IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 279 OF 2019

MBARUKU DEOGRATIAS .....APPELLANT

VERSUS

THE REPUBIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)
(Kairo, J.)

dated the 31st day of August, 2017

in

DC. Criminal Appeal No. 52 of 2015

JUDGMENT OF THE COURT

7th & 16th December, 2020

KITUSI, J.A.:

The first appeal by Mbaruku Deogratias, hereafter the appellant, to challenge the conviction and sentence imposed by the District Court of Bukoba was unsuccessful. He had been charged with rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2002 allegedly for having unlawful sexual intercourse with a ten - year old girl whose name we shall keep undisclosed.

The District Court sentenced the appellant to thirty (30) years imprisonment. This is a second appeal.

The alleged victim who testified as PW1 gave an account of how it all started. The appellant whom she knew before, talked her into going with him to a Guest House known as Mafao where he secured a room. He then went away leaving PW1 in the room but returned later and spent the night with her making love. PW1 said she was a school girl so that in the morning she showered, put on the school uniform she had been dressing and proceeded to school. Alas' she found her father already at the school and upon interrogations she disclosed to him as well as to her teachers that she had spent the night with a man at Mafao Guest House.

The matter was reported to the police where a PF3 for PW1's medical examination was issued, as the police want out in search of the appellant who had told PW1 that his name was Zakaida.

On being cross-examined by the appellant, PW1 stated that she was familiar with him because he had previously raped her by alluring her with "chapati". PW1's account was supported by Siima Emmanuel (PW2) the attendant at Mafao Guest House. She stated that the appellant had gone to that Guest House earlier on that date and secured the room and left, promising to return later. When the appellant went back to the Guest House, he brought a small girl in school uniform.

PW2 found her alone in the room. The girl spent the night there because PW2 saw her leave in the morning.

Medical examination conducted by Boniface Paul Shija (PW3) detected bruises in PW1's vagina although no sperms were found. In PW3's opinion, the bruises must have been caused by a forced penetration during sexual intercourse.

The appellant made a lengthy story in defence.

He denied committing the alleged rape and raised a number of issues with the prosecution case, such as why was PW1 still loitering in the street wearing school uniforms at night, why didn't her parents get concerned with her being out after school time and why were there no blood stains on the bed sheets or her underpants. He also wondered why PW2 would allow him into the Guest House with such a small girl in school uniform. And further that since PW2 never saw him in the room in which she found PW1 in the morning, why did she exclude the possibility that some other man had spent the night with that girl.

All this was neither here nor there, for the trial court accepted PW1's version as true and concluded that under section 127 (7) of the

Tanzania Evidence Act Cap 6 R.E 2002 that evidence was sufficient to base conviction.

Before hearing of the appeal could take off, we asked Ms. Veronica Moshi, learned State Attorney who appeared for the Republic, to address us on a small preliminary point. This is that the appellant had obtained from the High Court an order for extension of time within which to appeal to the Court, and that order was sought and granted under section 361(2) of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA). We asked Ms. Moshi to comment on whether the order was made under a correct legal provision.

Ms. Moshi submitted that the application ought to have been made under section 11(1) of the Appellate Jurisdiction Act Cap 141 R.E 2002 (AJA) and therefore the purported order of the High Court under the CPA was a nullity. Upon our intervention the learned State Attorney agreed and prayed that we extend the time under Rule 47 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

We were resolved that the justice of the case required us to proceed with the hearing on its merits, therefore we acted under Rule 47 of the Rules and extended the time within which to lodge a notice of

appeal to make it properly before us. Having done so, we allowed the parties to focus on the substance of the appeal.

This appeal raises a total of seven grounds but Ms. Moshi argued at the very outset that grounds 1,4,5,6 and 7 are new. She submitted that on the authority of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported), we are barred from considering such grounds.

We have no problem appreciating the point being made by the learned State Attorney because we have previously pronounced ourselves on the same. See for instance the case of **Lista Chalo v. Republic,** Criminal Appeal No. 220 of 2017 (unreported) in which we cited, **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016 and **Florence Athanas @ Baba Ali and Another v. Republic**, Criminal Appeal No. 438 of 2016 (both unreported).That position is the spirit of section 6 (1) of the AJA as well as Rule 72 (2) of the Tanzania Court of Appeal Rules, 2009 as amended. The said sub rule provides: -

> *(2) The memorandum of appeal shall set forth concisely and under district heads numbered consecutively, without argument or narrative, the grounds of objection to the*

decision appealed against specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, ***which are alleged to have been wrongly decided*** *(Underlining ours).*

We therefore agree with the learned State Attorney that whatever points raised on appeal before us they must first have been decided upon by the High Court for them to qualify as grounds for our determination.

In order to be able to tell if the grounds of appeal listed by the learned State Attorney are new or not, we have looked at the petition of appeal that was presented before the High Court, found at page 63 of the record of appeal. It is true that some of the grounds of appeal are new such as ground one raising the issue of PW1's age was not raised before the High Court. Grounds 5, 6 and 7 were also not raised before the High Court, so they are new. However, ground four on omission to conduct a parade of identification was raised as ground 6 at the High Court so it is not new.

On the issue of new grounds, the appellant who appeared without legal representation submitted that ground one is not new because it

was raised in the course of complaining why PW1's father did not testify. He submitted in elaboration that if PW1's father had testified, he would have alluded to the age of the victim.

We have taken a close look at the petition of appeal at page 63 of the record and the appellant's detailed submissions at the High Court, found at pages 82,83 and 84 of the record. It is undoubtedly clear that the issues raised under grounds one, five, six and seven are new. It is not true that the complaint for not calling PW1's father was aimed at raising the issue of the victim's age. As we shall later see, it was meant to raise the issue of PW1's behavior. In view of the settled law, we are not going to consider those grounds, more so because they are matters of fact. Even if we were to consider the issue of age, it is now part of our jurisprudence that age may be inferred from facts other than the parent's testimony. See the case of **Kazimili Samwel v. Republic**, Criminal Appeal No. 570 of 2016 (unreported). In this case, not only was PW1 in school uniforms suggesting she was a scholar, but her tender age surprised PW2 when she found her in the room of the Guest House where she worked. Everyone, including the appellant was referring to the victim as "child" from which we infer that PW1 was below 18 years.

Similarly, we think ground four, on the identification parade, deserves no more than a casual glance. According to PW1, the appellant was an acquaintance with whom she had sex before the one the subject of this case. Whether that is true or not, the law is clear that identification parades serve no meaningful purpose when the witness alleges that he or she is familiar with the suspect. We have decided so in many cases including **Karim Seif @ Slim v. Republic**, Criminal Appeal No.161 of 2017 (unreported).

Besides, this issue of visual identification and identification parade being one of fact should not have been sneaked in for our determination. We had earlier invited Ms. Moshi to tell us if matters of fact could be brought before us on second appeal. The learned State Attorney submitted that such matters cannot be raised on second appeal. For this reason and for the reason that a parade of identification is uncalled for when the suspect is known to the witness, we decline to consider this ground of appeal.

We are left with grounds two and three of appeal, on which there were brief submissions from both sides.

The appellant submitted in relation to ground two that the failure by the prosecution to call the victim's father crippled their case against him. At the High Court this ground was raised as ground number 5, and according to that ground the victim's father and teacher would have testified on PW1's behavior. Before us, Ms. Moshi submitted that PW1's father would not have added value to the prosecution case because he was not at the scene of the alleged crime.

Not only is this ground barren of merit because, as correctly submitted by Ms. Moshi, PW1's father was not at the scene of the alleged rape, but we also wonder whether the appellant is cunningly suggesting that rape would be justified if committed against a victim of a certain behavior. We shall dismiss this ground as being a very long shot and the appellant's suggestion as being distasteful.

The third ground is a complaint that proof that the appellant was in the room at Mafao Guest House is missing because the Guest Register was not tendered in exhibit. The appellant has maintained this argument throughout submitting that if PW2 found PW1 alone in the room, then only the Guest Register showing his name would link him with the girl. In response to this, Ms. Moshi submitted, referring us to page 13 of the record, that the appellant refused to be recorded in the Guest Register

on the ground that it is the girl he was about to bring (PW1) who was the guest to be recorded. When later the said guest turned out to be a minor, PW2 decided not to register her.

We have considered the submissions in relation to ground three and the evidence on record and we think it is true the appellant's presence at Mafao Guest House as a guest could have been established by tendering in court the Guest Register. However, we also note that that is not the only evidence that would have proved that fact. We have indicated earlier that the trial court found PW1 truthful and on the basis of her testimony convicted the appellant. Similarly, the High Court found PW1's testimony faultless. In view of the principle in **Selemani Makumba v. Repulic** [2006] TLR 384 that the best evidence in sexual offences comes from the victim, we think the resort to the Guest Register is uncalled for. Given the nature of the matter, we have no reason to expect that PW2 may have been involved in all details. Therefore, as we decided in **Elia Bariki v. Republic**, Criminal Appeal No. 321 of 2016 (unreported), and given the nature of the alleged offence, the evidence as to what actually took place in the room may only come from the victim and no any other. Therefore, this ground is also dismissed for want of merit.

In the end we find no merit in this appeal, which we dismiss in its entirety.

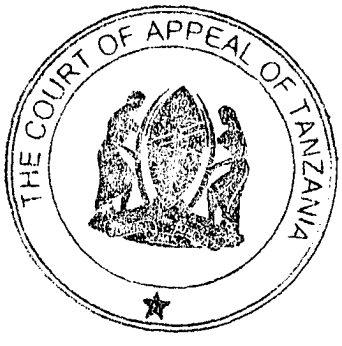
DATED at **BUKOBA** this 15th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This judgment delivered this 16th day of December, 2020 in the presence of the Appellant in person and Mr. Juma Mahone, State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL