IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., GALEBA, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 301 OF 2018

WAMBURA KIGINGA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Mwanza District Registry at Mwanza)

(Matupa J.)

dated the 19th day of September, 2018
in
Criminal Appeal No. 180 of 2017

.....

JUDGMENT OF THE COURT

27th April & 13th May 2022

GALEBA, J.A.:

In this appeal Wambura Kiginga, the appellant, was charged before the District Court of Chato at Chato in Criminal Case No. 363 of 2016 for the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code). The victim of the sexual abuse, whom we will refer to as the victim, was a poor young girl who was 9 years old in 2016 when she ultimately revealed the ordeal she had been going through for a long time, of sexual harassment by a male adult under whose custody and protection, she had unfortunately been placed by circumstances.

It all started by the victim's biological father, one Victor Masunga divorcing her mother, Shida Marwa (PW2) in 2008, when the victim was 9 months old as she had been born in 2007. After Victor Masunga divorced PW2, the latter went to Nyaburega Village in Chato District and got married to the appellant. PW2 had two more children with the appellant, namely Angel Wambura and Sara Wambura in her new marriage.

It appears that the matrimonial life in the new marriage continued normally, but nine years down the line in 2016, difficulties in the relation began to take shape. PW2 started to experience harassment, assault and vulgar language from the appellant. The disharmony at home progressively grew so much so that PW2 would no longer put up with the rigors of life together with the appellant, because the violence gradually solidified into a critical intolerable state. She, therefore, ran away from this second marriage to Katoro in Geita where she got remarried to yet another man, whose identity is neither on record, nor relevant to this judgment.

In retrospect, however, when PW2 ran away, she left behind not only the appellant, but also the victim, Angel and Sara. According to PW2's evidence, she left the victim with the appellant because the victim would assist to take care of her two younger sisters, Angel and Sara as

the appellant was a fisherman, who would not have time to take care of the two young girls. After PW2 left as stated, behind her back, the appellant started sleeping in one room with the victim and according to the prosecution, for a long time he raped the victim causing her untold pains following bad injuries bordering destruction of her female genitals.

The appellant was accordingly charged and later tried based on the above facts, but naturally, he denied any involvement in committing the offence.

Nonetheless, consequent to the trial, he was convicted of the offence of rape and was sentenced to life imprisonment on 17th February 2017. His appeal to the High Court, Matupa J. (as he then was) was not successful, it was dismissed for want of merit on 19th September 2018. This appeal is challenging the decision of the High Court based on a total of nine grounds of appeal, five of which are contained in the substantive memorandum of appeal which was lodged on 3rd June 2020 and four in the supplementary memorandum of appeal which was filed on 23rd July 2021. The grounds in the substantive memorandum of appeal may be paraphrased as follows:

> *"1. That, the two courts below erred in law and fact because they did not consider the appellant's defence;*

2. That, the prosecution did not prove the age of the victim;

3. That, the evidence of PW5 was not credible and exhibit PE1 which was tendered by him was unlawfully received and penetration was not proved; and

4. That, the evidence of PW1, PW3, PW4 and PW7, was not credible.

5. That, it took too long for the prosecution to arraign the appellant in the trial court."

The four grounds in the supplementary memorandum of appeal are as follows:

"1. THAT, both the trial and the first appellate courts grossly erred in law and in fact by failure to note the unlawfulness and irregularity in the admission of PE1 tendered by PW5 whose contents were not loudly read before the court to afford the appellant an opportunity to cross examine PW5, thus utterly prejudicial and unfair trial to the appellant;

2. THAT, even if PE1 was to be properly before the Court, still PW5's testimony is not worth, and unqualified to be an expert opinion as it's biased and conclusive on the commission of the offence;

3. THAT, PW1's testimony could reasonably not be reliable as she could not explain why didn't she report any of the numerous rape incidents allegedly committed by the appellant to her, prior to the one alleged to have been committed; and

4. PW1's testimony is incredible, unreliable and untruthful on the fact that the statement made in the police while reporting the commission of offence was not tendered nor availed to the appellant for examination, the absence of which never ruled out a possibility of PW1 and PW2 malicious intention/malice of fabricating/framing the case against the appellant."

At the hearing of this appeal on 27th April 2022, the appellant appeared in person without legal representation, whereas the respondent Republic had the services of Mr. Anosisye Erasto, learned State Attorney, who prior to commencement of hearing of the appeal, rose to inform the Court that, he was supporting the appeal because, the victim who had been abused to the extent referred to above, was not properly led by the court for her to promise to tell the truth and not lies before she was to give her evidence. The learned State Attorney referred us to section 127(2) of the Evidence Act [CAP 6 R.E. 2019] (the Evidence Act) and to bolster his argument he relied on the case of **John Mkorongo James v. R,** Criminal Appeal No. 498 of 2020 (unreported).

In rejoinder, the appellant being a layman, had nothing useful to add.

Thereafter we adjourned the matter for judgement, but after deliberation and a thorough review of the evidence on record, taking into consideration of the provisions, not only of section 127(2) but also of section 127(6) of the same Act, we thought it appropriate to recall parties and hear them on substantive grounds of appeal. We did so such that if we would agree with Mr. Erasto and expunge the evidence of PW1, the matter would end there for the evidence of the other witnesses would be rendered hearsay and therefore legally valueless. However, if we would not, we would proceed to dispose of the appeal on merit. The parties appeared before us for the second time on 9th May 2022 for hearing of the substantive appeal based on the raised grounds. Before getting there however, we invited parties to give us their views on whether section 127(6) of the Evidence Act, can be applied in isolation from section 127(2) of the same Act.

Although Mr. Erasto's initial reaction on 27th April 2022, was that as section 127(2) of the Evidence Act was not complied with, then the evidence of the victim, had no evidential value, this time round on a closer reading of section 127(6) of the Evidence Act, he was of a different view. He submitted that if the trial court can take evidence

even in violation of the requirements of section 127(2), still under section 127(6), the evidence may be used if the court can satisfy itself that the witness was telling nothing but the truth, underscoring the importance of ensuring the credibility of the witness, if the court is to rely solely on the latter subsection to the exclusion of 127(2) of the Evidence Act. He implored us to hold that the evidence of PW1 was credible and in the circumstances of the case, the victim told nothing but the truth and therefore her evidence is lawful under the provisions of subsection (6) of section 127 of the Evidence Act. That is the point upon which from now we will focus out full attention.

We will first determine whether the omission by the trial court to observe and comply to the letter with the provisions of section 127(2) of the Evidence Act had the effect of rendering the evidence of the victim expunged from the record. In order to determine that aspect of the case, it is significant that we start with a demonstration of how the evidence of the victim was taken on 4th November 2016 as reflected at page 3 of the record of appeal. In that respect, this is what is on record:

> *"**Court**: PW1. victim, who is Christian aged nine years, hence voire dire conducted and order to prove that she is a competent witness who can testify the truth.*

Voire dire test

-I'm victim

-I'm living at Kasenda village.

-My Mother is Shida Marwa.

-I don't know where she is living now.

-My mother was living with the accused.

-There was a conflict between my mother and the accused.

-I respect the accused as my father.

-My young daughter is Enjo Wambura.

-Another one is Sara Wambura.

-My friend is mama Irene.

-My father is a fisherman.

Ruling

I have conducted voire dire test to PW1 and I have found that she is a competent witness who can testify the truth on the relevant case hence I hereby grant the prayer of the prosecution side."

Looking at the above text, the victim being a Christian, there is no oath that was taken and there is no promise or commitment from her to tell the truth and not lies. Therefore, in short section 127(2) of the Evidence Act was violated. We will therefore briefly deliberate on the said section 127(2) of the Evidence Act, which provides that:

"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall,

before giving evidence, promise to tell the truth to the court and not to tell any lies."

This Court has interpreted the section to mean that, a child of tender age, which means a child of an apparent age of not more than fourteen (14) years as provided under section 127(4) of the Evidence Act, may legally give evidence if one of the two conditions is fulfilled. **One**, if before testifying the child swears or affirms; and **two**, if he or she promises to tell the truth and not lies in the course of giving evidence. According to the position of this Court at the moment, if none of the two conditions is fulfilled and the evidence of the child is taken, such evidence is deemed to have no evidential value and it must be expunged from the record. This Court has consistently held so in many cases including **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018, **Hamisi Issa v. R,** Criminal Appeal No. 274 of 2018, **Seleman Moses Sotel @ White v. R,** Criminal Appeal No. 385 of 2018 and **Mwalim Jumanne v. R,** Criminal Appeal No. 18 of 2019 (all unreported), just to mention, but a few.

What transpired in this case as indicated above, is that the disputed *voire dire* was carried out on 14th November 2016, whereas section 127(2) of the Evidence Act became operative on 8th July 2016 in which case, unless after *voire dire*, the child was sworn or affirmed or

promised to tell the truth and not lies as indicated above, the test alone would not have, legally, been enough.

In this case we are fully convinced, that although the child did not promise to tell the truth, what she narrated was original, true and authentic. We will now proceed to the evidence particularly of the victim, PW5 and that of the appellant. Testifying as PW1, the victim stated:

> *"This is my father who was arrested because he was raping me several times. He was raping me from the time when my mother separated with him. He was taking his penis and inserting it into my vagina after removing my pant. After inserting his penis into my vagina, I felt injuries and after feeling injuries for several times, I informed mama Irene who is a neighbour and mama Irene informed the village chairman who reported it to the police...It is the accused who raped me and I decided to report it after feeling injuries for a long time...It is the accused who was bringing food to us. No conflict with him more than raping me."*

Responding to the appellant during cross examination, the child reaffirmed:

> *"You were raping me during the night hours after being drunk. You raped me after removing my under*

pant. I reported it to mama Irene after feeling injuries for a long time."

PW5, the medical doctor stated at page 9 of the record:

"...I medically examined her and she was found to be raped several times and due to her age, the bruises were seen and the victim was seriously injured. Seriously, the victim was feeling injuries."

After the prosecution evidence, the following was the appellant's, casual and non-rebuttal account defending a serious case of the above magnitude. At page 14 of the record of appeal, he stated:

"I have ***been living with my daughter in absence of her mother without any problem****. I remember on due date when I was at my residence I was arrested and brought at Muganza Police Station. I pray for acquittal."*

[Emphasis added]

Our careful scrutiny and study of the appellant's evidence in chief above, the appellant by his testimony, did not deny the charge of rape, serious as it was. In cross examination, is where he even elaborated more on how they were sleeping in one room. He stated:

"I got married to her mother when she was nine months. ***She is not my daughter. We were sharing the same room. I am not the biological***

father of the complainant. *When I was informed, I denied."*

[Emphasis added]

We maintain the view that although the victim did not promise to tell the truth but, she told the truth anyway. Our view is deduced from the following circumstances; **first**, in her evidence in chief above, the victim was sincere, where the appellant was responsible she stated it. She did not blame the appellant on any other aspect of his obligations. For instance, she stated that, it was the appellant who was buying food for the family and also, that, the appellant had no any other problem except the act of ravishing her for a long time. **Second,** PW1 was consistent even during cross examination as she maintained that it was the appellant who raped her. **Third,** before the court, on the date that his evidence was taken, the appellant never disputed any part of the victim's evidence and; **fourth,** the appellant's defence evidence complemented that of the victim as he stated that he was sleeping inside one room with the victim. Thus, by any standards, the defence evidence was unable to effect a minute shake up to the solid prosecution case.

That is not to say, however, that we are not mindful of the principle of law and practice that no conviction in a criminal case should

be based on weaknesses of the defence as per this Court's decisions in **DPP v. Ngusa Keleja @ Mtangi and Another,** Criminal Appeal No. 276 of 2017, **Mohamed Haruna @ Mtupeni and Another v. R**, Criminal Appeal No. 259 of 2007 (both unreported) and many others. Nonetheless, we are aware too that a person charged of an offence has a reasonable obligation and he is by common sense, in the circumstances to clarify his position on a charge levelled against him for the prosecution to be able to understand the theme of the accused's defence as we observed in the case of **John Madata v. R**, Criminal Appeal No. 453 of 2017 (unreported) where this Court observed:

> *"It is common knowledge that although the accused has no duty to prove his innocence, he is expected to make the theme of his defence known so as to make the trial fair even to the prosecution, and we think this theme may be deduced from the line of cross examinations or notices such as when the said accused intends to raise a defence of alibi."*

See also **Mohamed Katindi v. R**, [1986] T.L.R. 134, **Hatibu Ghandhi and 8 Others v. R,** [1996] T.L.R. 12 and **Diamon Malekela Maunganya v. R,** Criminal Appeal No. 205 of 2005 (unreported).

In determining this aspect of the case, we will be guided by the principal of law that each case must be decided largely on its own facts

and too, that the core function of courts is to ensure that justice is done by whatever means in every case that come before them, not only to the accused but also to the victims of crime, and in this case, the victim of an obscene and illicit sexual torture.

In the circumstances of this case, we think, as indicated a while ago, that substantive justice needs to be done even in favour of children of tender age, who while giving evidence, every circumstance, like in this case, suggests that they told the truth and not lies, even if they might not have taken oath or affirmation or promised to tell the truth and not lies in compliance with subsection (2) of section 127 of the Evidence Act. This is explained by the enactment of section 127(6) of the Evidence Act which provides that:

> *"(6)* ***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 or 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."

[Emphasis added]

We must confess at the outset that we construed the opening phrase, "***Notwithstanding the preceding provisions of this section,***" to mean that, a conviction can be based on only subsection (6) of section 127 without complying with any other sub section of 127 including sub section (2).

Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are; **first,** that there must be clear assessment of the victim's credibility on record and; **second,** the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth.

We think those are the two conditions that must be fulfilled for the court to convict a suspect of sexual abuse under the above quoted section. Our understanding of the rationale for enactment of section 127 (6) of the Evidence Act, among other objectives like to get away with corroboration of the evidence of the victim of a sexual assault, was also

to remove limits to the courts and give them wider ground to operate outside the confines of subsection (2) of section 127. The law also, in our view, was enacted to net the offenders who would otherwise go scot-free only because of non-compliance with subsection (2) of section 127. We must also emphasize that invoking subsection (6) of section 127, without first complying with subsection (2) of that section, should always be cautious, rare and only in exceptional circumstances. The major point is to ensure that an offender is not proclaimed innocent, just because the trial court did not follow rules of evidence or procedure, in taking the evidence of the victim. In any event, non-compliance with subsection (2) of section 127, in no circumstance can it be a blame on the victim, but on the courts.

Notwithstanding our above observation, we are aware of this Court's decision in **Nguza Vikings @ Babu Seya and Two Others v. R,** Criminal Appeal No. 56 of 2005, (unreported), where we observed that for subsection (7) of section 127 (which was the equivalent of the current subsection (6) of section 127) to apply, subsection (2) of that section must be complied with first. However, we stated already that each case must be decided on its own merits and the prevailing circumstances at the time. For instance, **first,** at the time **Nguza Vikings @ Babu Seya** (supra) was being decided, issues of promising

to tell the truth or swear had not been enacted into our law, only *voire dire* test was the measure for a child witness to testify. In other words subsection (2) was on *voire dire* and; **second,** in that case the theme or the topic for discussion in the Court was whether the evidence of the victim of the sexual offence needed corroboration or not.

That said, we agree with Mr. Erasto that because the evidence of PW1 was taken in disobedience of section 127(2) of the Evidence Act, it did not necessarily mean that the evidence did not constitute truth or authenticity. In this case, we demonstrated factors showing that what the victim told the court was the truth and the victim was entitled to the benefit from the provisions of section 127(6) of the Evidence Act. In summary, we cannot expunge the evidence of the victim from the record, so we proceed to determine the appeal as presented.

As for the substantive grounds of appeal, the appellant prayed to adopt them as they are and opted for the learned state attorney to respond to them so that he might rejoin if he wished so to do.

In respect of the first ground of appeal in the substantive memorandum of appeal, the appellant was complaining that his evidence was not considered both by the trial magistrate and the first appellate court. In reply, Mr. Erasto admitted the truth of the ground. However, he was quick to add that the remedy has always been for the

first or second appellate court to analyse the evidence that was not considered and come up with a position that meets the ends of justice. He relied on this Court's decision in **Shabani Haruna @ Dr. Mwagilo v. R,** Criminal Appeal No. 396B of 2007 (unreported), contending that the omission is curable in the above terms under section 388 of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA).

On this point we agree with Mr. Erasto, because it has been the principle of law ever since, that where the courts below do not consider some evidence, then that is deemed to be an exceptional circumstance warranting the Court to interfere with the concurrent findings of the courts below. In cases like the instant matter, this Court is mandated to step into the shoes of the first appellate court and assess whether or not the defence evidence raised any reasonable doubt against the prosecution evidence. That has been the position in many decisions of this Court including **Felix Kichele and Another v R,** Criminal Appeal No. 159 of 2005, **Oscar Justinian Burugu v. R,** Criminal Appeal No. 33 of 2017 (both unreported) and **Shabani Haruna @ Dr. Mwagilo** (supra).

In this ground of appeal, we do not intend to invent the wheel, we have, in this judgment, adopted the position in the above decisions. In the circumstances, the first ground of appeal is allowed.

However, it will be recalled that when we were deliberating on section 127(2) and (6) of the Evidence Act, above, we stepped into the shoes of the first appellate court and analysed the evidence of the defence and observed that instead of challenging the prosecution case, the defence complemented it. To say it clearer, the defence evidence did not by any standards shake the prosecution case.

Mr. Erasto was brief in respect of the second ground of appeal which was a complaint that the age of the victim was not proved. He submitted that the age was proved by PW2, the victim's mother when she stated that the girl had been born in the year 2007. In the circumstances, he moved the Court to dismiss that ground of appeal.

In rejoinder to this ground, the appellant submitted that the child was born in 2009 at Bunda DDH hospital, in which case, according to him the child was 7 years in 2016. He also contradicted his own evidence on record, because at the hearing before us, he submitted that he was the biological father of the victim, whereas in his evidence he had testified at page 14 that he married the victim's mother when the child was nine months old.

According to law, in cases involving statutory rape, it is very critical that age of the victim is proved. In the case of **Alex Ndendya v. R,**

Criminal Appeal No. 340 of 2017 (unreported), on the same aspect, this Court stated:

> *"In light of the above, age is of utmost importance and in a situation where the appellant was charged with statutory rape then age of the victim must specifically be proved before convicting the appellant."*

Other cases in the category insisting on strict proof of age of the victim in cases of statutory rape, include but not limited to **Winston Obeid v. R,** Criminal Appeal No. 23 of 2016, **Edson Simon Mwombeki v. R**, Criminal Appeal No. 94 of 2016 and **Alyoce Maridadi v. R**, Criminal Appeal No. 208 of 2016 (all unreported).

At page 5 of the record of appeal when PW2, the mother of the victim was testifying, she stated that:

> *"Before getting married to the accused, I got married with another man and we obtained one offspring the victim in 2007. The real father of the victim is Victor Masunga resident of Musoma, hence the accused before the court is not the real/biological father of the victim."*

In addition, at the trial the appellant himself stated that he got married to PW2 when PW1, was nine months old. Legally, a parent and a guardian are competent witnesses to give evidence on age of the

child, so we treat the evidence of the two witnesses as lawful because one is a parent and another, a guardian.

In view of the above evidence of PW2 and that of the appellant at the trial, coupled with the submissions of parties on the question of age, we are satisfied that the age of the victim was proved, not only by PW2 and the appellant at the trial, but also during the hearing of this appeal before us, the appellant admitted, that the victim was born in 2009, which version of the evidence shows that indeed the victim was in any way below age 10 in 2016. Although there is a difference in the year of birth between 2007 and 2009, but in our view, the point was to prove that the victim was below 18 years in 2016 and below 10 years in the same year, for purposes of punishment. In the circumstances, the second ground of appeal in the original memorandum of appeal has no merit and we dismiss it.

Next were grounds 3 in the substantive memorandum of appeal on one hand, and grounds 1 and 2 in the supplementary memorandum of appeal, on the other. A common complaint in the three grounds of appeal is that the evidence of Renatus Bunzari, PW5, a medical doctor was not credible to establish penetration of the victim. The grounds also challenge the evidential value of exhibit PE1, the PF3 that was tendered by PW5 at page 9 of the record of appeal. In addressing these grounds

of appeal, Mr. Erasto was quick to admit that exhibit PE1 had issues because, after it was tendered, the same was not read over to the appellant as required by law. He therefore implored us to expunge it from the record. He submitted however that, despite his prayer to expunge it, the remaining evidence of PW5, will be sufficient in context because, it contains the details of the PF3, which he moved us to expunge.

In rejoinder to those grounds, the appellant submitted that there were other PF3 documents which were filled in at other hospitals which showed that the girl was healthy with no injuries as alleged by the prosecution. Nonetheless, the appellant submitted that he was not able to tender the documents, because they were with his local ward leaders, who, he did not specify.

We have studied the record in the context of the submissions by parties and we agree with Mr. Erasto, because at the High Court, the second ground of appeal questioned the legality of exhibit PE1, but not only that Ms. Ajuaye Bilishanga, the learned Senior State Attorney, did not submit on it, but also the court did not address its mind on the complaint. In any event, in appropriate circumstances, the proper procedure to be followed by trial courts when accepting documentary exhibits, is that after the document is cleared for admission and

accepted in evidence and properly marked, the document as soon as practicable, has to be read audibly in a language understandable to the accused. Short of complying with that procedure, generally acceptance of the exhibit is unlawful and the remedy is to expunge it. Indeed, at page 9 of the record of appeal, exhibit PE1 was tendered without objection but the same was not read over to the accused person. In the circumstances, we expunge it from the record.

It is significant to observe also that where a document is expunged, it does automatically follow that the evidence of the witness who tendered it must as well collapse or diminish in value. It depends, if the substance of the document which has been expunged is more or less the same as the oral evidence that was given by the witness, expunging the document cannot affect the recorded evidence. It is however not necessarily the case, where the substance of the document expunged is completely different from that of the oral testimony which was recorded.

It is not the first time that this Court has expunged documentary evidence and retained oral evidence of the witness who tendered it. In the case of **Huang Qin and Another v. R.** Criminal Appeal No. 173 of 2018 (unreported) a valuation certificate tendered at the trial as an exhibit was expunged because its contents were not read, but the Court

held that the oral evidence of the witnesses remained intact and valid. Guided by the Court's previous decision including; **Robinson Mwanjisi and 3 Others v. R**, [2003] T.L.R 2018 and **Anania Clavery Betela v. R,** Criminal Appeal No. 355 of 2017 (unreported), we shall do the same in this appeal by holding that PW5's evidence is retained regardless of the expungement of exhibit PE1 from the record because expunging the exhibit from the record, in the circumstances, has not affected the recorded evidence of PW5.

The next issue raised in the grounds under consideration is that the appellant is also challenging the evidence of PW5 because he was not given a right to cross examine him. With respect to the appellant, at page 9 of the record of appeal, it is clear that he was given a right to crosse examine PW5, but he opted not to ask him any question. We also do not agree with the appellant's submissions that there were other PF3s because, if indeed they were there, the same were not tendered, by any witness, neither from the prosecution, nor by himself from the defence. In the circumstances, ground 3 in the substantive memorandum of appeal and grounds 1 and 2 in the supplementary memorandum of appeal, are partly allowed in so far as they challenge the legality of exhibit PE1 and they are dismissed in any other respect.

Next in line for consideration are grounds 4 in the substantive memorandum of appeal and grounds 3 and 4 in the supplementary memorandum of appeal. In those grounds particularly grounds 3 and 4 in the supplementary memorandum of appeal, the complaint of the appellant is that PW1 was late in reporting her illicit sexual encounter for a long time and was not given the statement she made to the police. The other complaint is that the evidence of some witnesses was not credible.

In reply to these grounds, particularly on the issue of credibility, Mr. Erasto contended that the allegation has no merit because credibility of a witness is, by and large, the domain of the trial court. He submitted that credibility of PW1 was not at all questionable because at page 4 of the record of appeal, she explained each and every detail of how she was raped and went to report at the time she was tired and fed up with the obscene and illegal acts of the appellant towards her. As for late reporting, he submitted that the village chairman Methusela Mgema PW4 stated that the victim told him that the appellant had threatened her in case she disclosed the illegal acts to any third parties. So according to Mr. Erasto, the victim was fearful of reporting until when she would no longer put up with the sexual torture. He submitted that in the circumstances, the delay to report was justified. As for not being

given a statement by PW1, he contended that the one who reported at the police was PW4 and not PW1, so his complaint that he was not given a statement of PW1 has no basis.

In rejoinder, the appellant submitted that he could not have raped the appellant from January to October 2016 as per the charge sheet, without such child reporting to anybody. He contended that the case against him was cooked up and that had the case not been framed, the prosecution would have called his neighbours to come to the trial court and defend him.

We will start with the issue of credibility of witnesses with emphasis of that of PW1, the victim. To do that we will be guided by three principles which are now deep-rooted in our courts such that it has since become part and parcel of our jurisprudence.

One, that the best court for assessing credibility is the trial court and that this Court can rarely interfere with concurrent findings of two lower courts on an issue of credibility. The rationale being that this second appellate court does not have the advantage that the trial court enjoys, that of seeing, hearing and assessing the demeanour of witnesses. On this principle see this Court's decision in **Seif Mohamed E. L. Abadan v. R,** Criminal Appeal No. 320 of 2009 and **Aloyce Maridadi v. R,** Criminal Appeal No. 208 of 2016 and **Ayubu Andimile**

@ Mwakipesile v. R, Criminal Appeal No. 503 of 2017 (all unreported), among many other decisions.

Two, the other principle relevant to us is that, in sexual offences the best evidence is that of the victim, see **Selemani Makumba v. R,** [2006] T.L.R. 379 in line with section 127(6) of the Evidence Act and; **three** that every witness is entitled to credence and belief to his evidence unless there are good and cogent reasons to hold otherwise. This is one of the principles of the law of evidence as per the case of **Goodluck Kyando v. R,** [2006] T.L.R. 363 where this Court held that:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

According to **Aloyce Maridadi** (supra), good and cogent reasons for not believing a witness include the fact that the witness has given improbable and implausible evidence or that the evidence has materially contradicted any other witness or witnesses.

That is, as we discuss the three grounds under consideration, we will maintain our unwavering and constant focus on the above three basic principles of law and any others we may stumble upon as we proceed.

In all categories of rape, the basic ingredient for the prosecution to prove is penetration of the female genitals by the male sex organ. When it comes to statutory rape, there is an additional burden of proof of age of the victim in order to ascertain that at the time the offence was committed she was below eighteen (18) years of age since birth. We already discussed the evidence of the victim's mother, PW2 when disposing of the second ground of appeal in the original memorandum of appeal above. We too discussed already the evidence of PW1 and PW5 when dealing with section 127(2) and (6) of the Evidence Act. This is the evidence however, whose credibility is questioned. The trial court believed the evidence of PW1 and PW5 on the issue of penetration and that of PW2 on the age and accorded the evidence credence and used it along with other pieces of evidence from other witnesses to convict the appellant. At page 22 the trial court stated:

> *"In this case evidence of penetration is clear that it took place and for several days because the accused was living with her as a wife and husband and she informed PW3 who later informed PW4 as a village chairman and even through cross examination on the date of defence hearing the accused admitted that he was sharing the same room with the victim...there is clear direct evidence that both the victim and the accused knows each other and there was no conflict*

between the victim with the accused, hence the victim named the accused fairly because of being raped several times..."

The first appellate court agreed with the trial court and dismissed the appeal having agreed that the evidence of the prosecution witnesses was credible. Likewise, we must observe at this juncture that, the cross examination of the appellant to the victim did not shake the girl's truth. Her evidence remained the best, for she was the victim of the crime and the appellant, her aggressor. We find no reason to fault the two courts below for having accorded the prosecution evidence credence and belief. Further we find no good reasons for questioning the credibility of the prosecution evidence.

There was yet another point. That it took many months for the victim to report. At pages 8 and 10 of the record of appeal, PW4 and PW7 respectively, stated that PW1 told them that the appellant was threatening her in case she would disclose the scandal. Considering the age of the victim, a child of 9 years, the circumstances she was into, where the appellant was the sole person upon whom she depended for all necessaries of life, withholding information of torture from her step father to whom her life and survival entirely depended, was fairly justified.

Based on the above discussion, grounds 4 in the substantive memorandum of appeal and grounds 3 and 4 in the supplementary memorandum of appeal, have no merit and we dismiss them.

The last complaint of the appellant is in the 5th ground of appeal in the substantive memorandum of appeal. The complaint in this ground is that it took unreasonably long time to arraign the appellant in court. In reply to this ground, Mr. Erasto submitted briefly that, as soon as the appellant was arrested it took just few days of investigation and he was presented to court and trial started immediately.

Our thorough review of the record of appeal reveals that, Inspector Geofrey Sayyi, PW7 at page 10 of the record of appeal got information on 27th October 2016 and an investigation continued and according to PW4 at page 8 of the record of appeal, the appellant was arrested the next day on 28th October 2016 which was a Friday. Investigation continued and on Monday 31st October 2016 a charge was drawn and on 1st November 2016 the appellant was taken to court and a charge was read as per page 1 of the record of appeal. In all fairness, and with respect to the appellant, we do not agree with him on the complaint that he was delayed between his arrest and being taken to court. We observe so because, he was arrested on a Friday and on Monday the charge was drawn and the next day on Tuesday he was

taken to court. We are of the considered view that the appellant's complaint in the 5th ground of appeal has no merit and we dismiss it.

Consequently, in view of this Court's findings in determining the grounds of appeal above, we hold that this appeal has no merit and we dismiss it in its entirety.

DATED at **MWANZA** this 13th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of May, 2022 in the presence of the appellant in person and Mr. Emmanuel Luvinga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL