IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 418 OF 2017

MWITA CHARLES MKAMI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)
(Bukuku, J.)

dated the 5th day of July, 2016
in
(DC) Criminal Appeal No. 107 of 2016

.....

JUDGMENT OF THE COURT

30th June, & 4th August, 2021

KWARIKO, J.A.:

Mwita Charles Mkami, the appellant, was arraigned before the District Court of Tarime at Tarime with one count of rape contrary section 130(1) and 131 (1) (3) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019] (henceforth the Penal Code). It was alleged by the prosecution that on 30th June, 2015 during evening hours at Bomani area within Tarime District in Mara Region, the appellant had unlawful sexual intercourse with a girl aged five years who for the purpose of hiding her identity, we shall refer to her initials "IM" or simply the victim.

The appellant denied the charge but at the end of the trial, he was convicted and sentenced to life imprisonment.

Aggrieved by the trial court's decision, the appellant unsuccessfully appealed before the High Court of Tanzania sitting at Mwanza. He is therefore before this Court on a second appeal.

Briefly, the facts of the case which led to the appellant's conviction are as follows. The appellant was a tenant at the house of the victim's mother (PW1). PW1 and the victim also lived in the said house. On 30th June, 2015, at 17:00 hours, PW1 was at home together with the victim. Whilst there, the appellant came and entered into his room and shortly thereafter he called the victim therein to watch a video game. The victim heeded to the call and while inside, the appellant switched on the video loudly. The victim remained there for about one and half hours. When she came out, she was crying and complained that *"naumia yanatoka,"* literally meaning, she was hurting and something was coming out. At first, PW1 did not bother but shortly thereafter, when the appellant came out carrying his jacket, she inquired from him as to the reason why the victim came out of his room crying, but he did not reply. Following a short conversation between them not related to the victim, the appellant left.

As time went by, the victim continued crying and upon inquiry by PW1, she opened up and explained that while in the appellant's room, he placed her on the couch, undressed and touched her private parts with his fingers before he penetrated his male organ therein. Upon that revelation, PW1 called her friend one Suzana Mwita and upon inspection, the two found the victim's vagina swollen with sperms mixed with blood. On her part, the victim who testified as PW2 stated that when the appellant penetrated her, she was hurt and pus came out and later could not even sit on the couch as it was witnessed by her mother and mama Mwita.

Report of the incident was relayed to police station where a PF3 was issued for the victim to go to hospital for examination and treatment. However, at the hospital, they were told to return the following day for further examination. When the victim was sent back to the hospital as directed, she was examined by Dr. Ally Salum (PW3) who testified that upon inspection he found PW2's vagina swollen, with whitish brown matters, bruises and the hymen was traumatized, signifying that she was sexually assaulted with a blunt object. Whereas, laboratory results revealed that PW2 had contracted gonorrhea. PW3

posted his findings in the PF3 which was admitted in evidence as exhibit PE1.

On the same day, the appellant was arrested by No. F 9816 PC Ramadhani (PW5) from his place of work on the direction by PW1. He was taken to his room and upon inspection, blood stains were found on the couch and floor and his explanation was that the blood was a result of the injury inflicted on him when he was taking his motorcycle inside. However, upon inspection the police did not find any injuries from the appellant's body. A sketch map of the scene of the crime was drawn which was admitted in evidence as exhibit PE2.

In defence, the appellant was the sole witness. He denied the allegations and explained that when he returned home on the fateful evening, he found PW1 and PW4 at home but PW2 was not there. He stayed home for some time and left to his business and on his return at 21:00 hours he went straight to bed. He left to work in the early hours of the following day and later was arrested at his place of work for the present allegations.

In its decision, the trial court found that the prosecution sufficiently established that the victim was sexually assaulted and the

perpetrator was the appellant. He was convicted and sentenced as shown earlier. The first appellate court upheld the findings and dismissed the appellant's appeal.

In his memorandum of appeal before this Court the appellant raised a total of seven grounds which we have paraphrased into four points of complaint as follows:

1. That, the *voire dire* examination was improperly conducted on PW2.
2. That, the prosecution did not prove the aspect of penetration of a male organ into PW2's private parts and the type of instrument used by PW3 to examine the victim was not mentioned.
3. That, the two courts below did not assess the credibility of the prosecution witnesses since their evidence was contradictory and inconsistent.
4. That, the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant was connected to the Court through video link from Butimba prison, unrepresented; whilst the respondent/Republic was represented by Ms. Revina Tibilengwa, learned Senior State Attorney who was assisted by Ms. Dorcas Akyoo, learned State Attorney.

When he was invited to argue his appeal, the appellant only adopted his grounds of appeal and preferred for the State Attorney to begin her address reserving his right of rejoinder, should it be necessary to do so.

For her part, Ms. Tibilengwa prefaced her submission by declaring her stance that she was not supporting the appeal. As regards the first ground, Ms. Tibilengwa submitted that although PW2 gave an unsworn testimony, *voire dire* test was conducted as per section 127(1) of the Evidence Act [CAP 6 R.E. 2019] (the Evidence Act). She supported her argument with the Court's decision in the case of **Mohamed Seleman @ Nyenje v. R,** Criminal Appeal No. 108 of 2017 (unreported). She argued further that PW2's evidence was corroborated by PW3 making reference to the case of **Magina Kubilu @ John v. R,** Criminal Appeal No. 564 of 2016 (unreported).

Arguing the second ground, the learned Senior State Attorney submitted that the trial court considered the issue of penetration which was sufficiently established by PW1, PW2, PW3 and PW4; whilst the first appellate court considered it generally because the appellant did not specifically raise it. She contended that it is settled law that penetration however slight is sufficient to establish rape, fortifying the argument

with the Court's decision in the case of **Masalu Kayeye v. R,** Criminal Appeal No. 120 of 2017 (unreported) at page 16.

Ms. Tibilengwa went on to argue that the term 'uchi' referred to by PW2 was rightly understood by the trial court to mean a male or female organ and its reference depends on the circumstances of each case and background of a particular witness. She supported this argument with the decision in the case of **Hassan Kamunyu v. R,** Criminal Appeal No. 277 of 2016 (unreported).

As regards the type of instrument PW3 used to examine the victim as complained of by the appellant, the learned counsel contended that PW3 did not require any instrument to detect swelling or bruises in the victim's vagina so long as he said that he examined the victim.

In the third ground of appeal, the learned Senior State Attorney argued that although the trial court did not comment on the credibility of the witnesses, it did not invalidate their evidence. She added that this Court has mandate to revisit the evidence on record and come up with its own findings as it was stated in the case of **Masalu Kayeye** (supra).

She further contended that the contradictions by the prosecution witnesses were addressed by the first appellate court at pages 54 – 55

of the record of appeal. To fortify the foregoing argument, the learned counsel referred us to the case of **Abasi Makono v. R,** Criminal Appeal No. 537 of 2016 (unreported).

As to whether the prosecution case was proved beyond reasonable doubt which is the complaint in the fifth ground, Ms. Tibilengwa argued that with her foregoing submissions, the case against the appellant was proved as required in law.

Before she took leave, the learned Senior State Attorney raised one point of law which was not among the grounds of appeal. She submitted that the charge which was laid down against the appellant contained errors in the statement of the offence as the provision which establish the offence of rape was wrongly cited. She argued that the proper provision ought to be section 130 (1) (2) (e) instead of section 130 (1) of the Penal Code. However, she argued, that despite the said errors, the particulars of the offence and the evidence of witnesses were sufficient to inform the appellant of the charge against him, hence he was not prejudiced and that the omission is curable under section 388 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA). She supported her argument with the decision in **Masalu Kayeye's** case (supra)

where the Court referred to its earlier decision of **Jamali Ally @ Salum v. R,** Criminal Appeal No. 52 of 2017 (unreported).

Basing on the foregoing submissions, the learned counsel contended that the prosecution case was proved beyond reasonable doubt, urging us to dismiss the appeal for being devoid of merit.

In his rejoinder, the appellant complained that there are lingering doubts as to whether the incident of rape really occurred for the following reasons. One, there was delay to take the victim to hospital from 5:00 pm of the material date to the following day at 12:00 pm. Two, PW4 was coerced to come to court to testify. Three, PW5 did not prove the alleged blood stains in his room and there were no any photos taken and tendered in court in that respect. Four, while the charge shows that the offence was committed on 30th June, 2015, he was arraigned in court on 3rd June, 2015 which signifies that he was charged even before the incident occurred.

We have considered the grounds of appeal and the submissions of the parties. The crucial issue for our determination is whether the prosecution case was proved beyond reasonable doubt against the appellant. In determining this issue, we will be looking into the merits or

demerits of the appellant's grounds of appeal. However, before doing that, we wish to reaffirm a settled principle of law that unless there has been a misdirection or non-direction occasioning miscarriage of justice, a second appellate court like ours, will not interfere with the concurrent finding of facts by the two courts below. This position of law has been discussed by the Court in its various decisions including; **Osward Mokiwa @ Sudi v. R,** Criminal Appeal No. 190 of 2014, **Mbaga Julius v. R,** Criminal Appeal No. 131 of 2015 and **Paul Juma Daniel v. R** Criminal Appeal No. 200 of 2017 (all unreported).

As a starting point, we shall look into the propriety of the charge which was raised by the learned Senior State Attorney. While we acknowledge that the punishment provision was properly cited, the provision creating the offence of rape was wrongly cited. As rightly argued by the learned counsel, since the victim of rape was a girl aged below 18 years, the charging provisions as a whole ought to have been sections 130 (1) (2) (e) and 131 (3) of the Penal Code which provide thus:

> *"(1) It is an offence for a male person to rape a girl or a woman.*
>
> *(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:

(a) N/A;

(b) N/A;

(c) N/A;

(d) N/A;

(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.

131. (3) Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment."

However, this omission is curable under section 388 of the CPA because the particulars of the offence informed the appellant the date and place of incident, the name and the age of the victim. These particulars together with the evidence by the prosecution witnesses sufficiently informed the appellant about the charge against him which enabled him to ably marshal his defence. Faced with similar situation in the case of **Jamali Ally @ Salum** (supra), the Court stated thus:

"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."

See also **Masalu Kayeye** (supra) and **Barikiel Akoo Batana v. R,** Criminal Appeal No. 530 of 2016 (unreported).

Reverting to the first ground of appeal, the appellant complained that the trial court did not conduct *voire dire* examination as required in law. Before the amendment by Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 which came into operation on 8th July, 2016, section 127 (2) of the Evidence Act provided thus:

"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his

evidence, and understands the duty of speaking the truth."

The Court interpreted this provision in the case of **Jafason Samwel v. R,** Criminal Appeal No. 105 of 2006 (unreported) where it stated that:

> *"This provision imposes the duty on the trial magistrate or judge to investigate whether the child witness knows the meaning of an oath so as to give evidence on oath or affirmation. If the child does not know the meaning of an oath, then the trial magistrate or judge must investigate whether he is possessed of sufficient intelligence and understands the duty of speaking the truth. If he is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, he may receive his evidence though not given on oath or affirmation. In determining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth, the trial magistrate or judge must conduct a voire dire examination."*

Now, in compliance with the requirement of the cited law, the trial magistrate conducted *voire dire* on PW2 who was six years old hence child of tender age when she testified on 5th April, 2016. At page 12 of the record of appeal reads thus:

> ***"Voire-dire examination***

I reside at Bomani. I am a student at Anglikana. I am an Islam. I don't know how to tell lies. I know to tell the truth. It is not good to tell lies. I hate friends. I love my mother. I hate the accused person. (Pointing at the accused).

Court- *Upon conducting voire dire examination against the victim, ["IM"] a child aged six years it is my opinion that the child does not understand the nature and obligations of an oath or affirmation though she possesses sufficient intelligence and she understands the duty of speaking the truth. Therefore, the court will proceed to receive her unsworn evidence."*

It appears in this record that the court only recorded the child's answers to the court's examination. It is our considered view that although it was preferable for the trial court to have also indicated the questions asked but one cannot fail to understand what the child was responding to. The answers given are straight forward and understandable. We are therefore of the opinion that the *voire dire* examination was properly conducted. After all, the appellant did not explain what was lacking in the *voire dire* examination. This ground of appeal thus fails.

In the second ground, the appellant's complaint is that penetration of a male organ into the victim's vagina was not proved. Pursuant to

section 130 (1) (2) of the Penal Code, the offence of rape is committed when a male person has sexual intercourse with a girl or a woman in any of the circumstances under section 130 (1) (2) (a)-(e) of the Penal Code. Regarding penetration, section 130 (4) of the Penal Code provides:

> *"For the purposes of proving the offence of rape–*
>
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and*
>
> *(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent."*

The question which follows now is whether the prosecution proved penetration. In this case, the victim stated that the appellant touched her private parts using his fingers and then inserted his penis therein. She said, *"akaniingiza uchi wake huku sehemu za siri."* The appellant has queried that the term *"uchi"* referred to by PW2 was not explained. On our part, as rightly submitted by the learned Senior State Attorney, it is common knowledge that in Swahili language the terms *"uchi"* and *"sehemu za siri";* means a male or female organ, that is penis and vagina respectively. Addressing an identical scenario in the case of

Hassan Bakari @ Mamajicho v. R, Criminal Appeal No. 103 of 2012 (unreported), the Court stated thus:

> *"There are circumstances, and they are not few, that witnesses or even the court would avoid using such direct words as penis or vagina and the like, for obvious reasons including but not restricted to that person's cultural background; upbringing; religious feelings; the audience listening; the age of the person, and the like. These "restrictions" are understandable, given the circumstances of each case. Our considered view is that, so long as the court, the adverse party or any intended audience grasps the meaning of what is meant then, it is sufficient to mean or understand it to be the penetration of the vagina by the penis."*

See also **Hassan Kamunyu** (supra).

Likewise, in the instant case though the victim did not exactly mention the female and male organ for whatever restrictions, we are of the considered view that she meant nothing but penetration of the penis into her vagina. Surprisingly, the appellant has decided to bring this issue at this stage while at the trial he did not at all cross-examine PW2 about anything she said. Had he done so, the victim might have explained what she meant by *"uchi"*. Moreover, the law is settled that

the best evidence in rape case comes from the victim of the offence (see **Selemani Makumba v. R** [2006] TLR 379. Therefore, in this case the victim sufficiently explained how the appellant penetrated his penis into her vagina. However, apart from the evidence of the victim, there is her mother PW1 who soon after the incident inspected her and found her vagina swollen with sperms and blood. There is also the evidence of the doctor PW3 who found the victim's vagina swollen with whitish brown fluid and injured hymen. This evidence is sufficient to prove penetration as per section 130 (4) of the Penal Code.

Furthermore, the appellant complained that there was no proof of the instrument used by PW3 to examine the victim. According to PW3, his examination was visual. As correctly contended by Ms. Tibilengwa, PW3 did not need any instrument to find that the victim's vagina had bruises, swollen with whitish brown matter and hymen traumatized but his own eyes. The second ground too fails.

The appellant's complaint in the third ground is that the two courts below did not assess the credibility and demeanour of the prosecution witnesses as their evidence is contradictory and inconsistent. It is trite law that credibility of a witness basing on his demeanour is the domain of the trial court. However, the appellate court can be called upon to

assess the credibility of a witness if there is reason to do so. In the Court's pronouncement in **Shabani Daudi v. R,** Criminal Appeal No. 28 of 2000 (ureported), which was relied upon in the case of **Alex Nyambeho @ Fanta and Another v. R,** Criminal Appeal No. 309 of 2013 (unreported), it was said thus:

> *"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court. Our concern here is the coherence of the evidence of PW1."*

In the instant case, the trial court did not particularly discuss anything regarding the demeanour or credibility of witnesses. The reason for that in our view, is not hard to find. It is because there was no issue raised to that effect. This is because in his defence which has been reproduced hereinabove, the appellant did not question anything concerning the

credibility of the prosecution witnesses and did not complain that their evidence was contradictory and inconsistent. Despite the trial court not referring to witnesses' credibility, it was satisfied that their evidence was clear and well corroborated. The court said at page 32 of the record of appeal that:

> *"As for the evidence, prosecution did their best. PW1, PW2, PW4 and PW5 gave clear and well corroborated evidence implicating the accused with the offence charged..."*

On its part, the first appellate court, did not deal with credibility of witnesses because the appellant did not raise it. However, that court determined the appellant's first ground of appeal concerning contradictions by the prosecution witnesses. The court concluded at page 56 of the record of appeal thus:

> *"All in all, I find that, there was no contradiction which goes to the root of the matter. These witnesses were testifying upon one and the same episode. For that matter, I find this ground has no merit. It is dismissed."*

We hold the same view. Firstly, the appellant did not reveal the alleged contradictions and secondly, there was no any contradiction to weaken

the witnesses' evidence. Each witness testified on what he/she saw or heard in respect of the incident. This ground too fails.

From what has been discussed in the foregoing grounds, we can comfortably say that the prosecution case was proved beyond reasonable doubt. PW2's evidence was clear and uncontroverted that the appellant had sexually assaulted her. Her mother PW1 inspected and found her vagina swollen with blood and sperms soon after she came from the appellant's room. PW3 confirmed that the victim was sexually assaulted. This evidence is sufficient to establish the offence of rape where it was proved that the victim was sexually assaulted and the perpetrator was the appellant. The fourth ground too collapses.

Before we conclude, we would like to say something concerning the appellant's complaints raised in his rejoinder submission. We are of the considered view that, the complaints that there was delay to take the victim to hospital, that PW4 was forced to testify and there were no photos of the alleged blood stains on the appellant's couch have not been raised as grounds of appeal. Even though these complaints are among the grounds, we would not have mandate to discuss them because they were not raised before the first appellate court. We have repeatedly stated that matters not raised in the first appeal cannot be

raised in a second appeal. See the cases of **Sadick Marwa Kisase v. R,** Criminal Appeal No. 83 of 2012, **Yusuph Masalu @ Jiduvi v. R,** Criminal Appeal No. 163 of 2017 and **Mohamed Seleman @ Nyenje v. R,** Criminal Appeal No. 108 of 2017 (all unreported).

Another complaint is related to the date of incident appearing in the charge and the date of the appellant's arraignment before the trial court. This is a point of law which can be raised at any stage of the case; hence we have the mandate to determine it. As rightly raised by the appellant, the charge shows that the date of incident is 30th June, 2015 while the record of appeal at page 1 shows that the appellant was arraigned in court on 3rd June, 2015, meaning that he was charged before the incident occurred. We have perused the original record and found that it is only the coram which is usually written by the court clerk which indicates 3rd June, 2015 when the appellant was first arraigned in court. The rest of the proceedings which were signed by the trial magistrate indicates 3rd July, 2015 which also appears at page 2 of the record of appeal. Therefore, reference to 3rd June, 2015 as the date of appellant's arraignment is but just a slip of the pen by the court clerk as well as typographical error in the record of appeal. Thus, the date of incident is 30th June, 2015 as shown in the charge and the prosecution

witnesses, and the appellant was first arraigned in court on 3rd July, 2015. This complaint thus fails.

Consequently, we are of the settled mind that the prosecution case was proved beyond reasonable doubt against the appellant. In the event, this appeal is without merit and we hereby dismiss it.

DATED at **DAR ES SALAAM** this 4th day of August, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgement delivered this 4th day of August, 2021 in the presence of the appellant in person through Video facility and Ms. Dorcas Akyoo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL