IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., MKUYE, J.A. And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 376 OF 2017

GEORGE CLAUD KASANDA .....APPELLANT
VERSUS
THE DPP..... RESPONDENT

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

(Mmilla, J.)

Dated 8th day of September, 2017
in
Criminal Appeal No.1 of 2005
.....

JUDGMENT OF THE COURT

23rd & 27th March 2020.

LILA, J.A.:

In the District Court of Sumbawanga, the appellant, George s/o Kasanda, was charged with the offence of rape. He was convicted and sentenced to a term of 30 years' imprisonment and to suffer eight (8) strokes of the cane. In addition, he was ordered to pay TZS 300,000/= as compensation to the victim of the offence. In order to avoid any further stigmatization, we shall refer the victim of the offence as "the victim".

The charge laid at the appellant's door was couched thus:-

> *"**STATEMENT OF OFFENCE:** Rape 130 (1) (2) C and 131 of the penal code cap 16 Vol. I of the law*

as amended by section 5 and 6 of the Sexual Offences Special Provision Act. No. 4 of 1998.

***PARTICULARS OF OFFENCE**: That George s/o Claud @ Kadanda is charged on 8th day of November, 2004 at "ing'ombe within the township of Sumbawanga District in Rukwa Region did have carnal knowledge of the victim who is 16 years old without her consent."*

The salient facts of the case as found by the trial court and on the basis of which the appellant was convicted are that; the appellant was one of the teachers at King'ombe Primary School and the victim was a pupil at the said school. On 8/11/2004 at 3.00 p.m., the appellant requested the victim (PW1) together with other two pupils; Shida Razaro (PW2) and Mariam to assist him to wash home utensils at his house. The two heeded to the appellant's request. Another student one Maria followed them but she waited for them outside the house. After taking the utensils outside, the appellant sent PW2 to go and lock his office door. He then called the complainant into the house to collect a piece of soap for washing the said utensils. The appellant seized that opportunity to forcefully hold the victim, undress her clothes and raped her. The unwelcomed sexual intercourse caused pains as a result of which the victim screamed from pains which alerted PW2 who had already come back, who, together with Maria,

peeped through the open door and saw the appellant lying over the victim with bare buttocks raping her.

Then, the two rushed to the Head teacher (PW3) who was still in his office and informed him the mishap that had befallen onto their colleague. PW3 timely went to the appellant's house and found the appellant raping the victim. He stopped the appellant from doing so and the appellant freed PW1. When asked why he was doing so, the appellant pleaded to be forgiven. Despite PW3's efforts to convince the victim not to let the matter be known elsewhere, the victim reported the incident to her parents who later reported the same to the police who arrested the appellant. On the other hand, the victim was taken to the Regional Hospital at Sumbawanga where PW4 medically examined her and found her with fungi infections in her female organ and her hymen was not intact.

Subsequently, the appellant was charged. He denied committing the offence. Trial ensued and at the end he was convicted and sentenced in the manner stated above.

Being aggrieved with the decision of the District Court, the appellant appealed to the High Court against both conviction and sentence. The appeal was unsuccessful. Still aggrieved, the appellant has preferred this

third appeal fronting seven (7) detailed grounds of complaint which can be paraphrased thus:-

1. That, the first appellate judge erred to rely on the testimony of PW1, PW2 and PW3 who did not raise alarm so as to let other people witness the incident.

2. That, the learned Judge wrongly relied on the testimony of the victim who said she informed her parents over the incident but neither of them testified to prove so.

3. That, the offence of rape was not proved because medical examination did not reveal that the victim sustained bruises or sperms in the victim's female organ.

4. That the PF3 (exh. P1) was wrongly admitted in evidence because he was not accorded an opportunity to comment before it was admitted and that it was not thereafter read out to him.

5. That, the evidence of the police investigator was not considered.

6. That, the charge was not proved against as required by the law.

7. That, the defence evidence was not considered by the trial court.

The appellant appeared in person at the hearing of the appeal before us and was unrepresented. The respondent had the services of Ms

Scholastica Lugongo, learned Senior State Attorney who was assisted by Ms Marietha Maguta, learned State Attorney.

At the inception of the hearing of the appeal, we wanted to satisfy ourselves on two matters. We therefore, suo motu, raised those issues. **One**, whether all the seven grounds of appeal put forward by the appellant were solicited before the first appellate court, that is, the High Court. **Two**, whether the charge was proper. We engaged the parties on those two issues but, admittedly, both issues being legal matters for which the appellant, a layperson, was not conversant with, had nothing to contribute. He left it for the Court to decide.

For the respondent, Ms Maguta took the floor and argued on those two issues. She directed her missiles to grounds 1, 2, 4, and 5 of appeal as advanced by the appellant and was convinced that they were new. She, referring to the appellant's grounds of appeal at the High Court as reflected at page 17 of the record of appeal, contended that the listed grounds were not part of the grounds canvassed and determined by the High Court on first appeal. On account of that, she implored us to disregard those grounds of appeal. To cement her assertion, she referred us to our decision in **Athuman Rashid vs Republic**, Criminal Appeal No. 264 of 2016.

In respect of the propriety of the charge, Ms Maguta readily conceded that it was defective for citing a non-existent provision of the law. Elaborating, she argued that there was nothing like section 130(1)(2)C in the Penal Code, Cap. 16 R. E. 2002 (the Penal Code). She was, however quick to submit that, as the victim was under the age of 18 years, then the appropriate offence section ought to have cited section 130(1)(2)(e) of the Penal Code. In addition, she argued that the infraction was cured by the particulars of the offence which sufficiently informed the appellant the nature of the offence he was facing and that the victim of the offence was sixteen (16) years old.

The learned State Attorney's response to our second concern, prompted us to put it to her another follow-up issue whether, on the evidence on record, the prosecution proved the age of the victim so that the offence under the proposed section 130(1)(2)(e) of the Penal Code could stand. Initially, she attempted to argue that the facts narrated by the prosecution during the preliminary hearing and the victim's particulars taken before she gave her testimony were sufficient proof of the victim's age. However, on reflection, she retreated and conceded that they do not constitute part of the prosecution evidence hence the age of the victim was not proved. That concession inflicted a final blow to the prosecution case.

As a consequence, she, without mincing words, gave up and urged the Court to allow the appellant's appeal and set the appellant free.

Having heard, the seemingly unexpected responses from the learned State Attorney which were in his favour, the appellant, who initially appeared weak and desperate, jovially and with a rejuvenated voice, urged the Court to let him free so that he can join his family and friends at Sumbawanga.

We, on our part, have given a deserving consideration to the unchallenged arguments by the learned State Attorney. On our first concern, we, indeed subscribe with Ms Maguta that grounds 1, 2, 4 and 5 of appeal are new grounds. The appellant did not raise them in the High Court and therefore they were not considered by that first appellate court. We took liberty to seriously cross-check whether any of those grounds featured in the grounds of appeal the appellant raised before the High Court and we are satisfied that neither of them featured whether it be directly or indirectly.

In terms of the provisions of section 4(1) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA), the Court is mandated to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction. In view of that legal setting, a ground of appeal not

heard and determined by the High Court or a subordinate court with extended jurisdiction cannot be entertained by the Court. The Court restated that position in the case of **Bakari Abdallah Masudi vs Republic**, Criminal Appeal No. 126 of 2017 (unreported) where the Court stated that the Court cannot deal with grounds that were not discussed in the High Court. That position was reiterated in the case of **Hassan Bundala @ Swaga vs Republic**, Criminal Appeal No. 386 of 2015 (unreported) where this Court categorically stated that:-

> *"It is now settled that as a matter of general principle this Court will 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."*

We, according agree with the learned State Attorney that grounds 1, 2, 4 and 5 are new and we hereby disregard them.

In respect of the second issue, we entirely agree with the learned State Attorney that the defect in the charge was cured by the particulars of the offence which were read to the appellant before he pleaded to the charge. The particulars, in very clear terms, indicated that the appellant was being accused to have had carnal knowledge of the victim who was

sixteen years old. This position is reinforced by our unreported decision in the case of **Jamal Ally @ Salum vs Republic**, Criminal Appeal No. 52 of 2017 (unreported) in which, it was categorically stated by the Court that particulars of the offence and facts adduced through evidence are able to cure the deficiencies in the charge. In another case of **Deus Kayola vs Republic**, Criminal Appeal No. 142 of 2012 (unreported) where the victim of rape was a twelve years-year old girl the charge was problematic for citing, in the statement of offence section 130 and section 131 only. With lucidity, the Court observed that:-

> *"We have taken note the fact that the charge against the appellant was preferred under section 130(2)(e) and 131(1) of the Penal Code instead of section 130(2)(e) and 131. However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of the offence having sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old."*

The situation in the present case is identical to that which obtained in the above case. We see no reason to depart from the above legal position. We, instead, subscribe to the Court's observations in those cases and

therefore agree with the learned State Attorney that the anomaly is curable under section 388 of the CPA.

As highlighted above, the appellant was being accused of carnally knowing a girl aged 16 years. On account of that, the learned State Attorney was of the view that the offence section ought to have cited section 130(1)(2)(e). In essence that provision creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that, it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence. The prosecution is duty bound to establish among other ingredients, that the victim is under the age of eighteen so as to secure a conviction. Stressing on that position and who can prove the age of the victim, the Court, in the case of **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported) had this to say:-

> *"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 proof of age be given by the victim, relative, parent,*

medical practitioner or, where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of the victim on the authority of section 122 of TEA which goes thus:-

> *"The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

In the above case the Court deduced the age of the victim by considering that she was presented as a child of tender age, she was a class five pupil and the court conducted a *voire dire* before receiving her evidence and arrived at the conclusion that the victim was under the age of eighteen.

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 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). On that account, we have no doubt that preliminary answers given during a *voire dire* examination and facts narrated by the prosecution during preliminary hearing under section 192(1)(2)(3)(4) of the CPA are not an exception unless admitted and listed in the memorandum of undisputed facts which is later signed by all the parties to the case. The reason is that they are also not given on oath. That said, in a situation like ours, concrete evidence on the true age of the victim was therefore required from, as indicated above, the parent, relative, teacher, close friend or any other person who new well the victim. (see **Elia John vs Republic**, Criminal Appeal No.306 of 2016 (unreported).

Unlike the circumstances that obtained in **Issaya Renatus vs Republic**'s case (supra), in the present case the victim was not presented as a child of tender age and her evidence was received without a *voire dire* having been conducted. The two cases are, therefore, distinguishable. It was, in the instant case, therefore, obligatory on the prosecution to discharge its duty to prove the age of the victim by leading evidence to that effect. That was, as conceded by the learned State Attorney, not done. So, in the present case, the age of the victim remained a matter of

speculation and conjuncture. With this infraction, we are at one with the learned State Attorney that in the absence of evidence proving age of the victim the remaining prosecution evidence could not sustain the appellant's conviction.

Finally, we have to determine whether or not we should order a retrial. It is now settled that as a matter of general principle a retrial will not be ordered where the prosecution evidence is patently weak and by ordering a retrial, the prosecution will seize that opportunity to fill up the gaps at the prejudice of the appellant. That was the stance taken by the defunct East African Court of Appeal in the case of **Fatehali Manji vs Republic** [1966] E. A. 341). In that case it was stated that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that, a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interest of justice require."*

The observation in the above decision was followed by the Court in the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 in which the Court, in almost similar tone, stated that:-

> *"We are alive to the principle governing retrials. Generally a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that, an order should only be made where the interest of justice require."*

In the matter at hand, failure by the prosecution to lead evidence proving the age of the victim is a deficiency in the prosecution evidence. In the event that an order of retrial is made, definitely, the prosecution is prone to fill up the gap. This will occasion an injustice to the appellant. We have no doubt that Ms. Maguta took cognizance of this fact when she desisted from pressing for an order of retrial. We share the same view that an order of retrial is unnecessary and will not serve the interests of justice. We accordingly refrain from making such an order.

The above infraction and deficiency in the prosecution case sufficiently disposes of the appeal. We shall not, therefore, be labour to consider the grounds of appeal that survived after grounds 1, 2, 4 and 5 were disregarded.

To that end, we hereby invoke the powers of revision endowed to the Court under section 4(2) of the AJA to quash both the proceedings of the lower courts and conviction, set aside the sentence of imprisonment for thirty (30) years and the order that he should suffer eight strokes of the cane. We, as well, set aside the order of compensation. We, direct that the appellant shall be set free unless he is otherwise held on account of any other lawful cause.

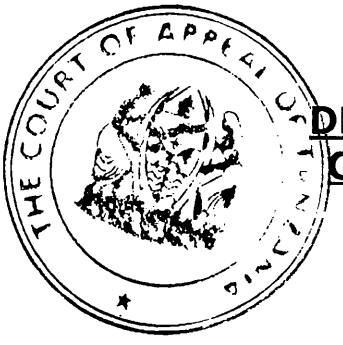
DATED at **MBEYA** this 26th day of March, 2020.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of March, 2020 in the presence of the Appellant in person and Mr. Fadhili Mwandoloma, Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL