IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 336 OF 2018

MENALD WENELA.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Levira, J.)

dated the 03rd day of July, 2018
in
Criminal Appeal No. 27 of 2017

JUDGMENT OF THE COURT

20th & 24th September, 2021.

FIKIRINI, J.A.:

This is a second appeal against both the conviction and sentence arising from the judgment of the District Court of Mbozi at Vwawa in Criminal Case No. 169 of 2016, dated 29th December 2016, in which the appellant, Menald Wenela was charged with one count of rape contrary to sections 130 (1), (2), (e), and 131 (1) of the Penal Code [Cap. 16 R.E. 2002] (Now R.E. 2019]. The appellant was convicted and sentenced to 30 years imprisonment.

Particulars of the offence as stated in the charge sheet are that on the 9th day of November 2016 at about 17.00 hours at Iyula village, the appellant had carnal knowledge with a school girl aged 12 years. Out of decency and dignity, the girl's name will be concealed and she will instead be referred to as PW1 or the victim.

What transpired culminating to the appellant's conviction, sentence, and consequently this appeal, as found on record, can be summarized as follows: that on a fateful day PW1 when coming from school she met the appellant who convinced her to go with him to Mswima to get something. On arriving at Mswima there was nobody around. The appellant took advantage of the situation by undressing PW1 and raped her by placing his male organ into her female organ. PW1 started bleeding and screaming calling for help. PW2 who was coming from school heard the call for help coming from Mswima's house crying "*mama, mama*" she responded by going to where the cries were coming from. The appellant fled after seeing PW2 approaching. PW2 saw PW1 bleeding and that her private parts were injured. PW2 reacted by going to Anania's wife and informed her, who in return sent PW2 to go and call PW1's mother. On cross-examination PW2,

maintained and stated that the appellant was having carnal knowledge of PW1 and that she was bleeding.

PW3, the victim's mother who was at Iyula market was informed. She proceeded to the scene of crime after the information. On arrival, she examined the victim and discovered that her daughter was raped. PW1 mentioned the appellant as the person who raped her. PW4, who is PW1's father was also informed by PW2. Meanwhile, PW1 was taken to the Police station, issued with PF3, and taken to hospital. Later PW6 a Police officer arrested the appellant who was arraigned in court.

At the trial, the appellant testified as DW1. In his defence he generally denied the allegations leveled against him. According to him, and based on the doctor's account who testified as PW5, PW1 when sent to hospital was in good condition although she had rapture in her private parts but without any infection. Disassociating himself from the crime, he stated that PW5 has not disclosed his name as the person who raped PW1.

The trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. The appellant was convicted and accordingly sentenced. As stated earlier he unsuccessfully appealed to the High Court, hence this appeal.

Before this Court, the appellant has raised 6 grounds, of which 3 are new, to wit, the 1st ground is on the complaint why PW1 and PW2 did not raise alarm for people to come to their assistance bearing in mind the incident occurred during the day; 2nd ground is that PW3 and PW4's evidence was hearsay, and 3rd ground is that exhibit P1 which is the PF3 was not read out in court and thus making PW5's account insufficient.

The remaining grounds namely the 4th, 5th and 6th were essentially on proof of the case beyond reasonable doubt in general. On the 4th ground, the appellant complains that PW1 and PW2's evidence contradicts each other while the 5th ground is on the failure by the prosecution to prove its case beyond all reasonable doubts as required by the law and finally, the 6th ground is on the complaint that the defence case was not considered.

When the appeal was called for hearing, the appellant appeared in person unrepresented. Mr. Njoloyota Mwashubila, learned Senior State Attorney appeared for the respondent.

The appellant after being addressed urged us to adopt his grounds of appeal. He however, stated to have an additional ground, that PW1 and PW2 before testifying did not promise to tell the truth and were sworn.

The learned Senior State Attorney contended that was an irregularity in recording evidence of PW1 and PW2. He contended that section 127 (2) of the Tanzania Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act) requires the witness of tender age to promise to tell the truth and not lies. The trial magistrate did not observe that. Instead conducted a *voire dire* test as reflected on pages 4, 5, and 6, of the record of appeal, which was no longer a requirement. Also, both PW1 and PW2 swore before testifying, which in his view was contrary to section 127 (2) of the Evidence Act. He thus fathomed what would be the situation once the evidence of these two witnesses is expunged from the record. There would in essence be no good evidence to support the conviction. He contended that since it was the court's omission, he was praying for the interest of justice the testimonies of these two witnesses be recorded afresh. In this regard, the learned Senior State Attorney initially supported the appeal.

Probed by us on the effect on section 198 of the Evidence Act and purpose of *voire dire* test and if he has read the case of **Godfrey Wilson v R,** Criminal Appeal No. 168 of 2018 (unreported) and upon reflection, the learned Senior State Attorney, outright declared that he did not support the appeal. Expounding on his stance, starting with the 3rd ground on exhibit

P1, he admitted that the PF3 was to be expunged for failure to comply with the requirement of reading the contents of the PF3 in court.

As for the 4thground, that PW1 and PW2's testimonies contradicted one another, the learned Senior State Attorney conceded that there, existed contradiction in the testimonies of these two witnesses, but he was nonetheless, quick to state that the contradiction did not go to the root of the case. He further contended that in cases of this nature, the victim's evidence was the best while that of PW2 was only to support PW1's evidence. Reinforcing his submission, he referred us to the famous case of **Selemani Makumba v Republic** [2006] T.L.R 379, in which the Court emphasized that the best evidence of rape comes from the victim.

The 6th ground was the complaint that the trial court did not consider the appellant's defence. Disputing this claim, the learned Senior State Attorney, referred us to page 23 of the record of appeal and asserted that the appellant's evidence was considered by the two courts below.

The last ground was the 5th ground on the complaint that the prosecution did not prove its case beyond reasonable doubt. On this point, the learned Senior State Attorney contended that PW1's testimony was clear and to the point, as to who raped her. Her testimony was supported

by that of PW2 and PW5 the doctor who examined PW1 and filed the PF3 which deserved being expunged for failure to comply with the requirement of reading out its contents in court. Despite expunging exhibit P1, PW5's oral account was still intact and supported PW1's testimony on penetration which is one of the major element in proving rape, he argued.

Winding up his submission he urged us to dismiss the appeal as it was lacking in merit.

In a brief rejoinder, the appellant aside from praying to be reminded of his grounds of appeal, which we did, had nothing much to say except maintaining that the evidence of PW1 and PW2 was contradicting one another.

In determining this appeal, we would wish from the outset to state two legal principles which will guide us along. The first **one** is on the issue of jurisdiction, this Court has been seized with jurisdiction to not entertain a ground of appeal which was not raised at the High Court, except if there is a point of law. There is a long list of authorities in that regard such as this Court's decision in the cases of **Samwel Sawe v Republic,** Criminal Appeal No. 35 of 2004, (unreported) as cited in the case of **Joseph Njasii v Republic,** Criminal Appeal No. 330 of 2016 (unreported), **Hussein**

Ramadhani v. Republic, Criminal Appeal No. 195 of 2015 (unreported), in which reference to other decision of **Hassan Bundala @ Swaga v Republic,** Criminal Appeal No, 416 of 2013 and **Jafari Mohamed v Republic,** Criminal Appeal No. 112 of 2006 (both unreported), were made. In the **Joseph Njasii** case (supra) at page 6 the Court had this to say:

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v R*** *[2004] T.L.R 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court when the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore struck out."*

In the **Hasan Bundala @ Swaga** (supra) also faced with the same scenario, the Court echoed its previous decisions by saying:

> *"It is now settled law that as a matter of general principle this Court will only look into the matters which came up in the lower court and were*

decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal".

See also **Yusuph Masalu @ Jiduvi v Republic,** Criminal Appeal No. 163 of 20L7; and **Juma Manjano v Republic,** Criminal Appeal No. 211 of 2009 (both unreported)

In that regard, this Court will not entertain the 1st and 2nd grounds of appeal as they have been raised for the first time in this Court, which is contrary to the law, since the High Court did not have an opportunity to determine them to warrant this Court to deal with them. Having said so, however, this Court will proceed to decide on the 3rd ground of appeal, even though is also new, since it is on a legal issue.

Two, it is a settled legal position that this being a second appellate court, rarely interferes with the concurrent findings of fact by the courts below. The Court will only interfere if, on the face of it, it appears there are mis-directions or non-directions on the evidence by the first appellate court when the Court is entitled to look at the relevant evidence and make its own findings of fact. In the case of **Peters v Sunday Post Ltd.** (1958) E.A. 424, the Court of Appeal for Eastern Africa held:

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."*

Encountered with the same challenge the Court in the case **Salum Mhando v Republic** [1993] T.L.R. 170, the Court held:

> *"Where there are mis-directions and non-directions on the evidence a Court of second appeal is entitled to look at the relevant evidence and make its own findings of fact."*

See also: **DPP v Jaffari Mfaume Kawawa** [1981] T.L.R 149, **Edwin Mhando v Republic** [1993] T.L.R 170, **Mussa Mwaikunda v Republic**, [2006] T.L.R 387, and **Salumu Mussa v Republic,** Criminal Appeal No 1 of 2011, (unreported).

Coming to the appeal before us and guided by the principles stated above, we will now embark on answering the grounds of appeal as raised.

It is not disputed that PW1 and PW2 were witnesses of tender age and in terms of section 127 (2), they could have testified without taking oaths provided that they promise to tell the truth and not lies.

The scenario is however different in the present appeal. In our case both PW1 and PW2, apart from being asked questions, but did not promise to tell truth before the court and not tell lies, the two witnesses of tender age were finally sworn and testified. Being sworn before giving evidence is a mandatory requirement under section 198 of the Criminal Procedure Act, Cap. 20 R.E. 2019. In the case of **Ally Ngozi v Republic,** Criminal Appeal No. 216 of 2018 (unreported) pages 14-17, finding themselves in that predicament, the Court sought refuge in section 198. For ease of reference the provision is reproduced below:

> *"(1) Every witness in a criminal case 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 above provision is not to be read in isolation, but with other provisions of the law. The Oaths and Statutory Declarations, Cap. 34 R.E. 2019, being one of them. Under section 6 power of the court to administer

certain oaths has been illustrated. Also, the Oaths and Affirmation in Judicial Proceedings are similarly governed by the Oaths and Affirmations Rule, GNs Nos. 125 and 132 of 1967. Under its Rule 2 oaths and affirmations by witnesses have been stipulated. In the different forms of oaths and affirmations by witnesses in courts the emphasis is grounded on telling the truth. As well articulated in **Ally Ngozi** (supra) page 16-17, an example is when oaths is made by a Christian or/and Moslem, reads as follows:

> *"I swear that what I shall state shall be the truth, the* ***whole truth and nothing but the truth; so help me God"***
> *"Wallahi Billahi, Ta "Allah": I solemnly affirm in the presence of the Almighty God that what I shall state shall be truth,* ***the whole truth and nothing but the truth."*** [Emphasis added]

For illustration, these two examples of oaths and affirmation, in our view suffice to drive home the point we are about to make. That being sworn or affirmed, obliged the witness to speak nothing but the truth.

Therefore, a witness of tender age can be a competent and compellable witness in criminal proceedings. Bringing that to our case, the oaths taken by PW1 and PW2 are in our view perfectly fine as in oaths the

witnesses promised to tell the truth and nothing but the truth, which in essence is what section 127 (2) of the Evidence Act, envisages.

As for the 3rd, 4th, 5th, and 6th grounds, the critical issue for us to determine is whether the prosecution case has been proved beyond reasonable doubt. In the process, we will be dealing with the four stated grounds above. On the 3rd ground, the appellant is contesting the value of exhibit P1 (the PF3). After the document was cleared for admission through PW5, the doctor who examined PW1, the PF3 was admitted in evidence but not read out in court to allow the appellant to know its contents and how he would have used it in countering the prosecution case and of course mounting his defence. Non-compliance to this aspect is a serious omission that renders the evidential value of the PF3 inept and calling for the expunging of it from the record, the action which we outrightly take, by expunging exhibit P1 from the record.

After expunging exhibit P1, the remaining question is whether the oral evidence of PW5 will remain intact. In her account, as reflected on page 9 of the record of appeal, she stated that on 9th November 2016 at around 5.50 pm at Iyula Dispensary, she examined PW1 who was escorted there by a Police officer, and her parents. She examined the victim and found

that her private parts indicated that she was raped as she was bleeding. The evidence speaks volumes more than even the PF3. Therefore, in the absence of exhibit P1, PW5's evidence still supports PW1's evidence that she was raped. This ground aside from being conceded to by the learned Senior State Attorney, we also support the position. The 3rd ground is thus partly allowed and partly dismissed.

Coming to the 4th ground that PW1 and PW2's evidence was contradictory, the learned Senior State Attorney, admitted the existence of contradiction, on one hand, but on the other, he impressed upon us that they were minor and do not go to the root of the case. We surely support this assertion. Inspired by our previous decision in the case of **Mohamed Haji Ali v DPP,** Criminal Appeal No. 225 of 2018 (unreported) citing another previous decision of this Court when faced with a similar situation in the case of **Dickson Elia Nsamba Shapwata and Another v Republic,** Criminal Appeal No. 92 of 2007 (unreported) the Court had this to say:

> "*Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at*

the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

In this case likewise, we consider the contradictions to be minor and did not go to the root of the case. Furthermore, in cases of this nature, the victim's evidence is usually the best. And that is now a settled legal position as propounded in the case of **Selemani Makumba** (supra). See also: **Hamis Mkumbo v Republic,** Criminal appeal No. 124 of 2007 and **Rashidi Abdallah Mtungwa v Republic,** Criminal Appeal No. 91 of 2011 (both unreported)

We find the 4th ground devoid of merit and dismiss it.

The complaint on the 6th ground is that his defence was not considered. We find this claim unfounded. We say so because, the defence case was considered by both the trial court and the High Court. On page 23 of the record of proceedings carrying the trial court's judgment, the trial magistrate answered the appellant's concern that neither PW5, the doctor

nor PF3 has mentioned his name. The trial magistrate meticulously explained to the appellant that the purpose of the PF3 is to show that there was penetration and that the victim was bleeding and her hymen perforated. The High Court on pages 52-53, supported the trial magistrate's evaluation and analysis concerning the purpose of the PF3.

The 6th ground is also meritless hence dismissed.

We are of the considered view that the prosecution has proved its case as required in law, beyond reasonable doubt and not as alleged by the appellant. Our basis, of taking such a position is banked on the evidence of PW1 which proved two major elements in any rape case, that there was penetration as she explained on page 5. For better appreciation of her evidence let the record speak by itself:

> *"I was from school I meet one Menald the one before this court and asked me to send me to Mswima to take something. I went to Mswima and there were no any person* ***the accused underdressed me and started raping me having sexual Intercourse with me by putting his penis in my virginal and I started bleeding*** *I made call of help and he ran away there came Anania's wife and my mother……"* [Emphasis added]

PW1's evidence was corroborated by that of PW2, who responded to the PW1's call of help. Upon arriving at the scene of crime she saw Menald who fled. Apart from seeing the appellant she also saw PW1 who was injured on her private parts and that is when she decided to call Anania's wife. Again, PW3, the victim's mother when she arrived at the scene of crime, she found people gathered. She went inside the house with one Felister Mbembela and examined PW1. PW3 stated to have found PW1 injured on her private parts. It was also her evidence as found on page 7, that when she asked PW1 as to who raped her, she mentioned Menald Wenela. With all this abundant evidence we are content that PW1 was raped and penetration was proved.

Another element is who committed the offence. Again from PW1 and PW2, the two witnesses both the trial court and High Court found credible and trustworthy, was evident that the appellant was the one who committed the offence. The appellant was named immediately after the incident and before even his arrest or reporting to the Police station. The claim that the case was not proved beyond reasonable doubt is devoid of merit and accordingly, we dismiss the 5th ground.

In conclusion, we are without any misgiving that the prosecution case was proved beyond reasonable doubt against the appellant. We accordingly find the appeal is without merit and hereby dismiss it entirely.

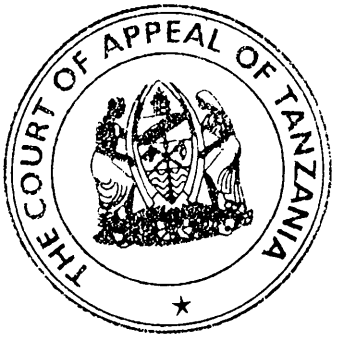
DATED at **MBEYA** this 23rd day of September 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This judgment delivered this 24th day of September, 2021 in the presence of the Appellant in person unrepresented and Ms. Safi Kashindi Amani, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL