IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 257 OF 2017

MICHAEL IGALABA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Makani, J.)

dated the 5th day of May, 2017

in

(DC) Criminal Appeal No. 14 of 2017

JUDGMENT OF THE COURT

16th & 27th August, 2021

KAIRO, J.A.:

In the Resident Magistrate Court of Shinyanga, the appellant, Michael Igalaba was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 [now R.E. 2019] (the Penal Code). It was alleged that on 25th day of March, 2016 at Ipango Village within the Municipality and Region of Shinyanga, the appellant had carnal knowledge of a girl aged nine (9) years old. We shall elsewhere refer to the girl as "the victim" or 'PW1' to conceal her identity.

The prosecution called four witnesses to prove its case while the appellant was the only witness for the defence. After a full trial, the learned trial Magistrate was satisfied that the charge levelled against the appellant was proved beyond reasonable doubt and, as a result, found the appellant guilty as charged, convicted and sentenced him to life imprisonment.

Brief facts as discerned from the record of appeal are that, on the material date, the victim after returning from school was sent by her mother; Esther Jeremiah (PW3) to their farm to pick some vegetables. While there, the appellant who was living in one of the houses in that farm approached and asked her if there were some cucumbers in the farm. The victim replied that they were available. The appellant came closer to the victim, as they were talking, he knocked her down, removed her clothes and his, then raped her. The victim felt pain and she screamed for help, in vain as there were no people nearby. She went back home late and did not tell her parents about the incident being afraid that they would beat her. Four days later, PW3 noticed that the victim was walking abnormally and told her father; Tito Emmanuel (PW2) who instructed her to check the victim. Having checked her private parts, PW3 found that the victim's vagina was tender and had

bruises and further discharging. She interrogated her as to what happened. She revealed a story of being raped by the appellant when she went to pick the vegetables from their farm. The matter was reported to the police by PW2 and a PF3 was issued. The victim was then taken to the hospital where it was confirmed that she was raped. The PF3 to that effect was tendered and admitted as exhibit P1.

In his defence, the appellant complained that the prosecution witnesses were all family members and that they were telling lies. He denied to know the victim nor the scene of crime. He however, admitted to know the victim's father and that they had a quarrel. At the end of it all, the trial court found the appellant guilty, convicted and sentenced him as indicated above after finding that the victim's evidence was credible thus worth believing. Besides, her evidence was corroborated by PW2 and PW3. The appellant unsuccessfully appealed to the High Court, hence this second appeal. The appellant raised four grounds in his memorandum of appeal which we have paraphrased as follows: -

1. *That, the court erred in relying in the victim's (PW1) evidence despite PW1's unreasonable delay to reveal the incident for a number of days, as such her evidence had to be acted upon with caution.*

2. *That, PW1 being a suspect witness, her evidence was to be disbelieved.*
3. *That, section 127 (7) of CPA was not complied with.*
4. *The two courts below erred in relying on hearsay evidence of PW2 and PW3.*

When the appeal was called for hearing, the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Ms. Salome Mbughuni, learned Senior State Attorney assisted by Ms. Caroline Mushi, learned State Attorney.

Upon inviting the appellant to argue his appeal, he simply adopted his grounds of appeal and thereafter preferred to hear the reply from the respondent Republic side while reserving a right to make a rejoinder if need would arise.

It was Ms. Mbughuni who responded to the appellant's grounds of appeal and from the outset she registered the respondent's stance to oppose the appeal. She started with the first ground followed by the third one, the second and fourth grounds were lastly agued together.

Responding to the first ground, Ms. Mbughuni conceded that there was a delay in reporting the incident by the victim as the offence was committed on 25th March, 2016 but the victim told her mother (PW3)

that she was raped by the appellant on 29th March, 2016. She however argued that the said delay was not unreasonable to render her testimony unreliable, considering the fact that the victim was of a tender age and further she was inhibited by cultural aspects whereby such an incident is considered shameful. Ms. Mbughuni further argued that despite that, the victim gave the reason of the said delay that she was afraid of being beaten by his father and that is why it was not until she was noticed by PW3 to be walking abnormally and upon interrogation, she revealed the ordeal she went through. She thus argued the ground to have no merit.

With regards to the third ground of appeal, Ms. Mbughuni conceded that the trial court made a finding that the victim was speaking the truth, as such, her evidence was credible and reliable. She pointed out that the offence was committed before amendments to section 127 of the Evidence Act Cap 6 R.E.2002 brought by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 (Act No. 4 of 2016) and by then a *voire dire* had to be conducted under section 127 (2) of the Evidence Act in order to determine the child's intelligence, whether she/he understands the duty of speaking the truth and the nature or meaning of an oath. Ms. Mbughuni went on to argue that in the present

case, the trial magistrate's conduct of the *voire dire* was not complied with to the latter as she did not satisfy herself whether the victim understood the nature of an oath or not before subjecting her to unsworn testimony. She added that the trial magistrate however ordered the victim to give unsworn evidence at the end of the day. In the circumstances, she argued, corroboration was vital and cited the cases of **Edson Simon Mwombeki v. Republic**; Criminal Appeal No.94 of 2016 and **Kazimili Samwel v. Republic;** Criminal Appeal No.570 of 2016 (both unreported) to back up her arguments. Ms. Mbughuni went on to submit that, apart from the victim's evidence, the trial court further relied on the evidence of PW2 and PW3 which evidence was corroborative to the victim's evidence.

To demonstrate her contention, Ms. Mbughuni submitted that, PW2 (the father of the victim) was the one who took the victim to the hospital and tendered exhibit P1 (PF3) which she however prayed the Court to expunge as its contents were not read over and explained to the appellant after it was admitted. She went on to submit that, another corroborative evidence is that of PW3 (the mother of the victim) who checked the victim's private parts and found that her vagina was discharging, tender and had bruises. When asked what had happened to

her, the victim told PW3 that she was raped by the appellant. She was thus of the view that though the *voire dire* was not conducted properly and reliance was on the victim's trustworthiness, the victim's unsworn evidence was properly corroborated by PW2 and PW3. Thus, she contended the appellant's complaint that the trial court did not comply with section 127(7) has no basis, and the third ground of appeal has no merit as well.

As for the second and fourth grounds of appeal whereby the appellant is complaining on the credibility of the evidence of PW1, PW2 and PW3, Ms. Mbughuni was brief and argued that those witnesses' evidence was coherent and in harmony with each other. She further argued that it is also a cherished principle of evidence that every witness is entitled to credence and his/her testimony believed unless there are good cause to the contrary to which she argued there is none. She referred to us the case of **Edson Mwombeki v. Republic** (supra) in which reference was made to **Goodluck Kyando v. Republic** [2006] T.L.R. 363 to support her submission. She concluded that the second and fourth grounds of appeal have to suffer rejection as well. She thus beseeched us to dismiss the appeal.

When invited to make his rejoinder, the appellant reiterated his complaint concerning the victim's delay to tell her parents on the rape incident, wondering why even the victim's mother (PW3) did not detect that the victim was raped when bathing her. He refuted the contention that the victim was raped. The appellant also complained why the Doctor who examined the victim did not come to testify in court and tender the PF3. The appellant concluded by praying us to find his grounds of appeal sound and order for his release from prison.

Having carefully considered the grounds of appeal, the submission made by the parties and the record before us, we now turn to determine the grounds of appeal. Going by his grounds of appeal, we noted that his major complaint is twofold:- **one**; on the credibility of the prosecution witnesses which covers grounds number one to three and **two;** on reliance to hearsay evidence of PW2 and PW3. We wish to point out that it is on these two complaints under which our discussion will base on in the course of addressing the grounds of appeal.

It is not in dispute that the victim disclosed on what befall her after being interrogated by her mother who noticed the victim to be walking abnormally. This was three days after the incident.

It is also glaring on the record that the victim told PW3 that she could not reveal the incident because she was scared of being beaten by her father. On our part, we consider the reason for delay given by the victim plausible and the delay was not inordinate considering the tenderness of her age. In **Alex Nyambeho @Fanta and Another v. Republic,** Criminal Appeal No. 309 of 2013 which reaffirmed the case of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (both unreported), the Court among others gave a guidance on how the credibility of a witness can be assessed by the appellate court. It stated:

> *"...The credibility of a witness can also be determined when assessing the coherence of the testimony of that witness and when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person..."*

The record of appeal reveals that the victim was eloquent and firm throughout her testimony. She even pointed out where the "dudu" of the appellant is located in his trouser when testifying. This confirms that she was credible witness worth trusting. At this juncture we feel obliged to reaffirm the well-established principle by this Court in **Selemani Makumba v. Republic** [2006] T.L.R. 379, and **Rashidi Abdallah**

Mtungwa v. Republic, Criminal Appeal No. 91 of 2011 (unreported), among others, that the best evidence in sexual offences, like the one at hand, comes from the victim herself as she is the one to express her sufferings during the incident. Further to that, the appellant's concern as to why her mother (PW3) did not detect that the victim was raped when bathing her is; apart from being an afterthought, was not a subject of cross examination which means the appellant agreed with what was said by PW3. As such the evidence stands unchallenged and the victim's

evidence as corroborated by PW2 and PW3 is entitled to be believed, (see **Goodluck Kyando v. Republic** [2006] TLR 363 at page 366). Connecting with the second ground wherein the appellant argue that the victim's evidence is not worth of belief, suffice to state that, in view of what we have discussed above, we are convinced that the victim's evidence was thorough and credible. She stood her ground, was consistent and coherent throughout and her evidence was not materially contradicted by the appellant who simply complained that the prosecution witnesses were all family members and that he had a quarrel with PW3. Even when cross examined by the appellant on the time of the commission of the offence, she was still firm and unshaken

when responding. We thus, find the first and second ground of appeal to have no merit as well.

Coming to the third ground, the appellant's complaint is that the trial court erred to rely on the victim's evidence and convict him without full compliance with section 127 (7) of the Evidence Act.

The issue therefore with regards to the raised complaint is whether the court complied with section 127 (7) of the Evidence Act before relying on the victim's evidence to convict. Before the amendment in 2016 the provision stated as follows: -

> *"127 (7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the*

victim of the sexual offence is telling nothing but the truth".

Our interpretation of the section is that the evidence of a child or victim of sexual may solely be relied upon by the trial court where the *voire dire* test was properly conducted, short of it, corroboration of the said evidence cannot be dispensed with. We stated that stance in **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported): -

> *"... section 127 (7) only obviates the need for corroboration, direct or circumstantial where the evidence taken under section 127 (2) emanates from a properly conducted voire dire thereunder; however, it does not dispense with or remove the requirement of corroboration where the evidence taken originates from a misapplication or non-direction of section 127(2)."*

It was submitted by Ms. Mbughuni, correctly though, that the offence herein was committed before the amendments to section 127 of the Evidence Act brought by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016. As it stood then, *voire dire* test was

required to be conducted before a child of a tender age could give his/her testimony. Section 127 (2) provided: -

> *" Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation; if in the opinion of the court, which opinion shall be recorded in the proceedings,* ***he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.*** *" [Emphasis added].*

The expression "a child of tender age" is defined under subsection (5) of the same section before being renumbered by the amending Act, as: -

> *" For the purposes of subsections (2), (3) and (4) the expression 'child of tender age' means a child whose apparent age is not more than fourteen years."*

The victim in the case at hand was nine years old, thus a child of tender age whose evidence was to be taken after conducting *voire dire.* The following is an extract of what transpired before the trial court as far as *voire dire* of the victim is concerned. For the purpose of this

discussion, we shall reproduce only the conclusion by the trial magistrate: -

> *"I find that the child is intelligent as she knows her school and even the subject which she is taught in school, she also knows the duty of speaking the truth. She also knows the consequences of telling lies to the Court and even to the parent. I am therefore satisfied that she can give evidence without oath."*

The victim then proceeded to give unsworn evidence. Thorough scrutiny of the extract reveals that the trial magistrate did not state in her conclusion whether the victim knows the nature or meaning of oath before concluding that she was to give unsworn statement. She instead, ended by giving her finding that the victim was intelligent and knew the duty to speak the truth. As such, we agree with Ms. Mbughuni that the *voire dire* test conducted was incomplete and section 127 (2) was not fully complied with. In this regard and according to **Kimbute's** case, corroboration of the victim's testimony cannot be dispensed with regardless of her credibility. Therefore, the appellant complaint that the victim account was solely acted upon to convict is wanting. We say so because the trial court also relied on other witnesses; to wit, PW2 and

PW3 who corroborated the victim's evidence to ground the conviction. We are fortified in that account because PW3, checked the victim's private parts and found that her vagina was discharging, tender and had bruises. Subsequently, according to the oral account of PW2, he took the victim to the hospital where upon examination it was established that she was raped. We thus agree with Ms. Mbughuni that the testimonies of PW2 and PW3 in this respect corroborated the victim's evidence that he was raped by the appellant.

We are aware that the appellant had complained that the prosecution witnesses were family members (PW1-PW3) thus were lying. However, the law is settled that such evidence can be relied upon if credible. There is therefore nothing wrong in law, in accepting and relying on evidence from family members to ground conviction as we are settled that the witness did not team up to concoct the story on the involvement of the appellant in committing the offence of rape. For this stance see; **Khatibu Kanga v. Republic;** Criminal Appeal No. 290 of 2008, and **Festo Mgimwa v. Republic;** Criminal Appeal No. 378 of 2016 (both unreported) together with **Ramadhani Kihiyo v. Republic**

[2006] T.L.R.323. In **Ramadhani Kihiyo** (supra) the Court emphasized that:-

> *"The evidence of relatives is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited, unless there is ground for doing so"*

We thus find the appellant's complaint in the third ground to have no merit.

With regards to the fourth ground, the appellant faulted the courts below to have relied on the evidence of PW2 and PW3 which he contended to be hearsay. We find the contention baseless because though PW2 and PW3 did not witness the rape, their evidence corroborated the victim's evidence that she was actually raped by the appellant. A cherished principle was given by the Court in **Goodluck Kyando v. Republic** (*supra*) cited to us by Ms. Mbughuni that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason not believing a witness. We are firm in our view that, like the two courts below, we have no reason to disbelieve the victim's account as corroborated by

PW2 and PW3 and we find nothing to fault them. The fourth ground of appeal is therefore unmerited.

As earlier stated, on the account of credible prosecution evidence, the charge was proved against the appellant beyond reasonable doubt.

In this regard, we do not find any cogent reason to vary the verdict of the trial and first appellate courts. In the end, we find no merit in this appeal. Consequently, we dismiss it in its entirety.

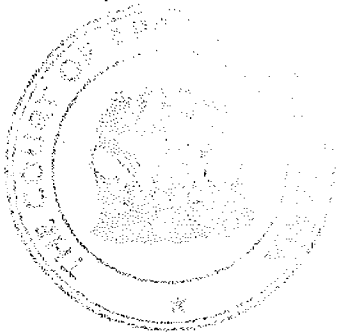
DATED at SHINYANGA this 26th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of appellant in person and Mr. Jukael Jairo assisted by Ms. Wampumbulya Shani, learned State Attorneys for Respondent/Republic, is hereby certified as true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL