IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A, And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 519 OF 2017

VEDASTUS EMMANUEL @NKWAYA..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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

(Gwae, J.)

dated 25th day of September, 2017

in

Criminal Appeal No. 255 of 2016

....

JUDGMENT OF THE COURT

9th & 14th July, 2021

FIKIRINI, J.A.:

Vedastus Emmanuel @ Nkwaya, the appellant who pleaded not guilty was charged and convicted before the District Court of Tarime at Tarime with an offence of rape contrary to sections 130 (1) and 131 (1) (3) of the Penal Code, Cap. 16 R.E. 2002 which now is [R.E. 2019]. The particulars of the offence were that, on 23rd December, 2015 at about 19:00 hours at Rhebu Street within Tarime District in Mara Region, did unlawfully have carnal knowledge of one HJ (victim) a child aged 8 years old. The trial court after full hearing found him guilty, convicted and sentenced him to

life imprisonment. Dissatisfied, he unsuccessfully appealed to the High Court. Undeterred, he has appealed to this Court. This is his second appeal with seven grounds of appeal listed as follows:

1. That, the lower court erred in law in relying on unreliable and uncorroborated evidence of a victim aged 8 years old.
2. That, the incident was not reported early to PW2 and PW3.
3. That, during preliminary hearing, PW3 was not listed as one of the witness in the prosecution list of witnesses.
4. That, the lower court mishandled the contents of evidence of PW6 and exhibit PE1.
5. That, the appellant's defence of "alibi" was not considered.
6. That, the prosecution did not prove its case beyond reasonable doubt.
7. This ground is covered under 6th.

The facts, which were eventually accepted by the trial court, resulting into conviction are briefly that on 23rd December, 2015, at about 19:00 hours, PW1-HJ who was 8 years old at the time, being born on 7th May, 2007, was at the football playgrounds in Serengeti. On her way home, she met the accused person whom she used to know by the name "kokoriko"

who lived at Mkuyuni which was about seven (7) to ten (10) houses from where she lived with PW2-NJ her mother. The appellant grabbed PW1's hand and took her into his room. In the room which had a bed, table and dishes, the appellant undressed her and he undressed himself and pulled PW1 on the bed which had a white bedsheet. PW1 slept on the bed and the appellant went on top of her took his penis and forcefully inserted it into her vagina, resulting into PW1 feeling pain. The intercourse took a while, until the appellant ejaculated. The appellant went to take a shower, and he went to the shop and bought PW1 biscuits and sweets, before he sent PW1 out, lest people find her in his house. On her way out PW3 - Anna Chenge saw her coming from the appellant's house. PW3 went to inform PW2 who was not at home at the time, she therefore left a message with PW4 -EJ that PW2 should go to PW3's place on her return from errands.

Upon being informed by PW3 what she saw, PW2 inquired from PW1 as to what was she doing at the appellant's house. That is when PW1 spilled the beans that she was raped by the appellant. PW2 took trouble of inspecting PW1's private parts and found that she has been raped. The following day she was taken to hospital, where PW6-Kimenya Peter a

clinical officer examined PW1 private parts and noted that she had no hymen. When the appellant appeared PW2 who was in the company of PW3 and PW4 asked him what he had done to PW1. The appellant fell down. PW2 proceeded to the chairman's place and reported the incident. On coming back in the company of the chairman they could not find the appellant. The chairman requested for PW1 to be examined. PW2 and PW3 were among those who examined PW1 and reported that she was raped. PW2 was given a note to go to Police but since it was already at night, the Police visit was done the following day. From the Police, PW1 was taken to hospital.

In his defence, the appellant who testified as DW1, fended for himself. It was his testimony that on 25th December, 2015 when he was coming back from work at about 09:00 hours, he was intercepted by a man and a woman, who started ill-treating him by hurling abusive words and beating him up until good Samaritans intervened by calling the Police. The appellant was arrested and taken to Police station, processed and later charged with the offence of rape. To give account of where he was on the fateful day and time, the appellant summoned one witness. DW2-Mary Augustine testified that on 23rd December, 2015 the appellant went to her

home and left for work at about 20.00 hours. DW2 did not know where the appellant went.

As alluded to earlier, that based on the evidence adduced the appellant was convicted and accordingly sentenced. At the hearing of the appeal, the appellant who was unrepresented opted to hear from the learned State Attorney first and reserved his right to rejoin, if need be.

Mr. Morice Mtoi, learned State Attorney prefaced his address by inviting the Court to rectify the irregularity noted on the charge sheet. That the charge sheet laid the offence against the appellant under section 130 (1) and 131 (1) and (3) of the Penal Code, instead of section 131 (1) and (2) (e) and 131 (1) and (3) of the Penal Code. He urged the Court to look at the irregularity as minor and which is curable and has not prejudiced the appellant. He thus implored the Court to do so under section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). To bolster his submission, he cited the case of **Festo Domician v R,** Criminal Appeal No. 447 of 2016 (unreported).

Arguing the appeal itself, the learned State Attorney outright opposed the appeal, supported both the conviction and sentence meted out against the appellant. Canvassing the grounds of appeal, the learned State

Attorney, contended that grounds 2, 3, 4 and 6 were not dealt with by the High Court and therefore urged us to find those grounds deserving no attention of our Court. He referred us to section 4 (1) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) and the case of **Festo Domician** (supra). He then proceeded to argue the remaining grounds.

On the 1st ground that the evidence adduced by PW1, a child of 8 years, was unreliable and uncorroborated, it was Mr. Mtoi's submission that the evidence was reliable and trustworthy as PW1 proved both penetration as reflected at p. 7 of the record of appeal and her age, which are the key elements in proving rape. In addition, the evidence of PW2, PW3, PW4 and PW6 corroborated PW1's account. All these witnesses were considered credible by the trial court which has the domain of determining witness credibility. Also, the testimonies of all these witnesses were coherent and consistent. Since the trial court believed them, the appellant has therefore an obligation to point out why he thinks that their evidence was otherwise.

On the 5th ground that the court did not consider the appellant's defence of "*alibi*", the learned State Attorney, informed the Court that he has gone through the record of appeal and could not find a single page in which the appellant has raised a defence of "*alibi*". He was nonetheless

quick to say that even if he did, he ought to have informed the court before or even during his defence stage, which he did not do and all the witnesses stated the incident occurred at 19:00 hours. The appellant never cross-examined on the time when the offence was committed. And in his defence he never touched on the 23rd December, 2015, the day on which the offence was committed.

The 7th ground on the complaint that the prosecution did not prove its case beyond reasonable doubt, the learned State Attorney aside from refuting the assertion, maintained that the prosecution case was proved beyond reasonable doubt relying on his submission when addressing the 1st ground of appeal. With his submission opposing the appeal, he urged us to dismiss the appeal.

Prompted by the Court on DW2's evidence, the learned State Attorney contended that there was no evidence the appellant was not at the scene of the crime if we go by what PW1, PW2, PW3 and PW4 testified. He went on contending that the offence was committed between 19:00-20:00 hours and DW2 could not prove that the appellant never left her place during the pointed out time.

The appellant in rejoinder, the appellant essentially acknowledged that there might be some new grounds in the memorandum of appeal but attributed the error to the person who helped draft the grounds.

Before embarking in determining the actual grounds of appeal, we find it necessary to first sort out two issues: one, on the defect on the charge sheet, considering it being the basis of the criminal trial. Two, that the 2nd, 3rd ,4th and 6th grounds were new.

We share the learned State Attorney's concern that the charge sheet is defective in the statement of the offence for not citing the relevant provision that appropriately states the offence of rape and the punishment provided. The cited provision in the charge sheet is section 130 (1) and 131 (1) and (3) of the Penal Code instead of 130 (1), (2) (e) and 131 (1) and (3) of the Penal Code. By omitting sub-section 2 (e) its effect is that the charge levelled against the accused person is incomplete. The omitted provision reads as follows:

> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(e) with or without her consent when she is under*

eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

The question which needs to be answered is whether the irregularity is curable, on the one hand and on the other, if it has prejudiced the appellant. As rightly contended by the learned State Attorney, the irregularity is not fatal. The reason we are saying so, is when the charge was read over and the particulars of the offence explained, it clearly mentioned the name of the victim, nature of the offence, age that she 8 years old, the place where the offence was committed and the time. We are settled that the appellant comprehended the charge, pleaded not guilty and mounted his defence when it was the defence case. In the case of **Jamali Ally @ Salum v R,** Criminal Appeal No. 52 of 2017 (unreported) the Court, when it faced with the same scenario, held that:

> *"In the instant appeal before us, the particulars of the offence were very clear and, in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave sufficient notice about the date when the offence was committed, the village where the offence was*

committed, the nature of the offence, and the name of the victim and her age."

The defect in the charge sheet is insignificant and can be easily cured, without prejudicing the appellant, under section 388 (1) of the CPA.

On the second concern that the 2nd, 3rd, 4th and 6th grounds are new, this will not detain us long. We outright agree with the learned State Attorney that matters not canvassed by the lower court cannot be raised before this Court. The Court in its long list of authorities namely: **Sadick Marwa Kisase v R,** Criminal Appeal No. 83 of 2012; **Hassan Bundala @Swanga v R,** Criminal Appeal No. 416 of 2013; **Yusuph Masalu @ Jiduvi v R**, Criminal Appeal No. 163 of 2017; **Nasib Ramadhani v R,** Criminal Appeal No. 310 of 2017; **Geofrey Wilson v R,** Criminal Appeal No. 168 of 2018 and **Festo Domician** (supra) (all unreported). In the **Sadick Marwa Kisase** (supra), the Court held that:

> "*The Court has repeatedly held that* ***matter not raised in the first appeal court cannot be raised in a second appellate court."*** [Emphasized]

So long as the raised grounds were not dealt with by the first appellate court, we in terms of section 6 (7) of the AJA, empowering us to

hear appeals from the High Court, find that we have no jurisdiction to entertain the grounds and especially since they do not involve legal issues. **See: Abeid Mponzi v R,** Criminal Appeal No. 476 of 2016 (unreported).

The 2nd, 3rd, 4th and 6th grounds are thus, hereby rejected.

Turning now to the appeal itself, the 1st, 5th and 7th grounds will all be considered together. It is a well established principle by this Court that the best evidence of rape comes from the victim herself. And for a girl of 8 years old the consent is immaterial. **See: Selemani Makumba v R** [2006] T. L. R. 379. PW1's evidence was watertight and it proved the necessary ingredients of rape. At p.7-8 of the record of appeal, PW1 vividly explained what transpired when she told the court:

> *"While inside he put off my clothes, skirt, blouse and pant he put off his clothes he had yellow shirt and white trouser, after that he pulled me on bed which had white sheet I slept he came on top of me he took his penis and inserted into my vagina, he forced the same to penetrate in which I felt pain. It was raining he did that for long hour. I saw white things coming from his penis they were like running nose......"*

This evidence on its own suffices to prove that there was penetration, one of the required ingredients in proving rape. Also at p.7, PW1 testified on her date of birth to be the 7th May, 2007, meaning at the time of the commission of the offence she was 8 years old. Furthermore, PW1 identified the appellant whom she recognized as "kokoriko" the name he was commonly known by, and that the appellant lived nearby. These facts were not controverted. With proof of penetration coupled with the fact that she was underage, and the identification of the appellant by the victim, we find, the trial court correctly convicted the appellant.

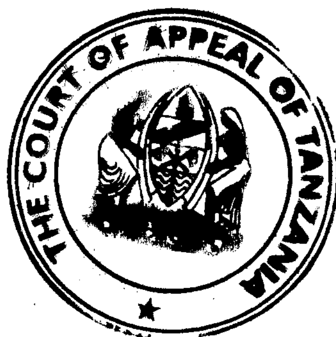
Although corroboration is not necessarily a requirement once the court finds the victim to be credible witness, in this instance even if it were to be assumed corroboration was needed, still the evidence of PW2, PW3, PW4 and PW6 would have weighed in and corroborated PW1's evidence.

The appellant's defence notwithstanding, the trial court found that PW1 gave a detailed account of what transpired on the fateful evening of 23rd December, 2015 such that his defence of "*alibi*" which he has been complaining has not been considered dying a natural death. This is regardless of what DW2 testified before the Court. Her evidence was in actual fact not useful in any way, as she could not prove the appellant's

whereabouts between 19:00 – 20:00 hours when the offence was committed.

On the basis of the reasons stated above, we find this appeal devoid of merit and consequently dismiss it entirely.

DATE at **MWANZA** this 13th day of July, 2021.



G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered on this 14th day July, 2021, in the presence of appellant in person–linked via video conference and Mr. Hemedi Halidi Halifani, Senior State Attorney for the respondent, is hereby certified as a true copy of the original.

G.H.HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL