**IN THE COURT OF APPEAL OF TANZANIA**

**AT MUSOMA**

**CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)**

**CRIMINAL APPEAL NO. 250 OF 2020**

**MWITA MARWA ABDALLAH..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania at Musoma)**

**(Galeba, J.)**

**dated the 27th day of March, 2020**

**in**

**Criminal Appeal No. 180 of 2019**

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## JUDGMENT OF THE COURT

*6th & 13th June, 2023*

**MWANDAMBO, J.A.**

The District Court of Tarime convicted the appellant, Mwita Marwa Abdallah of statutory rape of a girl of tender age, an offence created under section 130 (1), (2) (e) of the Penal Code. The particulars of the offence alleged that, on 13/5/2019, the appellant had canal knowledge of TM aged 11 years at the time. The true identity of the victim of the offence shall be withheld henceforth to be referred to as TM or the victim. The trial which followed after the appellant's plea of not guilty involved five prosecution witnesses and three for the defence.

The facts from which the appellant was charged and ultimately convicted have been set out in the judgment of the first appellate court in material respects necessary for the determination of the appeal. We take the liberty to adopt the relevant part in this judgment with the necessary modifications.

On 13/5/2019 at Kemange street in Tarime District, TM was on her way to draw water from a distant stream when she met the appellant who requested her to get him another bucket which he could use for picking his avocados. The victim went back and got the second bucket and gave it to the appellant. The duo walked along each other with for some time. Thereafter, the appellant disappeared in the bush and TM started looking for him. As that was happening, suddenly the appellant allegedly appeared from the bush and grabbed TM the neck warning her not to disclose anything to anybody as to what was about to happen and in any case no one would arrest him not even the police.

Within moments, the appellant was alleged to have undressed the victim's skirt and underpants and inserted his male organ into hers. The victim lost energy bleeding profusely from her genitals following that awful act. Thereafter, they both left. Then on the way, a good Samaritan one Chacha George (PW3) picked and took the victim to the Police before TM's aunt; Regina Joseph (PW1) was called before taking

the victim to Tarime District Hospital for medical examination. Dr. Masiaga Joseph Chacha (PW5) who examined the victim revealed existence of vaginal cuts and bruises in the victim's vagina suggesting penetration. PW5 posted his findings in the PF3 he tendered in evidence which was admitted as exhibit P2. One of the matters agreed during the preliminary hearing was that the appellant was arrested on 16/05/2019, three days after the incident and arraigned in Court on 20/5/2019 charged with the rape of TM to which he pleaded not guilty. Nevertheless, the District Court found the prosecution case proved the offence on the required standard and convicted the appellant followed by the mandatory custodial sentence of 30 years' imprisonment.

The appellant's quest to assail the trial court's judgment on appeal before the High Court at Musoma ended in vain. The first appellate court concurred with the trial court that the appellant was properly convicted and sentenced on the strength of evidence of the prosecution which proved the case beyond reasonable doubt. This appeal is against the first appellate court's decision dismissing the appellant's appeal.

The memorandum of appeal comprises five grounds of complaint namely; (1) failure to prove the case against him beyond reasonable doubt, (2) wrongful reliance on prosecution evidence and exhibits which

were contradictory and uncorroborated, (3) reliance on hearsay evidence, (4) grounding conviction on a defective charge and (5) failure to consider and give weight to defence evidence.

The appellant appeared in person to argue his appeal when it was called on for hearing. Mr. Anesius Kainunura, learned Senior State Attorney and Mr. Tawab Yahya Issa, learned State Attorney appeared for the respondent Republic resisting the appeal. With the Court's leave, the appellant was allowed to add new grounds which, upon our close examination, raise two main complaints, (1) the appellant's identification was not proved through an identification parade and (2) the victim's evidence was by way of oath contrary to section 127 (2) of the Evidence Act (the Act). Nevertheless, we do not think it will be necessary to belabour on grounds two, three and five separately because, as it will become apparent in this judgment, the determination of the appeal rests in ground one. At any rate, having examined the record against each of the complaints and the submissions made by the learned senior State Attorney, we agree with him that none of them advances the appellant's case.

Having adopted the grounds of appeal, the appellant elected to let the respondent Republic submit in reply before he could make his rejoinder, if such need would arise.

Mr. Kainunura addressed us on all grounds but in view of the approach we have adopted in the determination of the appeal, we shall skip the arguments on grounds two, three and five except where it shall be necessary to do so.

We shall begin our determination with ground four raising the complaint that the charge on which the appellant was convicted and sentenced was defective. Apparently, the appellant made no argument elaborating in what way the charge was defective. Needless to say, Mr. Kainunura argued and we respectfully agree with him guided by our decision in **Jonas Ngolida v. Republic**, Criminal Appeal No. 351 of 2017 (unreported) cited to us. The charge on which the appellant was tried and convicted was drawn in strict compliance with section 135 (a) of the Criminal Procedure Act (the CPA) by citing the relevant section creating the offence of rape of a girl under 18 years and the punishment section. Besides, it disclosed sufficient particulars on the ingredients of statutory rape which the appellant was charged with. The complaint is, therefore, devoid of merit and we dismiss it.

Next is the complaint alleging non -compliance with section 127 (2) of the Act raised as and additional ground. Worth for what it is, the complaint runs in Kiswahili language thus: *Kuwa ushahidi wa mhanga ulioegemewa kumfunga mrufani ulipaswa kuongozwa na si kuapishwa*

*mahakamani kwa sababu umri wake hauruhusu kisheria chini ya kifungu cha 127(2) cha CPA cha mwaka 2022.* We think the appellant had in mind section 127(2) of the Act rather than the CPA which has nothing to do with reception of evidence be it of tender age witnesses or otherwise. Even though we were unable to fully comprehend the complaint, we think he meant to argue that the said provisions were violated since, PW2, a tender age witness gave her evidence on oath. All the same, having examined the record, we agree with Mr. Kainunura that the complaint is misconceived. This is so because we have seen nothing in section 127 (2) of the Act prohibiting tender age witnesses from giving evidence on oath. Conversely, the section permits a witness of tender age to give evidence without oath or affirmation provided he promises to tell the truth and not lies. It is glaring from the record that, PW2 took an oath in compliance with section 198 of the CPA after the trial Magistrate had satisfied himself that the witness understood the meaning of the oath before giving her evidence. The trial Magistrate did so consistent with the Court's decisions on how to receive evidence of a tender age witnesses, amongst others, **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported) cited to us by the learned Senior State Attorney. The appellant's complaint is devoid of merit and we dismiss it.

Having disposed of the two grounds of complaint premised on legal issues, we now turn our attention to ground one which raises the issue of whether the case against the appellant was proved beyond reasonable doubt. The learned Senior State Attorney prefaced his submissions on this ground by pointing out the ingredients constituting the offence of statutory rape necessary for the prosecution to sustain the charge, that is to say; age of the victim, penetration of a male sexual organ into the victim's genitals and the perpetrator of the offence. As rightly submitted by the learned Senior State Attorney, there was no dispute on the age of the victim proved through the evidence of PW1 and PW2 that she was a standard five girl born in the year 2007. Although the record shows that the victim was aged 11 years at the time of testifying, her actual age was 12 years but below 18 years. Secondly, in view of the dictates of the law under section 127(6) of the Act and the Court's decision in **Selemani Makumba** [2006] T.L.R 379, that best evidence in sexual offences must come from the victim of the offence, Mr. Kainunura urged that, PW2's evidence established beyond reasonable doubt that there was penetration.

With regard to the culprit, Mr. Kainunura was unyielding that there was sufficient evidence that it was none other than the appellant. To support that contention, he pointed out that, (1) TM knew the appellant

when she met him at 08:00 a.m. on the material date, (2) PW2 mentioned the appellant to PW3 immediately after the incident, (3) PW4 knew the appellant and saw him in the company of TM walking towards Tarime District Hospital that very morning each holding a bucket. The learned Senior State Attorney impressed upon us that mentioning the appellant to the next person (PW3) she met immediately after the incident lent credence to her credibility on the authority of **Makende Simon v. Republic**, Criminal Appeal No. 412 of 2017 (unreported); **Jaribu Abdallah v. Republic** [2003] T.L.R 271 and **Marwa Wangiti Mwita & Another v. Republic** [2002] T.L.R 39. He was emphatic that, the appellant was properly identified through recognition and thus there was no need to conduct an identification parade as urged by the appellant. He wound up his submission urging that the case was proved beyond reasonable doubt against the appellant on the charged offence and thus the Court should dismiss the appeal.

The appellant attacked the trial court and first appellate court for concurring in their findings and the verdict of guilt arguing that, PW2 was not a credible witness because her description of him as a black young man in a *Kiduku* hair cut style was too general to link him with the crime since there was no evidence that such a description was unique to him. Besides, the appellant contended that, there was

contradiction in the time of commission of the offence amongst prosecution witnesses which created doubt in the case against him. He implored the Court to allow his appeal.

From our examination of the evidence on record against the arguments we have heard on this ground, it is plain that the decisive issue in the determination of this ground lies on identification of the appellant by PW2; the victim of the offence. The first appellate court concurred with the trial court that TM was raped by the appellant. Even though the issue regarding identification of the appellant did not feature as conspicuous as it does in this appeal, the first appellate court dealt with it tangentially and agreed that, since the victim had spent considerable time with the appellant from the moment he asked for a bucket to pick avocados coupled with mentioning the culprit to PW3, that was sufficient proof of identification. In doing so, the first appellate court concurred with the trial court's finding at page 34 of the record where it stated that PW2 and the accused person (appellant) took considerable time together at the scene of crime which justified believing her evidence as credible. Apart from that finding, the trial court did not go as far as specifically pronouncing itself on the demeanour and credibility of PW2.

There is no gainsaying that from the evidence, that PW2 spent considerable time with a person she claimed to have been the culprit. Nevertheless, her claim of being familiar with the appellant is short of establishing how log and frequent the duo met prior to the date of the incident. On the other hand, while it cannot be denied that PW2 made a description of the culprit in the form of his physique, skin complexion, attire and hair cut style, that by itself did not suffice for the purpose of proving that it was indeed the appellant and not any other person who was responsible for the crime. The reason for this is not far to seek. PW2's description of the culprit was not unique to the appellant for, there could be so many other young-men fitting into that description. As we held in **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (unreported), naming the culprit to another person is all what is crucial in cases involving identification by recognition. Description in the manner PW2 did would have been ideal in cases involving visual identification which could assist the police in pursuing the culprit followed by an identification parade which was not the case. At any rate, there is no evidence that PW2 made similar description to the police neither is there any investigative evidence that the appellant was arrested in connection with his identification by the victim on the charged offence.

We have examined the evidence by PW4 who is recorded to have seen the appellant and the victim walking towards Tarime hospital each holding a bucket around 10:00 a.m. on the material date but that evidence falls short of proving that the appellant was the real culprit. If anything, such evidence was but, founded on suspicion. It is trite that suspicion alone however strong, is not sufficient to sustain conviction in a criminal trial – See: **Mohamed Said Matula v. Republic** [1995] T.L.R. 3. That principle is in tandem with a time-honoured principle by Sir William Blackstone; an English in the 18th century that is, it is better that ten guilty persons escape than one innocent man convicted. This principle cannot be more apt in rape cases which brings to the fore yet another time-honoured principle by Sir Mathew Hale, Lord Chief Justice of the King's Bench who said; rape is an accusation which is easily made, hard to be proved and harder to be defended by the party accused, though never so innocent. The Court has cherished the soundness of this principle in its previous decisions, amongst others, **Moses Charles Deo v. Republic** [1978] T.L.R. 134; **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 and **Daudi Anthony Mzuka v. Republic**, Criminal Appeal No. 297 of 2021 (both unreported).

In our view, whilst there can be no doubt that the best evidence in sexual offences must come from the victim consistent with section 127 (6) of the Act reinforced in **Selemani Makumba,** that rule can only apply in cases where the victim's evidence is self-sufficient proving all ingredients of the sexual offence. In more or less similar circumstances, in **Mohamed Said Rais v. Republic,** Criminal Appeal No. 167 of 2020 Unreported), the Court observed that, the evidence from the victim of a sexual offence can ground conviction if it is beyond reproach by itself which boils down to credibility.

As alluded to earlier on, PW2's evidence of identification of the culprit falls short of proving that the appellant was the real culprit. Apparently, PW4's evidence is too weak to corroborate the victim's version on identification. It is for the forgoing reasons we are constrained to disagree with the learned Senior State Attorney that the prosecution proved its case that the appellant was the real culprit and thus proving the case against him beyond reasonable doubt.

In the event, unlike the two courts below, we hesitate to agree with them. Instead, we found ourselves compelled to disturb their concurrent findings of fact on the identification evidence being satisfied that such a finding was a result of non-direction and misapprehension of the evidence on record causing injustice to the appellant. That finding is

set aside and substituted with a finding that the identification of the appellant was insufficient to support the case against him.

In the event, we allow the first ground of appeal and ultimately the appeal and hereby quash the appellant's conviction, and set aside the sentence. The appellant shall be released forthwith from custody unless he is lawfully held therein.

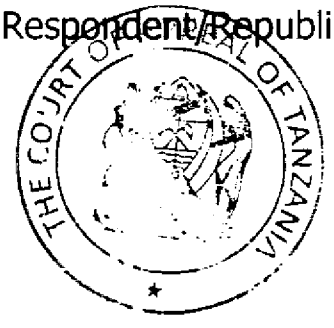
**DATED** at **MUSOMA** this 12th day of June, 2023.

R. K. MKUYE
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

The Judgment delivered this 13th day of June, 2023 in the presence of the appellant in person and the absence of the Respondent/Republic, is hereby certified as a true copy of the original.




C. M. MAGESA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**