IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 293 OF 2018

ALLY HUSSEIN ....APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Banzi, J.)

dated the 10th day of August, 2018

in

Criminal Appeal No. 350 of 2017

JUDGMENT OF THE COURT

23rd September & 8th October, 2020

MWANGESI, J. A.:

The appellant herein ALLY S/O HUSSEIN, is challenging the concurrent findings of the two lower courts and the sentence wherein, he was sentenced to life imprisonment after being found guilty of the offence of rape against a child of four years. According to the charge sheet, the appellant was charged with the offence of rape contrary to the provisions of section 130 (1) (2) (e) and 131 of the Penal Code Cap 16 R.E. 2002 **(the Code).** It was the case for the prosecution that, on the 29th day of November, 2016 at about 20:00 hours at Mangesani area within Bagamoyo

District in Coast Region, the appellant did have carnal knowledge of a girl aged four (4) whom we shall refer to as MB or simply PW3, for the sake of concealing her identity.

The brief facts of the case leading to the indictment and prosecution of the appellant resulting to the decision being impugned as gathered from the witnesses went thus: the appellant and PW1 who happened to be the mother of MB, were neighbours both residing at Mangesani area within Bagamoyo District, where PW1 had been engaging herself in selling food *(mama lishe*) at the centre of Mangesani. On the 29th November, 2016 at about 19:00 hours while PW1 was at her working place with her daughter (MB), was visited by the appellant who upon arrival as an ordinary customer, ordered for food.

Being a neighbour to PW1, the appellant was well known to MB. As a result, he was chatting with her while taking his dinner on the said evening. After he had accomplished to take his dinner and while retiring to his home, the appellant left together with MB, a thing which did not make PW1 to suspect any foul play, because they had been neighbours who were in good terms. At around 20:00 or so, while PW1 was continuing with her chores at her working place, she was surprised to find PW2 arriving

there while carrying MB, with information that she had been raped by the appellant. The matter was reported to the police and the appellant was arrested and charged accordingly.

Four witnesses namely Fatuma Siwatu (PW1), Zuhura Omari (PW2), MB (PW3), Doctor David Richard (PW4) and WP 9628 Beatrice (PW5) were lined up by the prosecution as prosecution witnesses to testify against the appellant. Additionally, the prosecution tendered one exhibit, that is a Medical Examination Report (PF3) which was admitted as Exhibit P1, to supplement the prosecution evidence.

On his part, in defence, the appellant conceded to the fact that he was indeed a resident of Bagamoyo District and that PW1 was his neighbour. He, however, strongly distanced himself from the contention by PW1 that he raped her daughter. It was his assertion that the case had been deliberately framed up against him by PW1, after he had turned down her proposal to have an affair with her. He submitted further to the effect that what prompted him to decline her offer, was the information which he got from reliable sources that she was a HIV victim. He summoned no witness to supplement his testimony which was given under affirmation.

As earlier alluded to above, the learned trial Resident Magistrate was convinced by the testimonies of the prosecution witnesses beyond reasonable doubt and as a result, he convicted the appellant as charged and sentenced him to life imprisonment. Dissatisfied by the decision and sentence of the trial court, the appellant un-successfully challenged them in the first appellate High Court where Banzi J. dismissed it on the 10th August, 2018. Still undaunted, the appellant has come to the Court premising his grievance on twelve grounds which read in *ipsissima verba*: -

1. *"That, your Lordships the first appellate Judge, erred in law and fact by upholding the appellant's conviction in a defective charge sheet as the principal act referred to, create a non-existent offence and furthermore, there was disparity between the charge sheet and the prosecution's adduced evidence.*
2. *That, the learned first appellate Judge, erred in law and fact by upholding the appellant's conviction while disregarding that he was arrested without a warrant and there was delay in bringing him before the appropriate court within twenty-four (24) hours after his arrest which was contrary to the mandatory provisions of section 32 (1) of the Criminal Procedure Act Cap 20 R.E 2002.*

3. *That, the learned first appellate Judge, erred in law and fact by upholding the appellant's conviction in a case whereby the trial court failed to guarantee a fair trial to the appellant after denying him bail relying on mere story from the public prosecutor that the appellant's safety was in danger after having raped a minor while the court had the constitutional obligation to dispense quality and equal justice.*

4. *That, the learned first appellate Judge, erred in law and fact by upholding the appellant's conviction on a case whereby the trial court witnesses (PW1, PW2, PW3, PW4 PW5 and DW1) recorded (sic).*

5. *That, the first appellate Judge, erred in law and fact by upholding the appellant's conviction basing on PW3's (victim's) testimony who lacked sufficient intelligence and failed to mention her age and never told the court if she knew the nature of speaking the truth and thereby, flouting the provisions of section 127 (2) of the Evidence Act Cap 6 R.E 2002 as amended by Act No. 2 of 2016.*

6. *That, the learned first appellate Judge, erred in law and fact by upholding the appellant's conviction basing on PW2's incredible and unreliable visual*

identification as it was dark and no light at the scene of crime.

7. *That, the learned first appellate Judge, erred in law and fact by upholding the appellant's conviction on a charge of statutory rape while the prosecution failed to prove the age of the victim (PW3) and if there was penetration of a male organ into the vagina of the victim as required by the mandatory provisions of section 130 (4) (a) of the Penal Code Cap 16 R.E.2002.*

8. *That, the first appellate Judge, erred in law and fact by upholding the appellant's conviction relying on the incredible and unreliable victim's evidence who failed to answer the appellant's question during cross-examination if there was anything that her mother had told her to speak in court.*

9. *That, the learned first appellate Judge, erred in law by misapprehending the trial court's non-compliance with section 9 (3) of the Criminal Procedure Act as the appellant was fully aware of the charge and had opportunity to cross-examine every witness with failure to note that the appellant was also entitled to cross-examine those witnesses on their previous statements as enshrined under section 154 and 164 (1) (c) of the Evidence Act.*

10. *That, the learned first appellate Judge, erred in law and fact by misleading herself that there was partial penetration relying on a mere story by PW4 (A Medical Doctor alleged to have examined the victim), without analyzing well the tendered exhibit P1 (PF3) where he could note that, the Medical Practitioner's remarks was that he found that rape was done but no penetration a stance which raises doubt on his credibility.*

11. *That, the learned first appellate Judge, erred in law and fact by holding that she was inclined to agree with the trial magistrate's findings as the defence failed to cast doubt on prosecution evidence, while failing to note that, the said trial court failed to comply with its own order on the appellant's prayer for summoning the said Asha for testifying to the effect that PW4 (the Doctor) received the offer of corruption to induce him to give evidence in compliance with section 164 (1) (b) of the Evidence Act.*

12. *That, the learned first appellate Judge, erred in law and fact by upholding the appellant's conviction in a case where the trial Resident Magistrate was not seized with jurisdiction to hear the case which ought to have been tried by a District Magistrate."*

On the date when the appeal was called on for hearing before us, the appellant who was linked to the Court from Ukonga Central Prison where he is serving his sentence via video conference, appeared in person, legally unrepresented. On the part of the respondent/Republic, it was represented by Mr. Medalakini Emmanuel, learned State Attorney.

Upon the appellant being invited by the Court to expound his grounds of appeal, he asked it to adopt the grounds of appeal in the way they have been presented in the memorandum of appeal as well as the written statement of arguments in support of the appeal, which was lodged on the 18th day of September, 2020 with nothing more.

Mr. Emmanuel on the other hand on behalf of the respondent, in responding to the grounds of appeal which were raised by the appellant, he at the very outset stated his stance that he was opposing the appeal. Nonetheless, before starting to respond to the grounds raised, he first pointed out some grounds which he termed to be new ones on account that, they concern factual matters which did not feature in the first appeal and hence, not deliberated by the first appellate Judge. These grounds included, grounds number 2, 3, 4, 8, 9, 10 and 11.

It was the submission of the learned State Attorney, that the fact that the above named grounds were not deliberated and determined by the first appellate court, they were improperly before this Court as it lacked the requisite jurisdiction to handle them. In so submitting, he sought refuge from the provisions of section 6 (7) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 **(the AJA)**, as amply construed by the Court in **Godfrey Wilson Vs the Republic,** Criminal Appeal No. 168 of 2018 (unreported). To that end, Mr. Emmanuel implored us to ignore those grounds and proceed to consider the remaining ones that is, grounds number 1, 5, 6,7 and 12.

Starting with the first ground which is to the effect that the charge against the appellant was defective, Mr. Emmanuel conceded to the contention that indeed, the charge was defective for the reason that subsection (3) of section 131 of **the Code,** which stipulates the sentence of the offence under which the appellant stood charged with, was not cited. It was however the view of the learned State Attorney, that the error was curable under the provisions of section 388 of **the CPA**, in that the age of the victim was mentioned in the particulars of the offence as well as in the testimony of PW1, who was the mother of the victim. Under the

circumstances, Mr. Emmanuel argued that the appellant was made fully aware of the age of the victim and that the omission occasioned in the charge sheet, did not prejudice him. Relying on the decision in **Faraji Said Vs the Republic,** Criminal Appeal No. 172 of 2018 (unreported), he urged us to dismiss this ground of appeal.

The complaint by the appellant in the fifth ground of appeal is that *voire dire* examination was not properly conducted to PW3 before she was permitted to give her evidence in court. In response, Mr. Emmanuel submitted that at the time PW3 gave her testimony that is, on the 29th December, 2016 the provisions of section 127 (2) of the Evidence Act Cap 6 R.E. 2002 **(TEA**), had been amended vide the Written Laws (Miscellaneous Amendment) (No. 2 of 2016) Act No. 4 of 2016, which came into force on the 08th July, 2016. And, in terms of the amended section 127 (2) of **TEA**, the witness who was of tender age, was required to give a promise to the court to speak the truth before she testified a thing which was not complied with. He therefore, asked us to expunge the evidence of the witness from the record in line with the holding in **Godfrey Wilson Vs the Republic** (supra).

Notwithstanding the removal of the testimony of PW3 (the victim) from the record, Mr. Emmanuel hastened to submit, the cogence of the evidence against the appellant was not adversely impacted. This was from the fact that there was still the evidence of PW1, PW2 and PW4 which sufficiently established the guilt of the appellant to the hilt. While PW2 did find the appellant in the act of raping the victim after hearing her crying and that she was oozing blood from her private parts; PW1 was the one who had been with the victim from whom the appellant took her. On his part, PW4 told the court that upon examining the victim, he discovered that she had been fouled on her private parts. The decision of **Leonard Joseph @ Nyanda Vs the Republic,** Criminal Appeal No. 186 of 2017 (unreported), was used by the learned State Attorney to convince us to dismiss this ground of appeal.

For the sixth ground of appeal, wherein the identification purported to have been made to the appellant by PW2 is challenged, the learned State Attorney argued that the contention was baseless. While he conceded to the fact that the incident under discussion occurred during night time, he was of the view that the question of mistaken identity by PW2 in the instant matter did not arise. This was from the fact that the

appellant was a neighbour of PW2 and hence well known to her. Furthermore, he was instantly named to her by the victim at the scene of the incident as 'Chudo', which was the common name of the appellant. We were therefore implored by Mr. Emmanuel, to find no merit in this ground as well.

The age of the victim constitutes the seventh ground of appeal whereby, the appellant complained that the prosecution failed to establish her age. In asking the Court to dismiss this ground for want of merit, Mr. Emmanuel referred us on page 10 of the record of appeal, where PW1 who happened to be the mother of the victim, categorically stated the age of the victim to be four and half years. Citing the holding in **Boniface Alistides Vs the Republic**, Criminal Appeal No. 346 of 2016 (unreported), he argued that the best evidence in regard to the age of a child, comes from the parents.

In the twelfth and last ground of appeal, the appellant challenged the jurisdiction of the court, arguing that his case which was lodged in the District Court of Bagamoyo, was wrongly presided over by a Resident Magistrate as the proper magistrate ought to have been a District Magistrate. Mr. Emmanuel on the other hand, submitted that the argument

by the appellant is misconceived because the cadre of district magistrates has been phased away and that, the Resident Magistrate who presided over the matter leading to the instant appeal, had the requisite jurisdiction. He thus requested us to dismiss this ground and thereby, dismissing the entire appeal and sustain the concurrent decisions and sentence of the lower courts.

The issue which stands for the Court's deliberation and determination in the light of the above, is whether the appeal by the appellant is founded. In resolving the issue, we propose to adopt the approach which was used by the learned State Attorney. To begin with, we are in agreement with Mr. Emmanuel, that grounds number 2, 3, 4, 8, 9, 10 and 11 in the memorandum of appeal by the appellant, relate to factual matters which were not deliberated and determined by the first appellate court. The law is settled that as a matter of general principle, unless there are points of law; this Court will only look into matters which came up in the lower court and were decided; and not on matters which were not raised nor decided by neither the trial court nor the High Court on first appeal. See: **Hassan Bundala @ Swaga Vs the Republic**, Criminal Appeal No. 386 of 2015 (unreported). To that end, the grounds named above, being based on

facts, are hereby ignored as we lack the requisite jurisdiction to handle them. That said, we proceed to consider the grounds of appeal which are properly before us.

In the first ground of appeal, the complaint by the appellant is pegged on the defect of the charge sheet, that the penalty provision that is, subsection (3) of section 131 of **the Code,** was omitted**.** This fact was conceded by the learned State Attorney, who however argued that the omission was not fatal. We, on our part, join hands with Mr. Emmanuel that the omission was curable under section 388 of **the CPA** for the reason that the omission did not prejudice the appellant. This was from the fact that the age of the victim was explicitly stated in the particulars of the offence. Moreover, PW1 who was the mother of the victim, did state the age of MB in her testimony and thereby, making the appellant to be fully aware of the age of the victim.

The Court was encountered with a similar scenario in **Burton Mwipabilege Vs the Republic,** Criminal Appeal No. 200 of 2009 (unreported), where an improper penalty subsection (1) of section 131 of **the Code** was cited instead of subsection (3) in the charge sheet. In

holding that the omission was not fatal, the Court used the following words: -

> *"As for the penalty provision, the section cited was also not proper. Since the victim was 10 years old, the proper punishment section would have been section 131 (3) where life imprisonment is the prescribed minimum sentence, and not section 131 (1) where the minimum sentence is 30 years' imprisonment. On the face of it therefore, the charge is illegal in form. But, we agree with Mr. Rwegerera that this is curable under section 388 of the CPA, because the irregularity has not in our view, occasioned a failure of justice."*

See also: **Faraji Said Vs the Republic** (supra).

We fully subscribe to the above holding and dismiss the first ground of appeal.

The complaint by the appellant in the fifth ground is to the effect that the evidence of PW3 who was of tender age, was un-procedurally received. It is on record as reflected on pages 15 through 17 of the record of appeal, that the evidence of PW3 who testified on the 29th December, 2016 was

received after the trial Resident Magistrate had conducted to her, a *voire dire* examination. The record provides in part that: -

> "***Prosecutor**: Today is the turn of a minor witness MB, 4.5 years.*
>
> ***PW3:** My name is MB I am 2 years old.*
>
> ***Court:** The witness is a minor. So we have to conduct voire dire test on her so as to know whether she knows the nature of an oath; and whether she possess sufficient intelligence on what she will be asked by the court, or in examination in chief or on cross-examination."*

Thereafter, the trial Resident Magistrate conducted a *voire dire* test to the witness and permitted her to testify without oath or affirmation for the reason that, she did not understand the nature or meaning of oath, but she possessed sufficient intelligence.

It is to be noted that the procedure which was adopted by the learned trial Resident Magistrate above, was not in compliance with the stipulation under section 127 (2) of **TEA** which reads that: -

> *"A child of tender age may give evidence without taking an oath or making affirmation **but shall,***

before giving evidence, promise to tell the truth to the court and not tell lies."

[Emphasis supplied]

See: **Msiba Leonard Mchere Kumwaga Vs the Republic,** Criminal Appeal No. 550 of 2015 and **Geofrey Wilson Vs the Republic** (supra)

In view of the error occasioned by the trial court in taking the evidence of PW3, we are constrained to agree with the learned State Attorney and sustain the fifth ground of appeal as we hereby do, by expunging the testimony of PW3 from the record.

The identification of the appellant by PW2 on the material night, as the one who raped the victim, is the gist of the sixth ground of appeal. Even though Mr. Emmanuel conceded to the fact that the incident in the instant appeal occurred during night and that PW2 did not explicitly explain the circumstances which assisted her to identify the appellant, he argued that the identification which was made by PW2 could not be faulted for three reasons. **One**, she was his neighbour and hence could not mistakenly identify him. **Two**, he was instantly named to her by the victim, that the one who had raped her was one *'CHUDO'*, which was the common name of

the appellant at that area. And **three**, the appellant was the one who left with the victim from where she was with PW1.

After closely going through the record of the trial court, we were able to note that the appellant had no any qualms with what PW1 testified in court that, after having taken his dinner at Mangesani centre, where she served him with dinner, he left with MB while retiring to his home. Under the circumstances, even if he could not have been seen by PW2 on the material night, he still bore the duty of explaining for the whereabouts or, for whatever happened to MB, from when he took her from the custody of her mother at the center of Mangesani. As it was for the lower courts, we are as well sufficiently convinced to believe that, the appellant was identified by PW2 as the one who raped the victim and ran away after raping her. We therefore find the sixth ground of appeal without merit and dismiss it.

In the seventh ground of appeal, the appellant faulted the lower courts for convicting him of a statutory offence, while the age of the victim was not established. Mr. Emmanuel on the other hand, has responded that the age of the victim was established by her mother (PW1). Indeed, while giving her testimony as reflected on page 10 of the record of appeal, PW1

was recorded to state that during the occurrence of the incident under discussion, her daughter was aged four and half years old. In an akin situation in **Boniface Alistedes'** case (supra) where the age of the victim was also at issue, we stated that: -

> *"It is worthy to note that the best evidence as to the age of the child, comes from the parents. PW3 being the mother of PW1 (the victim), her evidence cannot be easily faulted."*

In the same vein, the age of the victim in the instant appeal as clearly stated by her mother in court, could not be easily challenged. To that end, the seventh ground of appeal is found to be bereft of merit and we accordingly dismiss it.

The twelfth and last ground of appeal is about the jurisdiction of the Resident Magistrate, who presided over the appeal during trial. In the view of the appellant, the fact that the case was instituted in a district court, then it ought to have been presided over by a District Magistrate. Basing on what has been stipulated under section 40 of the Magistrates Courts Act, Cap 11 R.E 2019 this ground cannot detain us much. The provision reads that: -

"(1) A district court shall have and exercise original jurisdiction–

(a) in all proceedings of a criminal nature in respect of which jurisdiction conferred on a district court by any such law for the time being in force;

(b) in all such other proceedings under any written law for the time being in force (except as otherwise provided in subsection (2) of this section) in respect of which jurisdiction is conferred on a district court by any such law:

Provided that–

(i) where jurisdiction in any such proceeding as is referred to in paragraph (a) or (b) is conferred on a district court when held by a resident magistrate, a civil magistrate, or some other description of magistrate a district court shall not have jurisdiction therein unless it is held by ***a resident magistrate, civil magistrate or magistrate of such other description, as the case may be; and ...***"

[Emphasis supplied]

What can be gathered from the wording of the above provision is that, a district court is said to be properly constituted when it is presided over by a resident magistrate or a civil magistrate or a magistrate of such

other description. Of importance to note as of now, is the fact that the cadre of district magistrates, is no longer in existence. As such, Resident Magistrates are the only presiding magistrates in district courts. That being the case, this ground of appeal by the appellant is baseless and we dismiss it.

Consequently, in the light of what has been discussed above, the appeal by the appellant stands dismissed.

Order accordingly. Order accordingly.

DATED at **DAR ES SALAAM** this 6th day of October, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

This Judgment delivered on 8th day of October, 2020 in the presence of the appellant in person-linked via video conference and Ms. Imelda Mushi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL