IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 386 OF 2015

HASSAN BUNDALA @ SWAGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Khaday, J.)

dated the 30th October, 2014
in
Criminal Appeal No. 18 of 2014

JUDGMENT OF THE COURT

18th & 23rd February, 2016

KILEO, J.A.:

This appeal emanates from the decision of the District Court of Chato at Chato in its criminal case no 69 of 2013 whereby the appellant was convicted of rape contrary to section 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap 16 R. E. 2002. He was alleged to have raped a girl aged 8 years and towards that end he was sentenced to life imprisonment. The appellant's appeal at the High Court was unsuccessful and he is before us on his second appeal.

Brief facts of the case as presented at the trial show that on the material day the appellant had visited PW2 who was ill. PW2 was with her granddaughter, PW1. Finding PW2 sick the appellant offered to give her some body oil and soap. PW2 instructed PW1 to go with the appellant so that she could get the oil and soap from him. When they got to the appellant's house the appellant gave the child some food and thereafter closed the door and raped her. PW1 raised an alarm which prompted her brother, (PW4) to find out what was wrong. When he got to the appellant's house the appellant opened the door and tried to bribe PW4 in order to silence him. Upon examination by her grandmother PW1 was found to be bleeding from her vagina.PW6 Dr. Joram Nyanza medically examined her and filled in a PF3, exhibit PE1 which showed that there were bruises on her vagina and the hymen was perforated. When called upon to give his defence, the appellant virtually admitted to have committed the crime. This is what he said:

"Your honour, I remember that I committed it unknowingly on whether it's a criminal offence, I pray to your honourable court that I will never commit it again because now I know that it's a criminal offence. That's all".

At the hearing of the appeal the appellant appeared in person with no legal representation. The respondent Republic was represented by Mr. Hashim Ngole, learned principal State Attorney.

The appellant listed the following three grounds in his memorandum of appeal:

1. *That the age of the victim was not proved either by documentary or in any way reasonably so as to warrant the appellant's life sentence.*
2. *That; penetration as essential matter was not proved.*
3. *That; after being noted that the appellant was drunk at the time of the commission, the trial and first appellate court had not taken into consideration INTOXICATION as so revealed by the victim in XXD by ACC "you were drunk" at page 7 verse 33".*

The appellant who opted to submit after the learned Principal state Attorney had submitted did not have much to say apart from claiming that he did not commit the crime.

Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the

first appellate court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought. Indeed, as argued by the learned Principal State Attorney, if the High Court did not deal with those grounds for reason of failure by appellant to raise them there, how will this Court determine where the High Court went wrong? It is now settled that as a matter of general principle 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 for example, **Jafari Mohamed v. the Republic.**, Criminal Appeal No. 112 of 2006, **Richard s/o Mgaya @ Sikubali Mgaya v. R,Nazir Mohamed @ Nidi v. the Republic,** Criminal Appeal No. 312 of 2014 (all unreported).

In any case even if we were to consider these new grounds still they have no merit at all. Not only was the age of the victim mentioned in the charge sheet but the medical evidence through PW6 and the PF3, exhibit PE1 showed that the victim was aged 8 years when she was raped. The appellant did not challenge this evidence then and he can't be heard at this stage to say that the age of the victim was not proved. As for intoxication,

not only is it a new ground but the appellant never mentioned it at the trial. In any case, intoxication is not a defence to rape.

This matter need not really delay us. There was overwhelming evidence establishing that the crime was committed by the appellant. There was ample evidence that not only was there penetration but that the child was gravely harmed in the process.

The only thing that we think we should make an observation of is the manner of the taking of the evidence of PW1 and PW2 who were children of tender age. It is clear from the record that *voire dire* test under section 127 (2) of the Evidence Act was not properly conducted. The following is a record of what transpired before PW1 testified.

"CT: Let voire dire test be conducted.

-My head teacher is Mwalimu Misalaba

-I'm standard two

-At Iparamasa Primary School

-I'm living with my parents.

-My father has two wives.

-I know to speak the truth.

-I should not cheat you.

CT: the PW1 she is competent to know the truth and she competent to

testify evidence"

Thereafter what followed was the examination in chief. The witness was not sworn. The above is what exactly happened in respect of PW4 who was also a child of tender age aged 11 years.

In terms of section 127 (2) of the Evidence Act, Cap 6 R. E. 2002 the trial magistrate was required, after having conducted the *voire dire* examination to have indicated whether or not the child understood the nature of an oath, and if the child did not, whether the child understood the duty of telling the truth and was possessed of sufficient intelligence to justify the reception of his/her evidence. The provision states:

> **"Section 127 (2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."**

Though one can deduce from what the trial magistrate recorded above that both PW1 and PW2 were found to be competent to testify, the magistrate did not record whether or not the children understood the nature of oath. The children did not give their evidence on oath. We think this was not proper. Where a child understands the nature of oath the child has a right to give her/his evidence on oath. Unsworn evidence most often requires corroboration. Section 198 (1) of the Criminal Procedure Act, Cap 20 R. E. 2002 (CPA) requires that evidence be given on oath or affirmation(unless of course the witness being a child of tender age does not understand the nature of an oath as stated under section 127 (2) of the Evidence Act). Section 198 of the CPA provides:

> **"198 (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."**

Trial magistrates are better minded to observe the requirements of the law in every matter coming before them so that justice is done and be seen to be done to each side.