IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 114 OF 2017

(CORAM: LILA, J.A, KOROSSO, J.A. AND SEHEL, J.A.)

RUTOYO RICHARD.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(De- Mello, J.)
Dated 8th day of March, 2017
in
Criminal Appeal No.239 of 2016.
.....

JUDGMENT OF THE COURT

10th & 16th June, 2020

LILA, JA:

This is a second appeal. Rutoyo Richard, the appellant herein, was arraigned before the District Court of Musoma at Musoma with the offence of rape contrary to section 130 (1)(2) (e) and 131 of the Penal Code, Cap 16 R. E. 2002 (the Penal Code). It was alleged by the prosecution in the particulars of offence that; the appellant on 19th April, 2015 at Kamnyonge area within the District and Municipality of Musoma in Mara Region did have carnal knowledge of a fifteen (15) year old girl, who we shall be referring to by the acronym SJ, the victim

or simply PW1, in the course of this judgment. He was convicted as charged and was sentenced to serve a statutory minimum sentence of thirty years jail term. His first appeal to the High Court was unsuccessful, hence this appeal.

The present appeal, to say the least, is a clear manifestation of the reality of one of the famous Swahili Saying "unaruka majivu unakanyaga moto" literally meaning you avoid stepping unto ashes and you find yourself stepping unto fire. The victim avoided being taken to school by her mother for enquiry on her unsatisfactory performance but ended up in being raped. This is the situation under which the victim found herself in. As it were, she was schooling with her young sister, who we shall also be referring to as SJ JUNIOR so as to further hide the identity of the victim, at Buhare Secondary School. They were in form I. Midterm test paper results were released and SJ's score happened to be lower than that of SJ JUNIOR as the former scored 45% while the later scored 50%. Diana Moris (PW2), the victim's mother, was unhappy with that. She furiously questioned, abused and threatened to take the victim to her teacher for further inquiry. Afraid of what would befall on her in the event she was to be taken to school;

the victim parked her luggage on 19/4/2015 in the evening (around 6:00pm) and left on foot to her grandmother's place one Anastazia at Buhare. While on the way, she met the appellant and his friend who were on a motorcycle. The two, who were strangers to her, offered her a lift and as it was already late in the evening she accepted and the trio left going in the direction leading to Buhare and the journey ended at a certain house. After a short while, the appellant's companion left leaving the appellant and the victim therein. Elaborating on what happened thereafter, the victim claimed that for three consecutive nights, the appellant had sexual intercourse with her at knife-point. She told the trial court that in all those days until 21/4/2015 the appellant used to lock her inside the house during the day time and left to his errands but during the night he forcefully undressed her, forced her to sleep on the bed, lay her legs apart and he penetrated his male organ into her genital parts while holding a knife. She complained that she experienced pains and at one time blood oozed from her genital parts. That it was on 21/4/2015 when, after the appellant had closed the door from outside and left, one Mama Constantine passed nearby the house and she asked her to open the door. That she told her the whole incident and was locked in again while planning for how she would be

rescued. Upon return of the appellant, the door was forced open people who were outside and she managed to escape and the appellant was apprehended by people who were outside the house despite his attempt to disperse them by throwing stones onto them. According to Anastanzia Wilfred (PW3) who witnessed the appellant being arrested, the appellant was taken to Musoma Central Police Station. Surprisingly, the victim, went to one Alloys whereat she stayed for three days before she went back home. On 27/4/2015 she was taken to Central Police Station, issued with a PF3 and went to Nyasho Hospital where she was examined by Dr. Pius Biseko Makene (PW5) who revealed that her virginity perforated and had been penetrated by a blunt object which suggested that she was carnally known. He filled the PF3 which he tendered in court and was admitted as exhibit P1. PW2 simply told the trial court that the victim absented herself from the evening of 19/4/2015 till the 21/4/2015 when she was told by the victim's teacher one Nuru Geofrey (PW4) who was looking for the victim that she was seen with appellant.

A policeman one F. 3494 PC Dickson (PW7) told the trial court that he assisted in the arrest of the appellant at Buhare after receiving

a tip from PW2 and took him to Central Police Station Musoma. On his part, F. 1574 D/CPL Stephano (PW6), told the trial court that he recorded the appellant's cautioned statement (exhibit P2) on 21/4/2015 in which he confessed carnally knowing the victim.

In his sworn defence, the appellant vehemently protested his innocence claiming that he was arrested by two policemen who were accompanied by two women at his home after his return from his work and was taken to Musoma Central Police station and thereafter charged with the offence of rape. He said his statement was recorded and he signed. He however attacked the evidence by the victim (PW1), PW2 and PW3 as being untrue and that they are related hence fabricated the case against him. He, however, did not give reasons. In respect of the Doctor's evidence and PF3, he discredited such evidence claiming that only one side was examined as he was not also examined. In sum, he urged the trial court not to accord any weight to the untruthful prosecution evidence.

The appellant's lamentation notwithstanding, the trial court found the prosecution case strong and proved the charge at the required standard of proof beyond reasonable doubt. It was satisfied that the

appellant had forceful sexual intercourse with the victim, given that they spent three days together the issue of identification does not arise and based on assessment of her demeanour, the victim's credibility was impeccable. In addition, the detailed account of the incident by the victim which tallied with the appellant's explanation in the cautioned statement moved the trial court to reach at a finding that the appellant's culpability was fully established. Consequently and as hinted above, it proceeded to convict the appellant and sentenced him to serve thirty years imprisonment.

In the High Court, on first appeal, the appellant lodged a memorandum of appeal which comprised four grounds as hereunder:-

> "1. *That the presiding court erred when it failed to consider the non-existence/unestablishment of penetration as per the elapsed period of time i.e 72 hrs.*
>
> 2. *That the presiding magistrate had failed to realise the contradictions of exhibit P1 (i,e PF3) contents and or PW5's (Dr. Pius Biseko) findings with victims (PW1) evidence.*

3. *That due to the lack of prior descriptions the hon. Trial magistrate erred by acting on dock identification.*

4. *That, the prosecution case was not proved beyond reasonable doubt."*

After consideration of arguments of both sides, the High Court concurred with the trial court and found both the conviction and sentence sound in law. Like the trial court, identification of the appellant was found to be a non-issue. Also based on the best evidence rule as was propounded by the Court in the case of **Selemani Makumba vs Republic**, Criminal Appeal No. 94 of 1999 (then unreported), the High Court found the victim's evidence clear and consistent hence sufficiently proved being penetrated by the appellant. Feeling aggrieved, the appellant preferred this appeal fronting four grounds of appeal as hereunder:-

"1. That, both the trial and first appellate courts erred in law and facts by relying on incredible witnesses, i.e. PW1 who was rather a suspect witness whose evidence was unworthy of belief.

2. *That, both the trial and first appellate courts had taken no circumspections over the victim's pre and post*

conducts which suffice to inevitably conclude that rape by force was an afterthought.

3. *That, the trial and first appellate courts erred in law and facts to rely on the cautioned statement regardless its shortcomings in both the law and facts.*

4. *That, the appellant's age as clearly shown in the charge sheet and in the caution statements, i.e. 18 years old was not taken into consideration in sentencing a child as it offended the Penal Code Cap 16 RE: 2002 and the Child Act."*

The appellant who was linked with the Court through video facility appeared in person and unrepresented. Ms. Sabina Choghoghwe, learned State Attorney, represented the respondent Republic.

When the appellant was invited to elaborate his grounds of appeal, he refrained from doing so. He, instead, opted to make a reply after the learned state Attorney had responded to his complaints.

Before putting up her position on the merits of the appeal, the learned State Attorney first took issue with the grounds of appeal. She hastened to point out that all the grounds of appeal were new hence

they should not be considered by the Court. Elaborating, she contended that all matters raised in the grounds of appeal were not canvassed in the High Court and determined hence in terms of section 4(1) of the Appellate Jurisdiction Act, Cap. 141 R. ER. 2019 (the AJA), the Court lacks jurisdiction to entertain them. However, she took exception of ground four (4) of appeal which she said is a point of law which can be raised at any stage and the Court is obligated to entertain it. In supporting her argument, she referred us to our decision in the case of **Hassan Bundala @ Swaga vs Republic**, Criminal Appeal No. 386 of 2015 cited in the case of **George Claude Kasanda vs The Director of Public Prosecutions**, Criminal Appeal No.376 of 2017 (both unreported). She accordingly urged the Court to disregard grounds 1, 2 and 3 of appeal.

In ground four (4) of appeal, the appellant is aggrieved by failure by both courts below to accord due weight to his age when assessing appropriate sentence to pass against him. His complaint is centred on the fact that he was eighteen (18) years old when the sentence was passed against him. Responding to that, Ms. Choghoghwe, contended that she had no issue with it. She readily admitted that the appellant's

age was not considered at the time of passing sentence. She contended that the appellant's age had serious bearing on the sentence to be meted in terms of section 131(1) (2) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) which stipulates the appropriate sentence to an offender who is a boy of the age of eighteen (18) and below. In the present case, she argued further, the appellant was a boy and a first offender hence the appropriate sentence was corporal punishment and not a custodial sentence of thirty (30) years.

Before resting her case, the learned State Attorney, sought and we granted her leave to submit on a point of law she contended to have noticed when perusing the record and which did not form one of the grounds of appeal. She humbly contended that since the appellant was charged under section 131 (1) (2) (e) of the Penal Code which creates an offence of rape where the victim is under eighteen (18) years in which consent is immaterial, proof of age was of paramount importance. Her stance was that the personal particulars availed by the victim to the trial court before being sworn or affirmed which indicated that she was fifteen (15) years on the day she testified did not constitute part of the evidence on account of not being given on oath.

To cement her assertion, she referenced us to the case of **George Claude Kasanda vs Republic** (supra). Stressing on the point, she submitted that neither the victim's mother (PW2) nor the medical Practitioner (PW5) who in terms of the decision of the Court in **George Claude Kasanda vs Republic** (supra) could lead evidence proving the victim's age, discharged that duty. On that account, she pointed out, the victim's age remained unproved hence the prosecution failed to prove the charge against the appellant.

Enchanted by the learned State Attorney's response to his grounds of appeal, the appellant copiously agreed with her and urged the Court to allow the appeal and be pleased to let him free.

We have given deserving consideration to the appellant's grounds of appeal and the submissions by the learned State Attorney. We will start with the issue raised by the learned State Attorney that grounds 1, 2 and 3 of appeal are new hence this Court is precluded, in terms of section 4(1) of the AJA, from entertaining them. We unreservedly agree with her that, save for issues of law, it is trite law that this Court cannot entertain grounds of appeal which were not first put before the High Court for determination. That legal position has been restated in a chain

of cases (See **Hassan Bundala @ Swaga vs Republic** (supra), **Bakari Abdallah Masudi vs Republic**, Criminal Appeal No. 126 of 2017 and **Dickson Anyosisye vs Republic,** Criminal Appeal No. 155 of 2017, **Alex Ndendya vs Republic,** Criminal Appeal No. 340 of 2017, **Samwel Sawe vs Republic,** Criminal Appeal No, 135 of 2004, Nasibu **Ramadhani vs Republic,** Criminal Appeal No. 310 of 2017, (all unreported) and **Abdul Athuman Vs R** [2004] T.L.R.151. We are, however, unable to go along with her in the present case that such position squarely applies. As the above recited grounds of appeal before the High Court vividly show, the appellant had raised as a ground of appeal that*, the prosecution case was not proved beyond reasonable doubt.* General as it is, such a ground calls for an appellate court to consider all the evidence, oral, documentary and physical evidence to ascertain whether in their totality establish the appellant's guilt to the hilt. Need not to say, several grounds or points of grievance may be drawn from that general ground. Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance. This Court had

an occasion to face an identical scenario in the case of **Robert Andondile vs Republic**, Criminal Appeal No. 465 of 2017 (unreported) wherein, with lucidity, stated:-

> *"While we agree with Ms. Makombe that* ***this Court may not deal with grounds which were not raised and determined by the High Court or Resident Magistrate with extended jurisdiction, we asked the learned State Attorney to address all grounds for two reasons. First of all, at the High Court the appellant had raised a general ground that the prosecution had failed to prove the case against him beyond reasonable doubt, which is a general ground****. Secondly, the grounds of appeal are so overlapping that some elements in the so-called new grounds touch on those which had been earlier raised..."* (Emphasis added)

To that extent we concur and find that all the grounds of appeal were properly before us and deserved to be considered and determined.

Leaving aside the above, in view of the submissions of Ms. Choghoghwe, we think our determination of the issue taken on board by the learned State Attorney at the hearing of this appeal only will be

decisive. That is, whether on the evidence on record the offence charged was proved against the appellant beyond doubt.

Having gone through the evidence on record, we are in full agreement with Ms. Choghoghwe that the prosecution evidence fell short of proving the charged offence. As rightly argued by the learned State Attorney, the appellant was charged with the offence of rape under section 130 (1) (2) (e) and 131 (1) of the Penal Code. That section creates an offence of rape committed against a girl of the age of eighteen (18) and less now termed as statutory rape. Under that section, therefore, age of the victim is of great essence. For that offence to stand, it must be proved that the victim is eighteen or below. Times without number, this Court has demonstrated that need and casted that duty on the prosecution who, in our criminal jurisprudence is, imperatively obliged to prove the charge beyond all reasonable doubt. On this, we are grateful to Ms. Choghoghwe on her concession that, in the instant case, the prosecution did not completely lead any evidence tending to prove the age of the victim. The cited case of **George Claude Kasanda vs The DPP** (supra) clearly illustrated that settled position of the law. In that case, the Court cited with approval

the Court's decision in the case of **Issaya Renatus vs Republic** (supra) in which it was stated that:-

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to the proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate..."*

The court, in **George Claude Kasanda vs the DPP** (supra), then went further to state that:-

> *"Before we proceed, we find it opportune to remind the courts below and the prosecution that preliminary answers and particulars given prior to giving evidence are not part of the evidence as the same are not given on oath (See **Simba Nyangura vs Republic**, Criminal Appeal No. 144 of 2008 (unreported). Instead, they serve as general information (See **Nalogwa John vs Republic**, Criminal Appeal No. 588 of 2015* (unreported)."

In the instant case, as rightly argued by the learned State Attorney, no one be it the victim (PW1), her mother (PW2) or the medical practitioner (PW5) led evidence proving the age of the victim. What comes out clearly from the perusal of the record is that in the particulars given by the victim and the PF3 taken to PW5 indicated that the appellant was fifteen years old. On the authorities, that was insufficient to prove the age of the victim. We reiterate that cogent evidence relating to age from the victim, parent, close relative, close friend, teacher in which she was schooling or any person who knew well the victim was required. (See **Elia John vs Republic**, Criminal appeal No. 306 of 2016 (unreported).

The offence of statutory rape cannot stand where age of the victim, which is one of the crucial ingredients of the offence, is not proved. The appellant's conviction of the offence was therefore not sound in law. This being a deficiency on the prosecution evidence, an order for retrial is unjustified and will occasion injustice. (See **Fatehali Manji vs Republic** [1966] E. A. 341)

For the foregoing reason, like the learned State Attorney, we find the appeal meritorious. We accordingly invoke our powers of revision

in terms of section 4(2) of the AJA and hereby quash the appellant's conviction and set aside the sentence. The appellant be released from prison forthwith unless held for another lawful cause.

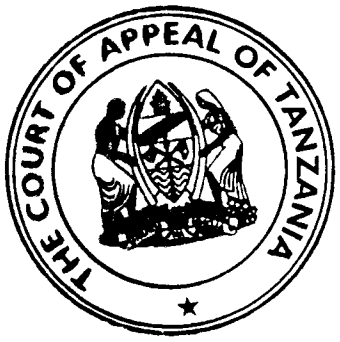
DATED at **MWANZA** this 15th day of June 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2020 in the presence of the appellant - linked via video conference Isanga - Dodoma and Mr. Victor Karumuna, Principal/Senior/State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL