IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 77 OF 2017

JULIUS KANDONGA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Levira, J.)

Dated the 6th day of March, 2016

In

Criminal Appeal No. 91 of 2016

JUDGMENT OF THE COURT

23rd October & 4th November, 2019
MKUYE, J.A.:

In the District Court of Chunya at Chunya, the appellant Julius Kandonga, was charged with the offence of rape contrary to section 130(1) and (2) (e) and 131(1) of the Penal Code, Cap 16 RE 2002. It was alleged that on or about the 3rd day of May, 2016 at Sinjilili Village, within Chunya District and Mbeya Region, the appellant did

have carnal knowledge of GP (name withheld), a girl aged three (3) years old. Upon a full trial, the appellant was convicted and sentenced to life imprisonment with a corporal punishment of fourteen (14) strokes of the cane. The appellant, being aggrieved, appealed to the High Court of Tanzania at Mbeya vide Criminal Appeal No. 91 of 2010 but his appeal was dismissed for lack of merit. Still protesting his innocence, he has preferred an appeal to this Court.

In order to prove the case, prosecution fielded four (4) witnesses, that is, the victim's grandmother Tabita Mwakyusa (PW1), the victim's mother Oliva Edson Mwakyusa (PW2), the victim of the alleged offence GP (PW3) and the Clinical Medical Officer at Chunya District Hospital, Lazaro Ernest (PW4). For the defence, only the appellant testified though he had initially, indicated to call two more witnesses.

The facts leading to this appeal run as follows: On 3rd May, 2016 at about 07:30 hrs, PW1 sent GP who was together with one Said to buy a razor blade from a nearby shop. They did not come home early

as they would have been expected. PW1 decided to follow them. On reaching at the shop she did not see PW3 and upon inquiry, Said who was outside the house where PW3 had entered, informed her that GP was inside the house where Baba Alpha had called her. PW1 called GP who came out from that house after two minutes and they went home. Since PW1 was not a resident of that village, she just came to visit her daughter PW2 after having given birth, she left on the same day to her home in Tukuyu.

Meanwhile, on the following day, that is on 4th May, 2016 at about 13:00 hrs, PW2 sent PW3 to buy soap from the same shop. However, PW3 refused. She said *"Siendi Baba Alpha yule pale anapigilia nyundo."* Literally translated, *"I am not going because Alpha's father is there hammering"*, whatever that means. On inquiring as to what was wrong with him, PW3 told her that *"alikuwa ananiwekea dudu huku chini."* Literal translation, *"he was inserting his manhood into my private parts".*

PW2 testified that she examined her private parts and discovered some dirty fluid discharging from her vagina. She, together with her young sister Diana Tabara, took her to the hospital where she was medically examined.

According to PW3 whose evidence was taken without oath after the *voire dire* test was conducted, one day while she was accompanied by one Said to buy a razor blade at the shop, she was called by the appellant to his house. She left Said outside and entered inside the house where the appellant required her to lie down on the plaited mat; he undressed her clothes and his trousers; and inserted the penis into her mouth and then into her vagina. Thereafter she heard her grandmother (PW 1) calling her and she went outside and returned home.

At the hospital where PW3 was taken by her mother, she was examined by PW4 who found that she had been raped. In his testimony PW4 explained that on examining PW3, it was revealed that

her vagina was smelling and some white fluid containing human being sperms was discharging from it. PW4 filled the PF3 thereof and was tendered as Exh. P1.

In his defence, the appellant did not agree or deny the charge levelled against him. He basically gave a narration on how he was arrested.

Upon the conclusion of the trial, the trial court was satisfied that the prosecution proved the case against the appellant beyond reasonable doubt since; **one,** there was no grudge between PW2 and the appellant which could culminate into PW2 couching PW3 to implicate the appellant; **two,** PW3 knew the appellant and her evidence was credible in explaining by pointing the place where the so called *"sarafu"* (penis) was inserted in her mouth and vagina and equating the said *"sarafu"* with a finger; and **three,** failure by the appellant to explain as to where he was at the said 07:30 hrs when the offence was committed.

In the High Court, the trial court's decision was upheld as it found that the victim was actually raped by the appellant who was properly identified by the victim.

The appellant has filed this appeal on ten (10) grounds of grievance. However, it transpired that the 2nd and 6th grounds were new as they were not dealt with by the first appellate court. The appellant prayed to abandon them and we marked them abandoned. The remaining grounds are to the effect that **one;** the prosecution failed to prove the case beyond reasonable doubt; **two,** the testimony of PW2 was a hearsay evidence and that PW4 was not qualified to fill the PF3 as he was a Clinical Officer; **three,** no investigator was summoned to testify in court; **four,** the white fluid which comprised human being sperms from the victim's vagina was not taken to the Government Chemist for DNA test to determine if it came from the appellant, **five,** the PF3 was admitted by trial court without conducting an inquiry after he had objected to its admission; **six,** penetration on

PW3 was not proved as the victim was not found with bruises in her vagina; **seven,** the first appellate judge dismissed the appeal due to weakness of the defence evidence; and **eight,** the charge sheet was not proved beyond reasonable doubt.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented; whereas the respondent Republic was represented by Mr. Ofmedy Mtenga, learned State Attorney. When the appellant was called on to amplify his grounds of appeal, he sought to adopt them without more and prayed to the Court to consider them, allow the appeal and release him.

On his part, Mr. Mtenga prefaced his submission by declaring his stance of not supporting the appeal. Responding to the appeal generally, as he was of the view that all the grounds boiled down to the first ground of appeal that the prosecution failed to prove the charge against the appellant beyond reasonable doubt as required by the law;

Mr. Mtenga submitted that though PW3 gave unsworn evidence, her evidence was credible to the extent that even the trial court did not doubt it. He contended further that, PW3 explained to the court on how Baba Alpha who came to be confirmed by PW2 to be also known as Julius Kandonga, took her to his house and inserted the *"sarafu"* on her mouth and in her private parts. He added that, on 4th May, 2016, PW3 was afraid to go to the shop where her mother had sent her to buy soap because Baba Alpha was there contending that "*Baba Alpha yule pale anapigilia nyundo"* and explained further that he was inserting his manhood into her vagina: "*alikuwa ananiwekea dudu huku chini".* He further added that, her evidence was corroborated by PW4 who examined her and found that she was raped and saw a discharge of fluid containing human being sperms.

Mr. Mtenga submitted further that, PW3's evidence was also corroborated by the evidence of PW1 who had sent her and a certain Said to buy a razor blade and made a follow up after being late to

come back and found Said outside who then told her that PW3 was inside Baba Alpha's house; and when she called her, PW3 came outside from that house after two minutes suggesting that the appellant was ravishing the victim. Mr. Mtenga insisted that, the evidence of PW1, PW2 and PW4 corroborated the evidence PW3. On that account, he urged the Court to find that the ground of appeal that the charge was not proved beyond reasonable doubt had no merit and dismiss it.

In relation to ground No. 2 relating to the PF3 which was filled by the Clinical Medical officer, the learned State Attorney contended that as the issue involved rape, it did not require a highly qualified personnel in medicine to detect rape. He did not produce any authority to support his proposition.

As to failure to call the investigator to testify in court as complained in ground of appeal No. 4, the learned State Attorney contended that section 143 of the Evidence Act, Cap, 6 RE 2002 (the Evidence Act) did not require any specific number of witnesses to prove

a fact in issue. He was of the view that what was required was the witness who could prove the case.

With regard to ground of appeal No. 5 relating to failure to conduct DNA examination on the fluid discharging from PW3's vagina to ascertain if it came from the appellant, Mr. Mtenga urged us to find that it is baseless as the offence of rape can be proved without such DNA and in this case, he said, PW1, PW2, PW3 and PW4 sufficiently proved the offence of rape. On the totality of their submissions, the learned State Attorney prayed to the Court to find that the appeal has no merit and dismiss it.

In rejoinder the appellant insisted that the prosecution witnesses were not credible.

We have examined the rival submissions from both sides and, we think, the issues for our determination are **one**, whether PW3 was

raped and **two**, whether it was the appellant who raped the victim (PW3).

With regard to the first issue as to whether PW3 was raped, we agree with the learned State Attorney that it was amply proved that PW3 was so raped. We are aware that PW3 who was the key witness gave unsworn evidence after a *voire dire* test was conducted in terms of section 127 (2) of the Evidence Act, Cap 16, RE 2002 and the trial court made a finding on among others, that the witness could not take oath or affirmation as she could not know the nature of oath *"but can have something to tell the court".* In the trial court's judgment the trial magistrate explained that since she had rational answers the court believed that despite her age "but can have something to tell the court." We have considered this finding and the observation of the trial court and, we think, it is pregnant with meaning. Though the court finding might not be elegantly recorded, given the peculiarity of the case that the witness was 3½ years old and in the interest of justice, we think, this matter must be considered on its own peculiar

circumstances. In this regard, having considered the evidence adduced by PW3 as shown at pages 16 to 17 of the record of appeal which was lucidly given, we are of the considered view that by recording that *"but can have something to tell the court"* the trial court meant that, in its assessment, the witness possessed sufficient intelligence for reception of her evidence and knew the duty of speaking the truth, in terms of section 127(2) of the Evidence Act and thus she was allowed to testify without oath.

Despite the fact that PW3 gave unsworn evidence, as was rightly stated by the State Attorney, she lucidly narrated on how the appellant on the material day called her into his house and inserted his male organ into her mouth and then in her vagina on a promise of giving her sweets. Though her evidence under normal circumstances could have required to be corroborated under section 127 (7) of the Evidence Act, which was applicable at the time of the commission of the offence, the conviction is allowed to be founded on

uncorroborated evidence of a victim of rape upon the court believing for reasons to be recorded that the victim is telling nothing but the truth. The said section 127 (7) of the Evidence Act provides as follows:

> *"Notwithstanding the proceeding 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*** *(sic) or 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."***

[Emphasis added]

The above cited provision was elaborated in the case of **Kimbute Otinieli V. Republic** Criminal Appeal No. 300 of 2011 (unreported) that:

> "*Where the court does not conduct a voire dire then the evidence of a child witness must be corroborated for the purpose of determining whether he or she is telling the truth. That section 127 (7) is not intended to serve as an alternative legal basis for admitting or acting upon evidence which would otherwise not be admissible under section 127 (2).* ***That subsection 7 is only intended to abolish, in all trials involving sexual offences, the requirement under the common law rule of practice that the evidence of a child witness, a victim of sexual offence or a sole witness, must, whether given by a sworn witness or an unsworn child witness in fully compliance with section***

127 (2) must be corroborated to sustain a conviction".

[Emphasis added]

Nevertheless, it is also well established that in sexual offences cases, the best evidence is that of the victim. (See **Selemani Makumba Vs. Republic,** [2006] TLR 379.

There is no gainsaying that, in this case, basically, the evidence that PW3 was raped, came from the victim alone. Her evidence was recorded after a *voire dire* examination was conducted and found that she did not know the nature of oath but possessed intelligence for reception of her evidence and knew the duty of speaking the truth as we have construed earlier on. On the basis of the above stated principles of law, her evidence was credible and could be relied upon to sustain the conviction without corroboration.

In this case, however, there are other witnesses who corroborated her evidence. PW1 explained on how on 3rd May, 2016

she sent PW3 and one Said to buy a razor blade from the shop and on being late to come back home, she followed them and found Said outside the house but he informed her that PW3 was inside Baba Alpha's house and on calling her, she came out from that house.

PW2 also narrated on how on the following day on 4th May, 2016, PW3 refused to go to the shop where she had wanted her to go and buy a soap while alleging that "*Baba Alpha yule pale anapigilia nyundo*" and that "*alikuwa ananiwekea dudu huku chini*". PW2 explained how on examining her she found dirty liquid emitting from her private parts and when she was taken to the hospital it was confirmed that she was raped. For that matter her evidence cannot be said was hearsay. In addition, PW4 who examined PW3 revealed that the victim was raped and he in fact saw the victim's private parts emitting liquid containing human being sperms. In our considered view, PW1, PW2 and PW4 who were credible witnesses proved that PW3 was raped.

We are aware that the appellant raised two complaints regarding PW4's testimony. That the PF3 was filed by unqualified doctor; and that the sperms found in PW3's vagina was not subjected to DNA test to determine whether they came from him.

With regard to the first limb of complaint, we agree with the learned State Attorney that PW4 was a qualified personnel to detect rape. In this regard, PW4's evidence on that aspect cannot be faulted. At any rate, it is noteworthy that the PF3 contains an expert opinion which is not binding to the court. And more importantly, it has been the position of this Court that the best evidence in a sexual offence case comes from the victim herself/himself - see **Selemani Makumba** supra.

As regards the second limb of complaint that the DNA test was not done, we equally agree with the learned State Attorney that the offence of rape is not proved by sperms but can be proved without such DNA. On this we have in mind the provisions of section 130(4)

(a) of the Penal Code which provides that penetration however slight is sufficient to establish rape. The said provisions provides:

> *"For purpose of proving the offence of rape:*
>
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and."*

In this regard the existence of sperms or not is immaterial to prove sexual intercourse in sexual offences cases.

As to the second issue whether it was the appellant who committed the offence, the appellant did not agree or deny the commission of offence apart from his narration regarding his arrest. The evidence on record of appeal, however, shows that PW3 explained on how the appellant who was well known to her called her to his house. At this juncture we find it appropriate to leave the record of appeal to speak for itself:

"One day I was called by Baba Alpha and he required me to enter inside his house, on that day I was with Said s/o ... When Baba Alpha called me inside his house I left Said s/o ... outside the house.

Baba Alpha required me to lay down on the plaited mat "mkeka" I complied he undressed my clothes, he also halfly undressed his trouser, he took his sarafu "penis" put the same into my mouth, he later on put the sarafu in my vagina ... Later on I heard my grandmother calling me. I went outside and saw my grandmother, we returned back home. When I was asked by mother I told my mother that, Baba Alpha put sarafu in my mouth as well as in my vagina."

PW3's evidence was corroborated by PW1's evidence who, as we have alluded to earlier on, retrieved her from Baba Alphas house. As to who was Baba Alpha, PW2 clearly explained as shown at page 14 of the record of appeal that he was also known to other people as Julius

Kandonga but in the street where they were living together he was referred to as Baba Alpha. And in fact, if we may add, the appellant during the hearing of this appeal admitted that he is also known as Baba Alpha. So with the evidence available we are settled in our mind that it was the appellant who raped the victim.

There was also among the complaints by the appellant of failure by the prosecution to call an investigator to testify in court. However, as was correctly argued by the learned State Attorney, according to section 143 of the Evidence Act, there is no specific number of witnesses required to prove a fact in issue. What was required was the witnesses who could prove the case. (see **Yohanis Msigwa v. Republic**, [1990] TLR 148; and **Hassan Juma Kenenyera v. Republic,** [1992] TLR 100). In our considered view, the available witnesses sufficiently proved the case beyond reasonable doubt.

For the reasons we have endeavored to outline, we find the appeal to have no merit and, hence, dismiss it in its entirety.

Order accordingly.

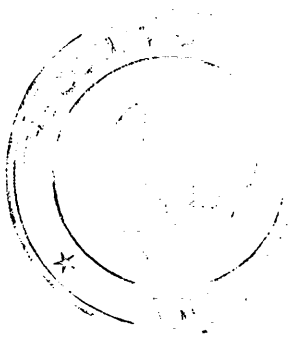
DATED at **MBEYA** this 1st day of November, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 4th day of November 2019 in the presence of the appellant in person, unrepresented 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