IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA J.A., MKUYE J.A., And MWANGESI J.A.)

CRIMINAL APPEAL NO. 504 OF 2017

WESTONE S/O HAULE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Ngwala, J.)

dated the 10th day of April, 2017

in

DC Criminal Appeal No. 33 of 2016

JUDGMENT OF THE COURT

5th June & 24th July, 2020

MWANGESI J.A.:

The appellant herein, was charged in the Resident Magistrates Court of Mbeya at Mbeya with the offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code Cap 16 R.E. 2002 **(the Code)**. The particulars of the offence were to the effect that on the 9th day of July,

2015 at Isanga area within the City and Region of Mbeya, the appellant unlawfully had carnal knowledge of a girl aged nine (9) years whom for the sake of covering her identity will be referred to as GK.

Upon the appellant protesting his innocence when the charge was put to him, the prosecution paraded in court six witnesses and tendered one exhibit to establish the guilt of the appellant. The witnesses included, the victim of the incident (PW1), Emmy d/o Mwasambili (PW2), Buni d/o Katule (PW3), Blastus s/o Kalinga (PW4), WP 2123 Detective Sergeant Suzana (PW5) and Bahati Jackson Zambi (PW6) while the exhibit was a medical examination report (P1).

On his part in defence, the appellant relied on his own sworn testimony. At the end of the day after the trial Senior Resident Magistrate had evaluated the evidence placed before him, was satisfied that the commission of the offence by the appellant had been proved beyond reasonable doubt. The appellant was therefore convicted as charged and sentenced to the mandatory sentence of life imprisonment. The challenge of the conviction and sentence by the appellant in the High Court of

Tanzania at Mbeya proved futile and hence, this second appeal to the Court.

The appeal to this Court has been anchored on seven grounds which can be paraphrased to be: -

1. *That, the case against the appellant was not proved to the standard required by law.*

2. *That, the first appellate Court erred in upholding the conviction and sentence of the trial court while the age of the victim was not established.*

3. *That, the first appellate Court erred in law and fact in upholding the decision of the trial court wherein the appellant's right under section 240 (3) of the Criminal Procedure Act, Cap 20 R.E 2002 was not complied with.*

4. *That, the first appellate Court grossly erred in law and fact when it dismissed the appeal believing on the testimony of PW5 that the doctor who had examined the victim was away for studies without corroborative evidence.*

5. *That, the first appellate Court erred in law and fact in dismissing the appellant's appeal while his conviction by the trial court was based on hearsay evidence of PW2, PW3, PW4, PW5 and PW6.*

6. *That, the first appellate Court grossly erred in law and in fact in dismissing the appellant's appeal and upholding the decision of the trial court without considering the fact that there was no witness who eye witnessed the incident.*

7. *That, the first appellate Court erred in failing to note that the appellant's defence evidence was completely ignored by the trial court.*

Before we embark on considering the merits and/or demerits of the appeal, we think it is apposite albeit in brief, to give the facts leading to the impugned decision as gathered from the evidence from the prosecution witnesses. It was the tale of the victim (PW1) that on the 9th day of July, 2016 at about 14:30 hours when she was traveling from her school known as Sisimba Primary school towards her friend's place at Sinde area to collect keys for their home, she met the appellant on the way in a taxi. Upon seeing her, the appellant forced her to board into the taxi and moved together with her to Isanga area, where he raped her inside a certain room. And, after he had accomplished his mission, the appellant took her (PW1) to Sinde where he gave her TZS 200/= for bus fare to her home.

And on arrival at her home, PW1 did not reveal to her mother (PW3) who by then was sick, the ordeal which she had undergone.

On her part PW3 told the trial court that, what caused her to know that some foul game had been played against her daughter (PW1), were some blood stains which she found on the sink of their toilet during night. When she made some inquiry, she realized that it had come from the private parts of PW1, who although was walking with difficulties, she was hesitant to tell her what had actually happened to her. Due to the condition of her health that she was sick, she requested her sister (PW2) to assist in making some findings on what had befallen her daughter (PW1).

In execution of the assignment which she had been given by her sister (PW3), PW2 moved with PW1 to her school where she was joined by PW1's teacher one Bahati Jackson Zambi (PW6) in probing as to what had happened to her. In the course, PW1 disclosed to them that she was raped by the appellant on the previous day and thereby, causing her to sustain injuries on her private parts. Subsequent to such finding, the matter was reported to the police whereupon PW5, a police officer who was assigned to investigate on the matter was shown by PW1 the appellant's working

place, where she went to arrest him and eventually charged him with the offence of rape.

It was the contention of the prosecution during trial of the appellant that the evidence adduced by its witnesses, sufficiently established that the appellant had committed the offence of rape which he stood charged with. On the other hand, in his defence the appellant strenuously distanced himself from the charged offence arguing that the evidence which was led against him by the prosecution witnesses, was nothing but blatant lies as evidenced by its serious disparities. Nonetheless as alluded above, the version by the prosecution witnesses convinced the trial Senior Resident Magistrate, who convicted the appellant as charged and sentenced him accordingly, both of which were upheld by the first appellate Court on appeal and hence, the instant appeal.

On the date when the appeal was called on for hearing before us, the appellant who was linked to the Court from Ruanda central prison through video conference, had no legal representation whereas the respondent/Republic was represented by Ms. Prosista Paul, learned State Attorney.

When the appellant was invited by the Court to expound his grounds of appeal, he requested us to adopt them in the way they had been presented in the memorandum of appeal and invite the respondent/Republic, to respond to them while reserving his right of rejoinder if need be.

On her part, upon being welcomed by the Court to respond to the grounds of appeal by the appellant, Ms. Paul started by pointing out some grounds of appeal which she argued that did not feature in the first appeal. She named them to include grounds number 2, 4, 5 and 6. Placing reliance on the decision in **Simon Godson Macha** (Administrator of the estates of the late **Godson Macha) Vs Mary Kimambo** (Administratrix of the estates of the late **Kesia Zebedayo Tenga),** Civil Appeal No. 393 of 2019 (unreported), the learned State Attorney asked us to ignore those grounds of appeal for the reason that we lacked the requisite jurisdiction to entertain them.

With regard to the remaining grounds of appeal, Ms. Paul started to respond to the 3rd ground, followed by the 1st ground and finally concluded with the 7th ground of appeal. Responding to the third ground of complaint

that there was no compliance with the provisions of section 240 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002 **(the CPA)**, Ms. Paul submitted that the complaint by the appellant was unfounded on account that the requirement under the named provision of law was fully complied with. We were referred to page 28 of the Record of Appeal, where when the PF3 was being tendered in court as exhibit, the trial Senior Resident Magistrate addressed the appellant in regard to his rights contained in section 240 (3) of **the CPA** that is, as to whether he wished the doctor who examined the victim to appear in court and get cross-examined. The response by the appellant to the address by the trial court was that he had no objection to its being admitted in evidence. In the circumstances, Ms. Paul submitted that the appellant lacked basis to complain on this aspect, and she therefore implored us to dismiss this ground of appeal for want of merit.

As regards the first ground of appeal that the case against the appellant was not proved to the required standard, Ms. Paul, submitted that the said contention was incorrect basing on the testimonies of PW1, PW2, PW3 and PW6 which in her opinion, established the commission of the offence by the appellant to the hilt.

Expounding the testimony of PW1, the learned State Attorney submitted that her testimony was very elaborate from when she met the appellant in a taxi and the way he asked her to board onto the said taxi and later moving with her in the same to Isanga area where he ravished her. According to Ms. Paul, the tale of the witness was so clear and consistent and that is why the trial Senior Resident Magistrate, was sufficiently convinced that it was nothing but truth as reflected on page 46 of the record of appeal. We were strongly urged by Ms. Paul to believe the said testimony of PW1 seeking support from the holding in **Bakiri Said Mahuru Vs Republic,** Criminal Appeal No. 107 of 2012 (unreported).

Besides the above position, Ms. Paul argued that there were testimonies of PW2, PW3, and PW6 all of which corroborated the testimony of PW1. While PW3 was the first to discover that something wrong had happened to the victim (PW1) after noting some stains of blood on the sink of the toilet at her home, PW2 and PW6 were the ones to whom PW1 disclosed the incident of her being raped by the appellant and thereafter, she went to show them the place where her ravisher was working. To that end, the learned State Attorney implored us to find that the case against

the appellant was satisfactorily established relying on the holding of the Court in **Selemani Makumba Vs Republic** [2006] TLR 379. She thus asked us to dismiss the first ground of appeal.

With regard to the complaint by the appellant that his defence evidence was not considered by the trial court as well as the first appellate Court which constitutes the seventh ground of appeal, the response by Ms. Paul was that the complaint was again baseless because the defence evidence was considered. Reference was made to the second paragraph on page 49 of the Record of Appeal, where it is clearly indicated that the defence evidence of the appellant was considered by the trial Senior Resident Magistrate only to be found that it did not raise any reasonable doubt to the evidence from the prosecution witnesses. We were therefore requested by the learned State Attorney, to also dismiss this ground of appeal and ultimately the entire appeal.

In rejoinder, apart from reiterating what is contained in his grounds of appeal, the appellant insisted that the evidence of PW1 who was the star witness, was tainted with serious discrepancies in regard to where she alleged to have met him before he took her to Isanga where she alleged to

have been raped. The appellant also took issue with the incident of the victim of rape identifying him by the name of Zombi, which was not his name. He forcefully urged us to find that the discrepancies which have been indicated above, went on to show that the whole incident was a mere frame-up against him. He humbly implored us to resolve those discrepancies in his favour and set him at liberty.

What stands for our determination in the light of the submissions from either side above is whether the appeal by the appellant is founded. In resolving this issue, we are going to adopt the approach which was followed by the learned State Attorney, save that the positions of the last two grounds of appeal will change whereby, the seventh ground will be discussed first before concluding with the first ground of appeal. For a start, we look on the grounds of appeal which were said by Ms. Paul to be new ones in that they did not feature in the appeal before the first appellate Court. Indeed, from what we could gather in the grounds of the petition of appeal which was lodged by the appellant in the first appellate Court as reflected on page 55 of the Record of Appeal, they do not constitute any of grounds number 2, 4, 5 and 6 appearing in the appeal at

hand before the Court. The same therefore implies that these grounds of appeal were not canvassed by the first appellate Court.

Our law is settled that matters which were not canvassed by the first appellate Court cannot find way in the second appellate Court unless it relates to a legal issue. This was the position we took in **Ramadhani Mohamed Vs Republic**, Criminal Appeal No. 112 of 2006 (unreported), where we stated that: -

> *"We take it to be settled law which we are not inclined to depart from, that thls Court wiil only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

The foregoing position was reiterated in **Sadick Marwa Kisase Vs Republic**, Criminal Appeal 83 of 2012 (unreported) that: -

> *"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in the second appellate Court."*

See also: **Abdul Athumani Vs Republic** [2004] TLR 151, **Juma Manjano Vs Republic,** Criminal Appeal No. 211 of 2009 and **George**

Mwanyingili Vs Republic, Criminal appeal no. 335 of 2016 (both unreported).

In view of the position held in the authorities cited above, it is evident that the new grounds of appeal which were raised by the appellant in this appeal as pointed out by the learned State Attorney, none of which concern points of law, have no room for consideration in this appeal. To that end, we heed to the request by Ms. Paul and accordingly ignore those grounds.

Turning to the third ground of appeal that the provisions of section 240 (3) of **the CPA** were not complied with by the trial court, we think it apposite to reproduce the provision *verbatim* before dealing with the ground of appeal in either way. The provision provides thus: -

> *"S. 240 (3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and* ***the court shall inform the accused of his right to require the***

person who made the report to be summoned in accordance with the provisions of this subsection."

[Emphasis supplied]

From what could be revealed by the record of this appeal in the proceedings before the trial court, there was compliance with the requirement stipulated in the above quoted provision as reflected on page 28 of the Record of Appeal where it is indicated that: -

*"**Court:** The accused person has been addressed in terms of section 240 (3) of the CPA CAP. 20 (Revised Edition 2002) and answers:*

***Accused:** No objection, she be allowed to produce it."*

On the basis of what transpired in the above proceedings, we are inclined to join hands with the learned State Attorney, that the complaint by the appellant is devoid of merit because the trial court fully complied with the dictates of section 240 (3) of **the CPA.** That said, we dismiss the third ground of appeal.

The complaint by the appellant in the seventh ground of appeal, is in regard to his defence that it was ignored by the two lower Courts. According to his defence as discerned from his testimony on page 31 of the Record of Appeal, he stated that the evidence from the prosecution witnesses was false and that is why it was contradictory. He contended further that he was not known by the name of Zombi as it had been alleged by PW1. On the other hand, in considering the defence evidence of the appellant as reflected on page 49 of the Record of Appeal, the trial Senior Resident Magistrate stated in part that;

> *"The appellant alleged that the prosecution evidence was wrong but never said why, and further that the appellant also said that he is not called Zombi, but could not say why PW1 who so knows him would have lied against him".*

In view of what was observed above by the trial Senior Resident Magistrate in regard to the defence given by the appellant, we hesitate to side with the appellant that his defence was not considered. As clearly indicated in part of the judgment shown above, the defence of the appellant was considered but it was not believed. To that end, we dismiss the seventh ground of appeal and move to the first and final ground.

It has been the appellant's complaint in the first ground of appeal that the evaluation of the evidence led against him by the prosecution witnesses was not properly made. According to the appellant, the case against him was not established to the standard required by the law. This contention was however strongly countered by Ms. Paul on behalf of the respondent, who argued that the case against the appellant was proved beyond reasonable doubt. On our part, upon having dispassionately revisited the evidence in the record from either side, we have been moved to side with Ms. Paul for the reasons which we are going to give herein below.

Beginning with the testimony of the victim (PW1), the *voire dire* test which was conducted to her by the trial Senior Resident Magistrate, was done in full compliance with the requirement of the law. And, in regard to her narration before the court as to what happened to her on the fateful date, she was clear and coherent. She gave a consistent story starting from when she first met the appellant whom she knew by the name of Zombi from when she was told so by the father of her friend one Angel.

She narrated further on how the said Zombi managed to make her board onto the taxi wherein he was; and thereafter moving with her to the place where she was ravished at Isanga. And, to prove that she knew well the Zombi she was talking about, PW1 led PW2, PW5 and PW6 to the place where he was performing his duties where he got arrested. By leading them to that person, she proved that the person she was referring to as Zombi was none other than the appellant. In the circumstances, we fully associate ourselves to the findings of the lower courts that the witness was a credible one and that her testimony was properly relied upon.

The law clearly stipulates under the provisions of section 127 (7) of the Law of Evidence Act, Cap 6 R.E. 2002 **(the TEA)** that: -

> *"(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is*

satisfied that the child of tender years or the victim of the sexuai offence is telling nothing but the truth."

Amplifying what is provided in the above provision of law, we held in **Selemani Makumba Vs Republic** [2006] TLR 379 that the best evidence to establish the offence of rape has to come from the victim of rape. In its own words the decision reads in part 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 woman where consent is irrelevant that there was penetration."

See also: **Tatizo Juma Vs Republic,** Criminal Appeal No. 10 of 2013, **Yustiniani Mulokozi Vs Republic,** Criminal Appeal No. 286 of 2015 and **Misago Ndendakumana Vs Republic,** Criminal Appeal No. 540 of 2015 (all unreported).

Notwithstanding the foregoing position, there was also the testimony of PW3, the mother of the victim. Her testimony was that she found some blood stains on the toilet sink at her home and that after examining her daughter (PW1), she discovered that there was blood coming out from her private parts. On checking her she discovered that something had been

forced into the private parts of her daughter and thereby causing her to sustain some injuries. Such evidence corroborated the contention by the victim (PW1) that she was raped.

Consequently, we find that the appeal is without founded basis and as a result, we dismiss it in its entirety.

Order accordingly.

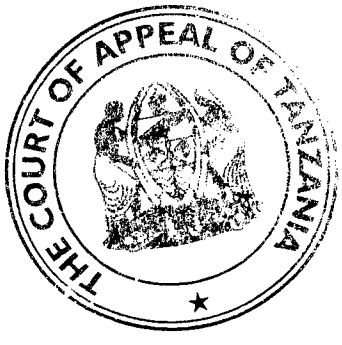
DATED at **DAR ES SALAAM** this 20th day of July, 2020

B. M. MMILLA
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of July, 2020 in the presence of the Appellant connected through video conference from Ruanda Prison – Mbeya and Ms. Estazia Wilson, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL