**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MJASIRI, J.A., JUMA, J.A., And LILA, J.A.)**

**CRIMINAL APPEAL NO. 394 OF 2015**

**CRISTOPHER KANDIDIUS @ ALBINO.....APPELLANT**
**VERSUS**
**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Teemba, J.)**
**dated the 20th day of April, 2015**
**In**
**Criminal Appeal No. 98 of 2014**

---

## JUDGMENT OF THE COURT

6th & 20th day of December, 2016

**JUMA, J.A.:**

In this second appeal, the appellant CHRISTOPHER KANDIDUS @ ALBINO, is still faulting his conviction and sentence of thirty (30) years imprisonment by the trial District Court of Morogoro at Morogoro (Nsana-RM) for the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16. It was alleged in the charge sheet that on 19thday of May, 2011 at Dete village in Ngerengere in the Morogoro district of Morogoro Region, the appellant had unlawful carnal knowledge of a thirteen year old girl, Semeni Selemani. After lodging his first appeal in

High Court at Dar es Salaam, by a judgment dated 20th April, 2015, Teemba, J. dismissed that appeal.

In brief, the evidence adduced by the prosecution witnesses traces back to around 05:00 hours on 19/5/2011 when, after spending a night guarding his farm from destructive wild animals Selemani Omary (PW3) returned home to catch up with some sleep. Barely an hour into his sleep, his wife awoke him to inform him there was a man sleeping in the room belonging to their daughter Semeni Selemani (PW2), who had at the time gone to school. When PW3 checked out for himself, he found many people already gathered and the appellant was indeed sleeping inside his daughter's room. The village leaders advised PW3 and his wife to follow their daughter up at school. According to PW3 when she was questioned about a man she left behind sleeping in her room, her daughter answered that the appellant had broken into the house, entered her room and proceeded to rape her. At the police station, both PW3 and his daughter were interrogated before the girl was referred to a dispensary for medical examination and treatment.

PW2 was examined by a medical officer, Joseph Maghulilo (PW4) of the Ngerengere Dispensary. The medical officer recalled how he asked his patient how she had incurred the genital injury. According to the testimony

of the medical officer, PW2's genitalia had large bruises and her hymen was not intact. The medical examination report was admitted as exhibit P1.

When the appellant was put on his defence, he testified on oath and called no witness to bolster his defence. The substance of his defence was that on 18/05/2011 at around 20:30 hrs while drinking beer at the house of one Mzee Challe a boy came over to inform him that his father, Selemani Gunga, wanted to see him. It was around 21:00 hrs when he met Mr. Selemani Gunga who asked him to repair a motorcycle belonging to his visitor. He went to yet another place where he carried out the repairs till around 01:00 a.m. when he demanded to be paid Tshs. 37,000/= for the work done.

Because it was rather late and he was supposed to be paid by Selemani Gunga, the appellant was offered a mat to sleep on till day break. In his testimony the appellant expressed his utter surprise that at day-break he was awakened by three people. They demanded to know why he was sleeping in a room where a girl also slept. His explanations were to no avail. Alarm was raised which attracted a crowd of people. That is how he was apprehended and taken first to the Kitongoji Chairman, and later to the police station.

For his second appeal the appellant has brought before us six grounds of appeal which may be summarized into four areas of complaints:

1. *Having expunged the evidence of the complainant (PW2) from the record, there was no evidence remaining on record which could justify the first appellate court to convict the appellant as it did.*
2. *The first appellate court erred in law and fact for relying on the evidence of the medical officer (PW4) and the undated medical examination report (exhibit P1) which it relied upon to connect the appellant with the rape of the complainant.*
3. *In the alternative, the appellant faulted the evidence of what PW3 was told by his daughter (PW2). He wondered why, if PW2 was in fact raped, she managed to go to school and failed to alert even her teachers that she had been raped.*
4. *Faulted his conviction on mere suspicion, for merely being found asleep in the room belonging to the complainant*

When the appellant appeared before us in person on 6th December, 2016, he preferred to let the learned State Attorney respond first to his grounds of appeal. The respondent Republic was represented by Mr.

Tumaini Kweka learned Principal State Attorney, who was assisted by Ms. Beata Kitau and Mr. Genesis Tesha, both learned Senior State Attorneys.

On behalf of her two colleagues, Ms. Kitau expressed the respondent Republic's full support of the appeal. The learned State Attorney submitted that the prosecution evidence which the two courts below placed reliance on to convict the appellant has many gaps which should have created doubt in the prosecution's case. Ms. Kitau urged us to give little credence to the evidence of PW2 who claimed to have woken up from her sleep to go out for a call of nature only to find someone who was drunk, sleeping on her bed. This person had sexual intercourse with her occasioning much pain. The learned State Attorney wondered how she continued to sleep in the same room till morning when she went to school instead of reporting to her parents first.

Ms. Kitau also faulted the victim's evidence for failing to testify on how the intruder found his way into her room, but was able to tell her father (PW3) that the appellant had broken into her room.

Ms. Kitau similarly faulted the failure of the learned trial magistrate to conduct the *voir dire* examination before allowing a child of tender age to testify. This, she added, rendered the probative value of the evidence of

PW2 inconsequential. Further, she submitted that *voire dire* to a witness of under the age of fourteen was mandatory in 2011 when the appellant is alleged to have committed the offence. She added that it is still a mandatory requirement now even with the handing down of the Full Bench's decision (dated 6th day of June, 2014) in **Kimbute Otiniel v. R.**, Criminal Appeal No. 300 of 2011 (unreported) and the subsequent amendment of section 127 of the Evidence Act, Cap 6 by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 Act No. 4 of 2016.

Ms. Kitau next gave two basic reasons why she downplayed the corroborative value of the evidence of the medical officer (PW4). **Firstly,** she questioned the way PW4 recorded in his report what the complainant had narrated, instead of recording what he actually found after his own objective medical examination of the patient. The learned State Attorney specifically referred us to the record of appeal where PW4 testified how he:

> *"...asked her **[the victim]** as to how she got injured on her genital parts and said that there is a man who went [to] her room and penetrated his penis in her vagina....."* [Emphasis added].

**Secondly,** she submitted that much as the medical evidence of PW4 and exhibit P1 may establish that the victim was raped, standing alone, these two pieces of evidence do not go further as to prove that it was the appellant who raped the complainant.

When his turn came to react to Ms. Kitau's submissions, the appellant fully associated himself with the position taken by the learned Senior State Attorney and urged this Court to allow his appeal.

We remain mindful that this being a second appeal the Court is more concerned with issues of law. Having carefully considered the submissions made in support of the appeal the issue of law calling for our determination is whether Ms. Kitau and the appellant are right to contend that the evidence on record has not proved beyond reasonable doubt that it was the appellant who raped PW2. It is appropriate to point out that the first appellate Judge even after expunging the evidence of the complainant (PW2) concluded that the remaining evidence on record proved the prosecution case that the appellant committed the offence of rape.

We would like at this very outset to express ourselves that the first appellate Judge and also Ms. Kitau; were both correct to urge the discarding of the evidence of PW2 following the complete omission by the

learned trial magistrate to conduct *voire dire* examination of a child of tender age in order to establish her competency to testify. As correctly submitted on by Ms Kitau, the Full Bench decision of the Court in **Kimbute Otiniel v. R.** (supra) retained the settled duty placed on trial courts to conduct *voire dire* examination failure of which leads to the discarding of the evidence of a child of tender age:

> *".... the misapplication of or non direction in the conduct of a voire dire by a trial court under sections 127(1) and/or 127(2) should henceforth be resolved in the following manner:*
>
> *1. Each case is to be determined on its own set of circumstances and facts.*
>
> *2. Where there is a **complete omission** by the trial court to correctly and properly address itself on sections 127(1) and 127(2) governing the competency of a child of tender years, the resulting testimony is to be discounted..."* [Underlined added].

By discarding the evidence of PW2 following complete omission to conduct *voire dire* examination, the prosecution case is denied the best evidence that would link the appellant with the rape for which he was charged, convicted and sentenced. This Court has on several occasions

stated that in sexual offences like rape, the victim is invariably the best witness to prove whether there was sexual penetration or not: **Rashidi Abdallah Mtungwe vs. R.,** Criminal Appeal No. 91 of 2011 (unreported). There were no other eye-witnesses to the sexual penetration apart from evidence that the drunken appellant was found asleep in PW2's room. Even the victim's mother did not testify to inform the trial court whether she examined her daughter to establish whether she had been raped as alleged.

The victim's father (PW3) did not witness the rape, but was only told later by her daughter. The evidence of PW3 that he was told by his daughter that the appellant had raped her is the evidence that carries little or no probative value since it was purely hearsay evidence. Similarly, the evidence of— E4344 DSGT Mohamed (PW1) the police officer investigated the case; Zainabu Omary (PW5) who reported the incident to the victim's school head teacher; and that of Kassim Kisomi (PW6), the local area chairman, did not prove that it was the appellant who raped the complainant. PW6 stated the following when he accosted the appellant:

> *"...I found the accused person standing near the door. I asked him as to how he entered in that house and said that* ***he was drunk and therefore he was not aware as to***

***how he entered in that house****..... I decided to write a letter to village office because that room which he entered is for the school child who is still young..."*[Emphasis added]

Significantly, in his defence, the appellant stated that two women who examined PW2's private parts were not called to testify. According to the appellant, after that examination the two women found no evidence to support the allegation of rape. The appellant stated:

*"...suburban chairman came and told them that the matter had to be sent to his office. We went to his office where I explained what happened. The chairman tried to solve the matter but they rejected. He wrote us the letter directing us to VEO. While there* ***the girl was taken in the both room (sic) by two women, they checked her and said that there was nothing which happened to her****."*[Emphasis added].

As rightly submitted by Ms. Kitau, while the evidence of the medical officer (PW4) at the very least proved that the complainant had been sexually penetrated leading to the perforation of her hymen; that evidence did not go further to forensically link the appellant to the offence. This missing link had to come from the remaining prosecution witnesses— PW3, PW5 and PW6. This appeal is a classic example of cases where the

prosecution should have filled the evidential gap by resorting to the DNA evidence to forensically link the rape of PW2 to the appellant. With regard to the DNA evidence, it has been observed that:

> *"DNA is one of the most powerful tools we have to solve and prevent crime. By analyzing the samples collected in a rape kit, forensic scientists can develop a DNA profile that is unique to the perpetrator. That DNA profile can then be compared to a data base with thousands of other DNA profiles from known offenders and from unsolved crime scenes. This process can both identify an unknown perpetrator and link a suspect to other crimes."*— **DNA and Rape Kit Evidence**, endthebacklog.org

Unfortunately, despite the enactment of the Human DNA Regulation Act, 2009 [ACT No. 8 of 2009] criminal investigation and prosecution in Tanzania still shies away from comprehensive use of the DNA evidence to fill evidential gaps to solve crimes especially where there is lack of direct evidence.

The shortcomings of the medical examination reports (PF3) in linking an accused sexual offender to his victim was discussed in a decision of the Court of Appeal of Kenya in **Evans Wamalwa Simiyu v Republic** [2016] eKLR where the appellant therein was charged with the offence of defiling a child aged 12 years. In one of his grounds of appeal the appellant

questioned the way the findings in the medical examination report (PF3) failed to link him with the alleged offence because, unlike the victim of the offence, he was not examined by any medical expert. He specifically faulted the trial magistrate for failing to invoke the powers bestowed upon him by Section 36 of the Sexual Offences Act, 2006 of Kenya [Rev. 2009] which empowers the court to order a DNA test so as to prove a link between the appellant and the complainant. Section 36 states:

> *"36 (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.*
>
> *(2) The sample or samples taken from the accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.*
>
> *(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a data bank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed."*

There is no doubt in our minds that DNA can, and should fill the evidential gaps in sexual offences in Tanzania. In its decision, the Court of Appeal Kenya [**Evans Wamalwa Simiyu v Republic** (supra)] while underscoring the important role which the DNA evidence can play to forensically link an accused person to the offence; it was quick to restate that other oral evidence can, even without the DNA evidence, still prove the offence:

> *"[19] Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to* ***Section 36*** *of the* ***Sexual Offences Act*** *which evidence could have exonerated him. In* ***AML v Republic 2012 eKLR*** *(Mombasa), this Court upheld the view that:*
>
> > ***'The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.'***
>
> *[20] This was further affirmed in* ***Kassim Ali v Republic Cr Appeal No. 84 of 2005*** *(Mombasa) (unreported) where this Court stated that:*
>
> > ***'The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.'***

*[21] Moreover,* ***section 36*** *of the* ***Sexual Offences Act*** *that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "**may**".*

*Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa."*

Back to the instant appeal before us, we find that the first appellate court misapprehended the evidence of PW3, PW5 and PW6 who were only told about the rape of PW2 much later. Our own re-evaluation of the same evidence does not lead us to the conclusion that it was the appellant, and not anyone else who raped the complainant on that night of 19th May 2011. We resolve the benefit of doubt in favour of the Appellant. This appeal has merit. The same is allowed and the conviction of the Appellant

is quashed and the sentence set aside. He is hereby set free forthwith unless otherwise lawfully held. We order accordingly.

**DATED** at **DAR ES SALAAM** this 13th day of December, 2016.

S.MJASIRI
**JUSTICE OF APPEAL**

I.H.JUMA
**JUSTICE OF APPEAL**

S.A.LILA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.


E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**