**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)**

**CRIMINAL APPEAL NO. 47 OF 2019**

**FRANK S/O KINAMBO ..... APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC OF PROSECUTIONS ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)**

**(Mashauri, J.)**

**dated the 17th day of June, 2019**

**in**

**Criminal Appeal No. 137 of 2018**

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## JUDGMENT OF THE COURT

24th November, 2021 & 1st September, 2022

**MASHAKA, J.A.:**

The Resident Magistrate Court of Katavi at Mpanda convicted the appellant Frank Kinambo of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code. The appellant was found guilty of having carnal knowledge of a girl aged 3 years and 7 months. To protect her modesty, we shall hereinafter refer her to the title "PW2" or the victim. The prosecution alleged that the appellant committed the offence on the 21st November 2016 at Kashaulili - Misufini area within Mpanda Municipality in the region of Katavi. The conviction of the appellant was based on evidence adduced by six witnesses and

two documentary exhibits. Upon his conviction, the appellant was sentenced to the statutory life imprisonment.

A factual account giving rise to the appellant's conviction as unveiled by the prosecution during trial is as follows: On the fateful day, the victim together with one Sophia and Jovita Charles (PW3) were playing and also picking mangoes at the gold society area which was near the residence of the victim and her parents. While there, it was alleged that, the appellant came to fetch water at a nearby well and he then left with the victim whom he promised to give mangoes. After sometime, PW3 and other children approached the appellant's house shouting at the victim to come outside the appellant's house. The victim surfaced from the appellant's house, she appeared sad and she told PW3 that she was raped by the appellant who warned her not to reveal about the incident. When the victim arrived at her parent's home at around 16.00 hours, she went straight to bed. Around 18.00 hrs on the same date, while the victim's mother Matilda Reuben (PW1) was giving her a bath, the victim complained to have pains in her genital parts and began to cry. At that moment, Sophia; another daughter of PW1 surfaced and told her mother that the victim was crying because she was raped by the appellant. Since PW3 was aware about the victim been taken to the appellant's house, PW1 asked

Sophia who confirmed about the incident. Then they all proceeded to the appellant's residence and found him present. Upon seeing him, the victim and PW3 shouted at him stating that he is the one who took the victim to his house. When PW1 probed the appellant, he claimed to be going to Tambukareli. He left and did not return. Amina Hamisi (PW4) testified confirming that the appellant was a tenant in the house where he was found upon being pursued by PW1, PW3 and the victim. She further testified that, since the appellant had disappeared and having returned, he had locked himself inside the house, the house was surrounded and the appellant opened the door after the arrival of the police. She added that, the appellant had earlier requested assistance to sort out the matter because the case against him was a serious one.

As the appellant did not return at his residence, PW1 opted to inspect the victim and found the victim's vulva swollen and some discharge oozing out from her vagina. In the unsworn victim's account, she testified that it is the appellant named Frank who took her to his residence, laid her on the bed and raped her. The victim further stated that, the appellant lived in the white house and that she identified him at his residence that same evening in the presence of PW1 and PW3. The matter was reported to the Police where the victim was issued with the PF3 and taken to the hospital. She was examined by Dr.

Athumani Thomas (PW5) who, besides finding blood stains on the victim's pants, he established fresh bruises on both sides of the labia and she felt pains. These findings made PW5 to conclude that the victim was actually raped and treated her with medication. The doctor tendered the PF3 which was admitted in evidence as exhibit P1.

It was also the prosecution account that, the appellant who had disappeared at his residence, returned thereto after three days. Upon investigation, H.311 DC Emmanuel (PW6) who recorded the cautioned statement of the appellant, recounted that the appellant confessed to have raped the victim. The cautioned statement was admitted as exhibit P2. The trial court conducted an inquiry and satisfied itself that it was voluntarily made by the appellant.

In his defence, the appellant distanced himself from the accusations levelled against him by the prosecution. He claimed to have been at gold society area on 20/11/2016 and returned at his residence on 23/11/2016. He challenged PW3's account as to why she did not report to the elders if at all she saw him taking the victim to his room. That apart, he claimed that, he was not the only tenant at the white house and that the victim was lying because upon reaching home, she did not inform her mother about the incident. The appellant

had no qualms with the evidence of his land lady (PW4) who testified that the appellant was her tenant. Moreover, the appellant denied to have made any cautioned statement.

Eventually, the trial court was satisfied that, in the wake of a truthful credible account of PW2 and PW3 corroborated by PW1, PW5, exhibits P1 and P2, the prosecution had proved the charge to the hilt that it is the appellant who raped PW2. As earlier stated, the trial court convicted the appellant as charged.

The appellant unsuccessfully appealed to the High Court which sustained the conviction and sentence hence the present appeal. The appeal is based on six grounds of appeal contained in the memorandum of appeal paraphrased as follows: **one**, the first appellate court erred in law to have based its conviction on the evidence of PW6 and the cautioned statement; **two**, the first appellate court erred in law sustaining conviction without considering his defence; **three**, the first appellate judge misdirected himself when he dismissed the appeal relying on hearsay evidence of PW4; **four**, the first appellate court erred in dismissing the appeal while the prosecution side failed to prove the charge beyond reasonable doubt; **five**, there was non - compliance with sections 235 and 312 of the

Criminal Procedure Act by the trial court and **six**, that the age of the victim was not established.

When the appeal was called on for hearing, the appellant entered appearance in person, unrepresented. The respondent Republic was represented by Ms. Safi Kashindi Amani, learned State Attorney. When the appellant was called to amplify on his grounds of appeal, he prayed to adopt his six grounds of appeal and let the learned State Attorney to submit first reserving his right to respond later, if need would arise.

In her reply, Ms. Amani supported both the conviction and sentence meted against the appellant. She submitted that although grounds one, two, three, five and six of appeal are new grounds which were not raised in the first appellate court, it was her contention that save for ground three, grounds one, two, five and six involve points of law and therefore properly before the Court. Relying on the case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), she urged us under section 4 (2) of the Appellate Jurisdiction Act (the AJA) not to determine ground three because the Court has no jurisdiction to entertain a new factual ground of complaint.

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 point of law. See: **Godfrey Wilson v. Republic** (supra) which quoted **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015, **Athumani Rashidi v. Republic**, Criminal Appeal No. 26 of 2016 and **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (all unreported). In the case of **Felix Kichele and Another v. Republic**, Criminal Appeal No. 159 of 2015 (unreported), 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 present appeal the complaint is that the trial court relied on hearsay evidence of PW4, which is not admissible as a matter of law. The appellant is questioning the evidence of PW4 to have been

admitted illegally. We shall thus deal with ground three notwithstanding Ms. Amani's objection.

We propose to dispose ground five ahead of the other grounds because it involves a procedural issue. The appellant is faulting the trial court on the non - compliance with sections 235 and 312 of the CPA. Ms. Amani drew our attention to page 48 of the record of appeal whereby, the trial court having heard the prosecution and the defence cases, properly found the appellant guilty, convicted and sentenced him. Further, she argued that the first appellate and trial courts complied with section 312 of the CPA and she prayed the Court to find the ground baseless as the provisions were complied with.

Acting under the provisions of section 235 of the CPA, the trial court having heard both the evidence of the prosecution and defence, convicted and sentenced the accused (the appellant). The appellant faulted the judgments of the courts below on the ground that it did not comply with the provisions of section 312 of the CPA, which provides that: -

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of*

*the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*

*(2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.*

*(3) N/A*

*(4) N/A."*

This complaint need not detain us. Undeniably, after the trial court heard the prosecution and the defence cases and what transpired thereafter can be gleaned at page 48 of the record of appeal reproduced hereunder:

*".... Having said so, I treat the evidence of the accused incredible, afterthought and incapable of raising doubt against the strong evidence of the prosecution. I therefore find the accused guilty of the offence of rape contrary to section*

*130 (1) (2) (e) and section 131 (1) of the Penal Code Cap 16 R.E. and convict him as charged."*

We have scrutinized the judgments delivered by the first appellate and trial courts and found they were composed in accordance with the dictates of the law. As for the trial court, it is glaring that, having found the appellant guilty, it convicted him as charged. Moreover, each judgment contained the points for determination, the decision thereon and the reasons for the decisions. The respective judgments were dated and signed by the presiding judge and trial magistrate and were pronounced in open court. Thus, we are of the considered view that ground five is baseless and is hereby dismissed.

With regard to ground one, the appellant complains that, the first appellate court erred in law to have based its conviction on the evidence of PW6 and the cautioned statement (exhibit P2). It was his contention that, the first appellate court did not consider whether the cautioned statement was in compliance with the law that it was voluntarily made. In response to the complaint, the learned State Attorney maintained that the cautioned statement was voluntarily made, recorded by PW6 who tendered it and properly admitted as exhibit P2 and read it before the trial court as gleaned at pages 33 and

44 of the record. The trial court found that the appellant's cautioned statement was voluntarily made and it was properly admitted in evidence without any objection by the appellant by way of cross-examination during the inquiry. Ground one lacks merit and is dismissed.

In ground two, the appellant faults the first appellate court for failing to consider his defence of *alibi* resulting into a wrong decision. We have gathered from pages 45 to 48 of the record, the trial court considered the appellant's evidence on the defence of *alibi* and concluded that the same was an afterthought, incredible and incapable of raising any doubt on the evidence of the prosecution. We entirely agree with the position of the courts below in view of the credible account of PW1, PW2, PW3 and the appellant's confession which show that the victim was raped by none other than the appellant. We find the complaint not merited. Ground two of the appeal is accordingly dismissed.

Advancing to ground three, the appellant faults the first appellate court to have dismissed his appeal by relying on hearsay evidence of PW4 which was not corroborated byany witness. Section 62 (1) of the Evidence Act, provides that oral evidence must be direct if it refers to a fact which could be seen, it must be the evidence of a witness who

saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who heard it; if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who perceived it by that sense or in that manner; and if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds. The evidence of PW4 recounted that she owned the white house where the appellant resided as a tenant and witnessed the arrest of the appellant. Also, PW2 identified the room she was raped in by the appellant in the presence of PW4, confirming it was indeed the appellant's room. To sum it all, we are of the considered view that PW4 adduced direct evidence in which the appellant failed to cross examine, hence acknowledging PW4's testimony which corroborated the evidence of PW1, PW2 and PW3 that the appellant lived in the room at the white house where he raped PW2. Thus, the third ground of appeal fails.

Going to ground six, Ms. Amani submitted that the discrepancies of the victim's age as argued by the appellant was baseless. She firmly argued that PW1 testified that the victim was aged three years and eight months. The learned counsel supported her contention citing

the case of **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported) and beseeched the Court to find it baseless.

It is settled law that, the evidence on proof of age can be adduced by the victim, parent, relative, medical practitioner or where available, by the production of a birth certificate. This was emphasized in the case of **Isaya Renatus v. Republic** (supra). In the present case, it is not in dispute that no birth certificate of the victim was tendered in evidence and the prosecution evidence presented a discrepancy of the victim's age. We are conscious of the age being of great significance in establishing the offence of statutory rape that the victim must be under the age of eighteen. We are satisfied that the age of the victim was proved by PW1 the victim's mother as reflected at page 7 of the record of appeal. Thus, ground six is meritless and we dismiss it.

Regarding ground four that the prosecution failed to prove the offence beyond reasonable doubt, this was challenged by Ms. Amani who argued that the prosecution evidence adduced by PW1, PW2, PW3, PW4, PW5 together with the PF3 exhibit P1 proved the charge against the appellant having established that he raped the victim.

Ms. Amani conceded that, PW2 and PW3 were witnesses of tender age who testified without prior promise to tell the truth. On this

she argued that, since the *voire dire* examination was conducted in terms of the old procedure, the evidence of PW2 be expunged because she did not understand the meaning of an oath. As for PW3, Ms. Amani urged us to consider her evidence because she knew the duty to speak the truth.

The Court has consistently held that, the best evidence of rape is that of the victim. See for instance, **Selemani Makumba v. Republic** [2006] TLR 379, **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008, **Julius Josephat v. Republic**, Criminal Appeal No. 03 of 2017, **Paul Dioniz v. Republic**, Criminal Appeal No. 171 of 2018 (all unreported) and **Galus Kitaya v. Republic** (supra).

Moreover, section 127(6) of the Evidence Act provides that conviction on rape may proceed on uncorroborated evidence of a child victim if the court is satisfied that the witness is truthful and credible and as such, is entitled to credence. See: **Eliah Bariki v. Republic**, Criminal Appeal No. 321 of 2016 (unreported). It is not in doubt that the trial court in its findings held that PW3; a child of tender age, possessed sufficient knowledge and understood the importance of telling the truth, in which she gave unsworn evidence. The trial court found that PW2 was unable to know the duty of telling the truth and did not know the meaning of an oath, therefore she gave unsworn

evidence. The trial court believed the witnesses to be credible and truthful and it displayed the manner in which the victim was raped by the appellant and how the incident was revealed by the victim when her mother PW1 was bathing her.

On our part, having re-evaluated the victim's testimony, we are satisfied that she gave a coherent and consistent account on how she was raped by the appellant at his house. That apart, she mentioned the appellant at the earliest moment which made it possible for PW1 together with the victim to trace the residence of the appellant and the scene of crime. Besides, the evidence of the victim was not contradicted by any other witness including the appellant himself.

Moreover, the evidence of PW2 is corroborated by; one, evidence of PW1 who had inspected the victim and found some discharge oozing out from the vagina; two, the oral account of PW5 and the PF3 (exhibit P1) which established that there was indeed penetration indicating that the victim was actually raped; and three, the appellant's cautioned statement (exhibit P2) in which he confessed to have taken the victim to his room and raped her. At this juncture, it is crucial to revisit part of the appellant's cautioned statement reflected at pages 57 and 58 of the record as follows:

*"Ninatambua kuwa nimekamatwa na kufikishwa kituoni hapa kwa kosa la kubaka ..... kuhusu tuhuma hizi ninakiri kuwa ni kweli nimetenda kitendo hiki cha kubaka dhidi ya huyu anayetajwa na ninatambua kuwa alikuwa mtoto mdogo kwani nakumbuka ilikuwa tarehe 21/11/2016 majira ya jioni nikiwa pale kwangu katika chumba na kwa nje, muda huo hapakuwa na mtu mkubwa ukizingatia pale ninapoishi wapangaji tuko wawili tu. ...mpangaji mwingine aitwaye STIVIN hakuwepo. Hivyo nilikuwa na mtoto huyo nikamwambia afuate maembe, akaja akaingia ndani, alivyoingia nikafunga mlango wale watoto wengine walikuwa mbali kidogo... Huyo mtoto tukiwa mle ndani nilimvua nguo, kisha nikachukua mboo yangu/uume wangu nikaupaka mate kisha nikaingia kwenye uke wa mtoto huyo. Nikiwa naendelea kufanya naye mapenzi, yule mtoto sio siri alikuwa analia, ila sikuwa na namna hadi nilipomaliza...ndipo nikamvalisha nguo nikamweka pale nje na kumwambia aende nyumbani kwao, japo alikuwa analia..."*

From the above excerpt, it is evident that by his own confession, the appellant clearly narrated as to how he lured the victim with mangoes, led her to his house and eventually raped her. In the case of

**Mohamed Haruna Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 (unreported), the Court observed that:

> *"The very best of the witnesses in any criminal trial is an accused person who freely confesses his guilt."*

It is therefore our considered view that, in the current appeal, what is contained in the appellant's confessional statement is the best evidence we can have in the incident in which the victim was raped. In the circumstances, the appellant's complaint that his conviction was based on a cautioned statement which he was not aware of which also seems to appear in his defence at the trial is, in our considered view an afterthought.

We are fortified in that regard because, as gathered from page 26 of the record of appeal, his objection on admissibility of the cautioned statement in evidence, was properly attended to by the trial court and overruled following an inquiry and which established that the cautioned statement was voluntarily made. This is cemented by the evidence by D/C Emmanuel (PW6) who gave an account on how he was assigned to interrogate the appellant and recorded his cautioned statement after he confessed to have committed the offence. Given that, the appellant was given opportunity during the trial but did not

cross-examine PW6, in which he acknowledged what was said by PW6 and he cannot be heard to complain at this stage.

All said, the appeal fails and accordingly dismissed in its entirety.

**DATED** at **DAR ES SALAAM** this 24th day of August, 2022.

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

The judgment delivered this 1st day of September, 2022 in the presence of Appellant in person and Ms. Anastazia Elias, State Attorney for the Respondent/Republic both connected via Video Conference facility from Mbeya High Court is hereby certified as a true copy of the original.

D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**