**IN THE COURT OF APPEAL OF TANZANIA**
**AT MBEYA**

**(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)**

**CRIMINAL APPEAL NO. 245 OF 2015**

**DIHA MATOFALI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania At Mbeya)**

**(Nyangarika, J.)**

**Dated the 4th day of May, 2015**
**In**
**DC Criminal Appeal No. 30 of 2014**

**.....**

## JUDGMENT OF THE COURT

15th & 20th April, 2016

## MUGASHA, J. A.:

This appeal originates from the decision of the District Court of Sumbawanga. The appellant **DIHA MATOFALI** was charged with the offence of rape contrary to sections 130(1) and (2)(e) and 131(1) of the Penal Code **[CAP 16 RE.2002]**. He was convicted as charged and sentenced to imprisonment to six (6) years with twelve (12) strokes of a cane. Aggrieved, the appellant unsuccessfully appealed to the High Court where the appeal was dismissed and the illegal sentence of six years substituted with mandatory minimum sentence of thirty (30) years according to law with the 12 strokes of a cane remaining intact.

The back ground to this case is as follows: On 04 /04/2012 at about 16.00 hrs. at Mpwapwa Area the appellant unlawfully had sexual intercourse with PW1 **MAGDALENA MANAJE** a fifteen years old girl. It was alleged that, on the fateful day PW1 **MAGDALENA MANAJE** and DW3 **REHEMA MANAJE** the appellant's wife, went to a spring or river to fetch water at Mpwapwa area. The appellant happened to be at the vicinity and he held a machete and catapult in his hand. Suddenly the appellant forcefully grabbed PW1, held her by the mouth, dragged her to the bush, undressed her and raped her. Subsequently the appellant raped PW1 in following instances:
**One,** when the appellant took PW1 to his father's house at Ulinji**; Two,** when the appellant took PW1 to his sister's house at Mashete**. Three,** when the appellant took PW1 to his sister's house in Paramawe village and he raped her on a daily basis. **Four;** at Matola where PW1 was placed under strict guard until when she managed to sneak to the bush at night during 20.00 hrs. and spent the night in the wilderness.

On the following day, PW1 met a certain woman who took her to the chairman and later to her relatives. Thereafter, PWI's father (PW2) was informed and when he inquired from DW2 he was told about what transpired at the river when PW1 and DW2 went to fetch water. The incident was reported to the Police and PW1 was on 24/4/2012 issued with PF3 and taken to the hospital where it was established that PW1 was habitually raped according to PW6 **(WP 6870 DC MWAJABU)**. PW3 **JERA NDENYE** Justice of Peace to whom the incident was reported to on 5/4/2012 by PW2, wrote to the Police at Paramawe and was told that PW1 was with the appellant. However, PW3 was not aware if PW1 was married to the appellant. The

appellant told PW5 that PW1 was his wife after paying dowry and her parents had consented. PW1 and PW2 denied the allegation that the appellant had paid dowry for marrying PW1. Following the arrest, the appellant claimed that; PW2 had fabricated the case because he had taken dowry of another man. The appellant's story was confirmed by his wife **DW3 REHEMA MENEJA.** The appellant denied the charge.

At the hearing of the appeal the appellant listed seven grounds of appeal which are conveniently summarized into six main grounds namely:

(1) *That, no birth certificate was tendered to establish that PW1 was below eighteen 18 years.*

(2) *That, the PF3 was wrongly relied upon while the appellant was during trial was not addressed in terms of section 240(3) of the Criminal Procedure Act.*

(3) *The caution statement was wrongly acted upon because was obtained contrary to the law.*

(4) *That the High Court did not consider the defence evidence as the appellant did not admit having sex with PW1 and the plea was unequivocal.*

(5) *The High Court judge wrongly dismissed the appeal relying on evidence that PW1 was raped due to loss of virginity without considering that loss of hymen can also be caused by playing acrobatics or riding a bicycle.*

*(6) The High Court judge wrongly believed the prosecution evidence which was adduced by relatives of PW1 in the absence of corroboration by independent witnesses.*

The appellant opted to submit after the learned State Attorney had submitted. However, he claimed that he did not commit the offence because PW1 was his wife.

Initially, Mr. Mtenga learned State Attorney conceded to the 2nd and 3rd grounds of appeal. He pointed out that, the PF3 was not tendered by a qualified Doctor and that the appellant was not addressed in terms of section 240(3) of the Criminal Procedure Act **[CAP 20 RE.2002],** which provides:

> *"When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection".*

Moreover, the cautioned statement of the appellant was also improperly obtained on 16/7/2013, considering that the appellant was arrested on 20/4/2012 which is contrary to section 50(1)(a) of the Criminal Procedure Act which specifies periods available for interviewing suspects as follows:

*(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–*

*(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*

In the light of the said procedural irregularities, the learned State Attorney urged the Court to expunge from the record the PF3 **(EXHIBIT PE.II**) and the cautioned statement of the appellant (**EXHIBIT P.I).**

On our part we agree with the learned State Attorney that, **EXHIBITS PE. I** and **II** must be expunged from the record because they were improperly admitted in evidence. It is clear that section 240(3) of the CPA was not complied with because after PW5 (**WP 6870 DC MWAJABU)** tendered the PF3, the appellant was not informed on his right to have the Doctor summoned so that he could cross-examine the Doctor on the contents of the PF3. Similarly, the caution statement was improperly received in evidence having been recorded almost three months after the arrest of the appellant while there is no evidence if extension was sought in terms of the law to have the statement lawfully recorded within four hours after his arrest.

Addressing the first ground of appeal, the learned State Attorney submitted that, the appellant's complaint of age of the victim is an afterthought as it was never raised in the first appeal. He relied on the case of **HASAN BUNDALA VS REPUBLIC Criminal Appeal No. 386 of 2015**

(unreported). Besides, the learned State Attorney argued that, during trial the appellant did not cross examine PW2 the father of PW1 about the age of the victim which was crucial opportunity missed. He cited the case of **NIYONZIMANA AUGUSTINE VS REPUBLIC, Criminal Appeal No. 483 of 2015 and ISMAIL SELEMAN NOLE VS REPUBLIC, Criminal Appeal No. 117 of 2013** (all unreported). He added that, DW3 knew the age of PW1 being wife of appellant and elder sister of PW1.

Addressing the 4th ground of appeal he argued that, the appellant's complaint on unequivocal plea to be baseless because the appellant did not plead guilty to the charge. Thus, the first appellate court correctly concluded that the appellant admitted to have had sexual intercourse with PW1 which is confirmed in his own testimonial account that he had sexual intercourse with PW1 as his wife when they visited several villages and spent nights together. He added that, the appellant's testimony is supported by PW1 who testified to have been raped by the appellant when they moved from one village to the other. The learned State Attorney relied on the case of **SELEMANI MAKUMBA V REPUBLIC, (2000) TLR 379,** in which the Court stated that the best evidence on rape is that of the victim.

Addressing the 5th ground of appeal, on the probable causes of loss of virginity of PW1, the State Attorney pointed out this to be a new ground and an afterthought because it was not raised in the High Court. However, he submitted that, there is overwhelming evidence that the appellant on several occasions raped PW1.

As for ground six, the learned State Attorney submitted that the first appellate court did not discredit the defence evidence. Besides, the charge

was proved against the appellant that he raped PW1 who was below 18 years.

It is now settled that, as a matter of general principle the court will only look into a matter which came up during trial and was decided and not on matters which were neither raised nor determined by the trial court or the High Court. See **JAFARI MOHAMED VS THE REPUBLIC, Criminal Appeal No. 112 of 2006)**

In any case, even if we were to consider the new grounds, yet they are not merited. Not only was the age of PW1 mentioned in the charge sheet, it was also in the testimonial account of DW3 aged 24 years, the elder sister of PW1 and appellant's wife who at page 23 of the record testified as follows:

> *"..... I am the first born Magdalena is the fifth born. She completed STD seven in 2010..... She complete STD Seven while 16 years old."*

Moreover, at page 23 of the record responding to question by the trial court DW3 testified:

> *"My husband took Magdalena while 16 years old....."*

Furthermore, during trial PW2 the biological father of PW1 was among the prosecution witnesses' who testified on how he came to know about what befell his daughter that she was raped by the appellant. However, the appellant did not ask PW2 about the age of PW1. As such, we agree that the appellant's complaint on age of PW1 is indeed an afterthought and the appellant cannot be heard at this stage to claim that the age of the victim

was not proved. (See **HASSAN BUNDALA VS REPUBLIC, Criminal Appeal No. 386 of 2015).**

The other new ground, which we consider to be an afterthought is the appellant's complaint that the first appellate court did not consider other factors which would have affected the virginity of PW1 such as, riding a bicycle and acrobatics. Apart from this being an afterthought and tantamount to inviting speculations it shall be discussed together with the issue as to whether or not the appellant did rape PW1.

It is settled law that in rape cases, the victim is the best witness as she is the one to express her sufferings during sexual intercourse. (**See SELEMANI MKUMBA VS REPUBLIC CRIMINAL APPEAL NO. 94 OF 1999** (unreported). The evidence of PW1 was that, the appellant forcefully raped her on several occasions from the day the appellant who held a machete dragged her to the bush and later in several villages until when PW1 managed to escape for safety. This is corroborated by the entire evidence of the defence. In the appellant's own testimonial account at page 19 of the record he testified as follows:

> *"I took Magdalena Meneja as his wife.... We said farewell to my first wife and we left Jangwani village where may parents reside.....We spent two nights. My father sent a message to her parents.. We left Ulinji village and there we spent four days before we left to town Sumbawanga and spent one night. We left again Mashete Village and we spent one night.*

*We left again to Matola Village where my sister is married. We spent like a week and three days. We again moved to Paramwe, where my bother lives and we spent more than two weeks".*

The above evidence is similar to that of DW2 (**DAMSON MATOFALI)** appellant's father and DW3 (**REHEMA MENEJA**). Moreover, when responding to a question by the trial court DW3 at page 23 replied as follows:

*"My husband took Magdalena while 16 years old. I think he has been accused of rape because he took Magdalena before she attained the age of majority"*

In the premises, the controversy raised by appellant on other probable causes of loss of virginity is watered down by the appellant's own admission to have slept with PW1 as his wife. Besides, the complaint is baseless because of the overwhelming evidence on rape by PW1 is corroborated by the defence evidence. The evidence of the appellant that PW1 was his wife because he had paid dowry, holds no ground because , it is settled that, PW1 was under the age of 18 years was raped and he had no capacity to consent. Without prejudice to the aforesaid, it is on record that, PW1 could not escape because the appellant placed her under strict guard. However, PW1 never consented to the inhumane acts of the appellant and that is why when opportunity arose she sneaked in the wilderness in the night hours. This demonstrates that she was against the forceful rape.

In our considered view, the learned first appellate judge properly considered the evidence of the defence and did not discredit evidence of

DW2 and DW3 whose testimonial account corroborate evidence of PW1 that she was raped by the appellant who claimed that PW1 is his wife. We agree with the first appellate court that, the first appeal was indeed unmerited because the appellant himself admitted to have sexual intercourse with a PW1 who was under eighteen (18) years. The findings of the High Court in sustaining conviction entered by trial court cannot be faulted.

In view of the aforesaid, we find the appeal lacking merit and for this reasons we dismiss it.

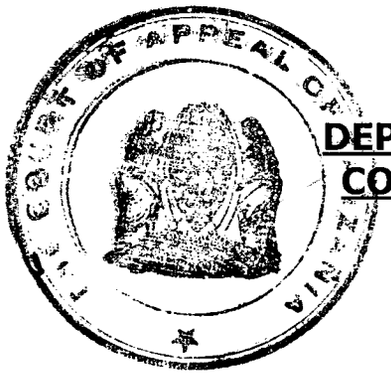
DATED at MBEYA this 19th day of April, 2016.

N. P. KIMARO
**JUSTICE OF APPEAL**

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

R. E. MZIRAY
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



E.Y. MKWIZU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**