IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: JUMA, C.J., MZIRAY, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO 310 OF 2017

NASIBU RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. Mwambegele, J.)

dated the 2nd day of June, 2014

in

Criminal Appeal No. 52 of 2013

JUDGMENT OF THE COURT

07th & 08th November, 2019 &

JUMA, C.J.:

The appellant NASIBU RAMADHANI was in the District Court of Mpanda, charged with the offence of rape contrary to sections 130 (2) (e) and 131 of the Penal Code, Cap 16 [R.E. 2002]. The particulars were that the appellant, on 10/11/2012 at or about 02:00 hrs. at Majengo area in Mpanda District, had unlawful sexual intercourse with a girl aged 14 years, who we shall identify as **PW3**.

The facts giving rise to this second appeal arose from a routine police patrol over the Majengo area of Mpanda township around 02:00 hrs. on 10/11/2012. WP 8243 Detective Mwanaidi (PW2), Inspector Mafie and Corporal Yohane who were in a patrol car. They stopped their car by when they heard cries from inside a guest house in the area. The police officers knocked at the main entrance door to the guest house, PW2 testified that there was no response. After a few more knocks without any response, the police forced their way into the reception desk area. The guest attendant (Irene Enos) deeply asleep; she had apparently slept through the noises. The attendant led the police to a guest room Number **'S'**, where, after a knock at the door, the appellant opened the door. The police identified themselves and asked about the noises. The appellant explained to PW2 and fellow officers that he was sharing that room with a girl he identified as his daughter, PW3. Inspector Mafie asked the appellant to step out of the room to allow PW2 space to interview the victim privately.

PW3 testified on how she ended up in that guest house room with the appellant. She explained how at 6 a.m. on 9/11/2012 she was at Tutuo bus stop waiting for a bus to take her to Inyonga. The appellant was the driver of a bus christened AIR BUS which she boarded to take her to Inyonga. According

to PW3, the bus did not stop at Kasisi where she was supposed to end her journey but travelled on Inyonga where she stepped out of the bus. A woman asked her why she seemed worried. She explained how she forgot to disembark at Kasisi. The woman volunteered to take her to a nearby mosque, where her plight would be publicised and her parents would get to know where she was. Somehow, the appellant heard these exchanges, and stepped in to assist PW3. He successfully persuading her to get back in the same bus, and travel on to Mpanda where he promised to a place for her to spend the night. He further promised that the following day, while driving back to Tabora, he would drop her at Kamsisi.

PW3 narrated that she boarded back into the AIR BUS, which finally arrived at Mpanda around 14:00 hrs. The appellant took her to a place where he bought her food to eat. He then took her to a guest house to sleep and promised to pick her up the following day. PW3 recalled that she was asleep in her room around 02:00 hrs when she saw the appellant, already inside her room. He was undressing, and also directing her to do the same. When she resisted, the appellant forcefully undressed her. His first attempt to sexually penetrate her vagina failed. He lubricated his penis with some oil which enabled

him a slight penetration. According to PW3, it was while she was crying out in pain when the police entered the room and arrested the appellant.

The prosecution also relied on the evidence of a clinical officer, Madona Chambuso (PW4), who tendered a medical examination report (PF3) which the learned trial magistrate admitted as exhibit P2.

In his defence, the appellant denied the accusation. He reasoned that at his old age, with grown-up daughters and grand-daughters of the victim's age, he could not have committed the alleged rape. The victim, he added, was too young for him to even contemplate any sexual intercourse.

The learned trial magistrate, C.M. Tengwa—RM was satisfied that the appellant raped PW3. He thus convicted the appellant sentenced him to serve thirty (30) years imprisonment. His first appeal to the High Court sitting at Mpanda was dismissed by Mwambegele, J. (as he then was). The first appellate Judge enhanced his sentence of thirty years to include corporal punishment of twelve strokes of the cane and compensation to the victim of the rape.

Still determined to overturn his conviction and enhanced sentence, the appellant has preferred this second appeal relying on six grounds of appeal.

At the hearing of appeal on 7/11/2019, the appellant appeared in person and preferred to let the State Attorneys to first submit in response to his six

grounds of appeal. The learned Senior State Attorney Mr. Fadhili Mwandoloma, appeared together with Ms. Safi Kashinde Amani for the Respondent DPP. Mr. Mwandoloma informed us that he will oppose this appeal. In addition, he urged us to disregard the appellant's **first**, **second, third** and **fifth** grounds of appeal because these are new grounds which were not raised and considered by the first appellate High Court. To support his position that the appellant should not be allowed to sneak new grounds which were not considered by the first appellate court, he referred us to excerpts of legal position which this Court had staked its position over new grounds of appeal in **GODFREY WILSON V. R.,** CRIMINAL APPEAL NO. 168 OF 2018 and **GEORGE MALIKI KEMBOGE V. R.,** CRIMINAL APPEAL NO. 327 OF 2013 (both unreported). In **GODFREY WILSON V. R.** (supra) the Court stated:

> *"...On our part, we subscribe to the above decisions. After having looked at the record critically we find that, as the learned State Attorney submitted, grounds Nos 1, 2, 3, 5, 6, 7 and 8 are new. With an exception of the 6th ground of appeal which raises a point of law, as was said in* ***Galus Kitaya v. R.,*** *Criminal Appeal No. 196 of 2015 and* ***Hassan Bundala @ Swaga, v. R.,*** *Criminal Appeal No. 386 of 2015 (both unreported) cases, we think that those grounds being*

new grounds for having not been raised and decided by the first appellate court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate court went wrong or right. Hence, we refrain from considering them."

With grounds of appeal number 1, 2, 3 and 5 out of equation, Mr. Mwandoloma urged us to dismiss the remaining ground number 6, which contended that the prosecution failed to prove the charge of rape against the appellant beyond reasonable doubt. He referred us to the evidence of the victim (PW3) which appears in lines 19 to 25 on page 12 of the record of appeal.

He submitted that what PW3 eloquently stated in her evidence, proved the offence of rape. PW3 testified that: —

"Surprisingly, I saw the accused inside the room undressing himself. He told me to take off my clothes. I refused. He forcefully undressed my skintight and under pant. He pushed his penis into my vagina. It failed to penetrate. The accused took oil and lubricated his penis and forced it again. It penetrated slightly. He told me

that I was tightening my thighs. He started slapping me and told me to stop shouting. While shouting I heard a knock at the door and the accused person put on a towel and opened the door. The woman police entered into the room and started to inspect my private parts. ....."

Mr. Mwandoloma saw all the ingredients of rape in the evidence of PW3, which in his view can sustain the conviction of the appellant on its own weight. He submitted further that evidence of the victim of sexual offence can, in terms of section 127 (7) of the Evidence Act, Cap. 6 R.E. 2002, stand alone to sustain a conviction:

> *"127 (7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*

To support his stance that the evidence of PW3, the victim of sexual offence contains all the ingredients of rape sufficient to stand on its own feet and sustain conviction, Mr. Mwandoloma cited the decision of the Court in **DAUDI SHILLA V. R.,** CRIMINAL APPEAL NO. 117 OF 2007 (unreported) and **SELEMAN MAKUMBA V. R.** [1992] T.L.R. 379. In **DAUDI SHILLA V. R.** (supra) the Court observed:

> *"The evidence of the complainant on what the appellant did to her is detailed and she missed no word. All the ingredients of the offence were given in her evidence. By then she was fourteen years. The Court in* ***Seleman Makumba Vs R ...*** *said: -*
>
> *'The evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman, consent is irrelevant that there was penetration'...."*

Mr. Mwandoloma further submitted that the evidence of the police woman (PW2) who was at the scene of crime, supported PW3's account that the appellant raped her. He submitted that PW2 testified on how the police found the appellant and PW3 sharing the same guest room. PW3 was half-naked and the appellant was wrapped-up only in a towel when the police arrived. Mr.

Mwandoloma referred us to the evidence where PW2 spent a few moments alone with PW3 and inspected the victim's private parts. That PW2 testified on how she found PW3's private parts smeared with lubricants, just as the victim had stated in her evidence.

The learned Senior State Attorney rounded up his submissions on sixth ground by inviting us to conclude that the prosecution proved beyond reasonable doubt that the appellant raped PW3.

The appellant in his fourth ground of appeal had contended that since Madona Chambuso—PW4 (the clinical officer who medically examined the victim) had found only **"bruises and sperms mixed with blood,"** no rape could in such medical circumstances, be said to have occurred. Mr. Mwandoloma pushed back against this argument; pointing out that in sexual offences the overriding evidence is proof of penetration. He cited the position which this Court took in **NYEKA KOU VS. R.,** CRIMINAL APPEAL NO. 103 OF 2006 (unreported) and submitted that as long as penetration is proved, presence or otherwise of the offender's semen will be of little or no significance. In **NYEKA KOU VS. R.** (unreported) the Court stated: *"In law, to have sex with a woman, even with the slightest penetration into the woman's*

vagina by the male organ, without the woman's consent (where consent is relevant), is rape."

In so far as proof of penetration is concerned, Mr. Mwandoloma referred us to the evidence of PW3 which, he submitted, proved penetration, albeit slight. That, PW3 testified on how, after much pushing and lubricating of his penis, the appellant managed to slightly penetrate her. This slight penetration, Mr. Mwandoloma submitted, is sufficient under section 130 (4) (a) of the Penal Code Cap. 16 to make the offence of rape complete. Section 130 (4) of the Penal Code states:

> *130 (4) For the purposes of proving the offence of rape–*
>
> > *(a)* ***penetration however slight is sufficient to constitute the sexual intercourse*** *necessary to the offence;* [Emphasis added].

Mr. Mwandoloma concluded his submissions on ground four by urging us to find that the offence of rape was proved beyond reasonable doubt and the first appellate court was correct to dismiss the appellant's appeal and to enhance his sentence. This Court, he urged, should similarly dismiss this appeal in its entirety.

In his brief response, the appellant vainly tried to resurrect such matters of facts as proper names of guest house and why the guest house attendant (Irene d/o Enosi) did not testify. After realizing that sitting on second appeal we have no jurisdiction to entertain matters of fact, he urged us to still invoke our wisdom to allow his appeal.

Having ourselves looked at the four grounds of appeal which Mr. Mwandoloma urged us to discard, it is apparent to us that indeed, grounds number 1, 2, 3 and 5 are completely new grounds and they appear for the first time before this Court. Apart from the fact that they were never raised and considered by the first appellate court; they do not raise any point of law to vest the Court with jurisdiction. These grounds of appeal number 1, 2, 3 and 5 are hereby discarded.

From the vantage point of sitting on second appeal, and after hearing submissions of parties on the fourth and sixth grounds of appeal, we found no reason to interfere with the concurrent finding of facts by the trial and the first appellate courts regarding the appellant having sexual intercourse with the then 14-year old PW3. The law under section 130 (2) (e) of the Penal Code is clear, sexual intercourse with a girl under 18 is Rape, with or without her consent.

The first appellate court agreed with the findings of facts by the trial district court that the appellant was the one who raped PW3. Mwambegele, J. (as he then was) stated:

> *"...It is my considered opinion that the victim's evidence was cogent enough and that she was able to direct herself to the ingredients of the offence, more importantly penetration. She testified that the appellant's penetrated slightly. At law, this was enough to establish a very important ingredient of the offence of rape. The extent of penetration does not matter. It is elementary law that, penetration, however slight it may be, is enough to prove sexual intercourse [see section 130(4) (a) of the Penal Code, Cap. 16 of the Revised Edition, 2002].*
>
> *The evidence of the victim was corroborated by PW2; a police woman who arrested the appellant. It was also corroborated by PW4; a clinical officer who examined the victim and prepared the relevant PF3 which was tendered and admitted in evidence as exhibit P2. According to PW4 and exhibit P2, there was 'ulceration to labia majora and hymen perforated.'...."*

There is no dispute from the evidence on record that the appellant slept with PW3 in the same room when the police arrived to arrest him. Under cross-

examination, the appellant admitted that he rented the room and slept with the complainant in the same room but weakly retorted that they slept in different beds.

There is no doubt in our minds that when the fourteen-year old girl (PW3) found herself stranded at Kasisi bus stop well ahead of Inyonga where she was supposed to alight from the bus driven by the appellant, she became vulnerable to potential sexual predators. The woman, who offered to take PW3 to a nearby mosque, at very least appreciated PW3's vulnerability on account of her tender age. Similarly, when the appellant as responsible bus driver stepping in to assist the stranded girl of tender age, he was assuming the role of "a person of authority" within the meaning of section 130 (3) (a) of the Penal Code which provides:

> *"130 (3) Whoever–*
>
> *(a) being a person in a position of authority, takes advantage of his official position, and commits rape on a girl or a woman in his official relationship or wrongfully restrains and commits rape on the girl or woman;"*

Being a driver of a public bus service vehicle, the appellant assumed a position of authority over his vulnerable passenger, and the law prohibits him from taking sexual advantage of his position of trust.

We agree with the learned Senior State Attorney that the evidence of the victim disclosed the necessary ingredient of rape. We similarly agree that the evidence of the victim of sexual offence can stand on its own feet to secure a conviction. As this Court referred to the import of section 127 (7) of the Evidence Act in **BAKARI HAMISI VS. R**, CRIMINAL APPEAL NO. 172 OF 2005 (unreported), a conviction may be founded on the evidence of the victim of the rape if the court believes, for the reasons to be recorded, that the victim witness is telling nothing but the truth. It is also appropriate to recall that under *voire dire* examination PW3 demonstrated intelligence and awareness of her duty to speak the truth. After *voire dire* the trial magistrate stated:

> ***"COURT:*** *Upon my keen examination of the questions and answers asked it is vivid that the child has demonstrated her highest intelligence and understanding. She is aware of the duty of speaking the truth and the consequence of breaching the same. Moreover, she understands the meaning of oath. This court, therefore, finds her competent enough to testify under oath.*

Sgd. CM Tengwa RM
22/4/2013"

On our part, we cannot interfere with concurrent findings of fact in the trial district court and the first appellate court that the appellant had sexual intercourse with the then a 14-year-old PW3.

As a result, this appeal is devoid of merit and is hereby dismissed.

DATED at **MBEYA** this 8th day of November 2019.

I. H. JUMA
CHIEF JUSTICE

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

The Judgment delivered this 8th day of November, 2019 in the presence of Nasibu Ramadhani, the Appellant appeared in person and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL