THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 96 OF 2022

(Originating from Ulanga District Court in Criminal Case No. 08 of 2022)

ATHUMANI MAKALA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Final Court Order on: 21/06/2023
Judgment date on: 17/07/2023

NGWEMBE, J.

The appellant, Athumani Makala has preferred this appeal after being convicted and sentenced according to the dictates of law. The appellant at trial was charged for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the **Penal Code Cap 16 R.E. 2019.**

According to the chargesheet, it was alleged that, between February 2021 and February 2022, at Madibila area Lupiro village,within Ulanga district in Morogoro, the appellant had carnal knowledge with a girl of 9 years old. Upon reading the charge sheet in a language known to the appellant and clearly explained to him, he unequivocally pleaded not guilty. Even during preliminary hearing, the appellant was smart enough to admit only some general facts including his name, age and other related personal

particulars. Also he admitted to know the accused person and that he was arrested on 25th February 2022 and later arraigned before the trial court.

Having so denied, the duty shifted from the accused to the prosecution who led the evidence of four (4) witnesses, including the victim (PW2), Victim's mother (PW1), Victim's aunt (PW3) and a medical Assistant Officer (PW4). The prosecution also tendered PF3, admitted as exhibit PE1. After the prosecution closing their evidences and having established a prima facie case against the appellant, the burden shifted to himself to shake the prosecution. Thus, he defended himself with corroboration from his wife and a father-in-law marked as DW1, DW2 and DW3 respectively.

The trial court having gauged the evidence, it was satisfied that the offence against the appellant was proved beyond reasonable doubt, it therefore proceeded to convict the appellant and subsequently sentenced him to statutory life imprisonment as the victim was under ten (10) years old. The judgment and sentence were passed on 25/10/2022 then on 02/11/2022, the appellant through the services of learned advocate Michael Chami, duly filed notice of intention to appeal against judgment and sentence. Thereafter on 29 November, 2022 the appellant's petition of appeal was duly filed in this house of justice grounded with only one grievance, to wit; the trial court erred in law and fact to convict and sentence the appellant, while the prosecution failed to prove the case beyond reasonable doubt.

This appeal was heard viva voce on 21/06/2023, where advocate Chami, appeared for the appellant, while the Republic was represented by learned State Attorney Josbert Kitale.

Arguing on the ground of appeal, Mr. Chami stood firm to challenge the credibility and reliability of the prosecution witnesses. Observed critically that PW1 (the victim's mother) had no good relationship with the appellant, therefore the whole case was vexatious. That PW1 testified to have noticed that, the victim was raped yet she did not report the matter at the earliest stage. Mr. Chami also argued that, the charge sheet stated that the offence was committed between February 2021 to February 2022 without specifying when the offence occurred.

The learned advocate proceeded to discredit PW1's testimony as hearsay as the offence was said to have been committed when she was not around. Again, her evidence contradicted with that of PW4 who examined the victim. Substantiated the contradictions by pointing that, PW1 said the victim discharged blood and pus, while the medical doctor negated all that. The environment of the alleged room wherein the victim was being raped, was not explained by any witness. PW1 testimony was insufficient, while PW2 as well was doubtful for failure to report the matter for the whole year. Mr. Chami brought to this court's attention the case of **Yasini Ramadhani Chang'a Vs. R [1999] T.L.R 89** on demeanour of witnesses. It was Mr. Chami's caution that, sexual Offences attracts severe punishment, hence their proof must be watertight. Rested by inviting this house of justice to allow the appeal and find the appellant innocent.

Having submitted, the learned State Attorney, strongly opposed the appeal by moving this court to believe that, all witnesses were credible and reliable. According to him, PW3 (the victim's aunt) was the first person to unveil the offence when she asked the victim why she did not go to school and the victim claimed to be sick. That the victim was taken to PW1 and

together went to police as the victim was discharging blood and pus from her private part.

That at the hospital it was revealed that the appellant has been raping the victim for the whole year. Mr. Kitale supported his argument with a case of **Godson Kimaro Vs. R, Criminal Appeal No. 54 of 2019,** that the delay of reporting the matter was explained by PW2.

Regarding the issue of demeanour, Mr. Kitale was right to submit that that is under the jurisdiction of the trial court. Since the trial magistrate did not make any comment on it as required by section 212 of the CPA, then same cannot be an issue.

Equally he contradicted on the submission of discharges of blood which was not recorded in any of the trial court's proceeding. Responding on the issue of time frame, he submitted that same was not specified in the charge because the appellant was abusing the victim for the whole year. He cited the cases of **Godi Kasenegala Vs. R, Criminal Appeal No. 10 of 2018 (Iringa)**, **Paschal Applinary Vs. R, Criminal Appeal No. 403 of 2016 (CAT Tabora)**. Rested by a strong insistence that the offence was proved beyond reasonable doubt.

In rejoinder, Mr. Chami pointed out that at page 22 of the proceedings indicated that PW1 testified that, the victim discharged blood and usaha (pus), the fact which was not proved. Therefore, the evidence of PW1 is doubtful and credibility was questionable. Hence, he repeated his prayer that the appeal be allowed.

Having paid a brief glance on the parties' submissions, this court is tasked to decide on merits of the appeal. Specifically, as the ground raised, the decisive issue is whether the offence against the appellant was proved beyond reasonable doubt.

Noteworthily, this is a first appellate court, whereas the court is entitled to reevaluate and consider the evidence laid before the trial court, to test if the trial court's decision was proper and grounded by material evidence adduced during trial. As it has been enunciated in many cases including the case of **Yasini Ramadhani Chang'a (Supra)** among those precedents where the Court of Appeal insisted with clear terms on the duty of the first appellate court. Specifically, it was observed: -

> *"Before we come to the end, we have to say that what was before the High Court was a first appeal, so it was by way of a rehearing and the learned judge was entitled to re-appraise the evidence and draw inferences of fact. It is true, as Mr. Jadeja pointed out, that the appellate court should tread with a lot of care since it is dealing with scripts while the trial court dealt with live persons revealing their demeanours. Despite of that, the appellate court can differ from the trial court if its opinion is not supported by the evidence and the right inferences."*

See also **Pia Joseph Vs. R, [1984] TLR 161, Alex Kapinga and 3 others Vs. R, Appeal No.252 of 2005, Bonifas Fidelis @ABEL Vs. R, CAT at Arusha, Criminal Appeal No. 301 of 2014** and **Siza Patrice Vs. R, Criminal Appeal No. 19 of 2010**. Also, in exercise of such duty, we held in **Pia Joseph** that: -

> *"An appellate court will not lightly interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the trial court did not address itself or address itself properly"*

The rationale of this rule is obvious, the trial court is placed on a better position of perceiving the facts of the case at first hand. It can

positively observe demeanour of the witness. This is what was held in the case of **Nyakuboga Boniface Vs. R, (Criminal Appeal No. 434 of 2016) [2019] TZCA 461,** where the Court of Appeal having referred to **Yasini Ramadhani Chang'a** stated as hereunder: -

> *"What we gather from the above observation, is the fact that observation and assessment of the demeanour of a witness, is in the exclusive monopoly of the trial Judge/magistrate. Moreover, besides observing the appearance of the witness, in resolving as to whether the witness is trustworthy and telling the truth, the trial Judge/magistrate, is enjoined to correlate the deamenour of the witness, and the statements he/she makes during his/her testimony in court. If they are not consistent, then the credibility of the witness, becomes questionable."*

Both parties are on the same perception of this position of the law which is correct. Therefore, this court will accordingly deal with the evidence before the trial court, while also having in mind the caution registered above. This appeal bears only one grievance that the offence was not proved against the appellant as Mr. Chami argued strongly, while Mr. Kitale, learned State Attorney, stood firm in the contrary position that, the offence was proved to the required standard.

Obviously, in deciding guilt of the accused, a court of law must be guided by those principles on burden and standard of proof, along with all other relevant principles. To tell whether the court followed a given principle, it must be reflected in the route through which the magistrate passed to reach the verdict. It is not only by stating that a certain principle of law guided the court, but rather being actually guided by such rule.

In criminal cases, the burden of proof is on the prosecution. Every ingredient constituting the offence must be established. The accused bears no burden to prove that he is innocent. It is known that even before being charged, a person is presumed innocent until proved guilty. His duty is only to raise reasonable doubt against the prosecution's case. In rare cases, the burden of proof on certain facts is shifted by law to be on the accused, such accused person is not required to prove the fact beyond reasonable doubt but is enough to proof on balance of probability.

That is part of the gist of our laws, particularly Section 3 (2) and 110 (1) of the **Evidence Act.** See **John Nyamhanga Bisare Vs. R, [1980] T.L.R 6** and **Pascal Yoya @ Mganga Vs. R, (Criminal Appeal No. 248 of 2017) [2021] TZCA 36,** where specifically it was held: -

> *"In cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence"*

In this appeal, the charge which took the appellant to custodial sentence for life was that of rape. This court has observed several times that rape is among the serious offences with stiff fixed sentences. In those offences, the courts' penology and jurisprudence are in a style, suspended. In case of conviction, the court is prohibited from reducing the sentence regardless of how strong the mitigations may be.

Rape of a girl below the age of ten (10) years, is punishable by imprisonment for life. As the victim was said to be of 9 years old in this case, the appellant was sentenced to statutory sentence of life imprisonment.

It has happened in many cases where this court discovered that some sexual offences were staged for retaliation for grudges. Due to its nature, rape is easy to allege than other offences. Without much care, it may be hard to unveil a framed-up case of rape than other offences like robbery, manslaughter and the like. This is also considering the moral stability of the current generation, where a woman can train her daughter to bear false witness even against her own father. This is about the deceiving women and their trained daughters and not about all witnesses in all cases.

But what sexual offences appears in courts these days, makes it real what Sir Matthew Hale Lord Chief Justice of the King's Bench Court, in his book **The History of The Pleas of The Crown 635 (1847)** stated at the time of Saxon laws when rape was punished with death, about rape offences he stated: -

> *"It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent. I only mention these instances, that we may be the more cautious upon trials of offenses of this nature"*

That observation has commonly applied in common law courts and been discussed by prominent jurists including Sir William Blackstone in his book **Commentaries on the Laws of England, 16th edition (1825).** Under the circumstance therefore, it is of utmost importance that before convicting a man for rape or any other sexual offence, the court should get assured that the evidence laid before it proves all the ingredients and that

it has been established crystal clear, the accused before it is the true offender in respect of the particular victim.

In this appeal the trial magistrate was satisfied that the victim was raped by the appellant and that considering the environment at PW1 home, the appellant was properly identified as the rapist. This position is applauded by the respondent/Republic, but seriously challenged by the appellant who believes that, the offence was not proved at all.

The decisive issue before this court is yet to resolve; whether the offence was proved beyond reasonable doubt. Following the principles earlier pointed out, I have visited the evidence which was laid before the trial court. In resolving this issue, I am obliged to present its summary before deliberating on the issue.

The victim (PW2) testified that the appellant who is the neighbour and acquainted to her and her mother, raped her several times every time when her mother was away to another village to buy fish. The rape incidents have endured from the year 2021 to 2022. She wanted to raise an alarm when she saw the appellant entering her room but the appellant told her to close her mouth. During rape she felt pain, but the appellant closed her mouth using a cloth and that he threatened to kill her if she disclosed about the incident to any person.

The victim, PW1 and PW3 states that, the appellant had easy access as the doors are broken. The victim claims that, after being raped for a long time, her vagina started to discharge blood and pus so she told her aunt (PW3) who took her to her mother (PW1) somewhere at farms. Thereafter they left for Lupiro Police Station. On the way, she disclosed to her aunt that the accused used to rape her at night. That she usually slept with the electric lights on so she identified the appellant. At Lupiro police

station, they reported the matter then went to Lupiro Health Centre where the doctor examined her and told them that she had been raped. Also, that on other occasion before the incident, the appellant chased her in morning hours and she informed one uncle July. That she did not tell anyone of the incidents for the whole year. The story about reporting to her aunt was corroborated by PW3, the victim's aunt.

PW1, the victim's mother, testified that she knows the appellant who is her neighbour, but they are not in good terms. She explained that, the appellant once sent her son to hatch coconut, in the act the son fell and got injured. The victim was hospitalized for one year. The victim (her daughter) was born on 18/08/2013 and at that time she was in Standard two at Lupiro Primary school. The witness has five children, but lives with two; the victim who was then 9 years old and another, a victim's brother aged 11 years old.

That mother testifies further that, she used to travel and be away for up to one week, leaving the two children alone at home. That each of the children sleep in different rooms. The day which PW3 went to the farm with the victim to inform her of the victim's condition was 25/02/2022 when she was at Nanji area. But when she asked the victim, the victim did not tell her the truth, but ran away. PW1 asked her sister PW3 to take the victim to police so that she would reveal the incidents. When PW3 took her, on the way to police, the victim revealed that she had a lover with whom she had sexual intercourse and that lover had threatened her not to tell anyone or he will kill her.

In further cross examination, she stated that she once saw sperms in the victim's underwear before the eventful date. She took the victim to hospital and was treated. PW2 in further cross examination, told the court

that when she was taken to the hospital, she was discharging blood and her underwear had blood spots. The doctor saw blood discharge and the underwear which had blood spots.

PW4 one Amani Kombe, Medical Assistant Officer who examined the victim stated that on 24/02/2022 at Lupiro Health Centre he attended the victim who came with her mother requiring proof if the girl was raped. Hereunder is part of his testimony at page 14 of the typed proceeding: -

> *"I started with investigation and testing then to prove if the girl was raped. According to the examination and testing did not found if the girl was raped. She was not virgin. The victim has no any bruises or swelling on her vagina, but she had sexual intercourse with someone for long time"*

This witness also tendered a PF3 in respect of the victim, which was admitted as exhibit P1. I have examined the said PF3. In this court's opinion, the PF3 is parallel to what PW4 testified in court. At Part IV B and C, taken together the comments of the doctor regarding his observation and remarks, read: -

> *"Labia minora/majora are normal. No bruises, neither discharge observed, no hymen noted...NOTE. No any abnormal findings noted, hence the child is well experienced in sexual issues"*

The appellant who was aged 42 in his defence, testified that he is married and lives with his parents. He knows the victim as his neighbour who usually pass by his home when she is going to school, their respective homes are just about 20 meters apart. He confirmed that they are not in good terms because of the son called Rama, who fell from the coconut tree as PW1 stated. He explained that PW1 refused to take the son to hospital

till when advised by other people. He himself gave Tshs. 20,000/= for Rama's medication.

On 24/02/2022 he was at Ikungua in his farming activities when he was phoned by one Mgambo Kiduku who arrested him and took him to Lupiro Police Station, where upon arrival was informed of rape case. He believed that, the case against him was fabricated by PW1 to retaliate for the injury of her son (Rama). He did not rape the victim, all what was stated about the rape were untrue, but PW4 who stated that the victim was not raped was trustworthy. DW2 Roswita John Libutu, appellant's wife testified that on 24/02/2022 the accused was at Ikungua village. But on 25/02/2022 he did not return home. She was told that he had gone to Nanji area for reconciliation of a land dispute. But when went to Lupiro Police station she learnt that the appellant had a rape case. This was parallel to DW3, Juma Kisoma, the appellant's father-in-law and DW2's father. In summary those were the evidences took the appellant to life imprisonment.

Notably, the offence of rape is created under section 130 (2)(e) of the **Penal Code,** which states: -

> ***"Section 130**.- (1) It is an offence for a male person to rape a girl or a woman.*
>
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(a) – (d) NA*
>
> *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

The offence of rape under section 130 (1)(2)(e) of the **Penal Code,** is otherwise termed as *statutory rape*. To prove such kind of rape, the prosecution must establish mainly two ingredients; carnal knowledge of a girl and age of the girl to be below 18 years and for the purpose of sentence under section 131 (3), that the age of the victim is below ten years. But in all cases, the rapist must be well identified and that the evidence available irresistibly point to him. Carnal knowledge is proved by penetration of a man's reproduction organ (penis) into the woman's vagina. For the purpose of rape, slight penetration suffices to constitute the offence. Same is provided under section 130 (4) (a) of the Penal Code.

The case of **Godi Kasenegala** cited by the learned State Attorney, is among the many useful precedents which give explanatory interpretation of rape, thus: -

> *"Under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of eighteen years without her consent. Two, having sexual intercourse with a girl of the age of eighteen years and below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of Penetration i.e. the penetration, even to the slightest degree, of the penis into the vagina"*

From PW4's evidence along with exhibit PE1, there is no doubt that the victim was not a virgin and had no bruises in her private part. Her vagina was normal, having no sign of recent penetration. The witness upon examination found that she was not raped, her private part showed that she is experienced in sexual activities. The victim was 9 years, whose age

was not disputed. In law she cannot have liberty and discretion to engage in sexual intercourse. Therefore, assuming the observation of PW4 was true, then the conclusion of being raped is inevitable. Regarding her age, the court refer to the case of **Alex Ndendya Vs. R, Criminal Appeal No. 340 of 2017** where the Court stated that: -

> *"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 on the issue of age includes **Charles Yona Vs. R, (Criminal Appeal No. 79 of 2019) [2021] TZCA 339** and **George Claud Kasanda Vs. R, Criminal Appeal No. 376 of 2017**. In our case, the charge sheet stated clearly that the victim was 9 years old. PW1 who is a mother of the victim uncontrovertibly stated that, the victim was born on 18/08/2013, hence on the day of testifying she was 9 years old. PW1 and the victim herself consistently testified about the age.

Having resolved part of the issues that the victim was 9 years of age and that she was raped, the remaining question is who raped the victim. The prosecution was firm that, it managed to prove the appellant as the rapist. The appellant maintained that; he did not rape the victim. Rather at the trial court he suggested that, the case was fabricated. Mr. Chami wanted the court to take note of the bad relationship between PW1 and the appellant while also pointing out some other weaknesses of the prosecution case.

This court has considered the facts in the proper width, but to start with, this court finds that the timing of the occurrence of the offence was not established, for the following reasons; *First* - it is unknown when exactly was the victim raped for the first time. *Second* – it is unknown

when did the victim lose her virginity. *Third* – None of the witnesses noticed any difference of the victim's condition like, inability to walk properly and the like. *Fourth* – the range between February 2021 to February 2022 as the time when the victim was being raped as mentioned in the charge sheet was an estimation not supported by any evidence. *Fifth* if the range of one year from February 2021 to February 2022 means the victim was raped from the age of 8 to the age of 9, which fact was not established.

Considering critically the opinion of PW4, the victim was experienced to sexual intercourse, which does not necessarily mean the victim started such activities in February 2021. Again, PW1 the mother of the victim stated in her testimony that, she once found sperms in the victim's underwear. That the victim's vagina was discharging blood and pus, by then she took her to hospital and she was treated properly. This suggests that the victim was raped on those incidents, again neither dates and year are not mentioned nor person who tampered with the victim's vagina was mentioned. It is even unknown if any investigation was mounted on that event.

In this case, the only witness who mentions the appellant as the rapist is the victim herself. Rightly, the victim is the best witness in sexual offences. Her evidence can in itself ground conviction, corroboration is not necessary, this was expounded in the famous case of **Selemani Makumba Vs. R, [2006] T.L.R 379** also followed in and maintained in many other decisions including that of **Yohana Saidi Bwire Vs. R, Criminal Appeal No. 202 of 2018, CAT at Arusha.**

However, the rule is qualified that, the victim whose evidence is considered as the best, must be credible since as I observed earlier that

sexual offences are prone to fabrication. It was held in the case of **Hamisi Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019** that: -

> *"We are alive however to the settled position of law that the best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s)"*

The principle that, best evidence comes from the victim now applies subject to credibility and reliability of the victim. The trial court found the victim to be credible and of course it believed her evidence to be the best, relying on the famous case of **Seleman Makumba (Supra).** I am aware that generally, findings of trial court on credibility of the witness binds the appellate court unless there are circumstances requiring reevaluation of credibility. The case of **Omari Ahmed Vs. R, [1983] T.L.R 52**, is among the earlier decisions on that rule, where it was inter alia ruled: -

> *"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility."*

Considering the nature of the appeal and on the basis of what the first appellate court is required to do, this court has deeply considered as to whether the victim was credible enough for the court to believe her testimony as the trial court did. No doubt the trial court was in a better position to observe the demeanour of witnesses, although in this case as Mr. Kitale rightly argued, no record was made about the victim's demeanour. Generally, credibility of witnesses is not exclusive for the trial

court, but even the appellate courts have a good chance to test credibility of the witnesses as much as they can reevaluate the evidence. On how credibility test is made, the law is clear as stated in **Shani Chamwela Suleiman Vs. R, (Criminal Appeal No. 481 of 2021) [2022] TZCA 592** that: -

> *"On appeal the credibility of a witness can be gauged through coherence and consistence of his testimony"*

The position was also previously stated in the case of **Elisha Edward Vs. R, Criminal Appeal No. 33 of 2018** among many others. But upon visiting the testimony of the victim (PW2), this court is justified to state that her testimony was completely inconsistent to PW4 in respect of her health condition. She stated before the trial court that, when she was taken to hospital, she was discharging blood and her underwear had blood spots, while the Assistant Medical Officer (PW4) saw no blood discharge and bruises. Equally the doctor's testimony was congruent with exhibit PE1, which negated all those claims. To the contrary, he testified and recorded in PE1 that the victim's vagina was normal; no bruises, no discharge, no abnormal findings and that the victim is well experienced in sexual activities.

The question remains serious that if the doctor who took trouble to examine the victim's vagina and reach to such conclusion would have overlooked the discharge of blood in her vagina and blood spots on the victim's underwear, if at all there were any? Not only that, PW1 and PW3 seem to have been swayed by this same theory of the victim that, she was bleeding and discharging pus from her private parts, the fact which according to PW4 was not true.

Without losing focus, the above observation should not be understood to mean that discharge of blood or pus was necessary to constitute the offence rather it is the victim's credibility being tested. On the above, this court is justified to rule that, PW2 was not credible. Even taking the above on the other way, it brings the conclusion that, the prosecution evidence had serious contradictions which in my view, went deep to the root of the case.

Apart from that, there were other serious doubts apparently featured in the prosecution's case. PW1 and PW2 both testified that the house had broken doors that, anyone may enter into the house. At the same time, it was a normal routine for PW1 to leave the victim alone and sometimes with another child of 11 years up to a week away. The same PW1 claimed that she once saw sperms in the victim's underpants. The victim was once bleeding and discharging pus, which she claimed to have treated her. Neither Medical officer nor medical report were produced to prove that fact. Even assuming those facts to be true, PW1 who is the mother of the victim did not take any measure towards that observation to her daughter of eight or nine years old. Again, she kept her habit of leaving the children alone for days or weeks. No wonder, she did not notice any change on her child, but this court is of the view that had PW1 performed her duty of a responsible mother even to a minimal rate, the loss of her daughter's virgin would not go unnoticed. It is unfortunate that, even the neighbours and teachers never noticed anything in the whole year. Though it is very probable that other people noticed the vice, but just did not prefer altruism. Even the fact that a woman (mother of a child) never noticed the rape incidents of her daughter for the whole year, is highly disturbing.

Further, I have observed yet another contradiction in the testimony of PW1. That at once she found the victim's underpants with sperms and some other time the victim was bleeding and discharging pus from her vagina. Yet it is unknown how she dealt with that situation apart from securing medical attention for her. The same person stated that, after the allegations of rape, together with others, took the victim to hospital for examination to find out if she was raped. How possible would a truthful and reliable witness have self-contradicting stories on the same event?

Considering the case and events wholistically, this court observes that if at all there was an event of rape, which is highly doubtful, must have been facilitated and a result of PW1's irresponsibility. I think her morals are seriously questionable. What is the position of a woman who regularly goes away from her home for a week or weeks leaving her girl child of nine years in her house with broken doors? Doors that cannot prevent even a docile animal from entering therein, leave alone evil men? Part of her testimony at page 3 and 5 of the proceedings is reproduced hereunder: -

> *"I live in the rented house in that house we are three families, those are tenants I have no any problem in that house. I have norm of went out my house for about two or four days for my daily activities of getting bread. When I travel, I left victim with his brother. His brother aged eleven (11) years. Each one has his/her own room."*

In cross examination, she replied as follows: -

> *" I leave my child with people who taking care of them when I am absent...you used to enter in the room of my daughter by pass the door because those doors broken. Our door is broken*

so any person can pass...When I went to my business, I take one week. My room door closed by wood mill (kinu)"

One may say such mother, in this case has victimised the child. Unfortunate, the appellant was a person nearby, so he fell prey of concocted complaints which eventually took him for life imprisonment. In short what transpired in this case was a great controversy, it was for the respondent to deal with it.

Assuming the facts narrated by PW1 and PW2 were true, why PW1 being a parent and custodian was not taken to justice for endangering the lives of her children; the victim who is 9 years and the son said to be 11 years? This court thinks that there should be a positive approach in dealing with these offences. There was a need to deal with her even before the victim fell prey to the alleged rapists. But the investigators and the prosecution seem to have not been interested. We admonish the rapists and all evil doers, but sparing a parent like PW1 makes the law appear biased and uneven. But the law should be applied along with justice and morality.

Lastly, there is an issue of the victim's failure to report about the rape incidents for the whole year. She did not talk about the incidents of rape until when she was being taken to Lupiro Police Station by PW3. It is known in criminal law, failure to report the offence usually waters down the credibility of the witness. In case of rape where mostly the victim is expected to give direct evidence, the whole case is weakened as the famous precedent of **Marwa Wangiti Vs. R, [2002] TLR. 39, Jaribu Abdallah Vs. R [2003] TLR. 271** along with **Salum Seif Mkandambuli Vs. R, (Criminal Appeal 128 of 2019) [2021] TZCA 263** and **Lameck Bazil & Another Vs. R, (Criminal Appeal No. 479 of 2016) [2018]**

TZCA 191 stated. I have considered the reasoning of the trial magistrate that failure to disclose the offence was due to victim's being threatened to be killed by the alleged rapist.

I accept that in many cases, threat can justify delay to report the offence. But it should be qualified here that, there must be reasonable fear or apprehension of that fear in the whole period of delay or non-disclosure. In this case, there were no material upon which, to ground the conclusion that the victim remained in constant threat and fear since 2021 to 2022.

Even the purported identification of the appellant upon which, the trial court seems to have relied on, had no credit on the prosecution side. This is because as the facts were laid, the appellant and PW1's family were neighbours and acquaintances. Even the victim herself stated to know the appellant and his daughters, bearing in mind that she mentioned the rapist in fear of the police, it is probable that the appellant was named only for being known to her, in short doubts are many.

It is the position of this court that, in sexual offences where the guardians of the victims are immoral like PW1, the investigators must deal with all possibilities before taking anyone to justice. The courts should warn themselves against all possibilities of fabrication of cases. Another unfortunate, this court has failed to observe if at all, the whole incidence was not investigated. Neither police investigator appeared in court and testified critically on his professional discoveries based on his investigation.

In this case a girl seems to have been engaged in sex since when she was eight (8) years or may be below that and her mother seem not to have observed and take any care whatsoever. In this case and as the facts so stand, there is highly probable that different men and boys in the street/village were abusing the victim at their wish. Under the circumstance

of this case, it was very dangerous to convict the appellant for rape in absence of the credible evidence linking him with the offence.

Had the trial court considered the apparent peculiar features pointed out herein, it would have reached into a different verdict that the appellant was not guilty. Despite the medical expert's evidence that the victim is not virgin and used to sex, which means the victim was being raped, the rapist was not established.

I find enough merit in this appeal; hence I allow it. The conviction is quashed, life imprisonment sentence is set aside. The appellant be released immediately, unless held for any lawful cause.

Order accordingly.

Dated at Morogoro this 17th July, 2023.

P. J. NGWEMBE

JUDGE

17/07/2023

Court: Judgement delivered at Morogoro in chambers on this 17th July 2023 in the presence of the appellant, and Josbeth Kitale, learned State Attorney for the Respondent/Republic.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

17/07/2023