IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MWARIJA, J.A., WAMBALI, J.A, And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 279 OF 2017

ABDI ALLY TITU .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

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

(ABOUD, J.)

dated the 24TH day of April, 2017
in
Criminal Appeal No. 11 of 2016
.....

JUDGMENT OF THE COURT

20th September & 2nd October, 2019

KOROSSO, J.A.:

The above named appellant was convicted of the offence of rape contrary to sections 130(1) (2)(e) and 131 of the Penal Code, Cap 16 Revised Edition 2002 (the Penal Code) by the District Court of Lushoto at Lushoto and sentenced to thirty (30) years imprisonment. He was also ordered to pay compensation of Tshs. 300,000/- to the victim within 60 days. His appeal to the High Court was dismissed in its entirety.

The particulars of the offence at the trial court alleged that on the 3rd October 2015, at Ngazi village-Mlalo within Lushoto district in Tanga region,

the appellant did have carnal knowledge of a girl aged 13 years who we shall henceforth refer to as "CM". The appellant pleaded not guilty to the charge, and the prosecution produced four witnesses and one exhibit (PF3) to prove the case against the appellant.

Briefly, the case for the prosecution reveals that on the 25th September 2015, the appellant went to the house where "CM" (who was PW1) lived with her family, and on finding her there, managed to convince "CM" to go with him to Mlalo. It is alleged that on the way, around Mng'aro, "CM" was taken to a bush, where she was told to lie down, then undressed, the appellant also removed his clothes and had carnal knowledge of "CM" (or did "a bad game to her" as stated by "CM" in her testimony). Thereafter, they both dressed up and according to "CM" it was becoming dark and the appellant left her there telling her to wait until he came back because he had to go to pick a bag. After a while, the appellant came back with a bag, and the two of them left Mng'aro. While on the way to Ngazi, the appellant told "CM" that they should not walk close together or be seen that they were together. Upon reaching Ngazi they had tea, and "CM" was told by the appellant to go into a room there. It is alleged that they stayed in the room for ten days and each day the appellant had carnal knowledge of "CM".

On the other hand, on the part of "CM" father, Richard Mkufya (PW2), on the 25th September 2015, he noticed his daughter "CM" was missing and after failing to trace her, he reported the matter to the Village Executive Officer of Mng'aro and was given a letter to take to the police station, which he did. At the police station, PW2 upon reporting the incident of his missing daughter he was told to continue looking for her. PW2 continued to investigate on his daughter's whereabouts and on the 4th October 2015 received information that the appellant was with "CM" at Ngazi. He reported this information to the police, and then with a Sungusungu and the Kitongoji chairman went to the appellant's house. According to PW2 and Athman Omary (PW3) upon arrival there, they knocked the door and the appellant came out from the house (according to PW3, the appellant came out shirtless), and when asked about the child he was with in the house, the appellant responded that he was with his granddaughter. Shortly thereafter, "CM" also came out from the house and the appellant was then arrested and taken to the police station.

The evidence of Dr. Omary Manji (PW4), a clinical officer who testified to have attended and examined "CM" and tendered the PF3 (admitted as Exhibit P1) was that, "CM" was examined and that sperms were found in her

vagina revealing she was raped, her virginity was deflowered, and that she had signs of having sex for long.

In his defence, the appellant denied having left with and raped "CM", stating that he did not know PW1 and also in effect raised the defence of *alibi,* stating that on the dates it is alleged he committed the offence against PW1, he was not in that area, but in Goka and Makasi attending to his ailing mother, and that the charge against him is framed in view of the grudge with PW2 because of a dispute over a piece of land (a *shamba).*

Upon assessing the evidence of the prosecution and the defence, the trial court directed itself to determine whether rape was proved. The trial court found as credible the evidence of "CM", PW2 and PW3, whose evidence revealed that the appellant disappeared with "CM" without permission from her parents, and also that the appellant had carnal knowledge of "CM" during the period she was with him as testified by "CM". That there was evidence that the appellant was found with "CM" at his house when he was arrested. The trial court also found that the evidence of PW4 and Exhibit P1 supported "CM" evidence, and that taking all the evidence in totality there was proof of penetration of a male sexual organ on "CM". That bearing in mind the age of "CM", there is no doubt that rape was proved. The trial court also found the

defence evidence not plausible in light of the credible evidence of the prosecution witnesses in proving the case. On the defence of *alibi* raised, the trial court considered it and rejected it on the ground that the evidence supporting it was contradictory and that the appellant failed to file the requisite notice. At page 28 of the record of appeal, the learned Senior Resident Magistrate stated that:

> *"In his defence the accused raised a defence of alibi that he was not present at the scene of crime. However he has contradicted himself on that on 25/9/2015 he was at home attending funeral ceremony of his aunt."*

Apart from the finding that there were contradictions in the appellant's evidence on his whereabouts, the trial court found that the appellant failed to prove his whereabouts on the date he is charged to have committed the offence. Therefore, in effect even in the absence of the notice as required under section 194(4) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA), the trial court considered the defence of *alibi* and found it wanting, concluding that it raised no doubt on the evidence of the prosecution. The first appellate court agreed with the finding of facts by the trial court and

in fact even discussed its understanding of the statement by "CM" that the appellant did a "bad game" and stated this at page 101 of the record of appeal:

> *"If the words "bad game" could mean something else, then the victim could have not been found with sperms in her private parts after examination. I have no doubt in my mind that the trial court rightly found that the victim was raped by the appellant."*

From the above excerpt, it is obvious that these are concurrent findings of facts by the trial court and the first appellate court on the fact that evidence leads to a conclusion that the appellant had carnal knowledge of "CM", and therefore "CM" was raped. Suffice to say these findings of facts are the subject of discontent by the appellant in the appeal before the Court. The appellant has preferred four grounds of appeal reproduced as under:

1. *That, the first appellate judge erred by non- assessing properly the circumstances of the whole evidence adduced in trial court, as well as the decision meted wrongly upon the appellant by the trial court magistrate though fabricated of rape case laid against appellant.*

2. *That, all the prosecution witnesses PW1, PW2, PW3 and PW4 also P1 exhibit tendered such evidence are false allegation as they failed to prove their case beyond a shadow of doubt.*
3. *That, both the trial court and appellate court erred in not contemplating the weightier point of the appellant that before this case there was contretemps from the boundaries of the land adjacently between appellant and PW2 Richard Mkufya who is a father of PW1 the girl allegedly raped by appellant.*
4. *That, the trial court magistrate erred by sentencing the appellant without indicating that, under what section of the penal code which has been tlegalized the appellants sentence according to law.*

At the hearing, the appellant fended for himself being unrepresented whereas on the part of the respondent Republic they had the services of Mr. Peter Mauggo, learned Principal State Attorney assisted by Ms. Regina Kayuni, learned State Attorney.

The appellant adopted the grounds of appeal and the written submissions and informed the Court he preferred the respondent to begin, reserving his right to reply thereafter.

Ms. Kayuni who submitted for the respondent Republic was in full support of the conviction and sentence against the appellant. With regard to the 1st and 2nd grounds of appeal which she preferred to address jointly. On the appellant's contention that the case was framed and that the prosecution failed to prove the case beyond reasonable doubt, she refuted the assertions as untrue and submitted that the case against the appellant was proved. When asked by the Court whether all the grounds of appeal were addressed in the first appellate court, she contended that the 1st, 3rd and 4th grounds of appeal were neither raised nor decided in the first appellate court and thus implored the Court not to consider or determine those grounds of appeal being new grounds. She however submitted further that the 2nd ground of appeal is the only competent ground for consideration and determination of this Court, since it challenges the analysis by the first appellate court regarding the prosecution evidence that led to a finding that the charges were proved as against the appellant based on matters which were raised and decided by the first appellate court.

Ms. Kayuni then proceed to submit on the 2nd ground of appeal, addressing whether the prosecution proved the case against the appellant beyond reasonable doubt. She stated that the prosecution proved its case to the standard required, as substantiated by the adequacy of evidence presented in the trial court and credibility of its witnesses as found by the trial court and confirmed by the first appellate court. That "CM" gave evidence on how the appellant took her without consent or knowledge of her parents and stayed with her for ten days and raped her every day. That it is now settled that the best evidence of rape comes from the victim herself, as also held in **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2008 (unreported) at page 12. That the trial court found the evidence of PW1 to be credible and thus believed it, a finding of fact that the first appellate court supported.

Another piece of evidence that proved the prosecution case the State Attorney contended, is the evidence of the doctor (PW4), arguing that this evidence should support the evidence of "CM", since his testimony was that the examination of "CM" revealed that sperms were found in her vagina and that she was no longer a virgin. That there is also evidence from PW2 and PW3 that the appellant was found coming from the room where "CM" came

from after her disappearance from her parents' house for ten days. She urged that there is also "CM" testimony on what transpired during the ten days she was with the appellant and the fact that she was subjected to having sexual intercourse with the appellant every day.

The learned State Attorney further contended that to prove the offence of rape as charged, ingredients include having carnal knowledge with a girl or woman with or without her consent since the victim is a girl under the age of 18 years. That in the case at hand evidence reveal that "CM" was 13 years of age and thus under the age of 18 and Section 130(2)(e) of the Penal Code is clear that consent is not a requirement to prove rape. That the victim, "CM" testified that during the period the appellant stayed with her he was doing a bad game to her, a statement that was construed by the trial court and first appellate court to mean having sexual intercourse. Therefore, taking the whole evidence in totality, as prescribed by the law this meant, the act of having sex with "CM", a 13 year old girl, was an act of rape done by the appellant against "CM". The learned State Attorney thus asserted that having regard to all the stated factors, the conviction and sentence against the appellant is proper, and that the appeal should therefore be dismissed for want of merit.

The appellant reiterated his submissions that he was framed and that in any case he was not a resident of the area and he did not know "CM". He prayed for his appeal to be allowed and to be set free. On whether the 1st, 3rd and 4th grounds of appeal were raised in the first appellate court, he left it to the court to consider this and guide appropriately. In his written submissions, the appellant, challenged the assertion that the prosecution proved the case beyond reasonable doubt as required by the law stating that the credibility of "CM" was doubtful arguing that in stating that she had a bad game with the appellant she did not prove whether she was forced or it was with her consent. He challenged the evidence by "CM" arguing that in her evidence she stated he did a bad game to her and did not use the word rape. He also contended that if it is true that before going to Mlalo they first went to a bush and the appellant raped her, why did "CM" not cry for help or why did she not leave when he went to take the bag as per her testimony? The appellant submitted that all this shows that there was no rape, that PW1 consented to the sexual act.

The appellant also challenged the charge, arguing that "CM" evidence was that the bad game done by the appellant occurred on the 25th September 2015 to 4th October 2015, while the charge states the rape occurred on the

3rd October 2015, thus he argued this shows inconsistency and that the charge against him is fabricated. He also raised what he stated as contradictions in the evidence of PW2 and PW3, stating that while PW2 testified that they went to the appellant's home looking for the child, PW3 stated he did not know the appellant not being one of the villagers.

Having dispassionately considered the memorandum of appeal and submissions before the Court from the appellant and respondent side, we now proceed to delve into issues for determination. At this juncture, the first issue constraining our minds is whether or not there are grounds of appeal which were neither raised nor decided in the first appellate court. We had invited the parties to address this issue at the start of hearing of this appeal. The respondent was of the view that the 1st, 3rd and 4th grounds of appeal are new grounds and therefore should not be considered nor determined while on the part of the appellant he had nothing substantive to add on this issue.

We have critically examined the grounds of appeal at the first appellate court and those before this Court, and while we agree with the learned State Attorney submissions that the 3rd and 4th grounds of appeal are new, not having been raised or determined in the first appellate court, we differ on the

1st and 2nd grounds of appeal. We think the 1st and 2nd grounds of appeal go to the standard of proof of the charge of rape, and the credibility of the prosecution witnesses which we believe was an issue raised for consideration in the first appellate court, as discerned in the ground that challenged whether prosecution proved the offence of rape as against the appellant.

For the 3rd and 4th grounds of appeal, the position is well settled, that is, where new grounds of appeal are raised in the second appellate court the same cannot be determined. We have considered the cases cited by the learned State Attorney on this issue, that is, **George Maili Kemboge vs Republic,** Criminal Appeal No. 327 of 2013 and **Sadick Marwa Kisase vs. Republic,** Criminal Appeal No. 168 of 2012 (both unreported), and in **Sadick Marwa Kisase** (supra) it was stated that:

> *"The Court has repeatedly held that matters not raised in the first appellate court cannot be raised in the second appellate court".*

There is also the case of **Ramadhani Mohamed vs. Republic** Criminal Appeal No. 112 of 2006 (unreported), where it was held that:

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

Suffice to say, we believe that having determined that the 3rd and 4th grounds are new grounds, for not having been raised and decided by the first appellate court, we cannot consider or determine them and we thus refrain from doing so and strike them out.

Moving to the remaining grounds, that is the 1st and 2nd grounds of appeal, we shall consider and determine them jointly. The main gist of contention as raised by the appellant relates to allegations of failure on the part of the prosecution to prove the charge of rape against the appellant and that the first appellate judge failed to properly analyse and assess the testimonies of the prosecution witnesses.

At this juncture, we find it important in the present case to determine whether or not the offence of rape of a girl under 18 years of age was proved or not as against the appellant. The legal position expounded in **Seleman**

Makumba vs. Republic, Criminal Appeal No. 94 of 1999 (unreported) is that:

> "*True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in the case of any other women where consent is irrelevant that there was penetration.*"

The trial court did find the evidence of "CM" to be credible. A finding confirmed by the first appellate judge. "CM" narrated in detail the incidence from the time the appellant came to their house and lured her to go with him to Mlalo and *enroute* there had carnal knowledge of her, and then took her to his place, where she stayed with the appellant for about ten days. That during this period, the appellant raped "CM" each day for all the days she was there. The fact that "CM" was with the appellant was supported by the evidence of PW2 and PW3, who found "CM" with the appellant on the day they apprehended him. PW4, who examined "CM", confirmed that he found sperms in "CM" vagina and signs that she had sexual intercourse, and thus proving what was stated by "CM" that the appellant did bad game to her was nothing but sexual intercourse. The first appellate judge found this to also strengthen the case for the prosecution and to show that penetration was proved by the

evidence of "CM" and PW4. It should also be remembered that section 130(4) of the Penal Code states that, for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence. As found by the trial court and the first appellate court "CM" was no longer a virgin and her vagina had sperms.

We wish to point out that, this is a second appeal. This being the case, the Court is required to be cautious and very slow to disturb the concurrent findings of facts of the two courts below. The Court may proceed to do that where there is misapprehension of the substance, nature and quality of evidence which result into unfair conviction as stated in **Elia Nsamba Shapwata and Another vs. Republic,** Criminal Appeal No. 92 of 2007 (unreported).

The other element of rape is that it should be without the victims consent. But the law also addresses the situation where the victim is under 18 years of age. Section 130(2)(e) of the Penal Code, which reads:

> "(2) *A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions*;

(e) *with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

Therefore despite the appellant's allegations that "CM" conduct does not show she was forced to engage in sex with the appellant, it should be understood that the law is clear that where the girl is under eighteen years the issue of there being consent or not does not arise, once a male has sexual intercourse with an under eighteen girl, it is rape.

The age of "CM" was never disputed in this case, the charge sheet shows at the time of the charge being drawn, she was 13 years of age and during the *voire dire*, she stated she is 13 years old. This fact was also not cross examined upon by the appellant nor was PW2 cross examined on the issue of age of the victim. PW4's testimony also reveals that the child he examined on the 4th of October 2015 is 13 years old. Therefore we are left with the only evidence available which remained unchallenged that "CM" was 13 years old at the time of the incident. The other argument raised by the appellant regarding the date stated in the charge not being the date the rape occurred

from the evidence of the prosecution witnesses, we find having considered the evidence, this contention has no substance. There is evidence from the prosecution witnesses that the appellant was found with "CM" on the 3rd of October, 2016, and there is nothing wrong to charge an accused on the date one is apprehended, it does not in anyway detract the finding of fact or raise doubts on the finding of rape against the appellant by the trial and the first appellate courts.

Another issue raised by the appellant was the defence of *alibi*. The trial court finding on this was that the evidence by the appellant was inconsistent and contradictory and did not in any way undermine the evidence of the prosecution witnesses. We find no reason to depart from these findings by the trial court and the first appellate court that the defence of *alibi* was not proved, and that in any case the appellant did not file the requisite notice under section 194(4) of the CPA. The appellant's assertions and evidence on this issue are unclear and he failed to raise doubts on the evidence of "CM" and that of PW2 and PW3 on finding him with "CM" on the day he was arrested.

In the event, we thus find that the 1st and 2nd grounds of appeal have no merit. Therefore having struck out the 3rd and 4th grounds of appeal, it means the appeal has no merit.

In the premise, for reasons stated hereinabove, we find that the appeal by the appellant is wanting in merit and, we hereby dismiss it in its entirety.

DATED at **TANGA** this 1st day of October, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

The judgment delivered this 2nd day of October, 2019 in the presence of the Appellant in person and Mr. Peter Maugo, learned Principal State Attorney assisted by Ms. Elizabeth Muhangwa, Principal State Attorney, for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL