

TANZANIA / JUDGMENT

HANGO OMARY HANGO VERSUS THE REPUBLIC

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IN THE COURT OF APPEAL OF TANZANIA AT DODOMA (CORAM: LILA. 3.A.. MURUKE 3.A. And MDEMU. 3.A.1 CRIMINAL APPEAL NO. 445 OF 2022 HANGO OMARY HANGO..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Dodoma) (Kaaomba. 3.) dated the 17th day of August, 2024 in Criminal Appeal No. 91 of 2021 JUDGMENT OF THE COURT 4th December 2024 & 3rd February, 2025 MURUKE. 3.A.: The appellant, Hango Omari Hango, was charged before the District Court of Singida at Singida (the trial court) with two counts. The first count was rape contrary to section 130(1)(2) (e) and 131 of the Penal Code, Cap 16 R.E. 2002 now (R.E. 2022). It was particularized that, between 15/12/2018 and 11/07/2019, at Mjudhuda Village Ikhanoda Ward, Ilongaro Division within the District and Region of Singida, the appellant had carnal knowledge of a giri aged 14 years, a pupil of standard four at Kisisi Primary School. The second count was on the offence of impregnating a school girl contrary to section 60A of the Education Act, as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016. It was alleged that on the same month and year appearing in count one, the appellant impregnated a school girl aged 14 years of Kisisi Primary School. For the purpose of this judgment, we shall refer to her as "the victim" or "PW3" in order to disguise her identity. The appellant denied the charge. Thus, a full trial ensued whereby the prosecution case was built upon three exhibits, namely; the medical examination report (exhibit P1), Victim Clinic Card (exhibit P2), and the appellant cautioned statement (exhibit P3). First prosecution witness was the father of the victim (PW1). He testified at the trial court that her daughter (PW3), fourteen years old girl was a standard four student at Kisisi Primary School. That, on 11/07/2019, he received a letter from Kisisi Primary School requesting him to meet the head teacher (PW2), which he complied. At school, PW2 told him that they have examined PW3 and found her to be pregnant. Upon being asked, PW3 mentioned the appellant to be responsible for her pregnancy. PW1 testified that, the appellant is his cousin son, who was staying with them assisting him with some of his works. With the help of the Head Teacher, he reported the matter to the police. The appellant was arrested at Manyara Region, having left on April 2019, without any information. The Head Teacher of Kisisi Primary School, Mr. Samson Muria (PW2) testified that, on 11th July 2019, they took all the girls for examination at the Government Dispensary, in which the victim was found pregnant. He informed the Village

Executive Officer who assisted to summon the victim's father. PW2 testified further that the victim was a standard six pupil at his school, but then she was no longer going to school because she was pregnant. As indicated above, the victim testified as PW3, that she stays with her parents and her grandmother. She was born on 14/03/2005, and that on 2018, she was a standard six pupil at Kisisi Primary School. On December 2018 at about 18:00 hours she was in her room resting. In the absence of other family members, the appellant entered her room, held her on the bed, removed her skirt and underpants, he also removed his trouser and boxer then inserted his manhood into her vagina. She felt pain but could not raise alarm as the appellant threatened her. She then started bleeding and there was discharge like water from her vagina. The appellant warned her not to tell anybody. In January 2019, she did not get her menstruation period, thus informed the appellant who convinced her that, he will assist in abortion, and marry her, then the appellant continued to have sex with her. After three months the appellant disappeared from their home without their knowledge. On July 2019, she was examined and found to be pregnant. At the hospital, the victim was attended by Dr. Musa Moses (PW4), a Clinical Officer at Mjughuda Dispensary. PW4 testified that, while on duty, he examined pupils of Kisisi Primary School for pregnant test, in which the victim was tested positive. He filled a PF3 medical report, that he tendered as exhibit P1. The Investigation Officer G.6119 Detective Constable Said Anyitike (PW5) said that he was assigned a rape case for investigation. He. also interrogated the victim who explained how the appellant raped and finally impregnated her. He also talked with the appellant after his arrest, and admitted to have sexual intercourse with the victim. PW5 tendered the victim's attendance register, clinic card, and affidavit to prove her birth date, which were received collectively as exhibit P2. According to F3107 Corporal Daniel (PW6) the appellant was, on 15th July 2019 at 17:15 hours, sent to their police station where he was stationed. He interrogated the appellant and recoded his statement at 19:00 hours in which he admitted to have sexual intercourse with the victim since January

2019. On February, the victim informed the appellant that she was pregnant. The appellant, promised to assist in abortion and promised to marry her, } thus continued to have sexual intercourse. Later, the appellant left without informing anyone until when he was arrested at Dasamedia Village Manyara Region where he was hiding. Before recording the appellant's statement, he informed him all his rights including to have a relative or any person of his choice but choose to make his statement while alone. At the end, the t appellant signed the statement, which he tendered and was received by the court as exhibit P3. In his defense, the appellant denied committing the offence although he admitted staying with the victim while working for her father, PW1 and that they deferred on payments of his dues, that is the reason of being arrested just to cover issue of none payments of his dues. Having heard the evidence from both sides, the trial court was satisfied that the appellant's guiltiness was proved beyond reasonable doubt. Thus, the appellant was convicted and sentenced to thirty (30) years imprisonment for the first count and to five years for the second count. He unfruitfully appealed to the High Court. Still believing on his innocence, he lodged the present appeal on ten grounds of appeal paraphrased as follows:

1. The prosecution case was not proved to the required standard.
2. Trial court failed to comply with section 127(2) of the Evidence Act.
3. The appellant was convicted and sentenced without resolving contradictions made by the prosecution witnesses.
4. DNA test was mandatory, however both courts did not take into consideration.
5. The two counts erred in relying on the cautioned statement without taking the appellant to the justice of peace.
6. The cautioned statement was not read aloud after being admitted.
7. The delay in naming the appellant in connection with the offence raises doubt 8 The court relied on the victim's evidence that she was threatened while she was free capable of disclosing the information to any other person.
9. The trial court failure to consider defense testimony At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Ms. Happiness Makungu assisted by Mr. Geoffrey Mlagala, both Senior State Attorneys, represented the respondent/Republic. When the appellant was invited to amplify on his grounds of appeal, he prayed to adopt as his submission and let the learned Senior State / * Attorney submit first reserving his right to respond later. He implored the Court to consider and allow all the grounds of appeal and set him free. It is worth noting that this is a second appeal. It is a settled position of the law that, the Court will not interfere with concurrent factual findings of the courts below, unless there has been misapprehension of the nature and quality of the evidence occasioning miscarriage of justice. For this position, see for instance, DPP v. Jaffar Mfaume Kawawa [1981] T.L.R, 149 and Isaya Mohamed Isack v. The Republic, Criminal Appeal No. 38 of 2008, Seif Mohamed E. L. Abadan v. The Republic, Criminal Appeal No. 320 of 2009 and Wankuru Mwita v. The Republic, Criminal Appeal NO. 219 of 2012 (both unreported). In the latter case, the position was emphasized thus: "... The law is well-settled that on second appeal, the court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless It can be shown that they are perverse, demonstrably wrong or clearly 10 unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; a violation of some principle of law or procedure or having occasioned a miscarriage of justice ." It is also settled law that, although assessing the credibility of a witness basing on demeanor is the exclusive domain of the trial court, credibility can still be determined by the appellate Court when assessing the coherence and consistency. of the witness and when evidence of such witness is considered in relation to the testimony of other witnesses, including that of an accused person. For this position, the cases of Daniel Malogo Makasi & Others v. The Republic (Consolidated Criminal Appeals No. 346 of 2021) [2022] TZCA 230 (2 May 2022, TanzLII) is relevant. Therefore, the assessment of the credibility of a witness is crucial because, every witness is entitled to be believed unless the witness has given improbable or implausible evidence or the evidence has been

materially contradicted by another witness or witnesses. The other principle relevant to this case is that, in sexual offences, the best evidence is that of the victim (see Selemani Makumba v. The Republic, [2006] T.L.R. 379). Moreover, in terms of section 127 (6) of the Evidence Act Cap. 6 R.E. 2019, the court can ground conviction basing on the evidence of the victim of sexual offence if it forms an opinion that the victims evidence is credible. Besides, it is settled that every witness is entitled to credence of his/her evidence unless there are good and cogent reasons to hold otherwise as expounded by the Court in Goodluck Kyando

- v. Republic [2006] T.L.R. 363. It is common knowledge that in cases involving statutory rape like the one at hand, it is necessary that the age of the victim must be proved. In the case of Alex s/o Ndendya v, The Republic, (Criminal Appeal 340 of
- 2017) [2020] 17CA 201 (6 May 2020, TANZLII), the Court stated that: "...in a situation where the appellant was charged with statutory rape then, age of the victim must specifically be proved before convicting the appellant." Having expounded position of the law relevant to the case at hand, we will now consider grounds of appeal. Starting with the 2nd ground, complaint is on none compliance with section 127(2) of the Evidence Act. The respondent's counsel submitted that, at page 18 of the record of appeal, line 1, PW3 the victim, said she was born on 14/03/2005, so the victim was above 14 years of age when she testified. Therefore, the victim was not a person of tender age. Respondent counsel insisted that PW3 before giving evidence, she affirmed to tell the truth. It is the appellant's contention that it was contrary to section 127 (2) of the evidence Act which imposes a duty to a witness of tender age to promise to tell the truth before giving evidence. A child of tender age is defined under section 127 (5) of the Tanzania Evidence Act that: "For the purpose of subsection (2), (3) and (4), the expression, child of the tender age means the child (whose apparent age is not more than fourteen years)". In the matter at hand, as can be gleaned from the PW3's testimony that she was born on 14/03/2005 as reflected at page 18 of the records, and averments in the affidavit of her birth, exhibit P2. Thus, she attained 14 years on 14/03/2019. Therefore, counting from the birth date to the date when she testified against the appellant, she was about 14 years, consequently not covered under section 127(5) of the Evidence Act. The record divulges that, prior to her testimony, PW3 affirmed to tell the truth and was affirmed. It is our opinion that PW3's evidence was correctly recorded as she testified under affirmation. Thus, the second ground of appeal lacks merit. In the 3rd ground the appellant complains that he was convicted and sentenced without resolving contradictions made by the prosecution witnesses. In this, the Respondent counsel submitted that, they tried to look into the contradictions, not mentioned by the appellant. Despite contradictions same does not go to the root of the matter while referring to the case of Issa Hassan UKI v. Republic (Criminal Appeal No. 129 of
- 2017) [2018] TZCA 361 (10 May 2018, TanzLII) at page 18, which insisted that slight discrepancies in testimony can be 'overlooked, and also the case of Shabani Haruna @ Dr. Mwagilo v. Republic (Criminal Appeal No. 396 of 2017) [2021] TZCA 708 (1 December 2021, TanzLII) to the effect that minor contradictions can be ignore. We have noted some contradictions, for

instance the class which the victim was at the time she was found to be pregnant is uncertain. According to the amended charge sheet, the victim is said to be a student of Standard Four as reflected at page 3 of the records, (PW1 and PW2), the father and the head teacher of the victim informed the Court that the victim was in grade six as seen at page 14 and 17 of the record. The victim herself PW3, the investigator (PW5) and (PW6) said that the victim was a standard five pupil as seen at page 18 of the records. It is worth insisting that, in evaluating contradictions and discrepancies in evidence, the duty of the Court is to evaluate the evidence as a whole, and more so, if such contradiction has the effect of corroding the prosecution evidence in totality. PW1, PW2, PW3, PW6, said PW3 was a school girl. She being in standard four or six is immaterial, what matters is that she was still a school girl below 18 years of age. The Court in *Mohamed Said Matula v. Republic*

[1995] T. L. R. 3, stated that: "Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter." See also, *Dickson Elia Nsamba Shapwata & Another v. Republic* (Criminal Appeal No. 92 of 2007) [2008] TZCA 17 (30 May 2008, TanzLII), *Toyidoto s/o Kosima v. Republic* (Criminal Appeal No. 525 of 2021)

[2023] TZCA 17305 (5 June 2023, TanzLII), and *Frank Maganga v. Republic* (Criminal Appeal No. 93 of 2018) [2021] TZCA 105 (13 April 2021, TanzLII). It is our view that the alleged contradictions are minor, and they don't go to the root of the case so as to discredit the prosecution's witnesses. Thus, ground three lacks merits, and it is therefore dismissed. Ground 4 of the complaint is on DNA test which was not conducted to prove if the baby born by PW3 was of the appellant. The issue to be resolved in ground four is whether DNA test was mandatory. In response learned State Attorney submitted that it is true that DNA test was not conducted to prove if the baby born by PW3 was of the appellant. This case was decided without evidence of DNA. However, this evidence is not mandatory to prove the offence of impregnating a school girl. DNA is scientific evidence to connect the appellant with the offence. However, it is not a mandatory legal requirement to prove the offence of rape in particular. In the case of impregnating school girl, the victim evidence was enough. DNA test was not a legal requirement insisted respondent's counsel citing the case of *Salum Nicholas Mnyumali v. Republic*, Criminal Appeal No. 327 of 2020, at page 15 to support his arguments. We agree that the DNA is a vital scientific evidence in determining the offences of this nature as they link the accused with the committed crime. However, the same is not a mandatory legal requirement to prove the present offences. The ingredients of the offence of impregnating a school girl, require the prosecution to prove beyond reasonable doubt, one, that the girl was impregnated when she was attending school and two, the school girl was impregnated by the accused, the issue of DNA is not an ingredient in proving the offence. See: *Sokolo Richard v. Republic*, Criminal Appeal No. 478 of 2020 [2024] TZCA. It is our opinion that, the absence of the DNA test could not override the evidence adduced by the victim who, no doubt was a

school girl and proved to have had sexual relationship with the appellant resulting to her pregnancy. We therefore find the fourth ground with no merit, thus it is dismissed. The complaint in the 5th ground is prosecution's failure to take the appellant to the justice of peace for confession apart from the cautioned statement he made at the police station. This ground should not detain us much as there is no law which compels the police to take an accused to the justice of peace save when the accused himself is in need of making his confession. See; Alex Mwashilindi & Another v. Republic (Criminal Appeal No. 626 of 2020) [2023] TZCA 18008 (15 December 2023, TanzLII). Turning to the 6th ground, the complaint is that the appellant's cautioned statement was not read out after being cleared for admission. On this, the Respondent counsel rightly admitted that Caution Statement was not read before being admitted. It is true as correctly admitted by the learned State Attorney that the records reveal that, PW6 when tendering the caution statement, the same was objected by the appellant (page 30-31) as a result the trial within trial was conducted and the Caution Statement was admitted but without being read out. Subsequently, in full trial exhibit P3 was improperly acted on. Thus, exhibit P3 is disregarded from the evidence. In totality, ground six has merits accordingly allowed. Grounds 7, 8 and 9 of the complaints are on delay by the victim to mention the appellant. The Respondent's counsel submitted on the three joined grounds that the appellant is faulting the credibility of PW3's evidence in that she delayed to mention the appellant. That is not true. At page 18 of record of appeal line 18-19, PW3, the appellant was mentioned at the earliest possible opportunity to his parents although not on the very date of being raped. On the offence of rape, the appellant delayed, but on impregnating a school girl, she said it immediately when asked by her father PW1 in the presence of PW2. It should be noted that, the victim was below 18 years, she was still a child. The victim was threatened by the appellant not to tell anyone. The victim believed the appellant so she did not tell anyone. The case of Elia Richard Shoo v. Republic, Criminal Appeal No. 196 of 2021 at page 12-13, shed lights on an explained delay on cases of sexual offences. Each case need to be taken on its own. Therefore, ground 7, 8 and 9 lack merits insisted the respondent's counsel. Going by the records, it is apparent that PW3 neither disclosed the ordeal nor mentioned the appellant to any one since the date she alleged to have been raped by the appellant on the first instance, and even on the days thereafter when she continued to have sexual intercourse with the appellant, until confirmed to be pregnant by the school authority. It is settled law that the credibility of a witness may be shaken due to unexplained delay in naming a suspect as held in the case of Marwa Wangiti Chacha [2002] TLR 39. However, this principle should not be applied reflexively. There must be consideration of the specific circumstance of the case. The Court in the case of Selemani Hassan v. Republic (Criminal Appeal No. 203 of 2021)

[2022] TZCA 127 (22 March 2022, TanzLII) held that: "We think it can apply fairly unrestrictedly in respect of, say cases involving property offences, it will not apply with equal force in cases concerning sexual offences where maturity of the victim, death threats or shame associated with such offences, may dissuade the victim from reporting the matter with

prom ptitude." In the instant matter as alluded earlier, PW3 never early disclosed that she was raped and that the appellant was her ravisher. In her testimony at page 18 she stated that the appellant threatened her not to tell anyone about what happened and even after knowing she has conceived, the appellant told her not to tell anyone, he promised her that he will assist to abort the pregnancy and marry her, thus appellant continued to have sexual intercourse with her. The victim was prevented by the appellant from reporting the issue of rape to anyone as he convinced her that he loves her, he will help her in aborting the pregnancy and he will marry her with her pregnancy. In our view a child of her age was not in a position to make any decision on her own taking into consideration that the appellant gave her promise which made her build a trust on him. It is worth insisting that, the act of a child, being raped is one of the most distressing, horrendous and demeaning experiences anyone could have. It always leaves the victim with feelings of self-loathing, self-blame page, and can cause post-traumatic stress disorder (PSTD) let alone being pregnant as a result of the incident. The victim being a child aged 14 years at the time of commission of the offence cannot be blamed for reporting late under the circumstances of this case. As such, all along, as rightly observed by the trial court, and first appellate court, the victim has consistently mentioned the appellant as the person who raped and impregnated her and has clearly stated when their relationship started without being contradicted by the appellant. Thus, grounds 7, 8 and 9 lacks merit and they are accordingly dismissed. Regarding ground one, generally the complaint is on whether the prosecution proved the case beyond reasonable doubt. We are of the view that PW3, the victim of sexual offence, was correctly believed by the two courts below. This is because: one, PW3's evidence was so clear, consistent and coherent. PW3 mentioned the appellant to her father (PW1), to be the I person who raped her and did so immediately after she was tested positive with pregnancy. The appellant being mentioned at the earliest opportunity by PW3, when found to be pregnant is a proof of reliability of her evidence. Two, PW3's evidence was not shaken at all during cross - examination by the appellant before the trial court as reflected below when PW3 was cross examined by the appellant, she replied: "There was no one a t home. You lie d to me that you w ill m arry me, and if becom e pregnant, you w ill take me. You were apprehended. I do n ot know where you were apprehended. I was raped m any tim es. The children were not a t home. You to ld me not to te ll anyone. You raped me. You held m y hands. You also h eld m y m outh so that I could not cry fo r help". It was expected that the appellant would have cross - examined the victim on such vital evidence she testified to incriminate him with the offences charged. But that was not done. It is settled that a party who fails to cross examine a witness while testifying is deemed to have accepted that piece of evidence and will be estopped from asking the trial court to disbelieve what the witness said. This stance was emphasized by the Court in the case of Patrick s/o Omary @ Richard v. The Director of Public Prosecutions (Criminal Appeal No. 236 of 2019) [2023] TZCA 17646 (25 September 2023, TanzLII). Three, both courts below believed PW3 as a truthful and credible witness and we agree with that finding. As intimated above, the appellant did not provide us with any plausible reason to convince us to interfere with the concurrent findings of the two courts

below, neither have we seen any. Four in sexual offences like the case at hand, it is a rule that, the best evidence comes from the victim. PW3 gave the account of what transpired with regard to sexual intercourse since 2018 to when the appellant disappeared in 2019. To the contrary, the appellant completely failed to shake the victim's evidence through cross examination as was held in the case of *Gerson Geteni v. Republic*, Criminal Appeal No. 73 of 2021 [2024] TZCA 452 (19 February 2024, TanzLII) that: "We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence". Five, though the appellant during his evidence in chief denied to have committed the offence, he did not deny that he was living at victim parents' house together with the victim until April, 2019 when he disappeared. Six, as it can be gleaned from the record, PW3's evidence is coherent. She well narrated on how she was raped by the appellant, (at page 18). She stated that on December, 2018 she was asleep, the appellant came and told her that she loves her, then he held her hands, undressed her skirt and under pant, he undressed himself and took his penis and inserted it in her vagina. She missed her menstrual period on the next month, namely January 2019. Having informed the appellant, they kept on having sexual intercourse until when the appellant disappeared. Once cross examined by the appellant, PW3 stated that the appellant told her not to tell anyone and promised to take her with her pregnancy. It is settled law that the best evidence in sexual offences is that of the victim as propounded in *Seleman Makumba v. Republic* [2006] TLR 397. Thus, in our view the evidence of PW3 which was corroborated by PW4, the medical doctor who proved that there was penetration as she was found pregnant, was sufficient to establish the offence of rape against the appellant. For the offence of impregnating a school girl, as alluded earlier, there is no doubt that the victim was a school girl. According to PW3's evidence, she was raped on December, 2018, she missed her menstrual period in January, 2019, she gave birth of her child on 26th September, 2019. In our view, series of events and evidence of victim proved with no doubt that the appellant was the one who impregnated the victim. From such observation, it is our opinion that ground one has no merits, the offences against the appellant were proved beyond reasonable doubt. In winding up, the appellant in 10th ground complained that, his defense testimony was not considered. Having perused the Judgment of the District Court, we have noted that the trial magistrate only summarized the evidence of DW1 as seen at page 71 of the record. Nothing suggests that evidence of defense was considered. The first appellate court had no chance to deal with the ground as the same was not raised as the court only dealt with the grounds of appeal as raised by the appellant. The Court in *Joseph Leonard Manyota v. Republic* (Criminal Appeal No. 485 of 2017) [2017] TZCA 261 (11 August 2017, TanzLII) held that: "It is opportune to restate here that on a second appeal; the Court is only entitled to deal with questions of law. However, this approach rests on the premise that the findings of facts are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature, and quality of evidence, resulting in an unfair conviction, this Court must in the

interests of justice, interfere. See the case of *Salum Muhando v. Republic* [1993] TLR 170 where it was held that: "Where there are misdirection and non-directions on the evidence, a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact". Subscribing to that position, this Court may evaluate the defence evidence for the interest of justice. Thus, this ground has merit. We now evaluate appellant defence evidence. In his defense the appellant said he was arrested following misunderstanding with victim's father on terms of payment on the work that he was doing for him, as a result, he left to Manyara Region in April. According to PW1, the appellant is his cousin's son. It was expected appellant to complain to his relative or to any other relevant authority instead of just leaving without any information. There is no reasonable explanation by the appellant worth of being believed why he did not pursue his rights but made himself disappear, until he was arrested in July. Equally so, the appellant did not cross examine the victim's father who testified as PW1, on his dues, instead in his defense he complained against the victim's mother who never testified. Amid strong evidence of the victim that he failed to contradict at the trial Court, defense of the appellant is nothing but, an afterthought. From the foregoing, it is our finding that save for grounds 6 and 10, the present appeal stands dismissed for lack of merits. DATED at DAR ES SALAAM this 30th day of January, 2025. S. A. LILA JUSTICE OF APPEAL Z. G. MURUKE JUSTICE OF APPEAL G. J. MDEMUS JUSTICE OF APPEAL The judgment delivered this 3rd day of February, 2025 in the presence of the Appellant and Mr. Gothard Mwingira, learned State Attorney for the respondent/Republic through video conference from Dodoma High Court, is hereby certified as a true copy of the original.

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