Chapter 7
Sexual and Other Forms of Violence Against Adult Women

Case 7.1 Leonard Jonathan v Republic[1]

High Court of Tanzania

Aspects relevant to VAWG: Gender sexual violence, traditional customary practices that perpetuate VAW, kidnapping, forced marriage, rape, role of the judiciary to create awareness and punish acts of S/GBV, sentence

Summary of evidence

The appellant and three others were jointly charged in the Magistrates Court with rape c/s 130(2) and 131(3) of the Penal Code, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. It was alleged that on 16th December 1999 at 18 hours, at Masama Mula village in Hai District, the appellant had carnal knowledge of one Aminiana Elikira without her consent. He denied the charge and was tried, found guilty, convicted as charged and sentenced to serve 30 years in prison and to receive ten (10) strokes of the cane.

The evidence in support of the charge was that as the complainant was walking home from church on the material day, she met the appellant, who was in the company of the co-accused persons. They forcibly carried her to the house of the appellant. They were armed with a machete and sticks, with which they threatened those who wanted to intervene and rescue the complainant. Once inside the house of the appellant, one Eshiwakwe, who was in the house, held apart the victim's legs as the appellant raped her. When he was through and as Eshiwakwe was about to take his turn, the victim's father, who had learnt of the kidnap of his daughter, broke open the door and disrupted the sexual assault by Eshiwakwe and the victim ran out of the house. The appellant and the co-accused persons ran away after one of them assaulted the victim's father, but they were later arrested and charged, save for Eshiwakwe who at the time of the trial was still at large.

In his defence, the appellant admitted that he had carnal knowledge of the complainant. His explanation was that he was in love with her and that he wanted to marry her, but she had insisted on a Christian marriage which he could not afford. He had then decided to ambush her and marry her under Chagga customary marriage norms. He claimed that people put pressure on the complainant to make a report against him, at the police station.

He took responsibility for the rape and denied that the co-accused were involved in the matter. While the co-accused were acquitted, the appellant was convicted and sentenced to serve 30 years' imprisonment plus ten strokes of the cane. He filed an appeal against conviction and sentence.

Issues and resolution

The prosecution was required to prove beyond reasonable doubt: there was sexual intercourse with the victim, that it was without her consent, and that it was the appellant and others who raped her. The appellant admitted kidnapping the victim, taking her to his house and having sexual intercourse with her. He said he loved her and, since he had no money for a church wedding, he decided to marry her under Chagga customs, which allowed kidnapping and forceful sexual intercourse. In the circumstances, the trial court found that the prosecution had proved the case beyond reasonable doubt.

Dismissing the appeal, the court upheld the conviction and found that:

- The appellant admitted in his defence that he captured and carried away the victim and had carnal knowledge of her without her consent because he wanted to marry her, but she had insisted on a Christian marriage which he could not afford, so he decided to marry her under Chagga customs and norms. The offence of rape was therefore proved.
- Under the Law of Marriage Act No. 5 of 1971, marriage is defined as the voluntary union of a man and a woman intended to last for their lifetime. The victim was therefore protected by the Law of Marriage Act No. 5 of 1971, because without volition and consent, there can be no valid marriage between parties intending to marry or to contract a marriage. The defence of contracting a Chagga customary marriage was therefore improbable and fallacious in fact and in law.
- The complainant was also protected by international norms, notably DEVAW, Article 4, which calls on states parties to protect and offer adequate relief to women victims of violence, to condemn violence against women, and to refrain from invoking custom, tradition or religion to avoid their obligations.
- The victim was also protected by the UDHR, Article 16, which grants individuals the right to marry with the full consent of the intending spouses; CEDAW, Article 16, which guarantees the right to freely choose a spouse and enter into marriage only with their free and full consent; and Article 23 of the International Covenant on Civil and Political Rights, which provides that no marriage shall be entered into without the free and full consent of the intending spouses.

Consequently, the court held that in view of the above international law provisions and national law and, since Tanzania is a signatory to the above conventions, it had a duty to protect women from violence meted out against them in the name of traditional practices that violate their fundamental rights and freedoms. The court found that the appellant offended the complainant's fundamental right to choose her spouse and to marry on her own volition. These circumstances reinforced the complaint of rape, which the court found had been proved beyond reasonable doubt. The entire appeal against conviction and sentence was dismissed. The appellant filed a second appeal to the Court of Appeal of Tanzania,[2] but the same was unsuccessful and dismissed. The decision of the High Court was upheld for the same reasons as those given by the High Court.

Of special note is the fact that in order to reach the verdict, the court interpreted the national law of Tanzania in the context of the international conventions that the country has signed and ratified and which create obligations on the part of the government to protect and offer adequate relief to women victims of violence. This is good practice to be emulated by the judiciary in East Africa.

Contribution to jurisprudence/Point to note:

- The court was firm in condemning a customary marriage practice of wife grabbing which affected a woman's bodily integrity and subjection.
- In emphasizing the need for voluntary consent of the parties when contracting a marriage, court sent a clear message that customary marriages were also subject to this universally recognized principle.

Case 7.2 Okeyo v Ogwayi[3]

Resident Magistrate's Court at Homabay

Aspects relevant to VAWG: Widow harassment, forced widow inheritance, dowry violence

Summary of evidence

Following the death of her estranged husband, the plaintiff (Janet Atieno Okeyo) sought a permanent injunction against her father-in-law (Jacob Ogwayi) to restrain him from forcing her to return with her two children to her marital home. Okeyo (the victim) and her deceased husband Joanes Onyango, who was the son of the defendant, had separated one year prior to his death. Several years after her estranged husband's death, her father-in-law (the defendant) had the plaintiff (Okeyo) arrested on the ground that since

his deceased son had paid dowry for her, she was his daughter-in-law and should be living with her children in her marital home.

He also claimed that a relative of her deceased husband had either inherited her or was available to inherit her.

Issues and resolution

The court was called upon to decide whether the fact of payment of dowry deprived the victim of the right to freedom of association and movement, and if this custom was applicable in this case.

The court held that forcing the victim to return to the marital home would violate her constitutional right to freedom of association and movement. Moreover, as she did not herself choose to be inherited by a relative of the deceased, there was no valid marriage between her and the said relative of her deceased husband. Most importantly, the court held that any customary law which required that the victim returns to the matrimonial home was repugnant to written law and, by virtue of the Judicature Act, section 3(2), the written law prevailed. The court further held that the age of the children and the fact that they had been living with their mother dictated that they remain in her custody. Finally, the court issued an injunction restraining the father-in-law from interfering with the plaintiff and from forcing her to return to the matrimonial home.

Contribution to jurisprudence/Point to note:

- Court interpreted the right to freedom of association and movement to include a widow's right not to be forced to return to her marital home and being remarried by a deceased's relations.

Case 7.3 Mukungu v Republic[4]

Court of Appeal at Nairobi

Aspects relevant to VAWG: Rape, requirement for corroboration in sexual offence cases, discrimination, constitutionality of the requirement of corroboration

Summary of facts

The appellant was convicted, by the senior resident magistrate at Voi, of the offence of rape contrary to section 140 of the Penal Code and sentenced to ten years' imprisonment with hard labour, together with two strokes of the cane. His first appeal to the High Court was dismissed. Being aggrieved by

the said dismissal, he filed a second appeal before the Court of Appeal, which noted that it being a second appeal, only issues of law would be considered.

The prosecution case was that on 20 October 2000 at about 7:30 pm at Mwakingali estate in Taita Taveta district of the Coast Province, the complainant (victim) was returning home from Voi township after some national celebrations, when she was accosted by the appellant. He dragged her into a nearby house, forcibly stripped her naked, threw her onto a mattress which was on the floor and forcibly had sexual intercourse with her. She screamed for help, but no one came to her assistance. After the act, the appellant left her inside the house and went away, after bolting the door from outside to prevent the complainant from escaping. A short time later, the appellant returned accompanied by another man who also forcibly had sexual intercourse with her. She did not identify him. It was the victim's testimony that several people saw the appellant pulling her to the house where he raped her, but when the complainant talked to them they refused to help her. Her effort later to make a telephone report of the incident to the police was fruitless. She then decided to report the matter to a village elder, who on account of ill health could not assist her. He, however, asked his wife and children to escort her to her house, which they did. She made a report the next day to Phoebe Nanzala, a police constable at Voi police station, who later arrested the appellant and charged him with the offence.

Phoebe testified that the complainant reported to her that she had been raped by two men. Her evidence is silent as to how she was able to know that the appellant was one of the two men who raped the victim. It is, however, a matter from which an inference can be drawn that the complainant identified him to her. The victim testified that the appellant was known to her before, although not by name.

The victim was medically examined and her urine and vaginal swabs were analysed. Some pus cells and spermatozoa were noted, a confirmation that she had recently had sexual intercourse. As the appellant was not medically examined, there was no medical evidence to connect him to the alleged offence.

The trial magistrate believed the complainant, looked for and found corroboration in the medical evidence and the testimony of Jenta Kwaze (Jenta) and Nyange Kwanze (Nyange). Jenta testified that someone knocked at her door on the material night seeking help. It was the complainant whom she only knew by appearance. She observed that the complainant appeared distraught and shaken, and was carrying her skirt and blouse in her hand. She had tied a sweater round her waist and, with her assistance, they tried in vain to call the police. The complainant allegedly gave her the appellant's

name, but this she could not recall. Nyange corroborated Jenta's story on the complainant's appearance on the material night. These were circumstances that supported her story that she had been raped. It was on the basis of this evidence that the trial magistrate found the appellant guilty, convicted him and thereafter sentenced him.

The only point of law raised in the appellant's memorandum of appeal in the Court of Appeal was that his conviction was based on uncorroborated evidence.

There were other grounds, but the court found that these were issues of fact and could not under the provisions of section 361(1) of the Criminal Procedure Code be dealt with on a second appeal, which must only relate to matters of law.

The court noted that although in sexual offence cases corroboration was necessary as a matter of practice to support the testimony of the complainant, there have been instances, as in *Republic v Cherop A Kinei and Another* [1936] 3 EACA 124 and *Chila v Republic* [1967] EA 722 at 723 (CA), in which it was held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be, is satisfied, after duly warning itself on the dangers of convicting on uncorroborated evidence, of the truth of the complainant's evidence. It went on to observe that the need for corroboration in sexual offences appears to be based on what the Superior Court restated in *Maina v Republic* [1970] EA 370. There the court said:

> *Before leaving the matter of the first two counts we would state in the hope it will be of use to the magistrate on future occasions, as pointed out by the Court of Appeal in Henry and Manning v Republic 53 criminal appeal rep 150, it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in the present case.*

In the present case, the court rightly pointed out that the same caution is not required of the evidence of women and girls in other offences, and that the court found no scientific proof or research findings to show that women and girls will, as a general rule, give false testimony or fabricate cases against men

in sexual offences and yet courts had consistently held that in sexual offences testimony of women and girls should be treated differently.

Ratio Decidendi

a) The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls.

Contribution to jurisprudence/Point to note

- Although it was a long established rule of practice that the evidence of a victim of rape needed to be corroborated with other independent evidence, the court took advantage of Kenya's progressive Constitution to evaluate the said rule within the principle of equality before the law and its prohibition of discrimination on the basis of sex. It consequently held that treating female witnesses differently in sexual cases cannot be justified.

Case 7.4 Uganda v Hamidu & Others[5]

High Court of Uganda at Masaka

Aspects relevant to VAWG: Abduction, rape, forced marriage, dowry, marital rape, the link between VAW and HIV/AIDS, role of the judiciary

Summary of evidence

The defendant, Yiga Hamidu, was indicted in the High Court of Uganda at Masaka on charges that he had hired two men to abduct a woman in his village and had subsequently raped her. The complainant (victim) told the court that she had been engaged to get married to the accused person and dowry had duly been paid in accordance with the customary law governing the parties. She had broken her engagement to the accused when she learned that his deceased wife had died of AIDS. She had insisted that they should each be tested for HIV before marrying, but the accused had refused. The accused hired some people, who kidnapped her, took her to his house, locked the door and raped her while her two abductors held her down on the floor. She told the court that she had not consented to sexual intercourse.

In defence, the accused denied the offence and raised the defence of mistake of fact or honest belief under section 9(1) of the Penal Code of Uganda. He told the court that he had honestly believed that the complainant was his wife, because he had paid dowry to her parents and a customary marriage

had been sealed. He further stated that under Uganda laws, a husband couldn't rape his own wife.

Issues and resolution

The fact that the accused person had the victim abducted and brought to his house, where he locked her in and had sexual intercourse with her, was not disputed. The accused claimed that he acted under the honest and mistaken belief that the victim was his wife, since he had paid dowry for her. It was his case that a husband cannot rape his wife under the laws of Uganda, implying that once a woman got married, she gave an express and irrevocable consent to the husband to have sex all the time and that the question of consent does not arise.

The court found no evidence that a marriage had taken place in accordance with the parties' Islamic faith. Moreover, the evidence demonstrated that the complainant never consented to sexual intercourse. The judge stated that even if the parties had been married under customary law, the facts and circumstances of the case would render the defendant guilty of rape.

He noted that the provision in the Penal Code that deals with rape does not make an exception for married persons.

He observed that some other jurisdictions have constituted the offence of marital rape to counter the outdated presumption of consent by virtue of marriage. The judge stated that the existence of a valid marriage or honest belief of a valid marriage is no longer a defence for rape in Uganda in view of the 1995 constitution, which provides for equal rights in marriage and full and equal dignity of the person. These provisions, he explained, exclude the operation of section 9(1) of the Penal Code to the situation in this case. Finding that the complainant was treated as a 'mere sexual instrumentality', the judge rejected the defendant's defence, found him guilty and convicted him of rape.

Contribution to jurisprudence /Point to note

- The judge innovatively uses the right to equality between husband and wife in marriage and the right to dignity of the person to enhance the protection of women from sexual violence in marriage.

Case 7.5 Ally Hussein Katua v Republic[6]

Court of Appeal of Tanzania

Aspects relevant to VAWG: Sexual gender-based violence, rape by a person in position of authority and trust, role of the judiciary in addressing VAW, sentence, adequate remedy

Summary of evidence

The appellant was charged with the offence of rape c/s 130(1) and 131(1) of the Penal Code, as amended by the Sexual Offences (Special Provisions) (SOSPA) Act No. 4 of 1998. After a full trial, he was acquitted for want of sufficient evidence. Aggrieved by the acquittal, the DPP appealed to the High Court of Tanzania at Tanga, where the learned judge set aside the order of acquittal, convicted the appellant as charged and sentenced him to a term of imprisonment for 30 years, with an order for payment of 500,000 Tanzanian shillings (TSh) as compensation to the victim of the rape. The appellant was dissatisfied and appealed to the Court of Appeal, but his appeal was dismissed as it did not raise any points of law to warrant intervention by the Court of Appeal.

The prosecution case in the trial court was that the complainant, a student at Mlingano Secondary School, lived with her grandmother in the same village where the appellant, a traditional healer and local medicine man, also lived. Prior to the date of the incident, the complainant/victim fell sick and the appellant was approached so that he could treat her.

She was taken to the appellant's home on 21 January 2004 and he initiated treatment. What followed thereafter borders on rituals and sorcery, as the victim was taken to various places.

Finally, the appellant asked her to undress and she obliged. The appellant spread a piece of cloth on the ground, asked her to sleep on it and he raped her. When the appellant was through with the sexual encounter, which he had earlier told her was part of the treatment, he warned her not to disclose the rape to anyone. They put on their clothes and went towards the appellant's home, where PW2 was waiting for her. They then left to go back home and on the way home from the appellant's home, the victim disclosed the rape incident to her grandmother (PW2). The matter was reported to the authorities and the appellant was arrested and charged.

In defence, he admitted having treated the complainant, but denied raping her. He called witnesses, who testified on the sickness of the complainant but not on the alleged rape incident. He was convicted and sentenced and filed an appeal to the High Court.

Issues and resolutions

There were three grounds for appeal, namely that: the charge as framed was defective in that the specific ingredient of an offence under section 130(3) of the Penal Code, as amended, was not stated. To that end, the appellant cited the following passage from the Court of Appeal's decision in *Mhina Hamisi v Republic:*

> *Lack of consent is a vital element in the offence of rape. Yet the charge against the Appellant did not disclose this important element. It is trite law that a charge should disclose the nature of the offence so that an accused person may know the nature of the case he has to answer.*

The second ground of appeal was that the evidence of the complainant (PW1) should not have been believed and acted upon wholesale, because her own grandmother (PW2) testified and told the trial court that the complainant had a history of mental illness and confusion. The third ground was that the judge on first appeal did not address her mind to the issue of time frame, which was important in checking the veracity of the evidence of the complainant and her grandmother (PW2).

The crucial issue in this appeal was whether or not the victim, the key and only material witness, was credible and entitled to be believed. The Court of Appeal found that while it was true that the element of lack of consent ought to be reflected in a charge of rape, with the advent of section 130(2)(e) of the Penal Code, consent was no longer relevant if the victim is under the age of 18 years. In the present case, the complainant was 17 years old at the time of the offence and, although the charge facing the appellant did not state the above provision, the omission was cured by section 388(1) of the Criminal Procedure Act (Cap 20 RE 2002) in that the appellant knew the nature of the charge against him.

The court was of the view that the appellant, being a traditional healer, took advantage of his position and committed rape on the complainant. He should therefore have been charged under section 130(1)(2)(e)(d) and 131(1) of the Penal Code because, being a traditional healer, the offence was committed by a person in a position of authority and trust.

On whether or not the complainant should have been believed, the court found her credible because her narration on what transpired was systematic and she had reported the rape to PW2 at the earliest opportunity, once they left the appellant's home. Even though there were contradictions in her evidence, the same were minor and did not go to the root of the overall prosecution case against the appellant. Since the appeal did not raise any point of law, it was dismissed.

Ratio Decidendi

(a) A history of mental illness will not automatically discredit the evidence of a victim of a sexual offence.

(b) Consent is not an ingredient to be proved in a charge of rape where the victim was below the age of 18 years.

Contribution to gender jurisprudence/Point to note:

- This case demonstrates the fact that courts are bringing back victims of sexual assaults to the centre of the criminal justice process. Instead of limiting the sentence to the punitive dimension normally associated with criminal law, the Court made an order of monetary compensation to the victim.

Case 7.6 Seif Mohamed El-Abadan v Rep

(Criminal Appeal No. 320 of 2009)

Tanzania Court of Appeal at Tanga

Aspects relevant to VAWG: Rape by person in position of authority, sextortion

Summary of facts

The appellant (Dr Seif Mohamed El-Abadan) was charged with the offence of rape contrary to sections 130(3)(c) and 131(1) of the Penal Code, Cap. 16 RE 2002. The particulars of the offence alleged that on the 14th November 2006 at Magunga Hospital in Korogwe District, the appellant abused his office as a doctor and staff of the said hospital and had carnal knowledge of a patient, one Stenala Pwere (PW1/the victim). He was tried, found guilty, convicted and sentenced to 30 years' imprisonment. Aggrieved by the conviction and sentence, he unsuccessfully lodged Criminal Appeal No. 73 of 2008 in the High Court of Tanzania at Tanga. After the High Court dismissed his appeal, he lodged a further appeal to the Court of Appeal.

The complainant, a victim of rape by the appellant, was 24 years old at the time of the offence. She had been suffering from chest pains and on the material day went to Magunga Hospital to collect her x-ray results. She collected the x-ray results from a clinical officer PW2 (Mr Makunga), who directed her to take the x-ray film to the doctor in Room 6, who happened to be the appellant. The appellant instructed her to remove her blouse and brassiere and lie on the bed for examination and she complied. The appellant examined her and told her to remove her underpants for examination of the uterus. She complied and bent with her legs apart as instructed by the appellant. The appellant put his fingers in her vagina saying he was examining her uterus, which he claimed had problems. He then told her to go out and wait until she was called back into the room and she complied.

After attending to some patients, the appellant recalled the victim and told her to go to the examination bed, behind the curtain and she complied.

When the patient he was attending to went out, the appellant locked the door with a key and put the keys on the table. He proceeded to the curtain and told the victim to take off her underpants, but she appeared hesitant and the appellant threatened to withhold treatment if she failed to obey his instructions. He ordered her to take off all her clothes and lie on the bed on her back, which she did. He again put his fingers in her private parts while he caressed her breasts with the other hand, which had no glove on. He asked her to caress his stomach and he unzipped his trousers and put his penis in her vagina while holding tightly onto her. The victim forcibly pushed him and he got out after satisfying his lust. The victim said that she was at that point wet in her private parts and on her thighs. He told her that he had sexually assaulted her out of love, but she told him that she was going to report the matter. The appellant asked her not to do so and offered her TSh1,000/=, which she rejected.

She left the room and remembered that she had left her brassiere behind and went back. The appellant opened the door and she removed it from a box under the bed and left. She then narrated her ordeal to a male nurse she met out there, but he told her not to tell anyone what had happened to her. She met other people including another nurse, PW2, who had directed her to the room where she found the appellant, the hospital secretary (PW4), a clinical officer (PW3) and PW5 and narrated to them all what had happened to her – but they did not appear to have taken any action. She went home and reported the matter to her parents and later to the police on the same day at 7.00 pm. Instead of issuing a PF3 to her for treatment, the police told her to go home and return the following day. The next day the police recorded her statement and gave her a PF3 for a pregnancy test. Thereafter, the appellant was arrested and charged with the offence of rape.

In defence, the appellant gave a sworn statement and denied committing the offence. He admitted treating the complainant, but he denied examining her. He said he read the x-ray results of the complainant and prescribed treatment for her, but later he was called by his immediate superior (PW5) and informed that PW1 had complained that he had raped her, which he denied. He claimed that PW4 (Susan Ilembo) fabricated the case against him due to an earlier misunderstanding between them, after which she threatened to fix him.

Issues and resolution

The appeal was bases on six grounds, namely:

1. That the learned judge failed to appreciate the misdirection of the learned trial magistrate on the issue of credibility of the prosecution witnesses. Had he properly directed himself, he would have

concluded that the complainant acted in a dubious way in deciding to go home and wash herself and/or consult her relatives on the issue before she took any action.

2. That the learned judge failed to draw an adverse inference on the failure to call the first alleged witness of the complainant as a witness in the case.
3. That the learned judge erred in law and in fact in failing to appreciate the weakness of the prosecution case in view of the defence claim that PW4, Susan Ilembo, had bad relations with the hospital after failing to get promotions.
4. That the learned judge should have held that the complainant was not a reliable witness, because she gave contradictory statements to the police and in court on how she left her brassiere in the consulting room.
5. That there was no credible evidence of penetration and that the finding on penetration was based purely on conjecture.
6. That the courts below misdirected themselves on the burden and standard of proof.

On the claim of there being 'bad blood' between the appellant and PW4, and that PW4 had earlier threatened to 'fix' the appellant one day, the court dismissed those allegations and found that they were mere afterthoughts, because PW4 was not cross-examined on such allegations which were safely introduced by the defence behind her back. The court noted that PW4 received the complaint from the victim and referred the matter to the medical officer for action. There was no evidence that PW4 went to the examination room at any time, and the appellant's claim that she planted the victim's brassiere in the room was rejected by the court.

On the issue of the case not having been proved to the required standard, because an important witness (Mary) had not been called by the prosecution, the court noted that the said Mary only listened to the rape complaint and for reasons known to her, she walked away leaving the victim with PW4, who referred the victim to the medical officer for action. The court was of the view that if the defence considered Mary Chorogondo an important witness, they would have called her.

On the grounds of appeal relating to credibility of the victim and other witnesses, the court found that being a second appeal, the court did not have advantage of seeing, hearing and assessing the demeanour of the prosecution and defence witnesses to justify interfering with the findings of the trial court on credibility. Dismissing the grounds relating to credibility of witnesses, the court cited the case of Augustino Kaganya & others versus Republic (1994)

TLR 16, wherein the court considered the issue of credibility of witnesses and held that–

> *… as the decision regarding who attacked the deceased was wholly based on the credibility of the witness, it is the trial judge who saw and heard the prosecution and defence witnesses as they testified who is better placed than the appellate court to assess their credibility …*

Finally, the court considered the submissions of either party and failed to find a ground for denting the credibility of the complainant. It did not find any contradictions in the evidence of PW1, the victim of the sexual assault by her doctor (the appellant). The court was in agreement with the learned trial judge, who had remarked that:

> *It is treacherous for one to stray away from a professional calling and turn against one amongst the very lot who bestowed their trust unto the person.*

In this case, it was treacherous for the appellant doctor to rape his patient, PW1. In the circumstances, the court was satisfied that the prosecution established the guilt of the appellant beyond all reasonable doubt, found no merit in the appeal and the same was consequently dismissed.

Case 7.7 Onesphory Materu v Republic

(Cr. Appeal No. 334 of 2009)

Court of Appeal of Tanzania at Tanga

Aspects relevant to VAWG: Rape, sextortion, sexual violence in places of detention, sentence, role of the judiciary to punish sexual violence by persons in position of authority

Summary of facts

The appellant was charged with sextortion, tried, convicted and sentenced to 30 years' imprisonment, with 24 strokes of the cane. The court further ordered him to pay TShs700,000/= as compensation to the complainant. This aggrieved the appellant and he preferred a first appeal to the High Court of Tanzania at Tanga, which appeal was dismissed. He filed a second appeal to the Court of Appeal at Tanga.

The prosecution evidence was that on 25th February 2007, PW4 (a woman police officer working at Lushoto Police Station) was resting at her home. At 2.20pm she received a telephone call from PC Jumanne, a fellow police officer, asking her to go to the police station to attend to an emergency. She went there and found one suspect, who was in police custody, crying. That suspect was the complainant/victim (PW2). On asking her why she was

crying, she (PW2) alleged that the appellant had raped her inside a police cell and had promised, in writing, to release her from police custody. The suspect (PW2) produced a written note, which she gave to PW4 (WP3503 Anna).

PW4 said that the written note (exhibit P1) was in the appellant's handwriting and it directed the release of PW2 from police custody. She directed the officer who had called her (PC Jumanne) to report the matter to their seniors. PC Jumanne did not testify.

In cross-examination by learned defence counsel, PW4 told the trial court that the complainant was crying out and asking why the appellant had carnal knowledge of her, promising to release her, and why he had refused to release her. The victim was also saying that the appellant had washed her (PW4's) private parts with water after the act of sexual intercourse in order to wash away the seminal fluid. PW4 further told the court that it was unprocedural for a male police officer to enter a cell where female suspects are held and it was also unprocedural for a suspect to be released through a written note in the form of exhibit P1.

Although PC Jumanne was not called to testify, the senior officer to whom he made the report, as directed by PW4, testified as the first prosecution witness (PW1). This witness (PW1) interviewed the victim and reported the matter to the officer in charge (SP Maganga), who was not called to testify.

The following day, Corporal Agripina (PW3) escorted the victim to hospital, where she was examined and a medical report PF3 filled in and tendered in court as exhibit P2. WP Corporal Agripina (PW3), in her evidence told the trial court that during the medical examination, the victim was found with bruises and remains of semen in the vagina.

In her narrative to the court, the victim, a 14-year-old girl, gave evidence under affirmation after voire dire examination. She first gave evidence on 12 October 2007 and was duly cross-examined by the accused person and was recalled to court on 12 December 2007 on the application of the defence counsel. In her testimony on 12 October 2007, the victim alleged that the appellant first undressed her and then undressed himself, and the sexual act followed, whereas in her testimony on 12 December 2007, she said the appellant first undressed himself before undressing her. Apart from this inconsistency, the evidence of the victim was straightforward and it was to the effect that on the material day, she was in remand custody at Lushoto Police Station on a charge of theft. At 11 in the morning the appellant, who was a police officer on duty at the police station, approached her, removed her from her police cell where she was the lone suspect, to a bench outside where she could sit in the sun. Apart from affording her the sunshine treat, the appellant gave her TShs1,000/=. Thereafter the appellant took her back to her cell and wrote her a 'release note'. The note, which was quoted in full by

the learned first appellate judge, was to the effect that the victim had been released from police custody because she had been found without fault. It was signed by the appellant and bears the stamp of Lushoto Police Station.

After giving the complainant the 'release note' the appellant left her inside the police cell. He went back to her at about 2pm and had sex with her. The appellant disengaged from the sex act when PC Jumanne (not a witness) called and this is what made the complainant cry out when she realised that the appellant would not keep his promise of releasing her after the sex act.

The appellant gave sworn testimony and admitted that he was on duty at the police station, as alleged by the prosecution witnesses. He also admitted that he wrote the 'release paper', as alleged by the prosecution witnesses who were fellow police officers. He explained that he wrote the 'release note' on behalf of one PC Mboka of Bumbuli Police Station, who made a verbal promise to release the complainant/victim, but did not put the promise into writing. The appellant alleged that the complainant became agitated and demanded written assurance that she would be released. He explained that it was at that point that he (the appellant) gave the written note on behalf of PC Mboka. After receiving the note, the complainant cooled down and the appellant reported off duty. The appellant refuted the allegations of sexual misconduct levelled against him, and called one witness, Getruda Aloyce (DW2), who told the trial court that she saw the appellant writing the 'release note' in order to cool down the complainant. The trial court dismissed the appellant's defence, found him guilty, convicted and sentenced him.

Issues and resolutions

The first ground of appeal was that the trial court erred in failing to warn itself of the dangers of convicting on the uncorroborated evidence of the victim. He urged the court to find that the victim was not be believed, because she contradicted herself by first saying that the appellant undressed her before undressing himself, and later changing to say the appellant undressed himself before undressing her. In the second ground, the appellant faulted the two courts below for relying on the 'release note' written by the appellant as proof that the offence was committed.

On the requirement of a self-warning by the trial court, the Court of Appeal noted that the appellant had raised this same point in the second ground of his memorandum of appeal to the High Court, and the High Court addressed this point very adequately at page 60 of the record by tracing the history of the law before and after the advent of section 127(7) of the Evidence Act, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. The court noted that prior to the amendment, there was a requirement for the court to warn itself of the dangers of basing a conviction on the uncorroborated evidence of

a child where a sexual offence was involved. The court further noted that after the amendment, the need for the warning was done away with and the only burden imposed on the court after the amendment is to give reasons that it is satisfied that a young child or the victim of the offence is telling nothing but the truth. Consequently, the court found that the first ground of appeal lacked merit and the same was dismissed.

In the second ground, the appellant faulted the courts below for relying on the 'release note', which he wrote to the complainant. The appeal court noted that the record of trial showed that the note was tendered in evidence without any objection from the appellant and, in his defence, the appellant had admitted to writing the 'release note' and even fielded a defence witness DW2 Getruda Aloyce to prove that the appellant indeed wrote the note (exhibit P1). In the circumstances, the second ground of appeal also lacked merit and was dismissed. In the final analysis, the court found that the appeal lacked merit and dismissed it in its entirety.

Ratio Decidendi

a) A trial court need not warn itself of the danger of convicting on the uncorroborated evidence of a child victim of a sexual assault as long as the court is satisfied that the victim is telling the truth and gives reasons to that effect.

Contribution to jurisprudence /Point to note

- The court completely did away with the requirement of having to warn itself when convicting on the uncorroborated evidence of a child victim of a sexual assault.

'Victims of defilement are often children of tender years; and in many cases the only other witness (apart from the victim) to the act of defilement is another child of tender years. The rule on corroboration in sexual offences makes proof of cases in sexual offences difficult.

In sexual offences where the victim is a child of tender years, evidential rules make the prosecution case doubly difficult – there is need to corroborate the testimony of the complainant in a sexual offence; there is need to corroborate the evidence of a child of tender years who gives evidence not on oath.

It is perhaps not in doubt that the rules of evidence that undervalue and discredit the evidence of children exacerbate the difficulties of proof.'

- This decision is therefore exceptionally important because it does not only improve legal protection for adult female victims of gender based violence but also that of a group which has hitherto been doubly vulnerable – for being female and for being young.

Case 7.8 Foro Yahaya v Uganda

(Criminal Appeal No. 83 of 1995)

Court of Appeal of Uganda, Kampala

Aspects relevant to VAWG: VAW, vulnerability to violence due to age, rape, murder

Summary of facts

The appellant was charged with the offence of murder contrary to section 183 of the Penal Code Act, tried and found guilty. He was convicted and sentenced to death and appealed against conviction and sentence. The prosecution evidence was that on 23 September 1993, the body of the deceased was found lying in a bush near the place where her cattle used to graze. It had two cut wounds, one on the scalp and another on the abdomen. According to the medical evidence, the cause of death of the deceased was hypovolemic shock due to the cut wounds.

The prosecution case was that on 22 September 1993 at about 1.00pm, the appellant went to the home of the deceased looking for her. The deceased was not at home then, but he found Twahika the grandson (PW3) who asked the appellant why he wanted the deceased. The appellant replied that she had promised him a job involving the thatching of a house. As the deceased was not at home, the appellant went away promising to return later. Indeed he returned an hour later, but the deceased had not returned yet. The appellant waited until she returned and lured her into going with him to the grazing place to see one of her cows, which he claimed had collapsed near a dam. Surprisingly, the appellant did not allude to the alleged job of thatching a house, which he had told PW3 the deceased had promised him, neither had he told PW3 about a cow having collapsed near a dam.

When the deceased failed to return home, PW3 reported her disappearance to the local council chairman (PW2) and informed PW2 that she had left home in the company of the appellant to see a cow that the appellant claimed had collapsed near a dam. It was the evidence of PW2 that after he received the report from PW3, the next morning, he collected the appellant from his house and asked him to show them the cow that had collapsed the previous day. The appellant said there was no such cow and said that he had taken the deceased to have her dress repaired and not to see a cow. PW2, together with PW1, PW3, the appellant and others, mounted a search which led to the discovery of her dead body in the bushes. The appellant, who was in the team, tried to run away, but was arrested since he was the last person to be seen with the deceased when they left her home – apparently to see a cow which the appellant alleged had collapsed.

It was the testimony of both PW2 and PW3 that the appellant told PW2 that he had killed the deceased after raping her for fear that she would report the matter to the authorities. A written confession made by the appellant to the police was admitted in evidence as exhibits P3 and P4. In the statement, the appellant explains that his brother and others planned the death of the deceased, that his brother asked him to be present to witness the murder, and that indeed the appellant witnessed the murder.

The appellant made his defence in an unsworn statement. He was silent about the day of the incident, but stated that on 23 September 1993 he was in the search party of Paulo Sabiti and Stephen Twahika and others when the deceased's body was discovered. He denied having killed her.

In convicting the appellant, the trial judge relied on the circumstantial evidence of how the appellant had tricked the deceased to go with him on the fateful journey, after which she was never seen again until her body was discovered lying in a bush. The court also relied on a written confession of the appellant before Inspector of Police, Samuel Kato, and which was admitted in evidence.

The court also believed the testimony of PW2, which was to the effect that the appellant had led him to his house and shown him a panga which was hidden under a bed and the evidence that, upon the discovery of the body of the deceased, the appellant had tried to run away but was restrained by the people around.

PW1 and PW3 testified that indeed the appellant attempted to flee the scene where the dead body of the deceased was found. In view of the above evidence, the appellant's defence of denial was rejected by the trial judge.

Issues and resolution

The appeal was based on one ground: that the learned trial magistrate erred in law and in fact in holding that the inconsistencies in the prosecution case were minor, resulting in the wrongful conviction of the appellant.

At the hearing of the appeal, counsel for the appellant argued that there were three contradictions in the state case which were major and thus vitiated the conviction of the appellant. The first was that the alleged confession to PW2 and PW3 was in contradiction with that made to the police in exhibits P3 and P4. The second contradiction was with regard to the discovery of the panga from the appellant. According to PW2, the appellant led him alone to his house and gave him the panga; but according to PW3, the panga was found in a bush 10 metres from the scene of crime. It was the appellant who showed the panga to PW2 and PW3.

The third contradiction according to defence counsel was that according to PW3, when the deceased's body was discovered, the appellant tried to run away, whereas according to PW2, the appellant did not do such a thing.

The court was of the opinion that there were no serious contradictions in the written and oral confessions of the appellant. The court found that in both confessions the appellant admitted having participated in the killing of the deceased. The only difference was that to the police, he did not allude to the rape and also named two other parties to the killing. In both confessions, the court noted that the appellant cited a panga as the murder weapon. It was of the view that the alleged contradictions lay not in the evidence of the prosecution witnesses, but in the statements of the appellant, and did not therefore affect the credibility of the prosecution witnesses. The court was satisfied that the evidence against the appellant was overwhelming. The injuries the deceased sustained and the assault on the vulnerable parts of her body were evidence of malice aforethought. Her assailants must have either intended to kill her or must have anticipated death as the probable result of the assault. The Court of Appeal was in agreement with the findings of the trial court.

Verdict

The court ruled that the appellant was rightly convicted and dismissed the appeal.

Ratio Decidendi

(a) Minor contradictions or inconsistencies which do not go to the root of prosecution evidence are not fatal to the prosecution case.

Contribution to gender jurisprudence/Points to note

- Women's experience of violence is not only at the hands of intimate partners.

Notes

1 *Leonard Jonathan v Republic*, High Court of Tanzania at Moshi, Criminal Appeal No. 53 of 2001 (original Criminal Case No. 292 of 2000 D/Court HAI).
2 Tanzania Court of Appeal, Criminal Appeal No. 225 of 2007.
3 In the Resident Magistrates' Court at Homabay, Kenya, Civil Suit No. 66 of 2001 (unreported).
4 {2003} AHRLR 175 {KeCA 2003}, {2002} 2 EA 482.
5 *Uganda v Hamidu & others*, in the High Court of Uganda at Masaka, Criminal Session Case No. 2002.
6 High Court of Tanzania, Cr. Appeal No. 99 of 2010.