

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 434 OF 2016

NYAKUBOGA BONIFACE ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

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

(De-Mello J.)

dated the 13th day of June, 2017

in

Criminal Appeal No. 144 of 2017

JUDGMENT OF THE COURT

25th & 29th November, 2019

MWANGESI, J.A.:

Nyakuboga s/o Boniface, who happens to be the appellant herein, was indicted for trial at the District court of Tarime, with the offence of rape contrary to the provisions of section 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap 16 R.E. 2002 (**the Code**). It was the case for the prosecution that, on the 4th day of May, 2016 at about 13:09 hours, at Kibuyi village within Rorya District in the Region of Mara, the appellant, did rape a girl aged about ten years, whom we shall thenceforth identify her as

N. d/o K., for purposes of concealing her identity. He resisted the charge when it was put to him.

In its endeavor to establish the commission of the offence by the appellant, the respondent/Republic, paraded six witnesses to give their testimonies namely, N. d/o K. (PW1), Jesca James (PW2), Vaileth Matiko (PW3), WP. 8111 Detective Constable Fatuma (PW4), E. 1230 Detective Corporal John (PW5), and Martin Gebo Malebo (PW6). The evidence of the prosecution witnesses, was supplemented by only one exhibit, which was a Police Form Report (PF3), which was admitted as exhibit P1. On his part in defence, the appellant relied on his sworn testimony only, and called no any witness to beef up his defence.

The finding of the learned trial Resident Magistrate, after considering the evidence placed before her, was to the effect that the case against the appellant, had been established to the hilt. The appellant, was therefore convicted as charged, and sentenced to the mandatory term of thirty (30) years' imprisonment. The finding and sentence of the trial court, were upheld by the first appellate Judge, in the High Court. Still undaunted, the appellant has come to this Court in a second appeal, premising his grievance on three grounds namely; -

1. *That, in the absence of DNA test, the prosecution case was bound to crumble, so far as medical examination report (PF3) had no evidential value to link the appellant.*
2. *That, the trial court and the first appellate court, had took no cautious (sic) as to PW2 Jesca James, whose evidence was unworthy of belief in as much as she had interest to serve against the appellant.*
3. *That, the lower court's findings over in-fragrante delicto (red handed) was rather suspiciously delivered by PW2, so much as PW2 was not eye witnessed (sic) the appellant raping the victim so un-cogent and unreliable.*

When the appeal was called on for hearing before us, Ms. Mary Yasinta Lazaro, learned Senior State Attorney, teamed up with Ms. Sabina Choghoghwe, learned State Attorney, to represent the respondent/Republic, whereas the appellant, entered appearance in person, legally unrepresented. Upon the appellant being invited to address us on the grounds of appeal, he implored us to adopt the grounds of appeal in the way they appear in his memorandum of appeal, and invite

the learned Senior State Attorney, to respond, while reserving his right of rejoinder, if need be.

On her part, before responding to the grounds of appeal raised by the appellant, Ms. Lazaro, submitted that from the three grounds of appeal which have been raised by the appellant, two of them did not feature in the appeal before the first appellate court, that is, the first and third grounds of appeal. That being the case, those grounds were not determined by the first appellate court, which renders this Court, to lack jurisdiction to deal with them. Placing reliance on the provisions of section 6 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (**the AJA**), and the holding of this Court, in **Festo Domisian Vs Republic**, Criminal Appeal No. 447 of 2016 (unreported), she urged us to disregard or strike out those two grounds of appeal, and proceed to consider the merits of the second ground of appeal only.

Responding to the second ground of appeal, wherein the two lower courts, have been challenged for giving credit to the testimony of PW2 and using it to found conviction to the appellant, the learned Senior State Attorney, argued that such challenge has no basis. It was her firm argument, that PW2 was a credible witness, whose testimony was so

detailed, revealing on how the appellant committed the offence, and the way he was found red handed by PW5. She argued further that, the fact that the trial court, which had the advantage of assessing her demeanour, believed her to be a credible and reliable witness, there was no way in which this Court, being a second appellate Court, could doubt the assessment which was made by the trial court. In so asserting, she sought refuge from the holding in **Edson Simon Mwombeki Vs Republic**, Criminal Appeal No. 94 of 2016 (unreported). In that regard, Ms. Lazaro, urged us to dismiss the appeal in its entirety for want in merits.

What stands for our deliberation and determination in view of the submissions from either side above, is whether PW2, was a credible witness. To begin with, we would wish to make it plain that any person, who is a competent witness in terms of the provisions of section 127 of the Law of Evidence Act, Cap. 6 R.E. 2002 (**the TEA**), is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not. See: **Goodluck Kyando Vs Republic** [2006] T.L.R. 363.

There are no rules of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour

of the witness, has been assessed by the presiding Judge/magistrate, and the assessment which is made to the evidence which he/she gives in court. This is because the assessment of demeanour, is the monopoly of the presiding Judge/magistrate. This Court in **Yasin Ramadhani Chang'a Vs Republic** [1999] T.L.R. 489, made a general observation in regard to demeanour of a witness, when it stated thus:

"Demeanour is exclusively for the trial court. However, demeanour is important in a situation where from the totality of the evidence adduced, an inference or inferences, can be made which would appear to contradict the spoken words."

What we gather from the above observation, is the fact that observation and assessment of the demeanour of a witness, is in the exclusive monopoly of the trial Judge/magistrate. Moreover, besides observing the appearance of the witness, in resolving as to whether the witness is trustworthy and telling the truth, the trial Judge/magistrate, is enjoined to correlate the demeanour of the witness, and the statements he/she makes during his/her testimony in court. If they are not consistent, then the credibility of the witness, becomes questionable.

In view of the foregoing therefore, the monopoly of the trial court in assessing the credibility of a witness, is limited to the extent of the demeanour only. But, there are other ways in which the credibility of the witness can also be assessed as the Court held in **Shabani Daud Vs Republic**, Criminal Appeal No. 28 of 2001 that: -

*"The credibility of a witness can also be determined in other two ways that is, **one**, by assessing the coherence of the testimony of the witness, and **two**, when the testimony of the witness is considered in relation to the evidence of other witnesses ---"*

The decision of the Court in the case of **Salum Ally Vs Republic**, Criminal Appeal No. 106 of 2013 (unreported) wherein, it reiterated its previous stance in an earlier decision, gave a guide on how an assessment could be made to the evidence given by a witness, as to whether it is credible and reliable to be acted upon or not. The Court stated that: -

"--- on whether or not, any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails the ability to assess whether the witness's

*testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances particularly in a particular case. The test for any credible evidence is supposed to pass, were best summarized in the case of **Abbdalla Teje @ Malima Mabula Vs Republic**, Criminal Appeal No. 195 of 2005 (unreported), to be: -*

- (i) Whether it was legally obtained;*
- (ii) Whether it was credible and accurate;*
- (iii) Whether it was relevant, material and competent;*
- (iv) Whether it meets the standard of proof requisite in a given case, otherwise referred to as the weight of evidence or strength or believability.*

See also: **Chrizant John Vs Republic**, Criminal Appeal No. 313 of 2015 (unreported).

Being guided by what has been highlighted above, we now turn to consider the circumstances pertaining to the appeal before us, as to whether from the available evidence in the record, PW2 was not a credible witness, as contended by the appellant. According to the appellant, the

witness was not credible because she had interest to serve against the appellant. On the other hand, the learned Senior State Attorney, argued that, since the trial magistrate, who assessed the demeanour of the witness, believed her to be credible, the observation made by the trial magistrate, has to be believed.

We are in agreement with the learned Senior State Attorney that, the question of the demeanour of PW2, was already dealt with by the learned trial magistrate, who had the advantage of observing the witness, while giving her evidence in court. Her observation on such aspect cannot be faulted. Being the second appellate Court, we will confine ourselves to the other two ways of assessing the credibility of a witness named above, starting with the first type, that is, as to whether the testimony of PW2 was coherent.

Upon having dispassionately revisited the record of the trial court, we were able to note that a consistent testimony was given by the witness, starting from when she was being examined in chief by the prosecutor, to when she was being cross-examined by the appellant. The implication which we got from such consistency is the fact that, the witness told the

court, what she did actually eye witness on the fateful date. Under the circumstances, PW2 did pass the test of coherence in her testimony.

In the second type of assessing the credibility of PW2, we were required to relate her testimony with the testimonies of other witnesses. In her testimony, PW2 told the trial court that, when she arrived at her home on the material date, she was told by her other children that, the appellant was raping their sister (PW1) in her room. Indeed, on opening the door, she found the two inside her room but not in the act of rape. When she asked them as to what they were doing therein, there was no answer. From such situation, she locked the door of her room from outside, leaving the two inside, and went to seek some assistance from the relevant authorities.

In her efforts to seek assistance, PW2 went to report the incident at the Police Station, where she found PW5, a Police Officer. According to the testimony of PW5, after receiving the complaint from PW2, he moved with PW2 to the scene of the incident (PW2's home), where he found the door of the room locked. Upon opening it, he found the appellant, seated on the bed and PW1, was also inside that room. Such testimony did tally well with the evidence which was adduced by PW2 in court.

There was yet the testimony of PW3, who told the trial court that, she was asked by PW5, to inspect the victim (PW1) on her private parts. Her findings after performing the task, was that she discovered that the victim (PW1) had been fouled on her private parts as there were mucus and some sperms. Such evidence did again correlate with what was testified by PW2, in regard to the complaint which she had lodged against the appellant.

As if the foregoing was not enough, there was also the testimony of the Doctor (PW6), who examined the victim (PW1), and filled exhibit P1 (the PF3) after being requested by the Police so to do. According to his findings after examining the victim as reflected in exhibit P1 was that, there had been forceful entry into the vagina of the victim using a blunt object, leading to '*bruises at the labia major, swelling of internal organ and white discharge sperm like stained with blood.*'

In the light of the testimonies of the three witnesses above plus exhibit P1, we are positively satisfied that, they did squarely relate to the testimony which was given by PW2 and thereby, leaving us with no any shadow of doubt that, PW2 was a credible and trustworthy witness and thereby, passing in the second test as well. To that end, we find the

second ground of appeal by the appellant, to be without founded basis and we dismiss it.

With regard to the other grounds of appeal, which were raised by the appellant in his appeal, it is our view that the complaint in the third ground of appeal, falls within the context of the second ground in that it revolves around the credibility of the testimony of PW2. We believe the same to have exhaustively been dealt with while discussing the preceding second ground of appeal above.

As regards the first ground of appeal, upon visiting the proceedings of the trial court, as well the grounds of the petition of appeal, which the appellant lodged in the High Court, we are in agreement with the learned Senior State Attorney that, it is a new ground, because it did not feature there. Since the first appellate court, did not make a finding on it, this Court lacks the requisite jurisdiction to entertain it and therefore, it has to be struck out. See: **Hassan Bundala @ Swaga Vs Republic**, Criminal Appeal No. 386 of 2015, **Hussein Ramadhani Vs Republic**, Criminal Appeal No. 195 of 2015 and **Bakari Abdala Masudi Vs Republic**, Criminal Appeal No. 126 of 2017 (all unreported).

We held in **Hassan Bundala @ Swaga** (supra) that: -

"It is now settled that as a general principle, this Court will only look into the matters which came up in the lower courts and were decided; and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

The foregoing position of law notwithstanding, even if we were to consider the said ground of appeal, still it would have been of no assistance to the appellant. This is so for the reason that, the test of DNA, could not be used to test the commission of the offence of rape. That said, the first ground of appeal, is as well dismissed for being baseless.

Consequently, the entire appeal by the appellant is found to be wanting in merits and has to fail. We thus dismiss it by upholding the finding of the two lower courts and the sentence which was meted down to the appellant.

Order accordingly.

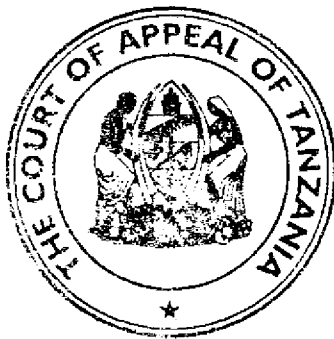
DATED at **MWANZA** this 29th day of November, 2019.


S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered on this 29th day of November, 2019 in the presence of the appellant in person and Ms. Ghati William Mathayo, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL