IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 441 OF 2017

JILALA JUSTINE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the judgment of the High Court of Tanzania

at Shinyanga)

(Makani, J.)

dated the 25th day of August, 2017
in
DC Criminal Appeal No. 112 of 2016

JUDGMENT OF THE COURT

20th & 27th August, 2021

MASHAKA, J.A.:

The appellant JILALA JUSTINE was charged before the District Court of Maswa at Maswa with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R. E. 2002]. Upon his conviction, he was sentenced to thirty years imprisonment. His appeal to the High Court was dismissed in its entirety. Still dissatisfied, he has brought this second appeal.

The factual setting as unveiled by the prosecution during trial, we briefly recapitulate. The prosecution marshalled three witnesses and produced one

documentary exhibit (PF3). It was alleged that between July 2015 and September 2015 at unknown time at Malampaka village within Maswa District in Simiyu Region, the appellant did rape one VJ (PW1). We appreciate that at the material time the victim was a child; to conceal her modesty and identity, we shall refer to her as the victim or PW1.

The victim (PW1) was the daughter of Joseph Bakande (PW3) born on the 05/12/1998 and she was attending her secondary education at Malampaka Secondary School. It was alleged that in the year 2014, PW3 discovered that her daughter was having conversation with the appellant over the mobile phone. Upon interrogating her daughter, she firmly denied to own the said phone. It was later alleged that the victim was the appellant's lover and they used to have sexual intercourse in the classrooms. Come 2015, PW1 disappeared and continued to remain at large. On the 28/03/2016, PW3 decided to report the matter at the Malampaka police station and recorded a statement which is alleged to have led to the arrest of the appellant. At the trial PW3 testified that having learnt that his daughter was in Mpanda, he sent her bus fare so that she could be brought back to Malampaka. On the 04/04/2016, PW1 was taken to Maswa police station where a PF3 was issued and on the following day went to the hospital for examination. According to Dr. Renatus Reuben (PW2) the victim was seven months pregnant. The

findings to that effect were recorded in the PF3 which was admitted in evidence as exhibit P1.

The appellant strongly denied the accusations by the prosecutions. He contended further that according to the statement of the victim's father, recorded at the Malampaka police station the victim was taken to Bagamoyo by a person called Mashaka s/o Justine and was left there helpless. The appellant denied the allegations that he was Mashaka Justine. He as well denied that he had a sister in Mpanda. Further, he maintained that since the prosecution failed to tender the clinic card, it was not proved that he is the father of the victim's child. Besides, he recounted that PW1 was above the age of 18 years because she was registered as a voter in the 2015 General Elections. Against this backdrop, the appellant was convicted and sentenced.

Being aggrieved, the appellant unsuccessfully appealed to the High Court, hence the present appeal. In the memorandum of appeal, the appellant has raised the following points of grievance to challenge the decision of the appellate court, paraphrased as follows: -

> *"1. The charged offence against the appellant was not proved beyond reasonable doubt since Exhibit P1 (PF3) neither established nor proved any ingredients of rape connecting the appellant with crime.*

2. That there was neither a medical clinical report bearing the appellant's name, nor DNA report as to ascertain that he was the biological father of the infant.

3. That PW1's age was not proved.

4. That it was not proved that the victim was a school child in the absence of the evidence of the teacher of respective school.

5. That his defence was not considered by the trial and first appellate courts".

Basically, the appellant is faulting his conviction which was based on the evidence that did not prove the charge beyond reasonable doubt.

At the hearing of the appeal, the appellant was present in person without legal representation, whereas Mr. Jukael Reuben Jairo and Mr. Nestory Mwenda, learned State Attorneys represented the respondent Republic. The appellant adopted the memorandum of appeal and opted to elaborate at a later stage after the submissions of the learned State Attorney.

As Mr. Mwenda took the floor, at the outset strongly resisted the appeal and supported the conviction and sentence. He submitted that according to the victim's account, it is the appellant who had carnal knowledge with her,

she got pregnant and on the 11/05/2016 gave birth to a baby girl named Jenipher Jilala and the appellant is the father. He argued that the victim's evidence that she was raped by the appellant is the best evidence, which was properly acted upon by the two courts below to ground the conviction of the appellant. To support this proposition, he cited the case of **Edson Simon Mwombeki v. The Republic**, Criminal Appeal No. 52 of 2016 (unreported). Thus, he contended that in the wake of the best evidence of the victim, the PF3 or the DNA report is inconsequential as it cannot stand as proof of rape. Pertaining to the age of the victim, the learned State Attorney argued this to have been addressed by the PW3 who testified that the victim was 17 years old when she was raped and referred us to the case of **Issaya Renatus v. The Republic**, Criminal Appeal No. 542 of 2015 (unreported) where the Court stated that proof of age is given by the victim, relative, parent, medical practitioner or where available by the production of a birth certificate.

Relying on the said decisions, learned State Attorney contended that in sexual offences the evidence of PW1 the victim is the best evidence, while the proof of age is given by the victim, relative, parent, medical practitioner or where available by the production of a birth certificate. Mr. Mwenda concluded that the issue of age was proved by PW1 and PW3, that the victim was below 18 years. Further, he contended that the appellant had carnal

knowledge with PW1 for several times in the classrooms. Thus, this being statutory rape, consent was immaterial as PW1 was under the age of 18 years.

The learned State Attorney further argued that the failure of not tendering a medical report nor DNA report to ascertain that the appellant is responsible for PW1's pregnancy and is the biological father of the child Jenipher is not relevant for the proof of rape as the determination for paternity of the child is not an issue in the present matter. He as well contended that although exhibit P3 was a medical report on PW1's pregnancy, it was the outcome of the sexual intercourse the appellant had with PW1.

In relation to the voter identity card presented by the appellant showing that the victim was more than 18 years having voted in the 2015 General Elections, Mr. Mwenda's viewed this as an afterthought considering that PW3 stated the age of the victim and the appellant did not cross-examine him. Concerning the complaint on the lack of corroboration from an independent witness like a school teacher and the alleged appellant's sister, Mr. Mwenda argued that the best evidence is from the victim (PW1) and the teacher or alleged sister were not present during the rape, hence baseless. He submitted that ground four is not merited.

On the last ground five, the complaint is on the first appellate court's failure to consider that it is not upon the appellant to prove his innocence, learned State Attorney maintained that the prosecution proved the charge against the appellant beyond reasonable doubt.

On the second doubt raised by the appellant that in exhibit D1, PW3 mentioned one Mashaka Justine to have impregnated her daughter, Mr. Mwenda argued this an afterthought because it was not raised during the prosecution case when PW1 and PW2 testified. Mr. Mwenda implored the Court to dismiss the appeal and confirm the conviction and sentence.

In rejoining, the appellant maintained his earlier stance that he did not rape PW1. He prayed to the Court to allow his appeal on the basis of the grounds of appeal raised and set him free.

This being a second appeal, it is a settled principle of this Court that it rarely interferes with concurrent findings of facts by the two courts below. See: **Raymond Mwinuka v. The Republic**, Criminal Appeal No. 366 of 2017 (unreported). The Court rarely interferes with the concurrent findings of fact by the lowers courts except where there has been misapprehension of the nature and quality of the evidence and other recognized factors occasioning a miscarriage of justice. We guard against unwarranted

interference and we will only interfere with such concurrent findings of facts if we are satisfied that they are on the face of it unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law. See, **Daniel Matiku v. The Republic**, Criminal Appeal No. 450 of 2016 (unreported).

The scope of our deliberations will depend on whether or not we find rationale for interfering with the findings of facts by the trial and first appellate courts. It is a trite legal principle that, in sexual offences, the best evidence is from the victim while other prosecution witnesses may give corroborative evidence. See: **Selemani Makumba v. The Republic**, [2006] T.L.R 379, **Galus Kitaya v. The Republic**, Criminal Appeal No. 196 of 2015 and **Godi Kasenegala v. The Republic**, Criminal Appeal No. 10 of 2008 (both unreported). However, the victim's evidence will be relied upon to convict if the same is found credible. This is in line with section 127 (6) of the Tanzania Evidence Act, [Cap 6 R. E. 2019] (the TEA) reproduced hereunder: -

> *"(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 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".

The question for our consideration is whether there is credible prosecution account to sustain the conviction of the appellant. Our answer is in the negative and we shall give reasons. In addressing this matter, we shall re-evaluate the evidence of PW1 and PW3 *vis a vis* the appellant's defence evidence. At the outset, it is in record at the trial the appellant tendered PW3 is statement (exhibit D1) who stated at the police station that it was Mashaka Justine who had taken his daughter to Bagamoyo as opposed to his oral testimony at the trial that it was the appellant who raped her daughter. This was a crucial defence evidence which was wrongly expunged at the first appellate court that it was admitted contrary to section 34B of the TEA.

With profound respect, this was a misdirection on the part of the learned appellate judge. We noted that the cited section 34B of the TEA

concerns proof of written statements in criminal proceedings where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend. This is not the case with the exhibit D1 the statement of PW3 recorded at the police station complaining of the disappearance of PW1. Section 9 of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA) stipulates that: -

> *"(1) Information relating to the commission of an offence may be given orally or in writing to a police officer or to any other person in authority in the locality concerned.*
>
> *(2) Any information under subsection (1) shall be recorded in the manner provided in subsection (3) of section 10.*
>
> *(3) Where in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and of any statement*

made by him under subsection (3) of section 10, to be furnished to the accused forthwith.

(4) Any information given under this section by any person may be used in evidence in accordance with the provisions of the law for the time being in force relating to the procedure for the adduction and reception of evidence in relation to the proceedings in respect of the offence concerned".

Exhibit D1 was the information given at the police station relating to the commission of an offence that PW3's daughter had disappeared from home, is pregnant and the man responsible is Mashaka Justine. Therefore, exhibit D1 was given to the appellant by the trial court in compliance with section 9 (3) of the CPA. It goes without saying that the first appellate judge wrongly expunged this statement for not being read before the court without considering the rationale of the document which has been admitted in evidence in the defence case. In essence the reading of such exhibit is to give the opportunity to the accused to understand the case against him and make a meaningful defence. So, this being the defence case and the appellant had in his possession the exhibit D1, there was misdirection of the evidence. Hence, we reverse the order and restore the exhibit D1 as part of

the record as it required no reading out and was properly admitted by the trial court.

We have stated earlier that in assessing the credibility of a witness the trial court's monopoly is limited to the extent of demeanor.

The Court held in **Goodluck Kyando v. R**, Criminal Appeal No. 118 of 2003 (unreported) that *"it is trite law 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."* The testimony of a witness will always be that it is true unless the witness's veracity has been assailed on his or her part to misrepresent the facts has been established or has given fundamentally contradictory or improbable evidence. However, there are other ways in which the credibility can be assessed as held by the Court in **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2001 (unreported), that: -

> *"The credibility of a witness can also be determined in other two ways, that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

According to exhibit D1, PW1 told her father that she was in Bagamoyo, pregnant and the man responsible was Mashaka Justine who left her helpless. However, during the trial, PW1 and PW3 had a different story as they alleged that it is the appellant who raped the victim. Even the contents of the statement exhibit D1 stated at the police by PW3, were not controverted by the prosecution. With this state of affairs, it was crucial on the part of the prosecution to parade the investigator as a witness to clarify to the court as to what led to the arrest of the appellant despite the fact that PW3 vide exhibit D1 named a different person at the police, to have raped his daughter and not the appellant.

With this state of prosecution evidence, it cannot be safely ascertained that PW1 and PW3 were credible witnesses worthy to be believed. In this regard, both the trial and first appellate courts, wrongly acted on the incredible and untrustworthy prosecution evidence to convict the appellant. This was a misapprehension of the evidence which ought to have been addressed by the first appellate court, which is duty bound to conduct a rehearing at the first appeal.

In view of what we have discussed, on account of discrepant prosecution account the charge against the appellant was not proved to the hilt. As a result, we agree with the appellant and accordingly quash the conviction and set aside the sentence. We order the immediate release of the appellant unless he is held for some other lawful cause.

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

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 27th day of August, 2021 in the presence of the Appellant in person, unrepresented and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL