IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: JUMA, C.J., NDIKA, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO 250 OF 2018

CHARLES HAULE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Songea)

(Chikoyo, J.)

dated the 25th day of April, 2016

in

DC. Criminal Appeal No. 10 of 2016

JUDGMENT OF THE COURT

28th & 30th April, 2021

JUMA, C.J.:

The District Court of Songea at Songea tried and convicted the Appellant, CHARLES HAULE, of one count of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code Cap 16 R.E. 2002; and of another count of unnatural offence, contrary to section 154 (1) of the same Code. The prosecution alleged and led evidence to prove that the Appellant committed these two offences on 24/2/20125 against a six-year-old girl. For the sake of her modesty, we shall refer to this girl as **"BM"**.

The victim, **BM**, was the first prosecution witness (PW1). After a brief exchange of questions with the learned trial Resident Magistrate (S.S. Kobero-RM) to determine whether she understood the meaning of an oath

and duty to speak the truth, he found that PW1 did not understand the oath's nature. However, the trial magistrate believed that PW1 had sufficient intelligence to know the duty to speak the truth and allowed her to give unsworn testimony.

PW1 said she and another nine-year-old girl we shall refer to as **RK** were out playing when the Appellant appeared, looked at her briefly and went away. He returned with a bicycle which he used to carry her to a farm, where he undressed his shorts and removed her underpants. He took out his penis, slept over her, and inserted it into her vagina and in her buttocks. PW1 said that she was seriously injured. When she cried out in pain, the Appellant warned that he would slaughter her. When the Appellant finished, he took PW1 to one Fiona and went away. In her testimony PW1 remembers how she was taken to the police station. The police referred her to the hospital where she received treatment.

Unlike the victim of rape who gave unsworn testimony, the second prosecution witness (PW2) who we refer to as **RK**; gave her testimony on oath. This was after the trial magistrate found that she had sufficient intelligence to understand the nature of an oath, and she knew the duty to speak the truth. PW2 confirmed to the trial court that she was out playing with PW1 when the Appellant took PW1 away. The third prosecution witness, who the record of trial proceedings refers to as DK.

Kayombo (PW3), was the clinical officer at Madaba Hospital when PW1 arrived for medical examination and treatment. He detected bruises in the victim's vagina and anus. He also saw what he described as sustained bleeding. Because of bleeding, he added, the victim was hospitalized from 24th to 27th February 2015. PW3 prepared a medical examination report, which he tendered in court as exhibit P1.

The Appellant testified in his defence, denying he committed the offences. On 24/02/2015, around 16:00 hours when he supposedly committed the crimes, he was in another place meeting up with one Prisca at a pub operated by one Mboko. Although he and Prisca had arranged to meet for drinks and later have sex, their meeting degenerated into a heated argument. Later around 22:00 hours, several people came over to inform him that the street chairman wanted to see him. He went to see the chairman who, before allowing him to go home, asked whether he knew the victim (PW1). He later learned that the victim was in fact Prisca's daughter. The police arrested him the following day.

In the following judgment, the learned trial magistrate found the two counts proved against the appellant and convicted him. The trial court sentenced the appellant to life imprisonment and six strokes of the cane on the first count of rape. For the second count of unnatural offence the trial court similarly sentenced him to serve life in prison.

The convictions and sentences aggrieved the appellant. He filed a first appeal to the High Court at Songea. That appeal was dismissed by Chikoyo, J.

The Appellant was further aggrieved with the decision of the High Court and filed this second appeal based on seven grounds of appeal, which are as follows: -

One, that the High Court erred in law and fact for upholding the trial court's decision on basis of the uncorroborated evidence of PW1.

Two, that the trial and first appellate courts failed to take into account, the fact that the victim did not know him before the incident. And why, the victim failed to describe him at least to prove she knew him.

Three, the police did not arrest him at the scene, nor was he ever identified.

Four, the evidence against him is an afterthought. He faults the first appellate Court for failing to consider his defence that the victim's mother, who had prior grudges against him, framed him up.

Five, failure by the prosecution to summon the victim's mother and hamlet leaders to testify as independent witnesses.

Six, the first appellate judge failed to consider his defence of Alibi which is found under section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002.

Seven, the prosecution did not prove its case beyond reasonable doubt.

At the hearing of this appeal on 28/04/2021, the appellant appeared remotely by video link between the High Court at Iringa and Iringa District Prison. Ms. Amina Mawoko, learned State Attorney, and Ms. Elizabeth Mallya, learned State Attorney, appeared for the respondent Republic. The appellant adopted all his seven grounds of appeal and urged us to let the learned State Attorneys first address his appeal grounds.

Ms. Mawoko opposed the appeal. She, in addition, urged us to strike out the **second**, **third,** and **fourth** grounds of the appellant's memorandum of appeal because they are new grounds that the High Court did not consider. The learned State Attorney directed her submissions on the remaining grounds number **one**, **five**, **six,** and **seven**.

Next, Ms. Mawoko argued the **first**, **fifth**, **sixth**, and **seventh** grounds in the memorandum of appeal. She urged us to dismiss the appellant's first ground of appeal, which faults the High Court for relying on the uncorroborated evidence of PW1. She submitted that although when she testified the four-year-old PW1 was a child of tender age (of under the age of fourteen), the trial magistrate examined her (*voir dire*) before receiving her testimony. The magistrate was, as a result, relying

on the provisions of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 (before its amendment by the Written Laws (Miscellaneous Amendments) (No.2) Act 2016 Act No 4 of 2016) to determine whether PW1 understood the nature of an oath and her duty to speak the truth. Ms. Mawoko submitted that while PW1 did not understand the nature of an oath, she, however, knew the duty to speak the truth. The learned State Attorney submitted further that after engaging PW1, the trial magistrate believed that PW1 possessed sufficient intelligence and understood the duty of speaking the truth. In Ms. Mawoko's opinion, the trial magistrate was right to allow PW1 to give unsworn testimony.

The learned State Attorney asserted that the evidence of PW1 as the victim of sexual crime has particular weight under section 127 (7) of the Evidence Act (before its amendment by Act 4 of 2016). It stands on its weight and is sufficient to convict the appellant. She cited the case of **SELEMANI MAKUMBA V. R.** [2006] TLR 379, where on page 384, the Court highlighted the weight of the evidence of the victim of sexual offence:

> *"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. In the case under consideration the victim,*

Ayes, said the appellant inserted his male organ into her female organ."

The learned State Attorney argued that although the evidence of PW1 can exist on its own to convict the appellant without corroboration, evidence of PW2, PW3, and Exhibit P1 corroborated her evidence. She referred us to pieces of evidence of PW1 and nine-year-old PW2. Both testified that while they were playing, the appellant came and picked PW1. That PW1 was crying when the appellant returned her. The learned State Attorney submitted that PW1, at the earliest opportunity, was able to mention the appellant by his first name, Charles. The earlier mention of the appellant enhanced her reliability. She cited the case of **MARWA WANGITI MWITA AND ANOTHER VS. R** [2002] TLR 39, where the Court stated that *"the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability,..."*

Ms. Mawoko submitted that the trial magistrate believed PW1 and PW2 despite their tender age and credited their evidence. She referred us to **GOODLUCK KYANDO V. R.** [2006] TLR 363, 367, where this Court stated:

"It is trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing a witness."

The learned State Attorney addressed the fifth ground of appeal where the appellant faulted the failure of the victim's mother and hamlet leader to testify. She urged us to dismiss this ground because there is already evidence of PW1, which can sustain the conviction without supporting evidence of PW1's mother or hamlet leader. Learned State Attorney referred to section 143 of the Evidence Act Cap. 6 R.E. 2002, which states that no particular number of witnesses must prove any specific fact. She submitted that in this appeal, the Republic called three witnesses to testify against the appellant. Even the evidence of PW1 alone is sufficient to prove the case against the appellant. In so far as Ms. Mawoko is concerned, the evidence of PW1 is evidence of the victim of a sexual offence. Even if PW1's mother or hamlet leader were to testify as witnesses, they would not give better proof than the evidence of the victim of a sexual offence, PW1.

Ms. Mawoko moved on to the sixth ground of appeal, where the appellant complains that the trial and the first appellate courts failed to consider his defence of alibi. He urged us to reject this defence because the appellant did not give notice as required under section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002, which states:

"194 (4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."

While Ms. Mawoko conceded that although the trial court did not consider the appellant's defence claiming that he was not at the crime scene, the first appellate High Court evaluated this defence and found this defence to be an afterthought. All in all, the learned State Attorney urged us to dismiss the sixth ground of appeal.

Lastly, Ms. Mawoko urged us to dismiss the seventh ground of appeal, where the appellant; asserts that the prosecution did not prove the case against him beyond a reasonable doubt. The learned State Attorney refers us back to the evidence on record, including one of PW1 which alone, proved the case beyond a reasonable doubt. Before she sat down, the learned State Attorney urged us to dismiss this appeal and allow the appellant to serve his sentence.

We invited the appellant to respond to Ms. Mawoko's submissions. He restricted his brief address to reiterate that we should allow his remaining **first**, **fifth**, **sixth**, and **seventh** grounds of appeal. We should pause here to observe that the appellant correctly abandoned his **second,**

third, and **fourth** grounds. A glance at his Petition of Appeal to the High Court appearing on page 45 of the record bears out Ms. Mawoko's objection against the **second, third** and **fourth** of appeal because they were not first canvassed in the High Court as the law demands.

In terms of section 4 of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, the jurisdiction of this Court is to hear and determine grounds of appeal from the High Court and subordinate courts with extended jurisdiction. In so far are the second, third, and fourth grounds of appeal did not pass through the gates of the first appellate High Court; the Court cannot entertain them on this second appeal. The Court said as much in **EMMANUEL KINGAMKONO V. R.,** CRIMINAL APPEAL NO. 494 OF 2017 (unreported), this Court cannot entertain new grounds of appeal where these were neither solicited nor addressed in the first appellate Court.

On the remaining first, fifth, sixth, and seventh grounds, the appellant stood by his stance that the evidence of PW1 required corroboration, and there was none. He saw no reason why the prosecution failed to bring PW1's mother (Prisca) to testify. Failure to bring up this important witness, he submitted, creates doubt in the evidence of PW1. This doubt, he added, should lead to allowing his fifth ground of appeal.

The appellant also argued that the learned State Attorney had conceded his sixth ground of appeal on failure to consider his defence to his understanding. He invited us to allow this ground.

Concerning the seventh ground of appeal, the appellant submitted that the evidence the prosecution presented does not prove the two counts of rape and unnatural offense beyond a reasonable doubt. He particularly highlighted the contradiction between PW1 and PW2 at the time he returned PW1 at the playground. He finally urged us to allow his appeal and set him free.

After concluding his submissions, the Appellant expressed his wish to add more oral grounds of appeal. The Appellant urged us to consider what he described to be extra grounds of appeal. After hearing the learned State Attorney's view on the request, we allowed the Appellant to read out his new grounds of appeal for us to determine whether they are within the jurisdiction of the Court. The two additional grounds were; **firstly,** he faulted the trial and first appellate courts for allowing the prosecution to call a witness who was not on the list during the Preliminary Hearing. **Secondly,** the Appellant blamed the trial and the High Court for mixing up and confusing the victim's names (PW1). These two grounds, he intoned, should be allowed for his benefit.

Ms. Mawoko was displeased with the belated way the appellant ambushed her with the two belated grounds of appeal. She left to the Court to decide on the appropriateness of the new grounds.

The appeal record shows that the appellant did not include these new grounds in his petition of appeal to the High Court. However, during the hearing of his first appeal, the appellant raised issue PW1 appearing under two different names, suggesting two separate victims. The learned first appellate Judge dismissed the complaint, concluding that the mix-up of names of PW1 did not prejudice the appellant.

The learned Judge said:

> *"I had a time of going through the record I agree with the appellant's submission that the names of the victims in two counts as per substituted charge sheet filed on 09/06/2015 are; first **[BM]** and second **[BH].** However, this defect in my opinion has not occasioned a failure of justice to the appellant as it could be a typing error hence it is curable under section 388 of the Criminal Procedure Act Cap. 20 R.E. 2002. More so the evidence from the record is clear that the victim is going by the name **[BM]** PW1 who has been also proved by the Exhibit P1 the PF 3. In that sense this allegation also is baseless."*

The complaint about the decision of the prosecution to call a new witness who the prosecution did not identify at the Preliminary Hearing

should not take much of our time because the position of the Court is well known. In **LEONARD JOSEPH @ NYANDA V.R.,** CRIMINAL APPEAL NO. 186 OF 2017 (unreported), one of the grounds of appeal was that PW4 was allowed to give evidence even though his name did not appear in the list of witnesses prepared at the Preliminary Hearing. While commending the established practice of writing down names of potential witnesses during preliminary hearing, the Court noted that this is only meant to facilitate effective management of the case and issuing of summons to intended witnesses to expedite trials. The Court insisted that the practice does not take away the right of the prosecution to call up new witnesses whose names were not mentioned at the preliminary hearing stage.

As we have stated time without number, the jurisdiction of the Court on the second appeal is on matters of law, but no matter of fact (See section 6(7)(a) of the Appellate Jurisdiction Act, Cap. 141. R.E. 2019). As a result, the practice of the Court on the second appeal is to resist the temptation to interfere with the concurrent finding of facts arrived at by the trial and first appellate courts, unless there are good reasons for, for example, where there is misdirection or misapprehension of evidence.

We have considered the record of the trial and the first appellate courts. We have also considered the submissions by Ms. Amina Mawoko, learned State Attorney for the respondent on the grounds of appeal, and

the appellant's submissions. The main issue for our determination is whether we can fault the concurrent finding by the two courts below, that the prosecution proved beyond a reasonable doubt all the essential ingredients of the two counts, rape and unnatural offence.

The trial and first appellate courts made a concurrent finding based on the victim's evidence (PW1) and her playmate (PW2) that the appellant raped the PW1. In convicting the appellant, the trial magistrate concluded that the victim, PW1, was a truthful witness. The trial court, in addition, found that the evidence of PW2 corroborated the victim's evidence. PW2 saw the appellant, who they knew as their neighbour, taking the victim from the playing ground.

In dismissing the appellant's first appeal, the first appellate court stated that the evidence presented by the prosecution against the appellant in robust, compelling, and the sufficient to sustain his conviction. From the perspective of section 127(7) of the Evidence Act, the first appellate judge noted that the evidence of PW1 alone was sufficient to convict the appellant. The learned judge also found that the evidence of PW2 supported the victim's evidence.

On our part, we cannot help but agree with the first appellate court that in terms of section 127(7) of the Evidence Act, Cap. 6 R.E. 2002, the evidence of PW1 stands alone and can sustain a conviction without

requiring supporting evidence. Under this provision, PW1 is a child of tender years (below the age of fourteen); she is also a victim of the sexual offence, rape. Section 127(7) states:

> *"127(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*** *of 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 sexual offence is telling nothing but the truth."* [Emphasis added].

Through his first, fifth, sixth and seventh grounds of appeal, the appellant has attempted to create doubt in the evidence of the victim, PW1. He cast aspersions on the prosecution case through his fifth ground by wondering why PW1's mother and Hamlet leaders did not testify for the prosecution. We do not think these two witnesses were at the scene of the crime to make their absence from the witness box so remarkable as to create doubt in the evidence of the victim of a sexual offence. We

shall be guided by what we said in **LEONARD JOSEPH @ NYANDA** (supra). The prosecution did not invite a Ten Cell leader and the investigator to testify for the prosecution. The Court declined to draw adverse inference on the absence of these witnesses, stating:

> *"Since it was not suggested at the trial that the two persons were at the crime scene at the material time, we do not see them as material witnesses. They had not direct evidence of their own on the case apart from whatever facts they might have gathered from their conversation with or interrogation of the eye witnesses (PW1, PW2, and PW3). In that sense, their evidence was not relevant to establish what actually happened on PW1 at the crime scene."*

Not even the Appellant's sixth ground of appeal on the failure to consider his defence of alibi is sufficient to cast doubt in the evidence of the victim (PW1) and that of PW2, who placed him squarely at the scene of crime and not at any other place. PW1 and PW2 knew the Appellant because the three lived in the same neighbourhood of Digidigi in Madaba, and the incident took place during broad daylight.

The fact that PW1 knew the Appellant very well is evident in her testimony, mentioning the Appellant by his first name:

"The one [who] raped me was Charles and it was a day we were playing with Rozi. Charles looked [at] me and then went to take bicycle and took me to his bicycle and sent me at the farm. He took me to the farm and took his penis inserted [in] to me by taking his pen inserted to my vagina and buttocks after undressing his short and my underpant. I was seriously injured, I cried a lot but he was telling me that if I cry he will slaughter me...".

We agree with Ms. Mawoko, learned State Attorney, that the first ground of appeal demanding corroboration of PW1's evidence lacks merit. The evidence of the victim (PW1) not only stands on its worth to sustain the appellant's conviction but was also corroborated, not least by PW2 and PW3.

The learned first appellate Judge (Chikoyo, J) took time to assess the credibility of the evidence of PW1 on its own merits when she said:

"In the instant appeal, upon scrutinizing the testimony of PW1 as a victim, I find her testimony is credible to sustain the appellant's conviction since PW1 knew the appellant before the incident as she was her neighbour that is why she managed to mention the appellant's name to PRISCA at the time when she was narrating what the appellant had done to her, that the appellant had raped and sodomized her.....More so, PF3 and the testimony of PW3 corroborated that PW1's vagina and anus had bruises which was caused by a blunt object.

Again, the fact that the appellant is known to the victim is well certain as stated above, and PW1's ability to mention the appellant's name to PW2 and PRISCA at the earliest opportunity is an all-important assurance of PW1's reliability".

From what we have said, we dismiss the seventh ground of appeal, which contends that the prosecution failed to prove both counts of rape and unnatural offence.

This second appeal lacks merit, and we dismiss it in its entirely.

DATED at **IRINGA** this 29th day of April, 2021.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 30th day of April, 2021 in the presence of the Appellant in person linked via video conference at Iringa Prison and Ms. Elizabeth Mallya, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

K. D. MHINA
REGISTRAR
COURT OF APPEAL