IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J. A., ORIYO, J. A., And MMILLA, J. A.)

CRIMINAL APPEAL NO. 327 OF 2013

GEORGE MAILI KEMBOGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated 13th day of September, 2013
in
Criminal Appeal No. 85 of 2012

.....

JUDGMENT OF THE COURT

28th & 30th October, 2014

ORIYO, J.A.:

The appellant is seeking to challenge the conviction for Rape entered against him by the District Court of Tarime District at Tarime and the sentence of thirty (30) years imprisonment and twelve (12) strokes of the cane imposed as a result. On his first appeal to the High Court, the trial court decision was affirmed, hence this second appeal to this Court.

The brief uncontroverted facts that led to the conviction and sentence of the appellant mainly came from the evidence of PW2, the victim and PW1, her mother and subsequently corroborated by the

appellant, (DW1). PW2 was aged sixteen years, a class 5 student, residing with her parents. Sometimes in February 2006, she disappeared from her parents' home and her whereabouts were unknown for about two weeks. Subsequently information reached PW1 that PW2 was staying at the house of DW1, a village mate, as husband and wife. PW1 took the necessary steps by collecting PW2 back home and notified the village chairman. The matter was subsequently reported to the police and PW1 was referred to hospital for medical examination.

In his defence, the appellant did not dispute the evidence of PW1 and PW2. In his brief evidence in chief, at page 4 of the record, he stated:-

> *"I agree with the evidence of the prosecution witnesses, that I agreed with the girl that I would marry her. We had agreed to meet on 14/2/2006 so that we could go to start life as wife and husband. We had agreed to meet at 9:00 p.m. at her home where I had to go for her. I went and took her to my home where we started living as*

wife and husband for two weeks. During this time we had sexual intercourse too. That's all".

At the hearing, the appellant was unrepresented, he appeared in person. The respondent Republic was represented by Mr. Lameck Merumba, learned State Attorney. The respondent Republic supported both the conviction and sentence.

The appellant raised three (3) grounds of appeal in his memorandum of appeal which may be summarized as follows:-

1. Absence of documentary proof (birth certificate) on the age of PW2.
2. Failure to establish lack of parental consent from PW1.
3. Failure to determine the case on merit after evaluation of the entire evidence on record.

Understandably, the appellant, being a layman preferred the learned State Attorney to make submissions first while he reserved his right of reply thereafter, if necessary. The respondent Republic supported the conviction and sentence imposed on the appellant. Mr. Merumba, submitted that the uncontroverted age of PW2 was sixteen years, in terms of the testimonies of PW1 and PW2 and of the one part and that of DW1 of the other part, in his evidence in chief. He stated that it is apparent from

the record that DW1 was in agreement and was satisfied that the age of PW2 was sixteen years, as he neither objected nor cross-examined PW1 and PW2 on that aspect. He further submitted that failure to cross-examine on a fact, that fact is taken as true. He referred to the case of **Damian Ruhele v R** Criminal Appeal No. 501 of 2007 (unreported) in support.

Concerning the age of PW2, we agree with the learned State Attorney that she was sixteen years old at the time of commission of the offence as testified by PW1, PW2 and corroborated by the testimony of DW1 in defence. The legal position on failure to cross-examine, is as was stated by the Court in the case of **Damian Ruhele** (*supra*), where the Court observed:-

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."*

See also this Court's decision in **Athanas Kibogoyo v R** Criminal Appeal No. 88 of 1992 (unreported).

In the present case, at the trial, as already stated, DW1 agreed in his evidence in chief that PW2 was sixteen years of age. On cross-examination by the prosecutor, however, he shifted his earlier stand and stated that PW2 informed him that she was eighteen (18) years old. However, the legal position is that as it was stated by the Court in the case of **Salu Sosoma vs R** Criminal Appeal No. 32 of 2006 (unreported), where the father of the victim had testified as to the victim's age and the Court observed:-

> *"...the evidence of Marko Lubola, PW2, the father of the victim, was cogent to ground a conviction. ...That evidence was not challenged. We are mindful of the fact that a* ***parent is better positioned to know the age of his child.***

(Emphasis ours.)

In our view, be that as it may, once it was established that PW2 was sixteen years of age, this was statutory rape and the provisions of section 130 of the Penal Code, Cap 16, R.E 2002, as amended by section 5 of the

(Sexual Offences) Special Provisions Act, (SOSPA), were rightly invoked by the trial court.

As for grounds 2 and 3 of appeal, the learned State attorney submitted that since they raise issues not raised and decided by the first appellate court, this Court has no jurisdiction to determine them. He referred us to the case of **Sadick Marwa Kisase v R** Criminal Appeal No. 83 of 2012 (unreported) where this Court stated:-

> *"The Court has repeatedly held that matters not raised in the first appeal court cannot be raised in a second appellate court."*

Further, relying on the Court's earlier decision in the case of **Ramadhani Mohamed v R** Criminal Appeal No. 112 of 2006 (unreported) it was held:-

> *"We take it to be settled law, which we are not inclined to depart from, that this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

See also **Richard Mgaya @ Sikubali Mgaya v R** Criminal Appeal No. 335 of 2008 (unreported).

In the event and on the basis of the settled legal position demonstrated by the Court, grounds 2 and 3 having been raised for the first time in a second appeal are not legally before us for determination and therefore lack merit.

In conclusion, this appeal fails in its entirety. We dismiss it. The appellant is to continue serving the sentence of thirty (30) years imprisonment with twelve strokes of the cane as imposed by the trial court.

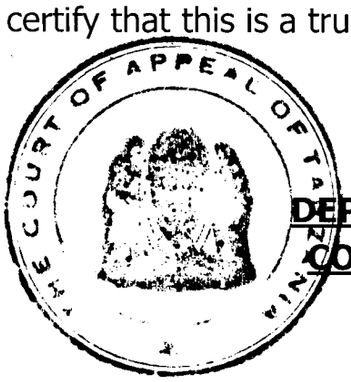
DATED at MWANZA this 30th day of October, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL