**IN THE COURT OF APPEAL OF TANZANIA**

**AT SHINYANGA**

**(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)**

**CRIMINAL APPEAL NO. 570 OF 2016**

**KAZIMILI SAMWEL ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania, at Shinyanga)**

**(Kibella, J.)**

**dated the 26th day of September, 2016**
**in**
**DC Criminal Appeal No. 39 of 2015**
**.....**

## JUDGMENT OF THE COURT

19th & 26th August, 2020

**MWAMBEGELE, J.A.:**

Kazimili Samwel, the appellant, was convicted by the District Court of Kahama in Shinyanga Region of the rape of a girl aged twelve. He was sentenced to a term of thirty years in prison. To conceal her identity, we shall refer to the girl as simply "the victim". The accusations placed before the appellant was that he raped the victim on 05.04.2010 at Majengo

Village in Kahama District, Shinyanga Region. His first appeal to the High Court was barren of fruit, hence this second appeal pegged on the following paraphrased grounds:

1. *That, both the two courts below erred in law by failure to warn itself before convicting the appellant basing on the victims unsworn testimony which was not corroborated by independent evidence and exhibits;*
2. *That, no intelligibility and truth test under voire dire was properly conducted and determined before unsworn evidence of the victim was taken;*
3. *That, the two Courts below erred in law for failure to resolve the issue of unproved age of the victim before convicting the appellant for rape;*
4. *That, both the ingredients of rape; penetration and consent were not sufficiently proved in Court;*
5. *That, the victim and her partisan witnesses were incredible.*
6. *That, rape was not established for want of professional proof of penetration and or direct evidence; rather the circumstantial evidence relied ought lead to the offence of unlawful/wrongful confinement; and*
7. *That, the prosecution case was not proved beyond reasonable doubt.*

We find it apt to narrate, albeit briefly, the material background facts which led to the appellant's arrest as can be deduced from the testimonies of the prosecution witnesses. On 05.04.2020, at around noon, James Kinamhala (PW3); the victim's father took the victim to the appellant's shop to buy her a pair of shoes. They bought the shoes and returned home. At home, one of the victim's friends was attracted by the shoes. She thus asked the victim to take her to where she had bought the pair so that she could also buy one. The victim, together with other three friends including the one who wanted to buy a pair of shoes went to the appellant's shop. There, the girl bought the pair and went back home, leaving behind the victim and the two girls. The appellant, after some gimmicks of asking the two girls to go somewhere and buy him cigarettes and after they did, asking them again to go and light the cigarettes, while being left behind with the victim, called for a *bodaboda*. Upon arrival of the *bodaboda*, the appellant lured the victim into boarding it together with him to his residence.

There, the appellant asked the victim to go and buy a mobile phone recharge voucher and when she returned, he forced her inside his room. While inside the room, the appellant gagged the victim's mouth with a

handkerchief, telling her in the process to undress. She refused. He administered some slaps on her and, after some time, she fell unconscious. Upon gaining consciousness, she found herself naked and the appellant was not there. She felt some pains in her vagina and anus. She then realised that she had been raped and sodomised. She raised an alarm. As she could not immediately trace her clothes, she put on the appellant's T-shirt and a towel which were tendered and adduced in evidence as Exh. P1 collectively.

Amina Jumanne (PW2) and Zablon Magelane (PW4) who lived in the neighbourhood, responded to the alarm the victim had raised. PW3; the appellant's father was also called to the *locus in quo*. They talked to the victim through the window as the door to the room had been locked from outside by a padlock. The victim told them that she had been left there by the appellant after he had raped and sodomised her. No. WP 5357 PC Christina (PW5) was called to lend assistance to the victim and showed up. She also talked to the victim through the window and told the same episode; that she was left there by the appellant after he raped and sodomised her.

While PW5 and those who responded to the alarm were in the process of breaking the door to rescue the victim, the appellant showed up and opened the door. The victim told them he was the one who took her in the room, raped and sodomised her and left her there. The appellant was arrested right away. PW5 examined the victim and found her raped and sodomised. She gave her a PF3 after which she went to the Hospital for medical check-up and treatment, if any. The PF3 was tendered and admitted in evidence as Exh. P2.

The appellant dissociated himself with the accusations levelled against him. In his defence at the trial, he admitted to have been selling shoes and that he lived at Majengo area. He also said the victim was his neighbour when he was doing business at Uhindini area.

The appeal was argued before us on 19.08.2020 vide video conference. The appellant appeared remotely in person at Shinyanga District Prison. Mr. Nassoro Katuga, learned Senior State Attorney assisted by Messrs Mafuru Moses and Nestory Mwenda, learned State Attorneys, joined forces to represent the respondent Republic.

Arguing the first and second grounds of appeal, Mr. Mwenda submitted that the *voire dire* test was not properly conducted but that it was sufficient enough to make the testimony of PW1 used to mount a conviction against the appellant provided that there was corroboration. He contended that that testimony was corroborated by the testimonial accounts of PW1, PW2, PW3 and PW4 who responded to the alarm as well as that of PW5; a police officer who was called to the scene of crime. These witnesses were told by the victim from the window that she was raped and sodomised and locked-in the appellant's room. Then the appellant appeared and opened the door and was arrested there and then. Mr. Mwenda thus submitted that the complaints by the appellant in the first and second grounds were without substance.

The subject of the third ground of appeal regards the age of the victim not being proved. On this ground, Mr. Mwenda submitted that the age of the victim did not come out clearly in evidence but was deducible from evidence. On this argument, the learned State Attorney relied on our previous decision in **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported) in which we observed at p. 8 of the typed

judgment that the age of a victim can be deducible from evidence. He implored us to deduce the age of the victim from the evidence.

Responding to the fourth ground of appeal, Mr. Mwenda submitted that as the age of the victim was below eighteen years, there was no need to prove consent. Regarding penetration, he submitted that the same was sufficiently proved through the testimony of the victim. The complaint in the fourth ground of appeal was also without merit, he submitted.

With regard to the rest of the grounds of appeal, it was Mr. Cosmas who addressed the Court. On the fifth ground, he submitted that the same was not raised and determined in the first appellate court. He thus urged the Court to disregard it, for under the provisions of section 4 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019, the Court hears matters determined by the High Court, he submitted.

The sixth ground of appeal was a complaint that penetration was not proved which was also the complaint in the fourth ground of appeal which had been argued by Mr. Mwenda. The learned State Attorney submitted that the case for the prosecution was proved beyond reasonable doubt.

In rejoinder, the appellant still disassociated himself from the accusations. He submitted that it was Kazimoto who committed the offence, not him. He urged us to revisit the testimony of PW1 and PW3 who mentioned Kazimoto as the one who ravished the victim. He also submitted that the age of the victim ought to have been proved by a birth certificate. No such certificate was tendered in evidence. With regard to penetration, he argued that the same was not proved despite PW1's exaggeration. The appellant added that there were contradiction in the testimony of witnesses. He gave an example; that while PW1 said she was twelve years old, PW3 said she was thirteen. That, he argued, was a discrepancy in evidence which casted doubt in the prosecution's case.

Having heard the contending arguments of the parties to this appeal, the ball is now in our court to confront the grounds of appeal. We will approach the grounds of appeal in the manner and style employed by the learned State Attorneys.

The first two grounds seek to challenge the *voire dire* test conducted by the trial court. As rightly put by the learned State Attorney, the *voire dire* test was inelegantly conducted in that the questions put to the victim do not appear in the record. To paint the picture, we wish to reproduce

what transpired on 07.10.2010 when the victim was fielded to testify. At p. 7 of the record of appeal, the trial court recorded:

> *"**Court** – the witness is juvenile. This court ought to conduct voire dire*
>
> *Xd,*
>
> - *I am in standard five. I know to speak true*
> - *I do not know the meaning of oath.*
>
> ***Court findings***
>
> *The witness despites she does not know the meaning of oath but she possesses some intelligence. Her evidence will received without oath.*
>
> *J. S. K. Hassan, RM*
>
> *7/10/2010."*

We agree that the *voire dire* test was not conducted in the manner it was supposed to. It has some shortcomings. As is apparent in the foregoing quoted proceeding in the trial court, the trial court did not record the questions put to the victim. The trial court just recorded the answers to the supposedly posed questions. What, we ask ourselves, is the effect of such eventuality? We find an answer to this question in **Nguza Vikings @ Babu Seya & 4 Others v. Republic**, Criminal Appeal No. 56 of 2005

(unreported) in which the Court interpreted the tenor and import of the then subsection (2) and (7) of section 127 of the Evidence Act, as it stood then:

> *"From the wording of the section, before the court relies on the evidence of the independent child witness to enter a conviction, it must be satisfied that the child witness told nothing but the truth. This means that, there must first be compliance with section 127 (2) before involving section 127 (7) of the Evidence Act; "Voire dire" examination must be conducted to ascertain whether the child possesses sufficient intelligence and understands the duty to speak the truth. If the child witness understands the duty to speak the truth, it is only then its evidence can be relied on for conviction without any corroboration otherwise the position of the law remains the same, that is to say that unsworn evidence of a child witness requires corroboration".*

In **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported), the Full Bench of the Court expounded on what should be done in case of misapplication or non-direction of section 127 (2), as it stood then:

> *"... section 127 (7) only obviates the need for corroboration, direct or circumstantial where the evidence taken under section 127 (2) emanates from a properly conducted voire dire thereunder; however it does not dispense with or remove the requirement of corroboration where the evidence taken originates from a misapplication or non-direction of section 127 (2)."*

What we glean from the foregoing excerpts is that when there is a misapplication or non-direction of the provisions of section 127 (2) of the Evidence Act, such evidence must be corroborated in order to rely on it. In the case at hand, the provisions of section 127 (2) of the Evidence Act were certainly misapplied. That being the case, on the authority of **Kimbute Otiniel** (supra), such evidence must be corroborates to be used in convicting the appellant. Was there any corroborative evidence in this case? Certainly. PW5 testified that she examined the victim and found that she was raped and sodomised. That was after she found the victim in the appellant's room and the latter complained that the appellant had raped and carnally knew her against the order of nature. That was enough corroborative evidence to give support to the evidence of the victim taken without a fully complied with *voire dire* test. For the avoidance of doubt,

we refrain from depending on a PF3 because it was expunged from evidence by the first appellate court for being improperly adduced in evidence. The first appellate court rightly took that course of action because; first, it was not read out in evidence after admission and we understand rightly so because it was tendered by the victim; a lay person at the medical profession. Not only that, but also that the appellant was not accorded his right to call the medical personnel who prepared it in terms of section 240 (3) of the CPA. That was a fatal ailment and which made the first appellate court expunge it. We thus dismiss the first and second grounds of appeal.

The third and fourth grounds of appeal hinge on the age of the appellant and that consent and penetration were not proved. As the learned State Attorney rightly submitted, the evidence regarding age does not come out clearly in evidence. The charge sheet in the particulars of the offence mentions twelve (12) years as the age of the victim. When the victim testified, she is recorded as a witness of thirteen (13) years and her evidence was taken after a *voire dire* test. The charge sheet and her evidence shows that she was a standard five pupil at Kahama Primary School. We agree with the learned State Attorney that despite the fact

that the age of the victim did not come out clearly in the testimonies of witnesses, the same is deducible from the very testimonies. We were confronted with an akin situation in **Issaya Renatus** (supra); the case referred to us by the respondent Republic. In that case, like in the present, there was no proof of age. The same was mentioned in the charge sheet and the introduction of the victim in the witness box. We expounded on the necessity of age in a charge under the provisions of section 130 (1), (2) (e) of the Penal Code. We stated at p. 9 of the typed judgment:

> *"There may be cases, in our view, where the court may infer the existence of any fact including the age of a victim on the authority of section 122 of TEA which goes thus:-*
>
> *"The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

Having reproduced the provisions of section 122 of the Evidence Act, we went on:

> *"In the case under our consideration there was evidence to the effect that, at the time of testimony, the victim was a class five pupil at Twabagondozi Primary School. Furthermore, PW1 was introduced into the witness box as a child of tender age, following which the trial court conducted a voire dire test. Thus, given the circumstances of this case, it is, in the least, deducible that the victim was within the ambit of a person under the age of eighteen. To this end, we find the first ground of appeal to be devoid of any merits."*

We find solace in this judgment which will guide us in the present case which is on all fours. It is apparent in the *voire dire* test that the victim in the case at hand was a juvenile who was in standard five at the material time. She was also introduced in the witness box as such. So was her testimony at p. 7 of the record of appeal. Even the charge indicated in the particulars of the offence that the victim, who was a standard five pupil at Kahama Primary School, was aged twelve (12) years.

Given the foregoing and on the authority of our decision in **Issaya Renatus** (supra), we find it safe to deduce that the victim was a child whose age was tender. We are certain that this deduction does not

prejudice the appellant who, given the charge and evidence as stated above, was aware that he was accused of raping a child of tender years. We thus find and hold that the circumstances of this case were such that the appellant was of the age of tender years. There was not need therefore for the consent, for this was a statutory rape to which consent is immaterial.

With regard to penetration, we are satisfied that the same was proved by the victim and supported by PW5. The victim testified that when she gained consciousness, she felt pain in her vagina and anus. She realized that she was raped and sodomised. That piece of evidence was corroborated by PW5; a police officer who examined the victim at the police station and found that she had been raped and sodomised.

We thus find no merit in the third and fourth grounds of appeal.

The fifth ground of appeal, as rightly submitted by Mr. Moses, is new; it is being raised in the Court for the first time. It was not raised in the first appellate court. It being a complaint on a fact that the victims were incredible, we think this ground is one of fact, not one of law which the Court can entertain without being decided upon by the first appellate court.

It is now settled law that, unless it is on point of law, a matter not raised in the first appellate court cannot be raised and entertained in a second appellate court – see: **Abdul Athuman v. Republic** [2004] T.L.R. 151 and **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004, **Ramadhani Mohamed v. Republic**, Criminal Appeal No. 112 of 2006, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012, **Richard Mgaya @ Sikubali Mgaya Republic**, Criminal Appeal No. 335 of 2008 (all unreported), to mention but a few.

On the basis of the settled legal position in the above cases, the fifth ground having been raised for the first time in this second appeal, is not legally before us for determination. We disregard this ground of appeal as urged by the learned State Attorney.

The sixth ground is a complaint that penetration was not proved. This ground is a repetition of ground four which has already been discussed above. As did the learned State Attorney, the reasoning and conclusion on the fourth ground above befits this ground as well. We shall not repeat them.

Last for consideration is the general complaint that the case for the prosecution was not proved beyond reasonable doubt. Having found and held above that all the grounds of appeal are without merit, it follows that the case was proved to the required standard; beyond reasonable doubt.

The above said and done, we find the entire appeal without any scintilla of merit and dismiss it entirely.

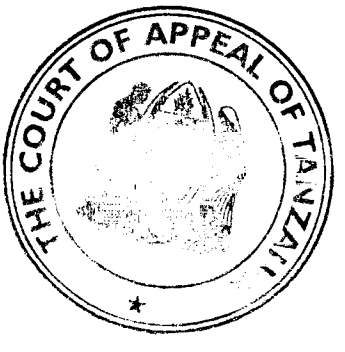
**DATED** at **SHINYANGA** this 26th day of August, 2020.

A. G. MWARIJA
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Judgment delivered this 26th day of August, 2020 in presence of the Appellants via Video link and Messrs Nestory Mwenda, Mafuru Moses and Ms. Edith Tuka, The learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**