IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 449 OF 2021

ADO ARON @ NZIKU ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa

(Matogolo, J.)

dated the 22nd day of October, 2021
in
RM. Criminal Appeal No. 27 of 2020
.....

JUDGMENT OF THE COURT

15th & 22nd March, 2024

MASHAKA, J.A.:

The appellant, Ado Aron @ Nziku, aged 26 years, a young man at his prime age was working for Grace Kanuti Mgaya (PW2) at Kitulila Village, within the District and Region of Njombe. He was charged before the Resident Magistrates' Court of Njombe at Njombe in Criminal Case No. 31 of 2019 with rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E 2002]. He was found guilty, convicted of the offence of rape and sentenced to life imprisonment. On appeal, the High

Court upheld the conviction and sentence, hence this second and final appeal.

The prosecution alleged that on 26th January, 2019 at Kitulila Village, within the District and Region of Njombe, the appellant had carnal knowledge of a girl aged eight (8) years. To protect the modesty of the girl, we shall hereinafter refer to the title "PW3" or the victim. The appellant denied the accusations resulting in a full trial to prove the offence against him. The conviction of the appellant relied on prosecution evidence adduced by five witnesses and two documentary exhibits namely: the clinic card (exhibit P1) and PF3 (exhibit P2).

The facts giving rise to the appellant's conviction and sentence unveiled by the prosecution during trial shows that sometime in August, 2018 the victim (PW3) a standard one student at Kitulila Primary School, was called by the appellant behind their house, he took off her clothes, unzipped his trouser zip, pulled it down and inserted his penis in her vagina. Thereafter the appellant threatened her not to tell anyone or else he would beat her. Come September, 2018 the appellant called her again behind their house and did the same; raped her. The third time on 26th January, 2019, when PW3 was in standard two, she was sent by Ostakia Mlelwa (PW4) her grandmother to fetch grass for *"simbilisi"* (guinea pigs). The appellant followed her, took her to the bush, removed her black

tights, laid her down and raped her by inserting his manhood in her vagina. That same day, PW3 informed PW4. In her evidence, PW4 stated that she is living with her son (PW3's father), her daughter-in-law (PW1) and her granddaughters and grandsons. She knew the appellant who was living with them and doing irrigation activities at their farms. PW4 testified that on 26th January, 2019 she had sent PW3 to get some bamboo trees and she decided to search for her as she was late. At around 10:00 am PW3 came back and PW4 on questioning her why she was late, she replied that the appellant asked her to go to the bush and had carnal knowledge of her. PW4 examined PW3's private parts and found she was bleeding and had bruises at her vagina. She reported the matter to PW1, mother of PW3. The evidence of PW1 explained how she noticed PW3 on 27/01/2019 walking spreading her legs which was not her normal way of walking. This prompted her to inspect PW3's private parts and noticed bruises thereon. PW3 explained to her mother and father what had happened and the father reported the incident to the local government authority and then to the police. PW3 was taken to the hospital where she was examined. PW3 stated in her evidence that the appellant was working for PW2.

A medical examination conducted by Dr. Gabriel Kinene (PW5) on 29/1/2019 found PW3 with bruises and her hymen was perforated. He

filled the PF3 which was admitted in evidence as exhibit P2. PW2 confirmed in her evidence that the appellant was his farm caretaker working and supervising the irrigation activities at their farm. The appellant was residing in Kitulila village where the victim and her family were residing.

In the defence case, the appellant testified that PW1, PW2 and PW3 gave hearsay evidence. He further stated that he had no dispute with PW2.

The trial court was impressed by the prosecution evidence of PW1, PW4 and PW5 which corroborated the evidence of PW3 that the appellant raped her. At the end of the trial, the court convicted and sentenced the appellant as stated earlier. The first appellate court was equally unconvinced as it dismissed his appeal, hence this final appeal.

The appellant raised in his substantive memorandum of appeal filed on 4th March, 2022 four grounds of appeal paraphrased as follows; **one**, the first appellate court erred in dismissing the appellant's appeal without considering that the victim was examined after a lapse of 72 hours, hence evidence of PW5 was void; **two**, the first appellate court erred to rely on the evidence of PW1 and PW4 without taking into account the contradiction on how commission of the offence came to their knowledge;

three, the first appellate court failed to note the possibility of evidence being planted against the appellant because he worked for the victim's aunt; and **four**, that the charge was not proved by the prosecution beyond reasonable doubt. On 15th March, 2024, the appellant filed a supplementary memorandum of appeal containing two grounds of appeal that; **one**, the age was not established as it varied with the evidence of PW1 and the clinic card (exhibit P1); and **two**, the first appellate court failed to consider that the exhibit P1 was not read out before the trial court after admission in evidence.

At the hearing, the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Pienzia Ireneus Nichombe, learned Senior State Attorney. When the appellant was called to amplify on his grounds of appeal, he prayed to adopt the six grounds of appeal and let the learned State Attorney to submit first reserving his right to respond later. He implored the Court to consider and allow the six grounds of appeal and set him free.

Before we commence with the merit of the appeal, in ground three, the appellant raised a grievance that the first appellate court had failed to take note of the possibility of evidence being planted against the appellant because he worked for the victim's aunt (PW2). In reply, Ms. Nichombe argued that this ground was new because it was not raised by the

appellant before the first appellate court. Normally, this Court would not entertain and determine a new matter which was not raised and determined by the first appellate court as we have declined such attempts in a number of cases, amongst others; **Jafari Mohamed v. Republic** Criminal Appeal No. 112 of 2006, **Hassan Bundala @ Swaga v. Republic** Criminal Appeal No. 416 of 2013; **Hussein Ramadhani v. Republic** Criminal Appeal No. 195 of 2015, **Abeid Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 (all unreported). On the authorities cited, it is a settled principle that a ground which was not raised and determined by the first appellate court cannot be entertained by the Court in a second appeal, unless it involves a matter of law. The complaint is based on facts which never featured before the first appellate court. It is our considered view that we are not mandated to entertain the said ground as it was not raised before the first appellate court and it does not involve a matter of law. Thus, we decline to entertain ground three.

Commencing with ground one of appeal, the issue is whether the evidence of PW5 and PF3 (exhibit P2) was void for the fact that PW3 was examined after the lapse of 72 hours. The appellant submitted that PW3 alleged to be raped on 26th January, 2019 and was examined by PW5 on 29th January, 2019 after a lapse of 72 hours. He further claimed that perforation of the hymen could have been caused by riding a bicycle or

wrestling. He prayed to the Court to allow this ground as it was not possible to establish rape after 72 hours. In reply to this ground, Ms. Nichombe contended that though the victim was raped and examined on the said dates it all depended on how the first information was reported. She argued that there is no law which states the time to be under consideration when the victim is to be examined. She submitted that the evidence of the victim explained how she was raped in August and September, 2018 and 26th January, 2019. She bolstered her argument citing the case of **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 (unreported). She concluded that the evidence of PW3 was sufficient to prove that she was raped by the appellant and prayed the ground be dismissed for lack of merit.

It is evident from the record that there was a delay in conducting medical examination of PW3 after the allegation that she had been raped by the appellant. It is not in dispute that PW3 was raped on 26th January, 2019 and the medical examination was conducted on 29th January, 2019. It is inconsequential and we find such delay cannot render the evidence of PW5 void. She conducted a physical examination of PW3's private parts regardless of the lapse of time. In addition, sexual offences may be proved in the absence of medical examination and absence of such evidence cannot always dent the prosecution case. Such evidence is to

corroborate existing evidence of the victim who adduces the best evidence in terms of **Selemani Makumba v. Republic** [2006] TLR 379 and **July Joseph v. Republic**, Criminal Appeal No. 226 of 2021 (unreported). We find ground one without merit.

On ground two, the appellant raises that there is contradiction between the evidence of PW1 and PW4. The appellant submitted that the evidence of these two witnesses is contradictory and weak. He clarified that PW1 stated that on 27th January, 2019, she noted PW3 was walking strangely, she checked her private parts and found that she had been raped. While PW4 stated that on 26th January, 2019 after PW3 returned home late from collecting bamboo trees, she asked her the reason and replied that the appellant had told her to go to the bush and had carnally known her. The appellant questioned how could they be living in one house and give different dates of information on the alleged rape of PW3. Ms. Nichombe in reply, submitted that the contradiction was minor as the finding is undeniable that PW3 was raped by the appellant. It was her contention that the minor discrepancies in evidence did not go to the root of the matter citing the case of **Dickson Elia Nsamba Shapwata and Another v. The Republic**, Criminal Appeal No. 92 of 2007 (unreported). She prayed ground two to be dismissed.

We have held in a number of cases that in evaluating contradictions and discrepancies in evidence, it serves no purpose for the Court to pick sentences and consider them in isolation from the rest of other pieces of evidence. The duty of the Court is to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter. See: **Dickson Elia Nsamba Shapwata and Another v. Republic** (supra) and **Anselimo Kapeta v. Republic**, Criminal Appeal No. 365 of 2015 (unreported).

As alluded earlier, the contradiction raised is on the evidence of PW1 and PW4 on how the information of PW3 being raped unfolded. PW1 asserts that on 27th January, 2019 she saw the victim walking improperly and asked her why she was walking spreading legs. It was at that moment when the victim informed her and she examined her. She did not mention the fact that she was informed by PW4. While the evidence of PW4 was that after PW3 returned late from collecting bamboo trees for the '*simbilisi*' and after asking why she was late and her response, PW4 took the initiative to inspect her private parts and found she was bleeding from her vagina and had bruises. PW4 stated that she reported the matter to PW1 mother of PW3. Admittedly, we are of the firm view that the purported contradiction in the evidence of PW1 and PW4 are insignificant discrepancies which do not corrode their evidence nor dent the

prosecution case. See: **Dickson Elia Nsamba Shapwata and Another v. Republic** (supra). We therefore find ground two without merit.

For a good flow in the determination of this appeal, we will dispose of first grounds one and two of the supplementary memorandum of appeal and then take on ground four.

Moving to ground one of the supplementary memorandum of appeal, the appellant's complaint is that the age of the victim was not established as the charge varied with the evidence of PW1 and exhibit P1, hence contradictory. Therefore, according to the complaint, the charge is at variance with the evidence and prayed to the Court to allow it. In response to this complaint, Ms. Nichombe contended that though the age of PW3 was established by herself to be 8 years old, PW1 stated that she was born on 30/10/2009 which would be 9 years plus, while the charge stated 8 years of age. The learned State Attorney argued that the variance as contended by the appellant was not fatal as the intention of establishing the age of the victim is to enable the prosecution to prove statutory rape and enable the court to dispense the appropriate sentence when an accused is found guilty. She was of the firm view that both the charge and evidence confirm that the victim was below the age of 10 years.

It is not in dispute that no birth certificate of the victim was tendered in evidence and the prosecution evidence presented a discrepancy of PW3's age. We are conscious of the age being of great significant in establishing the offence of statutory rape that the victim must be under the age of eighteen. As we held in **Isaya Renatus v. The Republic,** Criminal Appeal No. 542 of 2015 (unreported), such proof of age can be adduced by the victim, parent, relative, medical practitioner or where available, by the production of a birth certificate. The charge stated that the age of the victim was 8 years, while PW1 testifying on 18th April, 2019 stated that PW3 was born on 30/10/2009 hence aged 9 years and 5 months. It is our finding that the discrepancy between the charge and the evidence is inconsequential as the stated age is under eighteen years to establish statutory rape and below ten years for sentencing purposes. We are satisfied that the age of the victim was proved by PW1 mother of the victim. Ground one is meritless and we dismiss it.

In ground two of the supplementary memorandum of appeal, the appellant argued that exhibit P1 which was relied on by the lower courts to prove the age of PW3 was not read out after admission in evidence. It was conceded to by Ms. Nichombe citing the case of **Robinson Mwanjisi and Three Others v. Republic** [2002] T.L.R. 218 to bolster her argument that exhibit P1 is of no evidential value as its contents were not

read out after it was admitted in evidence and its consequence is to be expunged from the record. Our jurisprudence directs that such an omission renders exhibit P1 worthless and we accordingly expunge it from the record.

The complaint in ground four, is whether or not the charge was proved beyond reasonable doubt. The appellant was charged with the offence of rape. It was his contention that the prosecution failed to prove the charge. He questioned the failure of PW3 to report the alleged rape for the first and second time and the delay to report the incident which occurred on the 26th January, 2019. Ms. Nichombe, in her reply argued that the prosecution case was proved by the evidence of PW3 who was credible and reliable notwithstanding her failure to report on the alleged rape committed by the appellant in August and September, 2018. She was of the view that PW3 was courageous to inform PW4 on 26th January, 2019 when the appellant committed the rape. She further submitted PW1, PW4 and the expert opinion of PW5 corroborated the evidence of PW3 that without a doubt she was raped by the appellant.

In **John Ngusa v. Republic,** Criminal Appeal No. 593 of 2020 (unreported), the Court held that, in proving the offence of statutory rape three ingredients have to be established; the age of the victim, penetration of the victim and the person who committed the penetration.

At page 20 the record of appeal, evidence shows that PW3 was 8 years old at the time of testifying before the trial court promising to tell the truth as per section 127(2) of the Tanzania Evidence Act. PW1 stated that PW3 was born on 30/10/2009. The evidence of PW5 stated that when he medically examined PW3, he recorded that she was 8 years old by then. As we earlier stated, we are of the firm view that the contradiction which was raised in ground one of the supplementary memoranda of appeal was not fatal in the sense that the evidence supports the fact that PW3 was below the age of 18 years proving statutory rape, and below the age of 10 years for the purpose of determining the proper sentence to be imposed.

In this appeal, PW3 adduced the best evidence. She narrated how the rape was committed clearly establishing penetration by the appellant. As she was questioned by PW4 on 26th January, 2019 when she returned from collecting grass, she told her how the appellant asked her to go to the bush and had carnal knowledge of her. Thereafter, PW4 inspected PW3's female organ and found that she was bleeding and had bruises. In her evidence, PW3 named the appellant at the earliest opportunity which is an all-important assurance of her reliability as we observed in **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39. We are of the firm view that the defence evidence that PW1, PW2 and PW3 gave

hearsay evidence and that the perforation of PW3's hymen could have been through riding a bicycle or wrestling failed to shake the prosecution evidence. This would have been an appropriate question to challenge the evidence of PW5 during cross examination, which we find it is an afterthought. Both the lower courts properly comprehended the substance and quality of PW3's evidence to be credible and reliable and also, on the principle we held in **Selemani Makumba v. Republic** (supra) that the true evidence of rape has to come from the victim that there was penetration. The evidence of PW3 described explicitly how the appellant undressed himself and her and penetrated his male organ into her female organ proving that the appellant had carnal knowledge of PW3. The evidence of PW1, PW4 and PW5 corroborated that of PW3 proving that she was raped by the appellant.

In the first place the appellant does not deny the fact of being familiar to the victim and had no squabble or misunderstanding with PW2. Also, PW3 testified that at the time the rape occurred, the appellant was living with them as he was taking care of PW2's farm. PW2 and PW4 affirmed that the appellant was formerly working as a casual worker at PW2's farm. On the basis of the above, we firmly hold that the prosecution established beyond reasonable doubt that PW3 was raped by the

appellant and on the weight of the evidence, both the lower courts correctly found that the appellant raped PW3, a child of tender age.

Consequently, we hold that this appeal has no merit and we dismiss it in its entirety.

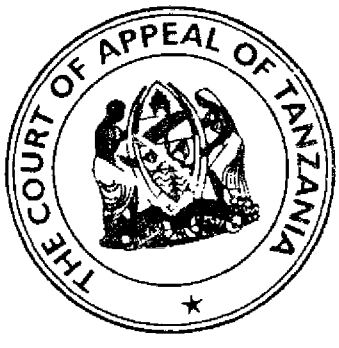
DATED at **IRINGA** this 21st day of March, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of Ado Aron @ Nziku, the Appellant in person and Ms. Magreth Mahundi, Senior State Attorney assisted by Ms. Radhia Njovu and Ms. Sophia Manjoti both learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.



J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL