IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 206 OF 2018

HARUNA MTASIWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Feleshi, J.)

dated the 13th day of April, 2018
in
DC Criminal Appeal No. 48 of 2017

JUDGMENT OF THE COURT

6th & 15th May, 2020

MWAMBEGELE, J.A.:

The appellant Haruna Mtasiwa was charged before the District Court of Iringa sitting at Iringa with rape contrary to sections 130 (1) & (2) (e) and 131 (1) & (3) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition, 2019). The particulars of the offence are that on 13.06.2016 at Kidilo Village within the District and Region of Iringa, he

had carnal knowledge of a girl aged eight years. We shall elsewhere refer to the girl as "the victim", to protect her modesty.

After hearing five prosecution witnesses and the appellant in defence, the learned trial Magistrate (G. N. Isaya - RM) was satisfied that the charge levelled against the appellant had been proved beyond reasonable doubt and, as a result, found him guilty as charged, convicted and sentenced him to life in prison.

The appellant was aggrieved with the decision of the District Court. His first appeal to the High Court at Iringa (Feleshi, J.) was unsuccessful. Still protesting his innocence, he has come to this Court on second appeal. His appeal is premised on eight grounds. **One**, the first appellate court should not have upheld the decision of the trial court which was not properly constituted because a social welfare officer was not in the coram. **Two**, the evidence of PW3 (the Doctor) should not have been relied upon as his testimony showed he examined the victim on 13.06.2016 at 16:00 hours which was before the commission of the offence. **Three**, failure to note that the PF3 was explained before admission into evidence. **Four**, the age of the victim was not proved in that the victim's mother (PW4)

testified that the victim was born on 26.06.2016. **Five**, the evidence of the victim was contradictory and it was not explained if "mdudu" referred to penis. **Six**, the contradictions in the testimony of witnesses were not minor as held by the first appellate court. **Seven**, the identification of the appellant was not properly resolved by the prosecution. **Finally**, that the first appellate court wrongly dismissed his appeal while the prosecution did not prove the case beyond reasonable doubt.

Briefly, the background facts leading to the appellant's arraignment are, in essence, captured in the evidence of the victim herself, Eliza Malegesi (PW4); her mother and Rajabu Augustino Mtasiwa (PW2); her grandfather. It goes thus: on 13.06.2016 at midnight, the victim was fast asleep in a two-roomed kitchen house together with her two sisters when a person she allegedly identified to be the appellant; her paternal uncle, forced entrance in the inner room and raped her. Her attempts to raise an alarm for help were futile as the ravisher gagged her mouth with a shoe. After the ordeal, she ran outside the kitchen house and hid at the backyard.

In the meanwhile, PW2 and her wife Veronica Kindole (PW5) arrived there to complain to PW4's husband who was a ten cell leader that the appellant had attempted to rape their daughter named **CM** but she raised an alarm and the appellant aborted the mission and ran away. PW2, PW4 and PW4's husband going by the name Jackson Mtasiwa, went in the kitchen house to check their children. They realised that the door was broken into and the appellant lay on the floor on the outer room of the kitchen house pretending to be asleep. PW2 had a solar torch whose light helped identify the appellant. They entered the inner room where children slept but the victim was not there. They searched for her in the vicinity and found her at the backyard of the kitchen house in great fear. She was crying. She told them that uncle Haruni had raped her. PW4 examined her private parts with the help of PW2's solar torch given to her. She discovered that there were blood stains and whitish fluid in the vagina of the victim. They reported the incident to the Village Executive Officer; a certain Jackson Mdota who showed up and attempted to arrest the appellant but the latter resisted. PW2, Jackson Mtasiwa and Jackson Mdota joined forces and, at the end of the day, arrested him. He was taken to the police station the very night.

The victim was taken to Ifunda Health Centre where Dr. Norbert Sanga (PW3) medically examined her and found that she had sustained what he called "a third degree tear which broke the wall between the vagina and anus". He also found bruises and some sperms in the vagina of the victim. He filled these findings in a PF3 which was admitted in evidence as Exh. P1.

When put to his defence at the trial, the appellant did not dispute on being arrested on 13.06.2016 at midnight. His account of what transpired on the material night dovetails with that of the prosecution but ascribes the reason for the arrest to a different reason altogether. He recounted the episode to the effect that on that date, at about 23:00 hours, he was at a *pombe* shop where PW4 and PW5 were selling local brew. The appellant did not pay for the brew he bought from them. He was told to deliver the money to their respective homes. The appellant went on to narrate the story that he first went to the residence of PW2 and PW5 where he knocked the door to no avail. Nobody opened the door for him even though the lights were on. He thus decided to go to PW4 but no sooner had he knocked PW4's door than PW2 and PW5 arrived claiming

that he had attempted to rape their daughter in the children's room. That PW2 hit him with a stick forcing him in the process to enter inside. The Village Executive Officer was phoned and showed up. That a scuffle ensued involving exchange of blows between him on the one hand and PW2 and the Village Executive Officer on the other. The appellant went on to narrate that the children were scared of the scuffle and ran outside their room. That he was overpowered and after the altercation, he was taken to the police station where he was accused of rape.

The appellant challenged the testimony of the victim that she could not have identified anybody inside the house with the help of light illuminated from moonlight. He charged that the moonlight illuminated outside and there was no solar lamps inside the house. He also stated that there was a discrepancy in the evidence of PW3, PW2 and PW4 in terms of time the victim was taken to the hospital; while PW3 testified that it was at 08:00 hours, PW2 testified that it was at 16:00 hours and PW4 said it was at 10:00 hours.

The appellant complained before the trial court that the whole thing was fabricated by PW2 with whom they were in conflict over land. That

they had been in conflict all along and that they could not even greet each other. However, the District Court found the appellant's defence too weak to raise any reasonable doubt in the prosecution's case and hence the verdict of guilt followed by conviction and sentence which were sustained by the first appellate court, hence this second appeal.

When the appeal was placed before us for hearing on 06.05.2020, the appellant appeared in person, unrepresented at Iringa Prison as the appeal was heard by video conference; a facility of the Court. The respondent Republic appeared through Ms. Kasana Maziku, learned Senior State Attorney, who was in the Court's premises together with us.

When we gave the floor to the appellant to argue his appeal, he simply adopted the grounds in the memorandum of appeal and asked the Republic to respond after which he would make a rejoinder if need would arise.

In her reply submissions, Ms. Maziku expressed her stance at the very outset that she supported the appellant's conviction and the flanking sentence meted out to him. She also expressed that the first, second, third and sixth grounds of appeal were not subject of the grounds of

appeal in the first appellate. Except for the third ground which involved a point of law, the other grounds should not be entertained by the Court, she submitted. Convinced that the law is settled on the point, the learned Senior State Attorney proceeded to argue the rest of the grounds, except for the first, second and sixth grounds.

Responding to ground three which is a complaint that the PF3 was explained before it was tendered, Ms. Maziku replied that the PF3 was not explained before it was tendered. She argued that no rule was offended. Neither was any case law offended. That process, she argued, involved clearing it before admission. The learned Senior State Attorney did not cite any authority to buttress this proposition.

With regard to ground four of appeal, Ms. Maziku argued that the testimony of PW4 showing that the victim was born on 26.06.2016 was but a *lapsus calami* in that the offence was committed on 13.06.2016 and the witness testified that the victim was aged eight years at the time. She added that a birth certificate was not relevant in that the best evidence was that of PW4, her mother. For this proposition, she placed reliance on our decision in **Bashiri John v. Republic**, Criminal Appeal

No. 486 of 2016 - [2019] TZCA 89 at www.tanzlii.org, in which, relying on our previous decision in **Issay Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported), we held that proof of age may be by parents, medical practitioner or by a birth certificate. After all, she added, the appellant never cross-examined the witness regarding age thus his complaint is an afterthought.

As to five, the learned Senior State Attorney submitted that given the age of the victim, she could not explain graphically the penis but, in its stead, she referred to it as "mdudu". Placing reliance of our decision in **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 (unreported), given the young age of the victim, she would not have been able to say amidst audience that the appellant inserted his penis in her vagina.

In relation to ground seven which is about the identification of the appellant, the learned Senior State Attorney submitted that she identified him with the help of moonlight which illuminated the room through the window. The victim was firm even in cross-examination at p. 10 of the record of appeal. When we prodded him on how wide the window was,

Ms. Maziku responded that there was no such evidence on the record. She added that PW2 testified that he entered the house and found the appellant lying on the floor and heard the victim crying from the rear of the house. The learned counsel added that the victim testified that the appellant raped her and went to lie at the sitting room of the kitchen and that is where he was found. The evidence of the victim respecting identification was also corroborated by PW4 who testified at p. 19 of the record that the appellant was identified with the help of light illuminated from a solar torch. He was arrested there and then and taken to the police station, she added.

Finally, the learned Senior State Attorney submitted that the prosecution proved the case beyond reasonable doubt through the evidence of PW1, PW2, PW3 and PW4. The learned Senior State Attorney relied on our decision in **Selemani Makumba v. Republic** [2006] T.L.R 379, at 384 where we held that true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. She added that PW4 examined the victim and discovered

that she had some whitish fluid in her vagina. Relying on **John Nziku v. Republic**, Criminal Appeal No. 181 of 2016 (unreported), she submitted that that was enough to prove penetration. She also referred us to the testimony of PW3 at p. 19 where she said that whitish fluid was sperms.

The learned Senior State Attorney added that the testimony of the victim, having complied with the dictates of section 127 (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2019 as amended by the written Laws (Miscellaneous Amendments) (No.2), Act, 2016 (the Evidence Act) was sufficient in itself to mount a conviction against the appellant. She added that even though the evidence of the victim in itself proved the case against the appellant, it found corroboration from the evidence of PW2, PW3, PW4 and PW5.

Regarding contradictions in time by the prosecution witnesses, the learned Senior State Attorney submitted that even though the witnesses referred to the midnight of 13.06.20126, reading in context, the witnesses were referring to the night between 12.06.20126 and 13.06.20126 thus PW3 examined the victim after the incident, not before the incident as claimed by the appellant. With regard to the contradiction in time as to

when the victim was taken to the hospital, Ms. Maziku relied on **Shihobe Seni v. Republic** [1992] T.L.R 379 to argue that in cases of illiterate witnesses, it was not fair or desirable to tie them down too closely to estimates of time.

Having argued as above, the learned Senior State Attorney impressed upon the Court that the case against the appellant was proved beyond reasonable doubt. He implored us to dismiss the appeal in its entirety.

In a short rejoinder, the appellant submitted that identification of the assailant in the present case was not watertight, for it was not whether he was identified by means illuminated from the moonlight or solar power. He argued that it could not be possible for any witness to identify any assailant in the room with the help of moonlight.

Regarding the PF3, he submitted that it was prepared before the incident. He also challenged evidence regarding the age of the victim arguing that a birth certificate ought to have been tendered to prove the age of the victim. He stressed that the case was manufactured by PW2 with whom he was in bad terms over a land dispute.

The appellant thus stated that the case against him was not proved beyond reasonable doubt and urged us to allow the appeal and set him free.

Having summarised the background facts of the case and the submissions of the parties, we should now be in a position to confront the grounds of appeal. But before we do that, we wish to acknowledge, as did Ms. Maziku, that ground one, two, three and six were not canvassed in the High Court. The appellant so admitted as well. In the circumstances, in accord with the settled law, we will not entertain them in this second appeal. That this is the law has been articulated in a number of our decisions – see: **Samwel Sawe v. Republic,** Criminal Appeal No, 135 of 2004, **Diha Matofali v. Republic**, Criminal Appeal No. 245 of 2015, **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006, **Juma Manjano v. Republic,** Criminal Appeal No. 211 of 2009 (all unreported) and **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016 - [2018] TZCA 20 at www.tanzlii.org to mention but a few. In **George Mwanyingili** (supra), we cited the following excerpt in **Samwel Sawe** (supra) which we think merits recitation here:

"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of ***Abdul Athuman vs R*** *[2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

That is the reason why we allowed the learned Senior State Attorney to make her response to only the remaining grounds of complaint as well as ground three which was not raised on first appeal but one of law which could be raised at any time.

In the third ground of appeal, the appellant complains that the PF3 was explained before it was tendered. Ms. Maziku resisted this argument with some force and to our mind rightly so. We have scanned the record of appeal in some considerable detail and have not been able to see

anywhere PW3 explaining the exhibit before it was tendered. If anything, as rightly put by Ms. Maziku, what was done was clearing the exhibit before it was tendered in line with what we articulated in **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R 218. We laid that principle in the following terms:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out. Reading out document before they are admitted in evidence is wrong and prejudicial. "*

We thus are in agreement with Ms. Maziku and dismiss the complaint by the appellant to the effect that the PF3 was explained before it was tendered.

Despite the foregoing finding, we do not think the exhibit was correctly tendered in evidence given that it was not tendered by PW3 but by the learned Senior State Attorney prosecuting the case. That is to say, it is the prosecutor who prayed to tender it. We may let the record at p. 16 paint the picture:

> ***"PW3 – XD by Abel (SSA)***

It is the very PF3 I filled. It bears my own handwriting. I pray it be tendered as exhibit.

Abel (SSA)

We pray to tender the PF3 of [the victim] as exhibit.

Accused: I have no objection

Court: *The PF3 of [the victim] is hereby tendered and admitted as Exhibit P1."*

As can be seen in the proceedings reproduced above, the witness prayed for the document to be tendered in evidence and the learned Senior State Attorney prayed to tender it. That was inappropriate. The Senior State Attorney, not being a witness, was not legally competent to tender the document. We find solace on this stance in our unreported decision in **Aloyce Maridadi v. Republic**, Criminal Appeal No. 208 of 2016, in which we relied on our previous decisions in **Frank Massawe v. Republic**, Criminal Appeal No. 302 of 2012 and **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic**, Criminal Appeal No. 78 of 2012 (both unreported) to observe at pp. 10 – 11:

"... a prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect, that was wrong because in the process the

prosecutor was not sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98(1) of the Criminal Procedure Act. As it is/ since the prosecutor was not a witness he could not be examined or cross examined"
See also: **Selemani Bakari Makota @ Mpale v. Republic**, Criminal Appeal No.269 of 2018 [2019] TZCA 381 at www.tanzlii.org.

In view of the above discussion, we are settled in our mind that the PF3 was wrongly admitted in evidence. We expunge it from the record.

We now turn to consider ground four the kernel of which is that the age of the victim was not proved for failure to tender her birth certificate. The appellant places heavy reliance on the testimony of PW4 who is recorded as saying the victim was born on 26.06.2016. We think this ground should not detain us, for, as rightly submitted by Ms. Maziku, inserting the year 2016 was but a *lapsus calami*. It cannot be gainsaid that the offence was committed on 13.06.2016 and the witness (PW4) testified that the victim was aged eight years at the time. The charge sheet to which the appellant pleaded shows that the victim was aged eight years. We are firm that PW4; the mother of the victim, who testified that

the victim was aged eight years when she was testifying, meant to say her daughter was born eight years back; not the same year she was giving evidence and the same year the offence was committed. In the same token, we agree with Ms. Maziku that a birth certificate was not required in the circumstances to prove the age of the victim contrary to what the appellant would want us hold. As we held in **Bashiri John v. Republic** (supra) in which, relying on our previous decision in **Isaya Renatus v. Republic**, (supra), we observed that proof of age may be by parents, medical practitioner or by a birth certificate. We find this ground wanting in merit. We dismiss it.

We now turn to determine ground five which is a complaint that the victim was not credible, that her evidence was contradictory and that it was not clear if the "mdudu" she referred to in her testimony meant penis. The appellant has not explained in material particulars how the evidence of the victim contradicted. The trial court found the victim as a witness of truth. So did the first appellate court. In the absence of the appellant's explanation, let alone a plausible one, we have no sound reason to vary this concurrent finding of fact by the two courts below.

With regard to the complaint that it was not proved that "mdudu" meant penis, the learned Senior State Attorney argued, and to our mind rightly so, that given the age of the victim, it was not expected she would graphically tell the trial court that the appellant inserted his penis in her vagina. Gone are the times in this jurisdiction when the victim was expected to graphically explain that the ravisher inserted his penis in her vagina. In **Simon Erro v. Republic,** Criminal Appeal No. 85 of 2012 (unreported), the victim, like here, referred to the penis as "dudu" and we held that that was sufficient. We also find support in **Joseph Leko v. Republic** (supra), the case cited to us by the learned Senior State Attorney, in which we observed:

> *"Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters. The cases of*

Minani Evaristi v. R, *CRIMINAL APPEAL NO. 124 OF 2007 and* ***Hassani Bakari v. R*** *CRIMINAL APPEAL NO. l03 OF 2012 (both unreported) decided by this Court in February and June 2012 respectively are some of the recent development in the interpretation of section 130(4) (a) of the Penal Code."*

[Underlining supplied].

See also: **Hassan Kamunyu v. Republic,** Criminal Appeal No. 277 of 2016 - [2018] TZCA 259 at www.tanzlii.org and **Baha Dagari v. Republic** Criminal Appeal No. 39 of 2014 (unreported)

On the strength of the above authorities, we are satisfied that by testifying, as recorded at p. 9, that "baba mdogo Haruna inserted his mdudu into my vagina (showing at her private parts)" she simply meant the appellant inserted his penis into her vagina. We find this complaint as without substance. We dismiss it.

We now turn to determine ground seven which is a complaint by the appellant that the victim could not have identified him with the help of light of the moonlight illuminating the room through the window. We

agree with the appellant on this complaint. It is doubtful if the victim indeed identified the appellant in the circumstances explained. There was led no evidence by the prosecution on the size of the window, whether it was open or closed, whether it was made of glass or wooden, et cetera. This doubt, as our criminal law prescribes, must be resolved in favour of the appellant. We are positive that the threshold regarding identification of an assailant in offences committed during the night, as articulated in the oft-cited **Waziri Amani v. Republic** [1980] TLR 250 was not met. In that case, the Court articulated at pp. 251 - 252:

> *"... evidence of visual identification, as the Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that, no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is absolutely watertight".*

We agree with the appellant that the victim could not have easily identified an assailant in the circumstances explained. However, even though we have so found and held, we are satisfied that other evidence

available irresistibly point to the effect that the victim was raped by none other than the appellant. We shall demonstrate.

When PW2 and PW5 arrived at the residence of the victim's parents and complained that the appellant has attempted to rape their daughter **CM**, PW2 and PW4 entered the kitchen house wherein they found the appellant pretending to be asleep. The victim had ran out of the house but when they found her at the rear of the house she told them that after the ordeal, the ravisher went to sleep at the outer room of the house. That is where the appellant was found pretending to be asleep. PW4 examined her only to find that there were bruises and whitish fluid in the victim's vagina. The examination by PW3 who medically examined her and saw bruises and sperms in her vagina lends support to what PW4 testified. We must be clear hear that we are referring to the testimony of PW3 which can be relied upon despite the fact that the PF3 was expunged - see: **The Director of Public Prosecutions v. Erasto Kibwana and 2 Others**, Criminal Appeal No. 576 of 2016 (unreported), **Thomas Robert Shayo v. Republic**, Criminal Appeal No 409 2016 (unreported), **Abasi Makono v. Republic**, Criminal Appeal no 537 of 2016 - [2019] TZCA 299

at www.tanzalii.org and **Shabani Ng'ombe Kenyeka v. Republic**, Criminal Appeal No. 454 of 2016 - [2019] TZCA 463 at www.tanzalii.org. This evidence, in totality, sufficiently proved in our considered view that the ravisher was the appellant. We thus find and hold that this ground is without merit as well.

With regard to the last ground, we are firm that the prosecution proved the case to the required standard; that is, beyond reasonable doubt. The victim, a child of tender years, was found by the trial court to be a witness of truth. In the light of our decision in **Selemani Makumba v. Republic** (supra) and as rightly submitted by the learned Senior State Attorney, the victim need not prove consent; it is enough proving penetration only. This is what is referred to in legal parlance as statutory rape. We are satisfied that the prosecution proved penetration through the evidence of the victim. She testified that the appellant inserted his "mdudu" in her vagina. In terms of section 127 (2) of the Evidence Act, as amended by the written Laws (Miscellaneous Amendments) (No.2) Act, 2016, that was sufficient on its own to mount a conviction against the appellant.

The evidence of penetration was also given by PW4; her mother who asked her daughter what had befallen her and she told her it was the appellant (whom she referred to as "baba mdogo") who inserted his penis (which she described as "mdudu") into her vagina. PW4 examined the victim and found that her vagina had bruises and observed some whitish fluid. As if to clinch the matter, PW3 who medically examined her, also found her vagina to have bruises and sperms. It may also not be irrelevant to interpolate here that the appellant did not cross-examine the victim on this point. He only cross-examined on whether there was solar lump illuminating the room and was answered in the negative. It is the law in this jurisdiction founded upon prudence that failure to cross-examine on an important matter ordinarily implies the acceptance of the truth of the witness's evidence on that aspect. Authorities on the point are not difficult to seek - see: **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010, **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 and **Bakari Abdallah Masudi**, Criminal Appeal No. 126 of 2017 (all unreported).

In the end of it all, with the exception of few pockets discussed above in which we have allowed some arguments of the appellant, we, generally, find no merit in this appeal. We dismiss it.

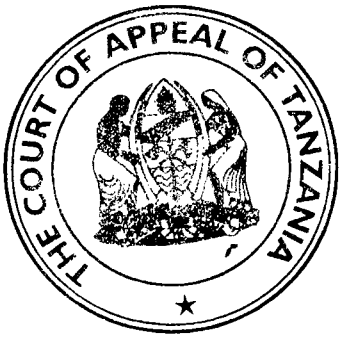
DATED at **IRINGA** this 14th day of May, 2020

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of May, 2020 in the presence of the Appellant in person through video conference and Adolf Maganda, Senior State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL