IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, CJ., MWARIJA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 525 OF 2019

YUSUPH NGEDE .....1ST APPELLANT
DAVID TOWO ..... 2ND APPELANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mansoor, J.)

dated the 24th day of May, 2019
in
(DC) Criminal Appeal No. 12 of 2019

JUDGMENT OF THE COURT

24th & 27th May, 2021

MWARIJA, J.A.:

The District Court of Mpwapwa convicted Yusuph Ngede and David Towo (the 1st and 2nd appellants respectively) of the offence of gang rape and consequently sentenced them to imprisonment term of thirty years. The prosecution had alleged that on 8/5/2018 at about 20:30 hours at Ng'hambo area in Igovu Village within Mpwapwa District, Dodoma Region, the appellants did have carnal knowledge of a thirteen years old girl who, for the purpose of protecting her dignity, shall be

known by her initials of "SK". The appellants denied the charge. However, after a full trial, the trial court was satisfied that the case against them had been proved beyond reasonable doubt.

Aggrieved by the decision of the trial court, the appellants unsuccessfully appeal to the High Court. Like the trial court, the first appellate court believed the evidence of the prosecution witnesses and thus upheld the appellants' conviction. Aggrieved further, they have preferred this second appeal.

The facts giving rise to the appellants' arraignment and their ultimate conviction may be briefly stated as follows: Until the material date (8/5/2018), the 1st and 2nd appellants were neighbours of one Hadija Kondo (PW4) and were thus known to her. On that date at about 22:00 hours while she was seated outside her house, she heard a girl's voice from the 1st appellant's room. The girl was crying for help complaining that she was being hurt. In response, PW4 and some other people went to the 1st appellant's room and attempted to open the door but found that the same had been locked from inside. They broke it and the victim, SK, got out of that room while the appellants were locked in the room until when the hamlet chairman, one James Michael Mahajile

(PW5) who was informed of the incident, arrived at the scene. Having been apprised of the incident by the victim, PW5 informed the police who arrived and arrested the appellants.

The victim was one of the six witnesses who testified for the prosecution. She gave evidence as PW1. Her evidence was however, taken in contravention of the provisions of s. 127(2) of the Evidence Act [Cap. 6 R.E. 2002] as amended by Act No. 4 of 2016 [now R.E. 2019] (the Evidence Act). At the time when she gave her evidence, she was thirteen years old and therefore, a child of tender age. According to the above stated provision of the Evidence Act, even though her evidence could be received without oath or affirmation, she was required to promise to tell the truth to the court and not to tell lies. That was not done.

In her testimony PW4 who, as stated above, heard PW1 crying for help from the 1st appellant's room, said that when PW1 got out of the said room, she was half naked and complained of having been raped by the appellants. Another witness, D/C George (PW6), was one of the police officers who went to the scene and later conducted investigation. He testified that he went to the scene of crime on the date of the

incident and found that the appellants had been locked in the 1st appellant's room. He arrested them and proceeded to interrogate PW1. He said that she told him, among other things, that she left her underpant in the 1st appellant's room. The appellants denied that allegation but according to PW6, after having conducted a search, he found it at the window of that room. The witness tendered a certificate of seizure as exhibit P3. That piece of evidence was supported by PW5, PW4 and the victim's mother (PW2) who went to the scene after the incident. Earlier on in her evidence, she said that she sent PW1 to a retail shop but until midnight she had not returned home. She came to learn of PW1's whereabouts after the incident.

PW1 was taken to hospital on 9/5/2018 after she had obtained a PF3 from Mpwapwa Police Station. At Mpwapwa District Hospital, she was examined by Dr. Sigfrid Ishengoma (PW3). In his evidence, PW3 said that from his examination, he found that PW1's vagina had a friction and that it was not the first time for her to have been carnally known. The medical examination report prepared by PW3 was later tendered by PW6 and the same was admitted in evidence as exhibit P2. He also tendered a sketch map of the scene of crime as exhibit P4 and a motorcycle allegedly found in possession of the 1st appellant.

In his defence, the 1st appellant (DW1) testified that on 8/5/2018 he fell sick and was thus at home. At 20:45 hours, he was visited by the 2nd appellant and shortly thereafter, he heard the door being locked from outside. He went on to state that, later, the police arrived and opened the door. They informed him that he had raped PW1 and was thereupon arrested and taken to police station.

The defence of the 2nd appellant (DW2) was not different from what was stated by DW1. He testified that on the date of the incident, he was informed by DW1 that he was sick. On that information, he visited DW1 but while there, they were arrested in the circumstances stated by DW1. DW2 added that the underpant alleged to have been found in the room was in fact found outside the house. His evidence was supported by that of Ufero David Towo (DW3). He testified that on the material date at about 22:00 hours, he was informed by DW2's mother about the incident and that DW2 had been locked in a room. He went on to state that, he went to the scene where after a short moment police officers arrived and opened the door. According to his evidence, he did not see any girl getting out of the room.

As stated above, after having considered the prosecution and the defence evidence, the trial court found that the prosecution had proved the case against the appellants beyond reasonable doubt. It found that the appellants' defence did not raise any reasonable doubt in the prosecution evidence. That finding was upheld by the High Court. Undaunted, the appellants have brought this second appeal.

In their memorandum of appeal, they have raised seven grounds which may be paraphrased as herein below:

1. That the learned first appellant Judge erred in upholding the appellants' conviction, while the evidence of PW3 did not establish that the friction he found in the victim's vagina was due to penetration of a male organ;

2. That the learned first appellant Judge erred in failing to find that the evidence of PW1, PW2, PW3, PW4 and PW6 was contradictory hence unreliable;

3. That the learned first appellant Judge erred in upholding the appellants' conviction while the trial court had acted on the evidence of PW1 which was invalid for having been improperly received;

4. That the High Court erred in failing to find that the trial court had wrongly acted on the evidence of the underpant while the prosecution did not prove that the same belonged to PW1;

5. That the learned 1st appellate Judge erred in failing to find that the trial court wrongly acted on the evidence of the motorcycle while the prosecution did not prove that it belonged to the 1st appellant;

6. That the learned first appellate Judge erred in upholding the appellants' conviction while there was a failure on the part of the prosecution to give reasons for the delay in sending PW1 to hospital for medical examination; and

7. That the learned first appellate Judge erred in failing to find that the trial court did not consider the appellants' defence.

At the hearing of the appeal, which was conducted through video conferencing facility linked to Isanga Prison, the appellants appeared in person, unrepresented. On its part, the respondent Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Mr. Elisante Gadiel Masaki, learned State Attorney.

When they were called on to argue their appeal, the appellants opted to hear first, the respondent's response to the grounds of

appeal and thereafter make a rejoinder, if the need to do so would arise.

Mr. Masaki started by expressing the respondent's stance that it was opposing the appeal. With regard to the grounds of appeal he argued that the 1st, 5th and 6th grounds raise new issues which were not considered in the first appellate court and thus urged us not to entertain them because, as a principle, matters which were not dealt with in the first appeal, cannot be canvassed in a second appeal unless they involve points of law. To bolster his argument, the learned State Attorney cited the case of **Eliah Bariki v. Republic**, Criminal Appeal No. 321 of 2016 (unreported).

With regard to the other grounds of appeal, the learned State Attorney contended that the same are devoid of merit except the 3rd ground which he conceded to. He agreed that the evidence of PW1 is invalid because the same was received in contravention of s.127 (2) of the Evidence Act. Citing the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported), he submitted that since PW1's evidence was neither taken on oath or affirmation nor did the said witness promise to tell the truth and not to tell lies, her evidence should be expunged.

It was the learned State Attorney's argument however, that, even without PW1's evidence, the remaining evidence sufficiently proved the case against the appellants. He submitted that, a sexual offence may not only be proved by a victim but any other evidence may be acted upon to found the accused person's conviction. He cited the case of **Issa Ramadhani v. Republic**, Criminal Appeal No. 409 of 2015 (unreported) to support his argument. According to the learned State Attorney, the evidence of PW4, PW3 and PW6 proved that PW1 was raped by the appellants.

With regard to the 2nd ground of appeal, Mr. Masaki argued that from the record, the contradictions which the appellants complained of in the High Court, concerned the evidence of PW3 and PW1; that whereas PW1 said that the appellants raped her on several occasions, PW3's evidence was to the effect that, from his examination of the victim, he found that she had previously been having sexual intercourse. The learned State Attorney argued that there is no contradiction in that evidence of the two witnesses.

As for the 7th ground of appeal, it was Mr. Masaki's submission that the defence of the appellants was considered by the trial court. He

referred us to page 45 of the record of appeal at which the learned trial Resident Magistrate made reference to the appellants' defence.

In their rejoinder, the appellants opposed the arguments made by the learned State Attorney. The 1st appellant submitted that grounds 1, 5 and 6 which Mr. Masaki contended that they are new grounds, raise points of law and thus urged the Court to entertain them. As for the 3rd ground, it was the 1st appellant's argument that when that evidence is expunged, the remaining evidence would not support the charge. He prayed therefore, that the appeal be allowed.

On his part, the 2nd appellant joined hands with his co-appellant that in the absence of PW1's evidence, the charge remains unproved because, according to him, the evidence of PW4 is not credible. Like the 1st appellant, he prayed that the appeal be allowed.

Now, in determining the appeal, we wish to begin with Mr. Masaki's contention that the 1st, 5th and 6th grounds of appeal are not worth consideration because they raise issues which were not dealt with in the High Court. Having examined the three grounds in question, we agree with him that the same raise issues which were not considered in the High Court and therefore, since those grounds are not based on points of law, the appellants are precluded from raising them in this

second appeal. In the case of **Eliah Bariki** (*Supra*) cited by the learned State Attorney, we observed as follows:

> *"This Court may not decide on matters that were not first put before the High Court for determination, and the rationale is that this Court only sits on appeals against decisions arising from the High Court or from Magistrates' courts in their extended powers, and this is in accordance with sections 5 and 6 of the Appellate Jurisdiction Act, Cap 141 RE 2002. We however hasten to add that this principle does not apply when the matter involves a point of law."*

On the basis of the above stated position therefore, we decline to consider those grounds of appeal.

That having been said, we now proceed to determine the other grounds of appeal. In doing so, we wish to start with the 3rd ground of appeal which concerns validity of PW1's evidence. We hasten to state at the outset that, we agree with Mr. Masaki that the evidence of PW1 was received contrary to the requirements of s.127(2) of the evidence Act. That provision stated as follows:

> " *127 (1) ... N/A*
>
> *(2) A child of tender age may give evidence without*

taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."

It is glaring from the record that PW1's evidence was received without having promised to tell the truth. That omission is fatal – see for instance, the cases of **Godfrey Wilson** (supra) cited by the learned State Attorney and **Masoud Ngosi v Republic**, Criminal Appeal No. 195 of 2018 (unreported) in which the Court had occasion to consider the effect of receiving the evidence of a child of tender age without oath or affirmation and without the child having promised to tell the truth. In the former case, the Court observed as follows:

" *In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No. 4 of 2016. Hence, the same has no evidential value."*

In that respect therefore, we find that the evidence of PW1 is of no probative value. We wish to add here that the evidence of the motorcycle which was tendered by PW6 and admitted in evidence and which is complained of by the appellants in their 4th ground of appeal,

cannot be relevant after the evidence of PW1 has been rendered invalid. In our view, that ground is for that reason, redundant.

From the finding on the 3rd ground of appeal, the issue is whether the remaining evidence of PW4, PW3 and PW6 which was relied upon by the prosecution to link the appellants with the offence is sufficient to sustain the appellants' conviction. It is noteworthy to point out here that, it is now an established principle that in proving a sexual offence, the best evidence is that which comes from the victim. The principle was aptly stated in the case of **Selemani Makumba v Republic,** [2006] T.L.R 379 in which the Court observed 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."*

In certain circumstances however, the offence may be proved despite the absence of the evidence of the victim. Such evidence must however, be cogent enough such that it leaves no reasonable doubt that the charged person committed it – see for example, the cases of **Yusuf Molo v. Republic**, Criminal Case No. 343 of 2017 and **Mbaraka Ramadhani @ Katundu v. Republic**, Criminal Appeal No. 185 of 2018

(both unreported). In the former case, there was evidence of the appellant's cautioned statement while in the latter case, there was evidence of an eye witness. After the Court had considered that evidence of the eye witness, it found as follows:

> " *We therefore believe PW2 when he testified that while on the visit to the bush to collect mangoes, he saw the appellant undressing PW1, unzipping his trousers, and penetrating his penis into her vagina. PW2 heard when the appellant warned his victim not to disclose to anyone about the rape."*

In the case at hand, PW6 was not at the scene of crime at the material time of the incident. With regard to PW4, although she was at the scene of crime, her evidence was only on what she heard while she was outside the 1st appellant's room and the act relating to the breaking of the door to that room. Her evidence was also on the fact that she saw PW1 getting out of the 1st appellant's room while half naked. Her evidence that PW1 was raped by both appellants was merely a statement from the victim which, having expunged her evidence, becomes hearsay. She said that she interrogated the victim who complained that she was raped by the appellants. Despite PW4's reliance on the fact that PW1 got out of the room while half naked, this

witness did not even inspect the victim's private parts to see whether or not she had been molested.

On record was also the evidence of PW3, the Doctor who examined PW1 a day after the date of the incident. This witness prepared a medical report (exhibit P2) but as admitted by the learned State Attorney, the same was improperly admitted in evidence. The same is thus expunged from the record. What remains is the oral evidence of PW3. He testified that in the finding to which he arrived at after examining the victim is existence of friction in her vagina. It was his further finding that the victim was not virgin. In our considered view, that evidence is not cogent enough to prove beyond reasonable doubt that the appellants committed the offence against the victim.

On the basis of the reasons stated above, we find that, had the first appellate Judge considered the error which was committed by the trial court, of receiving the evidence of PW'1 without complying with s.127 (2) of the Evidence Act, it would have found that the case was not proved against the appellants to the hilt. Since that finding suffices to dispose of the appeal, we do not see any pressing need to determine the 7th ground of appeal.

In the event, we allow the appeal and hereby reverse the decision of the High Court. Consequently, the appellants' conviction is quashed and the sentence meted out to them is set aside. They should be released from prison forthwith unless they are held for any other lawful cause.

DATED at **DODOMA** this 27th day of May, 2021.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

This judgment delivered this 27th day of May, 2021 in the presence of the Appellants in person connected through video conferencing facility linked to Isanga Prison and Ms. Phoibe Magili, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL