IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., MDEMU, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 208 OF 2020

KAMBARAGE MAYALA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

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

(Tiganga, J.)

dated the 18th day of March, 2020

in

Criminal Appeal No. 101 of 2019

JUDGMENT OF THE COURT

7th & 13th December, 2023

ISSA , J.A.:

The appellant, Kambarage Mayala was tried and convicted by the District Court of Nyamagana for the offence of rape contrary to section 130 (1)(2)(e) and 131 of the Penal Code, Cap. 16 R.E. 2019. Upon convicting the appellant, the trial court imposed a sentence of 30 years imprisonment. The appellant's arraignment before the trial court was a result of an accusation that, on 3.2.2014 at Nyamagana area within the

municipality of Mwanza, the appellant had carnal knowledge of a 13 years old girl whom we shall call XY or victim to hide her identity. The appellant pleaded not guilty to the charge. The prosecution fielded three witnesses to prove the charge, and after a full trial he was convicted as charged and sentenced to 30 years imprisonment, as stater earlier.

The brief facts of the case were that, in the evening of 3.2.2014 at Malimbe Nyegezi within Nyamagana District, XY was in a forest looking for firewood. The appellant, who is familiar to XY appeared and intruded on her modesty. He covered her mouth and took her to an unfinished and uninhabited house. He laid her down and had carnal knowledge of her. After satisfying his lust, he ran away leaving her helpless and bleeding.

XY who testified as PW2 managed to return home but she was still bleeding from her vagina. She went to sleep as her mother was not home at that time. The mother (PW1) returned home at 19.00 hours and XY's sibling informed her that XY has been raped and she was bleeding. PW1 went to check on her and she found her bleeding profusely from her vagina. XY narrated to her mother the story of her misery, and she

immediately named the appellant as the person responsible for that awful act.

In the morning, PW1 went to report the incident to the street chairperson who was not in office, but his assistant who was there gave her a letter which she took to Igogo police station. At the police station, PW2 was given a PF3 which she took to Butimba hospital. Dr. Adam Kulwa (PW3) is the person who attended XY at the hospital. After examination he filled the PF3, and his findings are that he saw blood coming from XY's vagina and that there were bruises suggesting she was carnally known. He concluded that a blunt object was inserted in XY's vagina.

The appellant, in his defence, denied having committed the offence. He testified that he had grudges with PW1, XY's mother who was longing for his companionship. His refusal irritated her and she fabricated the case against him.

The trial court found the prosecution evidence was sufficient to sustain the charge. Its findings were supported by the evidence of the victim, XY which was sufficiently corroborated by the evidence of her

mother, PW1 and the doctor (PW3). The trial court convicted and sentenced the appellant on the strength of the evidence of those three witnesses, which it found to have proved the case against the appellant beyond reasonable doubt.

The appellant's appeal to the High Court at Mwanza did not succeed. In that appeal, the appellant raised three grounds of appeal. **One,** that the trial court erred in taking PW2 evidence under oath without proper finding that, she understood the nature of oath. **Two,** that the trial court erred in relying on evidence which was not corroborated by DNA. **Three,** that the case was poorly investigated and prosecution failed to prove the case beyond reasonable doubt.

The learned first appellate judge in his judgment was satisfied that, the victim who had passed *voire-dire* test understood both the duty to speak the truth and the nature of oath. Hence, XY was not only competent, but also trustworthy witness. The learned judge also found that, the evidence of XY was corroborated by her mother (PW1) and the doctor (PW3). There was also PF3 which was admitted in evidence. He concluded that DNA was unnecessary and could not be used to test the commission

of the offence of rape. Lastly, he made his findings that the prosecution was able to prove its case beyond reasonable doubt as the evidence against the appellant was strong. He sustained the appellant's conviction and sentence, and dismissed the appeal.

Undaunted, the appellant has instituted the instant appeal predicated on four grounds of appeal. **One,** that the High Court believed the mere words of PW2 that she was raped without PW2 explaining clearly what transpired at the crime scene. **Two,** that the appellant was not properly identified as the offence was committed at night. **Three,** that the PF3 was not tendered by a doctor (PW3) and was not read out in court. **Four,** that the prosecution totally failed to prove the charge against the appellant beyond reasonable doubt.

When the appeal was called on for hearing, the appellant appeared in person and was fending for himself. He had nothing of substance to add to his grounds of appeal, hence, he allowed the respondent, Republic to submit first.

The respondent who was represented by Ms. Martha Mwadenya, learned Senior State Attorney started her submission by apprising the Court that, the 1st, 2nd, and 3rd grounds of appeal are new grounds which were not raised at the High Court. Hence, the appellant cannot raise them at this Court. She urged us not to consider those grounds of appeal. She bolstered her argument by our decision in **Galus Kitaya v. Republic,** Criminal Appeal No. 196 of 2015 (unreported).

Ms. Mwadenya proceeded to argue the 4th ground of appeal. She submitted that, the prosecution case was proved beyond reasonable doubt. PW2 (XY) at page 14 explained how the offence was committed and who committed the offence. She also intimated her mother shortly after the incident. The mother (PW1) testified that she checked XY and she found her bleeding from her vagina. The doctor (PW3) supported what was said by PW2. He found XY with bruises on her vagina and was also bleeding. The learned State Attorney concluded that, the victim was a credible witness and she testified on oath. Therefore, based on those evidence, the learned State Attorney argued that, the prosecution was able to prove its case beyond reasonable doubt.

In his brief rejoinder, the appellant narrated the story of how he met PW1 who was regularly visiting his garden in order to purchase vegetables. PW1 was longing for his companionship and she lured him to get involved with her romantically. When the appellant turned down the offer PW1 was irritated by his refusal and she fabricated this case. Further, the appellant expressed all manner of resistance that he never raped XY.

Our starting point in the determination of this appeal is the observation made by the learned State Attorney. It is true that, before the High Court, the appellant preferred three grounds of appeal which we have reproduced earlier. But before this Court the appellant raised four grounds of appeal, of which three are new.

This Court, in **Idrisa Omary v. Republic**, Criminal Appeal No. 554 of 2020 (unreported) made the position of law very clear on raising new grounds of appeal at the second appeal. We stated:

> *"Section 4(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (AJA) reading together with Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court has no power to deal with*

grounds which were not raised before the first appellate Court unless they involve points of law."

Further, in our earlier decision in **Galus Kitaya** (supra) we made a similar observation as follows:

"...usually the Court will look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."

Therefore, based on this principle, we decline to entertain the 1st, 2nd, and 3rd grounds of appeal as they are new and are based on factual issues.

Turning to the 4th ground of appeal, it is centred on the issue of whether the prosecution was able to prove its case beyond reasonable doubt. Section 130 (2)(e) of the Penal Code in which the appellant was charged with and convicted provides:

"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman

under the circumstances falling under any of the following descriptions:

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

This provision creates an offence now famously referred to as statutory rape. What are required to be proved are two facts: **One**, that the accused had sexual intercourse with a girl, with or without her consent. The sexual intercourse is proved by penetration of her vagina, even a slight penetration is sufficient to constitute sexual intercourse. **Two**, it must be proved that, the girl is under 18 years of age and that, if she is 15 or more years of age, it must be shown that she is not his wife.

In this appeal, the victim, XY presented herself at the trial as a 14 years old girl. That fact was not challenged in cross-examination or in evidence by the defence. We are, therefore, satisfied that her age was sufficiently established.

With respect to the second ingredient which is penetration, the evidence was abundant. The victim, XY narrated how she was carnally known by the appellant and in the process she had bruises on her vagina

and she bled a lot. The mother of XY (PW1) corroborated that evidence as she checked XY immediately upon returning home and she found her bleeding. On the next day, XY was taken to the hospital where PW3, the doctor examined her and he found her still bleeding and had bruises on her vagina which suggested that she has been carnally known.

The appellant was the person who was named by the victim to be responsible for that awful act. The appellant is familiar to the victim and he was living in the same village. The victim, named the appellant at the earliest opportunity when she narrated the incident to her mother. Further, the offence was committed in the evening when there is a clear vision. Therefore, there was no issue of mistaken identity.

The appellant, on the other hand, denied the accusation and his defence was that the case was fabricated by the mother of the victim because he has refused to grant her wishes to get involved with her romantically. That defence was not supported by any evidence, and the courts below were right in disregarding it. We are persuaded that, the appellant's defence did not raise any reasonable doubt in the prosecution

case. We, therefore, conclude that the ground of appeal under consideration is devoid of merit and is dismissed.

In the upshot, we agree that the prosecution's case was proved to the required standard. Accordingly, this appeal is devoid of merit and we dismiss it.

DATED at **MWANZA** this 12th day of December, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

Judgment delivered this 13th day of December, 2023 in the presence of the Appellant in person and Mr. Benedictor Ruguge, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL