IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MWAMBEGELE, J.A., MASHAKA, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 151 OF 2023

ATHUMANI MUSSA ZOAZOA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Tanga)

(Mtulya, J.)

dated 29th day of November, 2021

in

Criminal Appeal No. 18 of 2021

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JUDGMENT OF THE COURT

6th & 9th May, 2024

MWAMBEGELE, J.A.:

Before us is an appeal by the appellant, Athumani Mussa Zoazoa. He was arraigned in the District Court of Korogwe for rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Laws of Tanzania. He was found guilty, convicted and sentenced to thirty years' imprisonment. His first appeal to the High Court was barren of fruit, for Mtulya, J. dismissed it on 29th November, 2021. He has now come to this Court on a second appeal.

To come to grips with the matter before us, let us, briefly, provide a background to the appeal. It is this: on 18th February, 2020, at around noon, a girl of about ten years of age, who was a Class Four pupil at a Primary School in Mbogo Village in Korogwe District, Tanga Region, was at home. It was during a mid-afternoon recess and she had gone home for lunch. She prepared lunch for herself and took it together with her young brother whose name the record of appeal does not reveal. Immediately after she was done with her lunch, she went inside the house to prepare for the afternoon session at school. No sooner had she entered the house to put on her blouse, her school uniform, than the appellant, a buyer of scrap metal showed up. The appellant was not new to her as he used to visit the residence more often asking for scrap metal to buy. The material day was no exception; the appellant asked for scrap metal. The record of appeal, as far as we can glean, is not quite elaborate with the sequence of what actually transpired as the victim who is the best witness in the case in line with what we stated in **Selemani Makumba v. Republic** [2006] T.L.R. 379, is very economical with the details. Be it as it may, after a short while, the appellant undressed her and had carnal knowledge of her. The victim, in her brief testimony, uses the phrase "alinifanya kitendo kibaya", a phrase in Swahili language which, literally translated, means "he did a bad act to me". After the

heinous act, the appellant left. She did not tell any living soul about the incident. The record of appeal is silent on whether she was threatened not to tell anyone.

After some few days, on 20th February, 2020, to be particular, the victim's mother, Asha Shabani (PW2), noticed some foul smell from the victim. It does not come out clearly from the record of appeal why, but we can decipher from the cross-examination by the appellant, that she called her neighbour, Luciana Linus (PW3), a lady aged sixty, to go and observe what had gone amiss with her daughter; the victim. She told her about the pungent smell she noticed from the victim. PW3 examined the victim by lying her down in a supine position with her legs spread and examined her private parts. She realized that there was a swelling in her private parts and some bruises as well. When interrogated as to who caused the bruises and the swelling, the victim, kept mum at first but later told them that it was the appellant.

On the following day, PW2 took the victim to the police station where they obtained a PF3. They later went to Mombo Health Centre where Angelista Cyprian (PW4), a medical officer in charge of the Health Centre medically examined the victim. Her examination revealed that there were bruises, some discharge and a swelling in her vagina coupled

with some pungent smell. PW4 also noticed that the victim was not a virgin as the hymen was not there. PW4 filled the PF3 which was tendered and admitted in evidence as Exh. P2.

The appellant was later arraigned for rape. The prosecution fielded four witnesses in support of the charge. The appellant was the only witness for defence. After a full trial, the trial court having found that the prosecution witnesses were impeccable, held that the case was proved to the required standard and found the appellant guilty as charged, convicted and sentenced him as aforesaid. As already stated above, his first appeal to the High Court was found to be destitute of merit. This is his second appeal. The appeal has been predicated on four grounds of grievance; namely, **one**, that both the trial court and the first appellate court erred in law and in fact by convicting the appellant based on incredible and unreliable evidence of the prosecution witnesses; **two**, that both the trial court and the first appellate court erred in law and in fact by failing to notice that the victim and her mother were undermined by delaying to report immediately the abhorrent crime to the authority; **three**, that the trial court magistrate contradicted himself by failing to determine the date and place of the alleged offence; and, **four**, the prosecution did not prove the case beyond reasonable doubt.

The appeal was heard before us on 6th May, 2024. At the hearing, the appellant appeared in person, unrepresented. The respondent republic had the services of Ms. Tussa Mwaihesya, learned State Attorney.

When we gave the floor to the appellant to argue his appeal having reminded him of the gist of the four grounds of complaint comprised in the memorandum of appeal, he opted to let the respondent Republic respond to them, after which, need arising, he would make a rejoinder. We blessed that option and called upon the learned State Attorney to address us in response.

Ms. Mwaihesya kicked off by laying bare the stance of the respondent Republic to the appeal to the effect that she supported the appellant's conviction. With regard to the sentence meted out to him, the learned State Attorney was of the legal standpoint that it was illegal given that the victim's age was proved to be below ten years at the time of the incident. She was however hesitant to go into the nitty gritty of it given that we poked her at the outset why she did not appeal against the sentence if she was satisfied that it was illegal. However, in view of the fact that the point is one of law, we shall revert to it at a later stage in this judgment and, need arising, make appropriate decision on it.

The learned State Attorney argued against the grounds of appeal in the order they appear in the memorandum of appeal. Resisting the first ground of appeal, Ms. Mwaihesya submitted that the prosecution witnesses were credible and reliable and, citing **Goodluck Kyando v. Republic** [2006] T.L.R. 363, they were entitled to credence. She argued that credibility of witnesses is within the empire of the trial court and elaborated why she thought her witnesses were credible and reliable. Elaborating, she started with the victim (PW1), arguing that after the trial court found that she understood the duty to tell the truth and promised to do so and not to tell lies, she narrated in her testimony what befell her in the manner that was very consistent. The victim, she argued, was at home when the appellant arrived and asked for scrap metal. The appellant then undressed her, including her undergarment and he accomplished the atrocious act. The victim later narrated the story to PW2 and PW3. These two witnesses, the learned State Attorney went on, narrated the story in their testimonies also with sufficient consistency. PW3 examined the victim in the presence of PW2 and noticed bruises and a swelling in her private parts. PW4, a medical personnel, corroborated their evidence. The fact that the witnesses were consistent, was an all assurance of their credibility, she submitted. To support this proposition, she cited to us our decision in **Toyidoto s/o Kosima v. Republic**

(criminal Appeal No.525 of 2021) [2023] TZCA 17305 (5 June 2023) TanzLII. She implored us to dismiss this ground of appeal.

Arguing in respect of the second ground which challenges the trial court and the first appellate court for erroneously believing the prosecution witnesses; PW1 and PW2, while they delayed to report the incident, Ms. Mwaihesya argued that the evidence is clear that the victim lived with her father. Her mother (PW2) did not live there. Given her age, she submitted, which was below ten years, she was shy to report the same to her father. This, on the authorities of the Court, is acceptable. She referred us to **Selemani Hassani v. Republic** (Criminal Appeal No. 203 of 2021) [2022] TZCA 127 (22nd March, 2022) TanzLII in which we held that if the victim is a child of tender years and is threatened, the delay to report the incident does not erode her credibility. She thus implored us to find, as we did in **Selemani Hassani** (supra) that, given the age of the victim, the delay complained of is rational and explicable. She implored us to dismiss this ground of appeal like the first one.

The third ground of appeal seeks to challenge the two courts below for convicting the appellant while the trial court contradicted itself with regard to the date and place of the incident. The learned State Attorney

acknowledged the existence of the mishap in the judgment of the trial court found at p. 26 of the record of appeal but that the shortcoming did not prejudice the appellant. She predicated her line of reasoning to the fact that the charge sheet and the witnesses referred to the proper dates. She urged us to take the date and place referred to by the trial court at p. 26 of the record as simply a *lapsus calami* which did not prejudice anybody. She implored us to dismiss this ground of appeal as well.

Sequel to the foregoing arguments in the first three grounds of appeal, the learned State Attorney implored us to find that the prosecution proved the case beyond reasonable doubt. She insisted that the three ingredients of rape, the charge preferred against the appellant which are age, penetration and the assailant, had been proved. For the avoidance of doubt, these ingredients were proved despite the victim stating that "alinifanya kitendo kibaya". By so stating, she argued, on the authorities of **Hassan Bakari @ Mamajicho v. Republic**, Criminal Appeal No. 103 of 2012 (unreported) and **Hassan Kamunyu v. Republic** (Criminal Appeal No. 277 of 2016) [2018] TZCA 259 (25th July, 2018) TanzLII, the victim meant the appellant raped her. The learned State Attorney thus implored us to dismiss the appeal in its entirety.

In a short rejoinder, the appellant did not have any useful argument to add. He simply urged us to allow his appeal and set him free.

We start the determination of the grounds of complaints with the first ground of appeal. This grounds seeks to assail the credibility of the prosecution witnesses. It is indeed settled law, of course founded upon prudence, that the assessment of credibility of witnesses is within the empire of the trial court. This has been a stance of the Court in a string of its decisions – see: **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2001 (unreported), **Rashidi Shabani v. Republic** (Criminal Appeal No. 310 of 2015) [2016] TZCA 633 (29th July, 2016) TanzLII, **Abdallah Mussa Mollel @ Banjoo v. Republic** (Criminal Appeal No. 31 of 2008) [2010] TZCA 17 (19th February, 2010) TanzLII, **Francis Paul v. Republic** (Criminal Appeal No. 251 of 2017) [2021] TZCA 12 (11th February, 2021) TanzLII and **Toyidoto s/o Kosima** (supra). In the last case, we cited the following passage from **Ali Abdallah Rajab v. Saada Abdallah Rajab & Others** [1994] T.L.R. 132 which we find it worth recitation here:

> *"Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their*

credibility than an appellate court which merely reads the transcript of the record."

However, it is equally trite law that, save for demeanor, credibility may be assessed by an appellate court as well. That is what we observed in **Shabani Daudi** (supra):

> *"Credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of the witness can also be determined in two other ways.* ***One****, when assessing the coherence of the testimony of that witness and* ***two****, when the testimony of that witnesses is considered in relation to the evidence of other witness including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

In the case under appeal, the Court is, therefore, legally clothed with jurisdiction to determine the credibility of the witnesses not associated with demeanor. PW1 was the star witness in the case under appeal. The trial court found as a fact that this witness was witness of truth. So did the first appellate court. We have serious doubts. We say so knowing fully well that we are a second appellate court and must be

bound by the concurrent findings of fact of the two courts below. Our mainstay, by virtue of section 6 (7) (a) of the Appellate Jurisdiction Act, Cap 141 of the Laws of Tanzania, normally, is to confine ourselves to matters of law. This general rule is not without exception. The exception is when there has been a misapprehension of evidence or failure to take material point or circumstance into consideration. That this is the law in our jurisdiction we have stated in a plethora of our previous decisions. There is no dearth of case law on the point - see: **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Musa Mwaikunda v. Republic** [2006] T.L.R. 387, **Toyidoto s/o Kosima** (supra) and **Shabani Daudi** (supra), to mention but a few.

The case under appeal, we think, is one of those cases in which we are legally justified to meddle with the concurrent findings of fact by the two courts below based on the fact that, not only that there was a misapprehension of the evidence, but also that some important points or circumstances had not been taken into consideration. We shall demonstrate. The victim, as far as the record of appeal tells us, is very economical with the details of what actually happened. The incident is said to have happened on 18th February, 2020. When PW2 interrogated her with questions associated with the crime, the victim was not ready to

narrate the story. She did not tell her mother even after she was chastised. PW3 who heard the victim crying, went to see what had gone amiss. She found PW2 administering some strokes of the cane on the victim allegedly for some wrongs she committed. But even then, the victim did not tell her what was at the bottom of her heart. The economy of the details by the victim leaves a lot to be desired. In her testimony, after she narrated her parents' names, that she was on afternoon recess, the date and her place of residence, she simply stated on what is the most relevant part of her evidence:

> *"... I went inside to take my shirt so that I could go to school. Then Zoazoa came to ask for chuma chakavu [scrap metal] ... he undressed my clothes and undressed himself then 'alinifanya kitendo kibaya' and after that he left ..."*

That is all what she said in connection with her molestation. She was not detailed at all. She did not say, for instance, whether she was hurt, whether she wailed for help or raised an alarm. All what she said in reexamination is that the appellant muffled her mouth, perhaps to prevent her from raising any alarm. But what perturbs us is; if at all raising an alarm during the ordeal was futile because of the appellant's act of gagging her mouth, why keep quiet after the incident? Save for

the alleged rape and perhaps her mouth being stifled, we have no hunch at all of what circumstances went with it. Why she did not do that as reasonably expected of her or any person in that situation, is anybody's guess. To us, and perhaps to any reasonable man, that puts her credibility under suspicion. Once the credibility of a star witness is at stake, the prosecution case shakes and, most likely, crumbles. As we observed in **Selemani Hassani** (supra):

> *"... we are conscious that in view of the intrinsic nature of any sexual offence where only two persons are usually involved during commission, the testimony of the complainant is mostly crucial and must be scrutinized cautiously. Indeed, in this context, we held, for instance, in* ***Selemani Makumba*** *(supra), that the best proof of rape (or any other sexual offence) must come from the complainant. Accordingly, the complainant's credibility becomes the most important point of consideration."*

We find merit in the first ground of complaint.

The foregoing misgivings on the part of the victim are exacerbated by the fact that she, the star witness, took time to report and, indeed, it is more doubtful than not if she intended to reveal who the assailant was. This is the subject of the second ground of appeal to which we now turn.

As already stated above, the incident is said to have taken place on 18th February, 2020. It is not clear in evidence if the victim ever reported to anyone else. She did not report to her father, who was not even called to testify. It is not clear if she even reported to her teachers at school. She was hesitant to tell her mother even after she was caned. She remained hesitant to disclose who the rapist was. She only responded after she was asked for the second time by PW3 that it was the appellant who molested her. This conduct of the victim increasingly puts her credibility to question. This is even more so considering the fact that there is no evidence to show that she was threatened to be killed or beaten or anything falling in that basket, if she divulged the incident to anyone. In the absence of any threats, we are even more doubtful if the star witness was one of truth. In the same parity of reasoning, we are not prepared to agree with the learned State Attorney that the victim did not tell any living soul because she was an afraid child of tender age. This absence of threat distinguishes our case from **Selemani Hassani** (supra) referred to us by Ms. Mwaihesya in which, unlike in the present case, threat was manifest. In that case, at p. 16, we quoted with approval, the following passage from the decision of the Supreme Court of the Philippines in **People of the Philippines v. SPO1 Arnulfo A. Aure and SPO1 Marlon H. Ferol**, G.R. No. 180451. October 17, 2008:

"Delay in reporting an incident of rape due to death threats and shame does not affect the credibility of the complainant nor undermine her charge of rape. The silence of a rape victim or her failure to disclose her misfortune to the authorities without loss of material time does not prove that her charge is baseless and fabricated. It is a fact that ***the victim would rather privately bear the ignominy and pain of such an experience than reveal her shame to the world or risk the rapist's making good on his threat to hurt or kill her****. [Emphasis added]"*

As there were no threats to the victim in the case under appeal, we find **Selemani Hassani** (supra), subscribing to the Filipino case, distinguishable. If anything, the victim in the matter before us portrayed more incredibility than credibility. Her evidence was not credible, not convincing and inconsistent with human nature as well as the ordinary course of things as to be acted upon to found a conviction.

Sequel to the foregoing, we may recap that in a situation when a victim of rape is not threatened to be killed or harmed or the like threats, delay to report the incident diminishes her credibility and eventually undermines the charge of rape. In our considered view, what the victim

exhibited in the case under appeal is a hallmark of an incredible witness and she certainly falls in that realm, we so find and hold. The second ground of appeal has merit.

The determination of the complaint in the third ground of complaint will not detain us. It is evident at p. 26 of the record of appeal that the trial court referred to "12th day of September, 2019 at about 18:00 hours" as being the date and time on which the crime was committed. The trial court also referred to "Saadani-Magoma area within Korogwe District in Tanga region" as being the place of the commission of the crime. On the contrary, the charge as well as the evidence show that the date of the commission of the crime is 18th February, 2020 and the place of the crime as Mabogo village within the district of Korogwe in Tanga region. As the record is not vivid on the context in which the misnomer of the date of the crime and the *locus in quo* were cited, we agree with the learned State Attorney that the citation was but a *lapsus calami*. After all, the slip did not occasion any injustice to anybody. We therefore ignore it as an inconsequential lapse.

In view of what we have found and held above, an answer to the last complaint becomes palpable. We have found that the victim of the crime; the star witness in the case under appeal, was not a credible

witness and therefore unreliable. This makes the evidence in support of the prosecution case shaky. We are afraid we cannot give countenance to Ms. Mwaihesya's argument to the effect that the evidence from the star witness for the prosecution, the victim of the alleged rape, was impeccable. The case, for the reasons we have assigned, fell short of proof beyond reasonable doubt. It was not proved to the hilt.

We promised above to comment on the sentence meted out to the appellant. The evidence shows that the charge under which the appellant was charged, refers to section 131 (1) of the Penal Code as the punishment section. However, the oral and documentary evidence shows that the victim's age was under ten years of age, in which case the punishment section should have been section 131 (3) of the Penal Code. In view of this, the victim being of the age of below ten years, the prosper sentence should have been life imprisonment. It turns out that the sentence imposed on the appellant was but illegal. But now, that we have already found and held that the evidence on record was not sufficient to mount a conviction against the appellant, this finding is but an academic exercise.

In the final analysis, we find this appeal meritorious and allow it. Consequently, the conviction of the appellant is quashed and the

sentence imposed on him is set aside. We order that the appellant, Athumani Mussa Zoazoa, be released from prison unless held there for some other lawful cause.

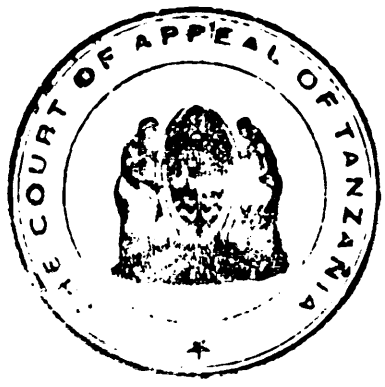
DATED at **TANGA** this 9th day of May, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 9th day of May, 2024 in the presence of the Appellant in person – linked via Video facility from Maweni Prison and Mr. Wilfred Mbilinyi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
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