IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 167 OF 2018

ISAYA JOHN.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kairo, J.)

Dated 7th June, 2018
in
HC Criminal Appeal No. 51 of 2016

JUDGMENT OF THE COURT

6th & 9th May, 2019

MUGASHA, J.A.

In the District Court of Karagwe, the appellant was charged with rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code [CAP 16 RE.2002].

It was alleged in the charge sheet that, on 21st November, 2014 at Kishao village within Karagwe District in the Region of Kagera, the appellant did unlawfully have sexual intercourse with one K.D a girl aged eight (8) years.

To prove its case the prosecution called three witnesses who are: **K.D** the victim (PW1), **JONESIA HENRY** (PW2), **JERONIMO CORONEL KATABAZI** (3) and **HENERY TIBAIJUKA.** The prosecution also tendered a PF3 which was admitted as Exhibit P1.

A brief account of the evidence which led to the conviction of the appellant is briefly as follows: The victim together with her grandmother one **PASCHAZIA TINUGA** and a house boy one **ISAYA** all resided in the same house. The grandmother had travelled to Dar-es-salaam leaving behind the victim together with the house boy. PW1 recounted that, on the fateful night, while she was in her room the houseboy went therein and took her to the sitting room. Thereafter, he undressed her shirt and underwear; he as well undressed and raped her. In the course of the rape, the victim felt pains but could not raise alarm because the house boy had covered her mouth and threatened to kill her if she narrated the shameful incident to anyone. After ravishing her, the houseboy returned her into her bedroom. In the following morning, PW2 a neighbour having visited the residence of one **PASCHAZIA TINUGA** noticed that the victim had a bad smell and was not walking properly. PW2 examined the victim and found that her private parts were injured and the victim

disclosed to have been raped by the appellant. Such disclosure was also made to PW4 who recounted that, PW1 his granddaughter went to his house. Having noticed that she was not walking properly, PW4 asked his wife who examined the victim and discovered that her hymen was ruptured. The matter was reported to the Police and the victim was issued with a PF3 and she was taken to the hospital where the medical Doctor who testified as PW3 confirmed that the victim was actually raped. According to the testimonial account of the victim, PW2 and PW4 after the fateful incident the appellant was arrested at Omurushaka while in a bid to escape.

On the other hand, the appellant denied the accusation by the prosecution account. He claimed that, the case was fabricated following his denial to avail the key of the house of **PASCHAZIA TINUGA**, to one **HENRY TINUGA** the victim's father who in return promised to revenge. He as well, told the trial court to have been arrested on 4th December, 2014 taken to Nyakahanga police station, discharged and then re-arrested on 5th December, 2014 and charged with the present offence.

Having accepted the prosecution's version to be true, the trial court convicted the appellant and sentenced him to imprisonment for thirty

years. Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed with an order that the appellant be canned ten strokes and pay a sum of TZS 200,000 to the victim.

Still undaunted, the appellant has preferred this second appeal. In the memorandum of appeal he has raised seven grounds of complaint which are paraphrased as follows:

1. That, the learned trial judge erred in law and fact that the prosecution side proved the case beyond reasonable doubt against the accused person while it failed to elaborate the light energy used by PW1 to identify the appellant.
2. That, the Rapist and victim slept in different rooms hence there was no accurate light at midnight it was not favourable for the visual identification.
3. That, the prosecution witnesses in their evidence did not state the total rooms of the house and perhaps a malicious person entered

before them which cast doubt on the prosecution.

4. The appellate Court erred to order additional corporal punishment and payment of compensation.

5. The PF3 was incompetent as it did not state the duration of injuries sustained and if the victim had received prior examination.

6. That, the evidence of PW3 was not evaluated since he stated that the wounds had a week which cast doubt on the alleged rape on 21/11/2014.

7. The defence evidence was not considered.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Ms. Susan Masule, learned State Attorney.

The appellant opted to initially hear the submission of the learned State Attorney while reserving a right of reply. Addressing us on the first to the third grounds of the appellant's complaint to the effect that, on account of absence of light the victim could not identify the appellant and in view of the number of rooms at the scene of crime a malicious stranger could have made access thereto and raped the victim, the learned State Attorney argued the same to be an afterthought since they were not initially raised before the High Court. However, she submitted that, the complaints of the appellant are well addressed in the victim's account who told the trial court to have been raped by the appellant after he took her from her bedroom to the sitting room. Moreover, she contended that, the appellant in his defence did not indicate or rather testify on any incident of a stranger having stormed into the house and committed the shameful act to the victim.

In addressing the 4th ground of complaint, the learned State Attorney conceded that, the charge preferred against the appellant ought have cited section 131 (3) of the Penal Code which prescribes the proper punishment as the victim was below the age of ten years instead of section 131 (1) which is not proper. However, she was quick to point out

that, the error is curable under section 388 (1) of the Criminal Procedure Act [Cap 20 RE.2002] as no injustice was occasioned to the appellant because in the particulars of the offence it was made clear that, he was alleged to have raped a girl aged eight (8) years. To support her propositions the learned State Attorney cited to us the case of **JAMALI ALLY @ SALUM VS REPUBLIC,** Criminal Appeal No. 316 of 2017 (unreported) and urged us to enhance the sentence from a prison term of thirty years to life imprisonment.

Regarding the complaint on the PF3, the learned State Attorney urged us to expunge it from the record because after its admission, it was not read out to the appellant in the light of what was held in the case of **ROBINSON MWANJISI AND THREE OTHERS VS REPUBLIC**, [2003] TLR 218. However, she stressed that, although the medical doctor (PW4) and an expert was of the opinion that, the injuries sustained by PW1 pursuant to the rape had lasted for about two weeks, still the best evidence on the rape incident remains to be that of the victim who was a credible witness. As such, she urged us to dismiss the 5th and 6th grounds of appeal.

Addressing the complaint that the defence evidence was not considered, the learned State Attorney faulted the same arguing that, it was considered by the two courts below and properly rejected whereby in addition, the conduct of the appellant who tried to escape after the fateful incident was concluded to connect him with the rape of PW1. In conclusion, the learned State Attorney urged us to dismiss the appeal in its entirety.

In reply to what was submitted by the respondent, the appellant argued that, the Doctor (PW4) who examined the victim as mentioned in the PF3 is a different person from the one who gave his account before the trial Court. He pointed out that, while at the trial PW4 introduced himself as DR. **JERONIMO CORONEL KATABAZI**, but the PF3 was signed by Dr. **KATABAZI.**

The appellant as well faulted the prosecution for **One,** not calling the victim's mother to testify on the age of the victim by presenting the certificate of birth or the ante natal clinic card; **Two** the uncertainty of time of commission of the offence in the charge and PW1's testimony

and **three,** the failure by the prosecution to call the investigator to testify.

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 that, the fateful incident occurred when the victim and the appellant were the only persons at the scene of crime after the victim's grandmother had travelled to Dar-es-salaam. **Two,** the victim mentioned the appellant to be the assailant to PW2 and PW4 and **three,** the conduct of the appellant who attempted to escape and was arrested at Omurushaka a distant place from the scene of crime. 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 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. 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."

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, the 1st to 3rd grounds are new before the Court as they were not raised in the first appellate court. 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. In this regard,

the grounds of appeal which the appellant did not raise in the first appellate court will not be considered by the Court. On this accord in line with what was held in the case of **FELIX KICHELE AND ANOTHER VS REPUBLIC**, (supra) we reiterate what we said in the case of **RAMADHAN MOHAMED VS REPUBLIC,** Criminal Appeal No. 112 of 2006 (unreported) as follows:

> *" We take it to be settled law, which we are not inclined to depart from, 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."*

Besides, in the present case since the new grounds are matters of fact regarding the light which enabled the victim to identify the assailant and the possibility of another person having accessed the scene of crime and raped PW1, these 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, the 1st to 3rd grounds of appeal are hereby dismissed.

We have opted to address the 4th ground of appeal at a later stage.

Before addressing the remaining grounds of appeal, we deem it crucial to state that, having revisited the evidence of PW1 we are satisfied that, she was a credible witness who testified how she was ravished by the appellant when the two were left alone in the house after **PASCHAZIA TINUGA** the victim's grandmother had travelled to Dar-es-salaam. Moreover, PW1 named the appellant at the earliest moment to PW2 and PW4 who noticed that the victim was not walking properly while PW2 who examined the victim found that she was actually sexually abused. In this regard, in our considered view the impropriety by the police not to indicate the actual time when the victim was raped at night is minor as it does not go to the root of the matter on the strength of the credible evidence of PW1 which was not materially impeached as viewed by the appellant.

As earlier pointed out, we have also gathered that, the appellant faulted the prosecution in relation to the Doctor's description of the

injuries and duration thus challenging the failure by the courts below to evaluate the evidence of the Doctor. It should be remembered that, apart from the learned State Attorney submitting that, considering the nature of the offence of rape the Doctor was not obliged to describe the complained injuries, however she urged us to expunge the PF3 because of the shortcoming of not being read out to the appellant following its admission in the evidence. Moreover, she urged us to disregard the Doctor's expert evidence because it was a mere opinion of PW4 in the wake of the credible evidence of PW1.

While it is true that, the PF3 was not read over to the appellant after it was cleared for its admission the same deserves to be expunged in the light of what we said in the case of **ROBINSON MWANJISI VS REPUBLIC** (supra). We thus expunge Exhibit P'1' from the record. However, in the light of testimonial account of the Doctor PW4 who we do not doubt that he examined the victim and considering that, the medical evidence does not prove rape, we found the Doctor's evidence not to have materially contradicted the credible evidence of PW1 that she was raped by the appellant on 21st November, 2014. As such, we

agree with the learned State Attorney that, the 5th and 6th grounds of appeal are without merit.

The appellant faulted both the courts below for not having considered his defence. We found this ground baseless because at page 27 of the record of appeal the defence of the appellant was considered and rejected by the trial court on the basis of the credible account of the victim and the conduct of the appellant who tried to escape after the incident. This was confirmed by the High Court at page 58 of the record of appeal whereby the first appellate court in dismissing the complaint on existence of grudges between PW1's father and the appellant, accepted the trial magistrate's rejection of the defence evidence on ground that, on the fateful night, those present at scene of crime were solely the victim and the appellant who later tried to escape but was arrested at Omurushaka. In this regard, we cannot fault the courts below to have not considered the defence as viewed by the appellant and we accordingly dismiss the 7th ground of appeal. In addition, we have the appellant's conduct leaving a lot to be desired. We say so because after the incident he attempted to escape as per the evidence of PW1, PW2 and PW4. Being an adult person who was entrusted with protection of

the victim, his conduct after the commission of the offence points the accusing finger to him and corroborates the evidence to the effect that he was a culprit and that is why he opted to escape after committing the shameful incident.

In the 4th ground of appeal, the appellant faulted the High Court in varying the penalty imposed by adding ten strokes of the cane and payment of compensation to the victim. We have conveniently linked this complaint with that of not having called the victim's mother as a witness so that she could present the victim's certificate of birth or the ante natal clinic card to prove the age of the victim as argued by the appellant. It was the contention of the learned State Attorney that, the infraction to cite section 131(3) of the Penal Code was curable under section 388 (1) of the CPA and as such, she urged us to impose life imprisonment as prescribed under section 131 (3) of the Penal Code because the victim was below the age of ten years.

In the case of **EDWARD JOSEPH VS REPUBLIC,** Criminal Appeal No 19 of 2009 (unreported) the Court said:

" Evidence of a parent is better than that of medical Doctor as regards the parent's evidence on the child's age."

Moreover, in **IDDI S/O AMANI VS REPUBLIC,** Criminal Appeal No 184 of 2013 (unreported) the appellant faulted the prosecution in not having tendered the certificate of birth to prove the age of the victim. The Court had to rely on the evidence of the father as being better placed to prove the age of the victim having observed that, after all the contents of birth certificate by and large depend on the information received from the parents.

In our considered view, since PW4 testified that the victim was his 8 years old granddaughter, who was staying with his mother, he was better placed to know the age of the victim. Besides, such evidence was not disputed by the appellant who did not cross-examine PW4 on that aspect. In this regard, the appellant did acknowledge that the victim was 8 years old. Therefore, in the light of what we said in the very recent case of **JAMALI ALLY SALUM @ SALUM VS REPUBLIC** (supra), we are satisfied that, the non citation of section 131(3) in the charge sheet did

not in any way prejudice the appellant considering that, in the particulars it was clearly stated that, the victim was eight (8) years old which was supported by PW4's account. Thus, we agree with the learned State Attorney that the omission to cite section 131(3) of the Penal Code is curable under section 388(1) of the CPA on account of not having occasioned injustice to the appellant.

In view of the aforesaid, in terms of section 131 (3) of the Penal Code the offence at hand is punishable as follows:

> *"Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

In the light of the cited provision, with respect, we thus fault the first appellate court in not enhancing and imposing the lawful sentence as required by the law after confirming that the appellant raped the victim. We thus find the 4th ground of appeal not merited and in this regard, we substitute the appellant's sentence of thirty years with that of life imprisonment.

In view of what we have endeavoured to discuss we find the appeal not merited and it is hereby dismissed in its entirety.

DATED at **BUKOBA** this 8th day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL