IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 216 OF 2018

ALLY NGOZI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Siyani, J.)

Dated 7th July, 2018
in
HC Criminal Appeal No. 65 of 2017

JUDGMENT OF THE COURT

18th & 24th September, 2020

MUGASHA, J.A.

In the District Court of Morogoro, the appellant was charged with two counts of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code [CAP 16 RE. 2002] and impregnating a schoolgirl contrary to Regulation 5 of the Education (Imposition of Penalty to Persons Who Marry or Impregnate a School Girl) Rules, GN 265 OF 2003 and section 35 of the Education Act [CAP 353 R.E 2002].

It was alleged in the charge sheet that, on diverse dates between April and June, 2016 at Kinonko village within the District and Region of

Morogoro, the appellant did unlawfully have sexual intercourse with one A.S.S a Primary School girl aged twelve (12) years and impregnated her. The appellant denied the charge. To prove its case, the prosecution fielded six prosecution witnesses and three documentary exhibits namely, the cautioned and extra judicial statements of the appellant; Exhibits P1 and P2 respectively and the medical report PF 3, Exhibit P3.

A brief account of the evidence which led to the conviction of the appellant is briefly as follows: The victim's family and the appellant were neighbours residing in Kinonko village in Mikese Ward. The victim was a standard three pupil at Kinonko Primary School who lived with her mother. On a certain day, while going to school, she met the appellant who seduced her to have sexual intercourse with him. She declined and told the appellant that she was a pupil. Then, the appellant grabbed the victim, took her to the forest and ravished her. Then he gave the victim some money, biscuit, juice and body oil and warned her not to reveal what had befallen her. The victim obliged and did not disclose the episode to her mother. Subsequently, on several occasions the appellant continued to have sexual intercourse with the victim in the forest luring her with the stated goodies. As the victim's behaviour changed because she was returning late from school with the goodies, this disturbed her

mother **SAUDA MUSSA** (PW2) who had to inquire from the school head teacher **MWANAIDI RAMADHANI MAGOGO** who testified as PW3. Upon receiving the complaint from PW2, PW3 took the victim to Kinonko health Centre and upon being examined, it was established that she was six weeks pregnant. When the victim was probed on the responsible person, she mentioned the appellant to be the person who sexually abused her on several occasions. The matter was reported to the village office where the appellant confessed to have committed the offence. This resulted to the arrest of the appellant and upon recording the cautioned and extra judicial statements (Exhibits P1 and P2) he confessed to have raped the victim. However, the statements were expunged by the first appellate court on account of some procedural infractions which adversely impacted on the validity of those statements.

In his defence, though the appellant admitted to have had sexual intercourse with the victim he claimed that he was unaware if she was a student.

Having accepted the prosecution's version to be true, the trial court convicted the appellant and sentenced him to imprisonment for thirty years in respect of the first count of rape and seven years for the second count of impregnating a school child. The sentences were ordered to run

concurrently and in addition, the appellant was ordered to pay the victim a sum of TZS. 5,000,000/= as compensation.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the conviction and the sentence were sustained. Still undaunted, the appellant has preferred this second appeal. In the Memorandum of Appeal, he has raised six grounds of complaint as follows:

1. That both courts below erred in law and fact to believe that PW1 was impregnated by the appellant without DNA test being done to prove the same.

2. That both courts below erred in law and fact to believe that the prosecutrix possessed enough intelligence to understand the nature of an oath while the age and answers of PW1 were not proportional during *voire dire* test.

3. That both courts below erred in law and fact to believe PW1 while she testified on oath that she didn't remember when she started her relationship with the appellant.

4. That both courts below erred in law and fact to believe that A.S.S is one and the same as A.S.S who testified

as PW1 and proceeded to convict the appellant without noticing such discrepancy.

5. That the first appellate judge erred in law and fact to sustain conviction of the appellant without considering that the trial was conducted without calling arresting officer who would have testified on the cause of arrest.

6. That the first appellate judge erred in law and fact to sustain conviction of the appellant based on the evidence of PW2 and PW3 without considering that they contradicted on the duration of the pregnancy of the victim, hence the case was not proved beyond reasonable doubt.

At the hearing of the appeal vide a virtual facility linked with Ukonga Prison facility where the appellant is serving sentence, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Ms. Anna Chimpaye, learned Senior State Attorney and Ms. Salome Assey, learned State Attorney.

The appellant adopted the grounds of appeal and urged the Court to consider them.

On the other hand, at the outset, the learned Senior State Attorney pointed out that, the appellant has raised new complaints in grounds one, four, five and six. In this regard, the learned State Attorney argued the four grounds not constituting questions of law is an afterthought because the grounds were not initially raised before the High Court and do not constitute points of law. As such, he urged the Court not to consider the new grievances. To support her propositions, he cited to us the case of **MATHIAS ROBERT VS REPUBLIC**, Criminal Appeal No. 328 of 2016 (unreported).

Addressing us on the first ground of complaint that *voire dire* test was not properly conducted, Ms. Chimpaye submitted that such examination was uncalled for following its removal through the Written Laws (Miscellaneous Amendments) (No 2) Act, 2016 (Act No. 4 of 2016) (Amendment Act) which came into force on 8/7/2016. In elaboration, she pointed out that, it is no longer a requirement of law to conduct *voire dire* test to establish whether the child of tender age knows the nature of oath or he/she possesses sufficient intelligence for reception of his/her evidence and instead, a witness of tender age is now required to promise to speak the truth before giving a testimonial account. She added that, since the victim affirmed to speak the truth, the same was

tantamount to a promise to speak the truth before adducing her evidence. On this account, Ms. Chimpaye urged the Court to consider the evidence of the victim as valid.

Regarding the third ground of complaint whereby the appellant faults the two courts below in relying on the victim's account which is silent on the date of the occurrence of the offence, the learned Senior State Attorney challenged the same as baseless. She argued that, while the charge sheet stated between April and June 2016 to be the period when the appellant raped the victim to be, that rhymes with the credible account of the victim who was a minor established that she was on several occasions raped by the appellant. Finally, the learned State Attorney urged the Court to dismiss the appeal and uphold the concurrent verdicts of the courts below because the charge against the appellant was proved beyond reasonable doubt. The appellant had nothing useful in reply apart from urging the Court to set him free.

Having carefully considered the arguments for and against the appeal and the evidence on record, it is glaring that, the conviction of the appellant which was upheld by the first appellate court hinges on **One,** the credible evidence of the PW1 who told the trial court that it is the appellant who on several occasions raped her in the forest. **Two,** the

victim mentioned the appellant to be the assailant to PW2 and PW3. In this regard, this being a second appeal, it is trite law that the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless there has been a misapprehension of the evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. See - **DPP VS JAFFAR MFAUME KAWAWA** [1981] TLR 149 and **FELIX KICHELE AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 159 of 2015 (unreported). In the latter case we among other things, said:

> *"It is an accepted practice that a second appellate court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate court..."*

Pertaining to the credibility of a witness, apart from being a monopoly of the trial court only in so far as the demeanour is concerned, the credibility of witness can be determined by the second appellate court when assessing the coherence of that witness in relation to the evidence of other witnesses including that of an accused person – See **SHABAN DAUDI VS REPUBLIC,** Criminal Appeal No. 28 of 2001 (unreported). Moreover, it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent and good reasons for not believing the witness which include

the fact that, the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See - **GOODLUCK KYANDO VS REPUBLIC** [2006] TLR 363 and **MATHIAS BUNDALA VS REPUBLIC**, Criminal Appeal No 62 of 2004 (unreported). Lastly, since it is settled law that medical evidence does not prove rape, the best evidence is the credible evidence of the victim who is better placed to explain how she was raped and the person responsible. See - **SELEMANI MAKUMBA VS REPUBLIC** [2006] TLR 379 and **EDSON SIMON MWOMBEKI VS REPUBLIC,** Criminal Appeal No. 94 of 2016 (unreported).

We shall be guided by among others, the above cited principles to determine the present appeal.

Initially, we wish to point out that, as correctly submitted by the learned Senior State Attorney, the first, fourth, fifth and sixth grounds are new before the Court as they were not raised in the first appellate court, unless they are points of law. This Court has in a number of instances held that matters not raised in the first appeal cannot be raised in a second appellate court. This Court, in the case of **GALUS KITAYA V. REPUBLIC**, Criminal Appeal No. 196 of 2015 (unreported), was

confronted with an issue on whether it can decide on a matter not raised in and decided by the High Court on first appeal. It stated as follows:

> *"... the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal. This however, does not mean that the Court will not satisfy itself on the fairness of the appellant's trial and his conviction."*

It is thus a settled position of the law 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, unless they are points of law. See- **ATHUMANI RASHIDI V. REPUBLIC**, Criminal Appeal No. 26 of 2016, **RAMADHAN MOHAMED VS REPUBLIC,** Criminal Appeal No. 112 of 2006 (both unreported), see also **MATHIAS ROBERT VS REPUBLIC** (supra) and **FELIX KICHELE AND ANOTHER VS REPUBLIC**, (supra).

Besides, in the present case since the new grounds are matters of fact, in the case of **FELIX KICHELE AND ANOTHER VS REPUBLIC**, (supra) the Court among other things, categorically stated:

"...Indeed, there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the High Court. That is part of the reason why under section 7(6) (a) of the Appellate Jurisdiction Act, 1979 it is provided that a party to proceedings under Part X of the CPA, 1985 may appeal to the Court of Appeal on a matter of law but not on a matter of fact."

In the light of the settled position of the law, in the present matter the complaints on the absence of DNA to establish paternity of the unborn child; the correct name of the victim and the absence of arresting officer to testify on cause of arrest and the alleged discrepant account on the duration of the pregnancy, these are disputes on facts which ought to have been initially raised and resolved at the High Court. Thus, since such factual matters do not raise any point of law, we cannot at any rate consider them at this stage. As such, grounds one, four, five and six will not be considered.

In addressing the second ground of appeal on the propriety or otherwise of the victim's account who was the child of a tender age, it is without dispute that, the trial magistrate conducted a *voire dire*

examination before receiving a sworn account of the victim. The appellant faults the same on ground that the victim did not understand the nature of oath.

As correctly submitted by the learned Senior State Attorney, prior to the amendment of section 127 (2) of the Evidence Act, Cap. 6, R.E. 2002 (Evidence Act) the trial magistrate was required to conduct *voire dire* test for the court to satisfy itself as to whether or not the child of a tender age understands the nature of oath and the duty of telling the truth; and if he is possessed of sufficient intelligence to justify the reception of his/her evidence. However, in the wake of the 2016 amendment through the Amendment Act, subsections (2) and (3) of section 127 of the Evidence Act were deleted and substituted with subsection (2) which stipulates as follows: -

> *"Amendment of Section 127* *26. Section 127 the Principal Act is amended by -*
>
> *(a) deleting subsections (2) and (3) and substituting for them the following:*
>
> *(2) A child of tender age may give evidence without taking an oath or making an affirmation* ***but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."***

[Emphasis added]

What can be discerned from the above cited provision as amended, provides for two conditions. **One,** it allows the child of a tender age to give evidence without oath or affirmation. **Two,** before giving evidence, such child is mandatorily required to **promise to tell the truth to the court and not to tell lies.** In emphasizing this position, the Court in the case of **MSIBA LEONARD MCHERE KUMWAGA V. REPUBLIC,** Criminal Appeal No. 550 of 2015 (unreported) observed as follows:

> *"... Before dealing with the matter before us, we have deemed it crucial to point out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No. 4 of 2016 (Amendment Act). Currently, a* ***child of tender age may give evidence without taking oath or making affirmation provided he/she promises to teil the truth and not to teli lies.****"*

[Emphasis added]

In the case of **GODFREY WILSON VS REPUBLIC**, Criminal Appeal No. 168 of 2018 (unreported), the Court was confronted with a scenario

whereby a child of tender age gave unsworn testimony without giving a prior promise to tell the trial court the truth and not to tell lies. The Court held:

> *"In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence, the same has no evidential value."*

In the cases cited above, the witnesses who were children of tender age gave unsworn or unaffirmed account without promising to tell the truth. That is different from the case at hand whereby the witness who was a child of tender age was affirmed before she gave her evidence which was in accordance with section 198 of the Criminal Procedure Act [CAP 20 RE.2002] which we found to be compellingly relevant stipulates as follows:

"(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

The cited provision requires examination upon oath or affirmation to be conducted in accordance with the Oaths and Statutory declarations [CAP 34 RE.2002]. The power of court to administer certain oaths is prescribed under section 6 of the Act which stipulates as follows:

"If any party to or witness in any judicial proceedings offers to give evidence on oath or affirmation in any form common amongst, or held binding by, persons of the community or persuasion to which he belongs and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding the provisions of sections 4 and 5, administer or direct its officer to administer such oath or affirmation to him."

In addition, Oaths and Affirmation in Judicial Proceedings are also governed by the Oaths and Affirmations Rule, GNs Nos. 125 and 132 of 1967 whereby on Oaths and affirmations by witnesses Rule 2 stipulates:

> "Every *oath or affirmation made in any judicial proceedings by any person who may lawfully be examined upon oath or affirmation or give or be required to give evidence upon oath or affirmation shall, subject to the provisions of section 6 of the Oaths and Statutory Declarations Act, be in the form and be administered in the manner* prescribed *in the First Schedule to these Rules."*

The Form of Oaths and Affirmations by witnesses in courts other than primary courts are as follows:

1. *Oath by a Christian:*
   A Christian shall, subject to the provisions of paragraph 4, be required either to hold the New Testament in his right hand or to hold the right hand uplifted and in either case to repeat the following:
   "I swear that what I shall state shall be the truth, the ***whole truth and nothing but the truth****; so help me God".*
2. *Affirmation by a Moslem:*
   A Moslem shall be required to repeat the following:

"Wallahi, Billahi, Ta "Allah": I solemnly affirm in the presence of the Almighty God that what I shall state shall be the truth, ***the whole truth and nothing but the truth****".*

3. *Affirmation by a Hindu:*

   A Hindu shall be required to repeat the following:

   "I solemnly affirm in the presence of the Almighty God that what I shall state shall be the truth, ***the whole truth and nothing but the truth".***

4. *Affirmation by pagans, persons objecting to making an oath, or persons professing any faith other than the Christian, Moslem or Hindu faith:*

   "I solemnly affirm that what I shall state shall be the truth, ***the whole truth and nothing but the truth****"*

[Emphasis supplied]

In the bolded expressions, it is glaring that, being sworn or affirmed, the witness undertakes to speak nothing but the truth. In other Commonwealth Jurisdictions such as, India and Uganda the Forms and modes of oaths and affirmation are similar to those in our jurisdiction. In India the forms and modes are prescribed under the Rules Under the Indian Oaths Act of 1873 whereas in Uganda, the Court Proceedings Evidence Oath under the First Schedule to the Oaths Act, Chapter 19.

In the said jurisdictions including ours, what is common in the forms and modes of oaths and affirmation of witnesses in the judicial proceedings is that, a witness before adducing the evidence undertakes to speak nothing but the truth. The reason underlying taking oath in judicial proceedings is because a witness is liable to speak the truth only after taking an oath. In our jurisdiction if any witness lies in judicial proceedings after taking an oath for speaking the truth, then it is itself an offence under section 106 of the Penal Code [CAP 16 RE 2019] for giving or fabricating false evidence which applies after taking an oath.

In terms of section 127 (2) of the Evidence Act, it is permissible only for a child of tender age to give unsworn account on condition of making a prior promise to tell nothing but the truth. It is also provided in subsection (5) that for the purposes of subsection (2), the expression "Child of tender age" means a child whose apparent age is not more than fourteen years. So, subject to the mandatory provisions of subsection (2) above, a child of tender age can be a competent and compellable witness in criminal proceedings. In this regard, in terms of section 198 (1) of the CPA, section 6 of the Oaths and Statutory Declaration Act, and Oaths and Affirmation Rules GNs 127 and 132 of

1967, whenever a child of tender age is examined upon oath or affirmation, that witness undertakes to speak nothing but the truth which amounts to a promise to speak the truth and not to tell lies as envisaged under section 127 (2) of the Evidence Act. Thus, in the case at hand, since the victim a child of tender age of 13 years was examined on affirmation, she had promised to speak the truth and not to tell lies and her account has evidential value. Therefore, the 2nd ground of appeal contained in the Memorandum of Appeal is not merited.

Before addressing the remaining grounds of appeal, we deem it crucial to state that, it is settled law that, in sexual offences, the best evidence is the credible account of the victim who is better positioned to explain how she was raped and the person responsible. In that regard, having revisited the evidence of PW1 we are satisfied that, she was a credible witness and coherent in testifying how she was on several occasions ravished by the appellant in the forest while on her way to and from school. Her evidence was not in any way shaken by the appellant as reflected at page 19 of the record of appeal when cross-examined by the appellant she firmly replied as follows:

"We used to do sexual intercourse at the forest. It is you who raped me. It is you who gave me some money and other things."

Moreover, PW1 mentioned the appellant at the earliest moment to PW2 and PW3 after she was found to be pregnant considering that she heeded to the appellant's warning not to reveal about the shameful incident which made it possible for the appellant to continue to sexually abuse her on several occasions. Apart from the victim's account entitling her to be believed by the Court, her testimony was corroborated by the appellant's own voluntary oral confession before the village officer as reflected at pages 24 and 25 whereby PW3 told the trial court that: *The accused was interrogated and admitted to have impregnated the victim.* PW3 maintained her stance during cross examination and re-examination. Moreover, before the trial court, in his defence at pages 38 and 39 of the record, the appellant admitted to have on several occasions sexually abused the victim and that he was responsible for the pregnancy but claimed to be unaware if she was a student. We find the reason for unawareness quite disturbing because, he knew that the victim was a student as he used to way lay her and sexually abuse her while going to school dressed in school uniform. That apart, it is on

record that during their first encounter, the victim, though forcefully raped, she had earlier disclosed to the appellant that she was a pupil. Besides, since they were neighbours, then the appellant must have seen the victim dressed in school uniform when going to school but opted to way lay her and raped her in the forest several times.

In view of what we have endeavoured to discuss we do not find cogent reasons to vary the concurrent verdicts of the courts below. We thus find the appeal not merited and it is hereby dismissed in its entirety.

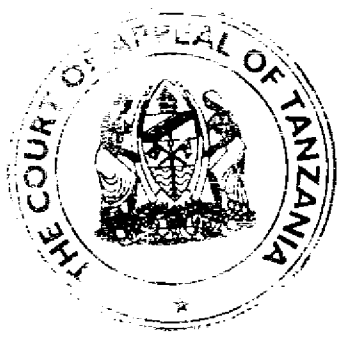
DATED at **DAR ES SALAAM** this 22nd day of September, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of September, 2020 in the presence of the appellant in person and Ms. Ester Chale learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIM
DEPUTY REGISTRAR
COURT OF APPEAL