

**IN THE COURT OF APPEAL OF TANZANIA  
AT MOSHI**

**(CORAM: SEHEL, J.A., FIKIRINI, J.A, And MLACHA, J.A)**

**CRIMINAL APPEAL NO. 148 OF 2022**

**JUMA IDD YOHANA.....APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the High Court of Tanzania at Moshi)**

**(Simfukwe, J.)**

**dated the 31<sup>st</sup> day of December, 2021**

**in**

**Criminal Appeal No. 48 of 2021**

.....

**JUDGMENT OF THE COURT**

2<sup>nd</sup> December, 2024 & 20<sup>th</sup> January, 2025

**FIKIRINI, J.A.:**

This is a second appeal after the appellant, Juma Idd Yohana, unsuccessfully appealed to the High Court in Criminal Appeal No. 48 of 2021. It all started with charges of rape levelled against him, contrary to section 130 (1) (2) (b) and 131 (1) of the Penal Code, Cap. 16 Revised Laws. The facts, as particularized in the charge sheet, are that on 4<sup>th</sup> September 2020, at Ruvu Jitengeni area, within the District of Same in Kilimanjaro region, had carnal knowledge of one MZA, whose name is censored to protect her dignity. She will thus be referred as MZA or PW1.

The appellant refuted the allegation. However, the trial court was satisfied that the prosecution had proved its case. Subsequently, he was convicted and sentenced to thirty (30) years imprisonment.

Facts leading to the conviction and sentence by the trial court marshalled from three (3) prosecution witnesses are straightforward. It is on record that, on an ill-fated day, PW1 was coming from Kwa Sita, heading to her home after visiting her son. While passing through a bush area, she heard the appellant, famously known as "Sita", her brother-in-law's son, calling her from behind. Looking back, she saw the appellant, who asked if he could escort her as she could not cross the thicket bush area alone. They proceeded walking. Suddenly, the appellant went ahead of PW1 and intercepted her. Confused and asking what was wrong, the appellant informed PW1 that he wanted her vagina. PW1 brushed him off by telling him not to do that. Surprisingly, the appellant, using his left hand, grabbed PW1 by the neck and pushed her down. Struggling to get up, using his right hand, the appellant opened his trousers and took out his penis and proceeded to pull up PW1's dress, squeezed her pants and penetrated her vagina by inserting his penis.

Still, under the appellant's control of choking PW1 by the neck, PW1 raised her voice pleading with the appellant, asking him to stop

choking her, assuring her to give him the sex he wanted. The promise relaxed the appellant, allowing PW1 to raise the alarm and call for help. PW1's action annoyed the appellant, who furiously told her that he would kill her and take the body into Ruvu River. PW1 pleaded with the appellant once again to let her go, promising him the best sexual encounter. Falling into the trap but still on top of PW1 continuing to have carnal knowledge of her, the appellant relaxed, which gave PW1 room to raise the alarm. The alarm raised alerted people, including Simon Samwel Margwe (PW2). On arrival, they found the appellant still on top of PW1. Using sticks and pulling him out, those people who gathered apprehended him, tied his hands and called militiamen, who took him to Makanya Police post via the Jitengeni Village office.

Rescued from the ordeal, PW1 also went to Makanya Police post and was issued with PF3. She attended Makanya Estate Dispensary, where she was referred to Same Government Hospital, where a clinical officer, Mwanakiti Mbaraka (PW3), examined PW1, and her findings were that she had been sexually engaged not long ago.

The appellant's defence was short. He denied committing the offence and claimed the case against him was a trumped-up story, as he had feuds with PW1 over a piece of land left to him by his grandfather.

The trial court was convinced that the prosecution had proved its case after they had been able to prove all the elements of rape: (i) that the appellant carnally knew PW1, (ii) that the encounter was without consent, and (iii) if there was consent then it was obtained by force, tricks, intimidation or fear of being harmed or injured, it convicted and sentenced him as intimated earlier on in this judgment.

His appeal to the High Court, which contained five (5) grounds, was unsuccessful; hence, the present appeal. Prelude to his appeal was a memorandum of appeal lodged on 21<sup>st</sup> April, 2022 containing four (4) grounds, which can be paraphrased as follows: **one**, that the charge preferred under section 130 (1) (2) (b) of the Penal Code was defective as it did not fit the condition falling under sub-section (b) of section 130 (1) (2) of the Penal Code, **two**, that the High Court relied on the trial court evaluation of evidence instead of re-evaluating the said evidence, **three**, that the prosecution case was marred with contradictions, inconsistency, incredible account and unreliable prosecution witnesses, and **four**, the case against the appellant was not proved beyond reasonable doubt.

This was followed by the 1<sup>st</sup> supplementary memorandum of appeal lodged on 31<sup>st</sup> October, 2022 containing five (5) grounds summarized as: **one**, there was variation between the charge sheet and

the evidence adduced regarding the appellant's name, **two**, that there was variance between the charge sheet and evidence over the scene of crime, and **three**, that there was variance between the charge sheet and the evidence led to prove charge preferred under section 130 (1) (2) (b) of the Penal Code. Grounds three and four are the same as grounds three and four in the initial memorandum of appeal.

The 2<sup>nd</sup> supplementary memorandum of appeal had three grounds: **one**, that the prosecution failed to call material witnesses, namely Mzee Benedict, the Local Militia Officer and the investigator; **two**, that PW1's credibility was not properly scrutinized since she alleged to be residing at Ruvu Mferejini while in the charge sheet she was resident at Makanya, Same, and **three**, that the defence case was not considered.

The hearing of the appeal took place on 2<sup>nd</sup> December, 2024. Before the Court, the appellant, who was not represented and hence fended for himself, Ms. Janeth Sekule, learned Senior State Attorney, assisted by Ms. Tusaje Samwel, learned State Attorney, appeared for the respondent Republic, were present.

Ms. Samwel commenced her address opposing the appeal, supporting the conviction and sentence meted. In arguing the appeal,

the learned State Attorney combined ground one in the memorandum of appeal and grounds one, two and three from the 1<sup>st</sup> supplementary memorandum of appeal. The grievance in those grounds was that the appellant was complaining he was convicted under section 130 (1) (2) (b) of the Penal Code instead of section 130 (1) (2) (a) of the same. The learned State Attorney referred the Court to page 10 of the record of appeal, where PW1 stated that consent was procured by force. She further stated that though consent is chargeable under section 130 (1) (2) (a) of the Penal Code, it is also found under section 130 (1) (2) (b) and therefore, whichever of the two would have suited. The appellant was thus correctly charged.

Tackling the concern that the place where the offence was committed as per the charge sheet differs from PW1's evidence in which she testified living at Ruvu Mferejini while the charge sheet depicts that the offence was committed at Kwa Sita. The learned State Attorney countered by explaining that Kwa Sita was within Ruvu Jitengeni; thus, under the circumstances, there is no difference as purportedly portrayed by the appellant.

Also raised was the grievance that his name, which appeared in the charge sheet, differed from that PW1 and PW2 used in court. They both referred to him as Juma Idd Yohana @ Sita, while in the charge

sheet, his name read Juma Idd Yohana. Disputing the appellant, the learned State Attorney challenged him for not cross-examining PW1 and PW2 when he was given the opportunity. She also contended that the appellant admitted to those names during the preliminary hearing, raising it at this point was postscript. Otherwise, the prosecution did comply with the rules governing the charge sheet as provided under sections 132 and 135 of the Criminal Procedure Act, Cap. 20 Revised Laws (the CPA).

On the third ground in the memorandum of appeal, the prosecution case was based on weak, tenuous, contradictory, inconsistent, incredible and unreliable evidence. This ground was argued with the fourth ground in the 1<sup>st</sup> supplementary memorandum of appeal. The learned State Attorney admitted the existence of a contradiction between PW1 and PW2 on how militiamen got to the scene of the crime and apprehended the appellant. According to PW1, it was PW2 who called the militiamen, whereas PW2's version was that after pulling away the appellant who was on top of PW1, they took him to Mzee Benedict, who advised that he be taken to the Village office. On the way, they met the militiamen, who placed the appellant under their arrest and took him to the Police. The contradiction mentioned, even though it existed, was

minor and did not go to the root; therefore, it did not affect the prosecution case.

The learned State Attorney equally retorted the one on the ground, raised in the 2<sup>nd</sup> supplementary memorandum of appeal on failure to call material witnesses. She contended that the three (3) prosecution witnesses were crucial. PW1 explained how she was raped and by whom. This piece of evidence was supported by PW2, who caught the appellant red-handed on top of PW1 having sexual intercourse, and PW3 was the one who examined her, and the findings were she had had sexual intercourse a while ago.

She furthermore argued that as per section 143 of the Evidence Act, Cap. 6 Revised Laws (the EA), no specific number of witnesses to call can prove a fact. It is crucial that if a particular piece of evidence would assist in building up the prosecution's case, then that is a material witness to them. In the case at hand, besides explaining what transpired, PW1 could elaborate on how the appellant was apprehended and, using a motorcycle commonly known as "bodaboda", he was taken to Police Makanya. However, there was no need to call the Militia men.

Similarly, the learned state attorney maintained that there was no need to call Mzee Benedict as he was not at the crime scene, had seen nothing, and was not an essential or material witness.

Ground three in the 2<sup>nd</sup> supplementary memorandum of appeal that the defence case was not considered, which is similar to ground two on lack of re-evaluation by the 1<sup>st</sup> appellate court, was dismissed by the learned State Attorney, who argued that the trial court on page 36 of the record evaluated the evidence on record and concluded that the appellant's defence that the charges against him were fabricated could not hold water. The trial court rejected the claim that PW1 was holding grudges against him, resulting from a feud over a piece of land. The trial court failed to fathom how PW1, already divorced from the appellant's relative, could have an interest in the said piece of land.

On a different note, the learned State Attorney urged the Court to step into the 1<sup>st</sup> appellate court shoes and re-evaluate the defence evidence, which was not thoroughly discussed.

The final grounds were ground four from the memorandum of appeal and ground five from the 1<sup>st</sup> supplementary memorandum of appeal, that the prosecution case was not proved beyond reasonable doubt. These two grounds were responded to, clarifying that PW1

testified on what occurred to her on the 4<sup>th</sup> September, 2020. Knowing that the best evidence in sexual offences comes from the victim, PW1 patiently explained how the appellant, without her consent, raped her by inserting his penis into her vagina. PW2 corroborated PW1's account as he found the appellant on top of PW1 continuing to have sexual intercourse. When PW3 examined PW1, confirmation was she was found with fluids on her private parts, indicating the intercourse occurred a not long time ago. Fortifying her submission, the learned State Attorney referred the Court to the case of **Shabani Haruna @ Dr. Mwagilo v. R**, (Criminal Appeal No. 396 of 2017) [2021] TZCA 708 (1<sup>st</sup> December, 2021; TANZLii).

Winding up her submissions, she urged the Court to dismiss the appeal and uphold the two lower court decisions.

Asked by the Court if all the elements proving rape were demonstrated, her response was with certainty that all the elements were proven. Starting with penetration, lack of consent and who did that, PW1, the victim, evidenced all these. PW2 added to what PW1 had testified.

In rejoinder, the appellant had little to respond to except to maintain that all his grounds of appeal be considered and, ultimately, he be released from prison.

We have examined the record of appeal and considered all the appellant's grounds and submissions by the respondent Republic. Our deliberation will start with ground one in the memorandum of appeal argued together with grounds one, two and three in the 1<sup>st</sup> supplementary memorandum of appeal that the charge was defective in three aspects: one, that the charging provision did not fit the circumstances in section 130 (1) (2) (b) of the Penal Code.

According to the appellant, there is variation between the charge sheet with the evidence on record since section 130(1)(2)(b) provides circumstances of rape where consent is obtained by the use of force, threats or intimidation by putting the victim in fear of death or of hurt or while she is in unlawful detention. Insinuating that in the present appeal, there were no such circumstances. This is different from what is found on the record. The evidence on record suggests that at the beginning, there was no consent at all, as the appellant used force to grab PW1's neck, fell her down and raped her.

While we agree with the appellant that sections 130 (1) (2) (a) and 131 (1) of the Penal Code would have as well been the correct

provision as it covers having carnal knowledge with a woman without her consent, however, in this instance, we are of the view that the provision invoked was proper. This position stems from PW1's account that when the incident was ongoing, she acted as if she consented to the act. At the same time, in a real sense, she did not, as she used consent as a trick to get a chance to raise the alarm. But even if, for the sake of argument, which we do not go by, we assume she did consent, the consent was induced by force and the threat of being killed and thrown into the river.

In short, both provisions of sections 130 (1) (2) (a) and (b) would have applied to the situation.

It is noteworthy to mention that even if there is a wrong or non-citation of the enabling provision, the infraction is curable under section 388 of the CPA. In most cases, the particulars of the offence and evidence are what is relied on.

In **Jamali Ally @ Salum v. R** (Criminal Appeal No. 52 of 2017) [2019] TZCA 32 (28<sup>th</sup> February 2019; TANZLii), the Court deliberated and settled that the purpose of the charge sheet is to notify a person of a criminal charge being preferred against him to enable him to provide a

defence. The essential matter is for particulars to be clear and understandable to the accused person to avoid prejudicing him.

The complaint was that there was a variance between the charge sheet and evidence regarding the crime scene's location, and we dismissed the complaint right away as a non-starter. The charge sheet on page 1 of the record states Ruvu Jitengeni as the crime scene area. PW1 and PW2, in their testimony, testified that on that fateful day, PW1 was coming from Kwa Sita area heading to her home in Ruvu Mferejini, and the incident occurred in the Kwa Sita area. According to PW2 on page 11 of the record, Kwa Sita area is within Ruvu Jitengeni village. As stated in the charge sheet, the witnesses had clarified that the offence was committed in Kwa Sita area, which is within Ruvu Jitengeni. Thus, there is no variance in where the offence was committed and the evidence from the witnesses.

The appellant as well complained about a variation of his name in the charge sheet and the evidence of PW1 and PW2. The names appearing on the charge sheet are indeed Juma Idd Yohana @Sita, the same name PW1 and PW2 had been referring to the appellant. If the appellant was disputing this to be his name, he would not have pleaded to the charge as those were the names appearing. He kept quiet when facts were read over to him during the preliminary hearing. On page 5

of the record, after facts were read out, the appellant, when addressed on matters, not in dispute, this was his response reproduced verbatim: -

**"Accused:** *I dispute all the facts read to, save for my personal particulars."*

In his own words, he admitted to his particulars, which included his name as it appears in the charge sheet, that is, Juma Idd Yohana @ Sita. Besides, he never cross-examined PW1 and PW2 about the name, which he alleged was not his.

All the aspects raised in the cited grounds number one of the memorandum of appeal and grounds one, two, and three of the first supplementary memorandum of appeal are without merit and are dismissed.

Grounds three in the memorandum of appeal and four in the 1<sup>st</sup> supplementary memorandum of appeal is that the prosecution case was based on weak, contradictory, inconsistent and unreliable evidence. We have thoroughly read the evidence complained about. Admittedly, there is a contradiction between PW1 and PW2 testimony on the presence of the militiamen at the crime scene area. According to PW1, PW2 was the one who called militiamen who came and apprehended the appellant. This account is different from that of PW2, whose version is that after pulling the appellant who was on top of PW1, the appellant was taken to

Mzee Benedict. We find the contradiction minor as it did not change the fact that the appellant was found on top of PW1, apprehended and processed accordingly.

As was the conclusion in several of our decisions, minor contradictions must be disregarded. For example, in **Marmo Slaa Hofu and 3 Others v R.**, CAT Criminal Appeal No. 246 of 2011 (unreported) where it held that: -

*"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case."*

See also: **Abiola Mohamed @ Simba v. R** (Criminal Appeal No. 291 of 2017) [2021] TZCA 632 (2<sup>nd</sup> November, 2021; TANZLii).

We firmly hold that the contradictions in the testimonies, if any, were minor and did not affect their evidence. Moreover, it showed that witnesses were not coached or rehearsed; on the one hand and on the

other, the ordeal PW1 went through should not be underrated. She must have been shocked and humiliated by what the appellant had done to her to remember everything correctly. We thus share the observation by the two lower courts dismissing the contradictions as minor and that it did not impact the prosecution case. The grounds under this aspect are equally lacking in merit and hereby dismissed.

Failure to call material witnesses, namely, Mzee Benedict, the Militiaman and the investigator, was ground one in the 2<sup>nd</sup> supplementary memorandum of appeal. On this point, we wish to observe the following: *first*, a material witness is a witness who has a connection with the transaction in question. In the present appeal, the three prosecution witnesses were significant to its case. PW1, who was the victim; PW2, an eye witness PW3, who examined PW1 and found fluids in PW1's private parts, indicating she had a sexual encounter not a while ago. See: **Wambura Marwa Wambura v. R** (Criminal Appeal No. 115 of 2019) [2022] TZCA 429 (14<sup>th</sup> July, 2022; TANZLii). We can safely say material witnesses advance the prosecution case, not otherwise.

*Second*, under section 143 of the EA, the principle is that no number of witnesses is required to prove the fact. The provision reads: -

*"(143) Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for proof of any fact"*

This was elaborately discussed in **Yohanis Msigwa v. R**

[1990] T. L. R. 148, referring to the above section held: -

*"(i) As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen and his/her credibility."*

Mzee Benedict, the local militia officer and an investigator, were not material witnesses since PW2, the eye witness and the victim, PW1, testified and proved the case as the appellant was caught on top of PW1 raping her and was arrested right away. The ground is meritless.

The High Court did not precisely consider the defence. However, the appellant's defence was, in our view, satisfactorily considered by the trial court, even though the appellant claimed it was not. Analyzing his defence on page 36 of the record, the trial magistrate considered and discussed the defence evidence at length. In his defence, the appellant alleged that the case was fabricated against him because PW1 was interested in the piece of land left by his grandfather. This was the

cause of the feud between PW1 and the appellant over the said piece of land. The appellant never cross-examined PW1 on this fact.

We find that to be an afterthought by the appellant in building up his defence. It is a settled principle that, although the accused has no duty to prove his innocence, he is expected to make the theme of his defence known to make the trial fair even to the prosecution, and the theme of defence starts with cross-examining witnesses. See; **Suleiman Dago @ Swalehe v. R** (Criminal Appeal No. 59 of 2022) [2024] TZCA 280 (29<sup>th</sup> April, 2024; TANZLii), that failure to cross-examine implies acceptance of the truth of the matter.

The trial magistrate discounted the appellant's defence, reasoning that PW1 could not be interested in her ex-husband's land while she had already been divorced. In this case, the defence was considered but rejected as it did not raise any doubt on the prosecution's evidence. Rejection of defence does not mean non-consideration of the same, as stated in **Jafari Mohamed v. R** (Criminal Appeal No. 112 of 2006) [2013] TZCA 344 (15 March 2013). We entirely associate ourselves with the trial court decision in consideration of the appellant's defence evidence. The ground fails.

The last and most crucial point is whether the prosecution case was proved to the hilt. The essential elements of rape under sections 130(1) and (2) (a) and (b) are; (i) lack of consent or (ii) use of force and threat to procure consent, (iii) penetration and (iv) prove that it was the accused/appellant who raped the victim. In the present case, PW1, PW2 and PW3 proved that PW1 was carnally known. Starting with PW2, he eye witnessed the appellant raping PW1. PW3, on her part, examined PW1 and found mucus on her private parts, suggesting that she was recently penetrated. Likewise, in PW1's account, she proved the fact that the appellant penetrated his penis into her vagina. She also proved a lack of consent. In her testimony, she did not consent to the act, which is why the appellant used force to rape her. Considering that in sexual offences, the best evidence comes from the victim, in this appeal, we find that PW1 ably proved all the elements constituting rape contrary to either sections 130 (1) (2) (a) (b) and 131 (1) of the Penal Code. See: **Selemani Makumba v. R** [2006] T. L. R. 379.

The cherry on the pudding was that the appellant was caught in *flagrante delicto*, so no issues of identification arose. Despite his defence refuting committing the offence, the appellant's defence is,

in our view, an afterthought, and it did not cast any doubt on the prosecution case. The ground lacks merit.

The above analysis shows that the appeal has no merit and is dismissed entirely.

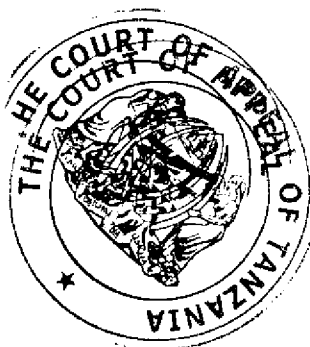
**DATED at DAR ES SALAAM** this 15<sup>th</sup> day of January, 2025.

B. A. M. SEHEL  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

L. M. MLACHA  
**JUSTICE OF APPEAL**

The Judgment delivered this 20<sup>th</sup> day of January, 2025 in the presence of the appellant in person and Ms. Edith Charles Msenga, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



  
D. P. KINYWAFU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**