were not called; and that an identification parade was not conducted. Having carefully considered the records, I hold a view that the appellants complaints are devoid of merits. There is no question that the victim knew the appellants and that the appellants knew the victim. Regarding how the incident unfolded, she narrated as she was about to close the restaurant the appellants appeared and she attended them as usual. As she was about to close the restaurant the appellants

offered her a ride home. However, instead of taking her home they proceeded to a forest where they gang raped her. Thereafter, the victim escaped and reported the matter to Pw4. For his part, Pw4 narrated that at around 01:00Hrs, on the 28th day of November, 2020, the victim reported that she was raped by the appellants. After the report he directed the victim to proceed to medical checkup. Thereafter, he ordered Pw5 to arrest the appellants. Under these circumstances there was no question of mistaken identity or possibilities of mistaken identity.

I should add that, whether the person to whom the victim reported was VEO or hamlet chairperson is also immaterial. I should also add that such horrifying circumstances it would be asking too much to require the victim to precisely recall the person to whom she reported the matter. After all she was in a different village and most importantly, Pw4 testified that the victim reported to him the matter at around 01:00Hrs, on the 28th day of November, 2020. That is, in my view, sufficient to establish that the incident happened and reported on good time.

The appellants complaint that there was a need for an identification parade is also unfounded. It is trite that an identification

parade is carried out to enable a witness to identify her assailant whom she has not seen or known before the incident. This view was stated by the Court in the case of **Joel Watson @ RAS vs The Republic**, Criminal Appeal NO. 143 of 2010 (unreported) where the Court (Bwana, J.A) observed that:

> *"The purpose of an identification parade is inter alia, to enable a witness identify his/her assailant whom he/she has not seen or known before the incident (See **Abdul Farijalah and Another vs Republic**, Criminal Appeal No. 99 of 2008; **John Paulo @ Shida and Another vs. Republic**, Criminal Appeal No. 335 of 2009 (both unreported). Such identification conducted by the Police is not substantive evidence (See **Eailian Aidan Fungo and Another vs Republic**, Criminal Appeal No. 278 of 2008; **Imamu Selemani Msovu and Another vs. Republic**, Criminal Appeal No. 306 of 2010 (Both unreported). As provided for under section 60 (1) of the Criminal Procedure Act (the CPA), an identification parade may be conducted during the investigation stage for the purpose of ascertaining whether a witness can identify the suspect of the crime."*

A similar view was taken by the Court in the case of **Doriki Kagusa v. The Republic**, Criminal Appeal No. 174 of 2004 (unreported) where it was observed as follows; -

> *"The identification parade was absolutely unnecessary where the identifying witnesses or witness knew the suspect before the incident; it is superfluous and waste of resources to conduct such a parade. We have asked ourselves this question; the identification parade is held*

to achieve what purpose when the suspect is well known to the identifying witnesses? Our answer has already been indirectly given above. It is unnecessary and a waste of time."

As I have pointed out above, in the instant case, the victim knew the appellants and they have themselves admitted that they knew the victim. It is also evident from the records that the unfolding of the incident took several minutes if not hours. There was therefore no need to conduct an identification parade. It is also worth noting here that an identification parade is by itself not substantive evidence. It is usually only admitted for collateral purposes, mostly, to corroborate dock identification of an accused by a witness. See **Mussa Hassan Barie & Another vs. Republic**, Criminal Appeal No. 292 of 2011 (unreported). I must also stress here that there was no need for the prosecution to present evidence that someone else saw the appellants at the victim's restaurant.

It was next contended that the prosecution case was dented because several witnesses were not called, including the good Samaritans who responded to the victims' alarm at night and took her to the hamlet chairman and the hamlet chairman himself. I do not agree with the appellants on this for a simple reason that, if the

evidence of Pw1, Pw4 and Pw7 was believed by the trial court it is not necessary to multiply witnesses to prove the case and thus non-examination of the good Samaritans and hamlet chairman does not, in my opinion, cast any doubt on the prosecution case.

Afterall, pursuant to section 143 of **the Evidence Act, [Cap 6 R.E 2022]** there is no number of witnesses required to establish a fact in evidence. See **Furaha Alick Edwin vs Republic** (supra). Further to that in the case of **Amiri Hassan Kudura vs Republic** (Criminal Appeal 271 of 2013) [2016] TZCA 637 (20 June 2016) TANZLII, the court observed that:

> *"We are fully aware that no particular number of witnesses is required for the proof of any fact. In **Yohanis Msigwa v Republic** (1990) TLR 148, it was stated that: -*
>
> > *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen and his/her credibility.""*

The appellants complaint in the fourth ground is therefore devoid in merits. I am convinced that the prosecution was not negatively impacted by failure to summon the people who escorted the victim to Pw4 or the person alleged to have seen them on the fateful day.

It was also the appellants contention, in the eighth, nineth and tenth grounds of appeal, that procedures during preliminary hearing were violated. Specifically, they alleged that they were not reminded of the charge they faced. They also complained that the facts were not properly read so that they may select which facts they admitted and which ones they rejected. Finally, they complained that, contrary to the dictates of section 192(3) of the Criminal Procedure Act, the memorandum of undisputed and disputed facts was not readout to them before appending their signatures.

From the records, at pages 7 to 8 of typed proceedings, there is evidence that preliminary hearing was conducted on the21st day of April, 2020. There is also evidence that after the trial court had conducted a preliminary hearing, it prepared a memorandum of agreed and disputed facts for both appellants. The records show that the appellants and the state attorney prosecuting the matter signed the memorandum of agreed and disputed facts as required by section 192 (3) of the CPA. However, I agree with the appellants that, the record does not show that the memorandum of agreed facts was read over and explained to the appellants in the language they understand in compliance with section 192 (3) of the CPA.

It is true that failure to properly conduct a proper preliminary hearing in accordance with section 192 of the CPA is a fatal and incurable irregularity. There is a long list of authorities on this including the case of **MT 479 Sgt. Benjamin Holela vs R** [1992] T.L.R 121; **Kanuda Ngasa @ Kingolo Mathias vs Republic** (Criminal Appeal 247 of 2006) [2011] TZCA 66 (15 February 2011) TANZLII; **Republic vs Abdallah Salum @ Haji** (Criminal Revision 4 of 2019) [2019] TZCA 297 (10 September 2019) TANZLII; and **Boniface Thomas Mwimbwa and Another vs Republic** (supra).

However, I am also aware that the above position is premised on scenarios where the contents in the memorandum of admitted or undisputed facts contains incriminating facts. The rule does not apply where there are no incriminating facts. I am fortified in this view by the decision of the Court of Appeal in the case of **Boniface Thomas Mwimbwa and Another vs Republic** (supra), where the Court cited the case of **Republic v. Abdallah Salum Haji** (supra), for a position that an omission to read the memorandum of agreed facts to an accused person in the language he understands is a fatal irregularity. Having said that, the Court, at page 12, (Mwandambo, J.A) observed as follows:

"However, upon a close examination of the authorities it seems to us that the omission can only be incurably fatal where such matters contain admissions of incriminating facts and not just any other facts, for that will be prejudicial to the accused person who may not have an opportunity to cross examine witnesses on such admitted facts. The position in the instant appeal is that the appellants made no admission to any fact except their names, employment and their arraignment in court on the information on which they were convicted of at the end of their trial. With respect, we are not prepared to accept that the parliament intended to render the omission to read the agreed facts fatal even when such facts cannot form the basis of the accused's conviction."

In the instant case, the records show that the appellants admitted their personal particulars such as age, occupation, residence, religion and tribe. They also acknowledged that they knew the victim something which is also confirmed in their defence. These facts were not the reasons why they were convicted for the offence. There was, therefore, nothing prejudicial against the appellants. Grounds eight, nine and ten are thus without merits.

In response to complaint that the appellants defence was not considered, I agree with Mr. Makoli that the trial court considered the appellants defence. Having carefully examined the records I am satisfied that the trial court summarized and analyzed the defence and

rejected it for being insufficient. In rejecting the defence evidence, the trial court made the following observations:

> *"In the defence, the 1st accused made a general denial that he knows the victim but he didn't rape her, her father said that he was mentioned by the victim because they were lovers at school and he is married, that the victim was furious with that move, for the 2nd accused he said he knows the victim but he didn't rape her, I have scrutinized their defence, their evidence is too weak to shake that of the victim and the doctor."*

From the above excerpt, it is clear that the appellants defence was considered and analyzed by the trial court found to be wanting.

For my part I have scrutinized the appellants defence and observed that the first appellant testified that he had sexual relationship with the victim in their school days and left. It was his contention that upon her return, she was angry that the first appellant was married and decided to frame him for rape. The second appellant confessed knowing the victim. However, regarding the incident he informed the court that on the fateful day he was home. He failed to understand why the victim mentioned his name.

Having examined the above testimony I agree with the trial court that the appellants defence did not shake the prosecution case. In light of the victim's story that the appellants offered her a ride and

proceeded to rape her on the fateful day, the appellants general denial of the incident was insufficient. They did not offer any plausible explanation of their whereabouts on the fateful night and neither did they raise any doubts in the prosecution case. Suffice to note that the appellants defence was insufficient to shake the prosecution case. The seventh ground of appeal is also devoid in merits.

In conclusion, having carefully considered the entire evidence and the circumstances proved in this case, I am clearly of the opinion that the prosecution case against the appellants as found by the learned trial magistrate, has been fully established beyond reasonable doubt. I am also of the opinion that no other reasonable view on the evidence could be possible than the one which was taken by the learned P.R.M.

The appeal is therefore lacking in merits. The same is dismissed in its entirety. The conviction and sentence imposed by the trial court on these appellants is maintained. Accordingly, the appellants will serve out the remaining portion of their sentence.

The appeal is disposed in the aforestated terms.

DATED at **IRINGA** this **22ND** day of **MARCH, 2024**.

THE HIGH COURT OF TANZANIA

S.M. KALUNDE

JUDGE