IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 77 OF 2020

ROZIGA PASKALIA @ TAI .... APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Magesa, SRM-Extended Jurisdiction.)

dated the 30th day of December, 2019

in

Criminal Appeal No. 44 of 2019

....

JUDGMENT OF THE COURT

20th October, 12th November, 2021

KOROSSO, J.A.:

This is a second appeal. The appellant, Roziga Paskalia @Tai, was arraigned before the District Court of Kibaha at Kibaha, tried and convicted for the offence of rape contrary to section 130(1)(2)(e) and section 131(3) of the Penal Code, Cap 16 R.E. 2002, now R.E. 2019 (Penal Code).

It was alleged that on diverse dates in April 2019 at an area known as Kibaha kwa Mathias, within Kibaha District, Coast Region, the appellant did have carnal knowledge of a girl aged 3 years who shall

henceforth be referred to as "the victim" or "PW3" to conceal her identity. The appellant adamantly denied the accusations against him.

The prosecution paraded four witnesses to prove their case: Inviolata W. Mtitu (PW1), Tatu Yahaya (PW2), Zena Luimiko (PW3) and WP 3450 D/Sgt Anastazia (PW4). Additionally, two exhibits were tendered and admitted into evidence, the victim's PF3 (Exh. P1) and the victim's post-natal growth card (Exh. P2). PW2 testified that she had been living at Mwanalugali Kibaha with her daughter, the victim, aged 3 years and 6 months, born on 17/11/2015. It was her testimony that, around April 2019, PW3 was taken by her grandfather so as to live with him at his residence at Kibaha kwa Mathias. At the end of April 2019, during school holidays, the victim went back to stay with PW2. It was during this period that PW3 informed PW2 that she did not want to go back to her grandmother's place for reason that she was hurt by her uncle known as baba Tai. PW2 was confused and together with PW3 went to the victim's grandparents place and PW3 did not dither and continued to state that she has been hurt in her private parts by baba Tai. Thereafter, PW2 went to report the incident at a Police station and given a PF3 and proceeded to Tumbi hospital where PW3 was examined

by PW1. According to PW2, the person known as "Baba Tai" is the appellant and the victim's uncle, a younger brother of the victim's father.

PW1's evidence was that she examined the victim, who came with PW2 and a PF3 on 1/05/2019 around 15.00 hours. According to PW1 his examination of the victim's private parts no bruises were found, and she had no hymen. PW1's overall finding was that a blunt object had penetrated PW3's private parts.

In defence, the appellant apart from his own sworn testimony as DW1 he fronted 3 other witnesses: Arafat Juma (DW2), Shida Charles (DW3) and Luimiko Charles, the appellant's brother and victim's father (DW4). The appellant denied the charges against him and alleged that on 1/3/2019 he went to visit his grandfather at Chalinze and that the charges against him were concocted by PW2 who had grudges against him.

Upon hearing the evidence from both sides, the trial court found the evidence of PW3 had been sufficiently corroborated by PW1 to prove to the standard required that the victim was raped. The trial court took cognizance of the young age of PW3 but found that she did express herself clearly and confidently and was truthful. The trial court thus

convicted the appellant as charged. Dissatisfied, the appellant's appeal to the High Court which was heard and determined by the Resident Magistrate's Court of Kibaha, was unsuccessful. Magessa, SRM Ext. Jurisdiction found the appellant's complaints including faulting the trial court for not properly analyzing the prosecution evidence, relying on incredible and unreliable evidence of prosecution witnesses, relying on suspicions evidence which failed to prove the charge beyond reasonable doubt to be unmerited. In essence, the first appellate court concurred with the findings of the trial court and dismissed the appeal.

Aggrieved by the decision of the first appellate court, the appellant filed the memorandum of appeal to this Court predicated on four grounds of appeal which basically raise the following grievances; **one,** faulted the first appellate court for enhancing his sentence from 30 years to life imprisonment whilst he was not charged for contravening subsection 131(3) of the Penal Code; **two,** flawed the courts reliance on the evidence of PW3, a child of tender age that her evidence was recorded in contravention of section 127(2) of the Evidence Act, Cap 6 R.E 2002 (the Evidence Act); **three,** challenged the first appellate court's findings contending it failed to re-evaluate and analyze inconsistent and contradictory evidence of prosecution witnesses; and

four, faulted the first appellate court for sustaining his conviction relying only on the prosecution evidence and disregarding the defence evidence.

On the day the appeal was called for hearing, the appellant entered appearance in person, unrepresented and outrightly urged the Court to consider his grounds of appeal and allow those representing the respondent Republic to submit first in response to his grounds of appeal. And reserved his right of rejoinder should the need arise. On the part of the respondent Republic, Mr. Emmanuel Maleko, learned Senior State Attorney and Ms. Sofa Bimbiga, learned State Attorney entered appearance and resisted the appeal.

Mr. Maleko began going directly to respond to complaint number one that faults the first appellate court for enhancing the sentence to life imprisonment in the absence of section 131(3) of the Penal Code in the charge against the appellant imploring us to find that it lacked merit. He contended that the first appellate court had jurisdiction to interfere with the sentence of thirty years meted by the trial court, which was illegal bearing in mind what the appellant was convicted against. The learned Senior State Attorney argued that the appellant's assertion that the charge against him did not warrant the enhanced sentence is

misconceived. He contended that the record of appeal (the record) shows that the original charge was substituted to read subsection (3) of section 131 of the Penal Code, instead of section 131(1) and the amendment is there and it is handwritten and signed at page 3 of the record. In the alternative, he argued that even if the charge had not been amended, because the victim's age, being below ten years old, was known to the appellant from the start and proved by evidence, it follows that enhancement of sentence by the first appellate court, for the purpose of rectifying the illegal sentence imposed by the trial court was justified.

Having considered the arguments from both sides and gone through the record of appeal we find that we need not spend much time on this complaint. We agree with the learned Senior State Attorney that this complaint that section 131(3) was not stated in the charge sheet is misconceived. This is because, the record shows that on 1/8/2019 the prosecution substituted the charge to correct the name of the appellant (then the accused) and the provision of the law found at pages 3 and 13 of the record. In the amended charge at page 3 of the record, the statement of offence reads:

> *"RAPE: Contrary to Section 130(1)(2)(c) and Section 131(3) of the Penal Code [Cap 16 R.E 2002]".*

Clearly, section 131(3) is part of the statement of offence, and pronounces a sentence of life imprisonment upon conviction of rape where the victim is below ten years old. It reads:

> *"S.131 (3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

Evidently, having taken into account the above provisions of the law and upon being satisfied that the charges against the appellant were proved to the standard required concurring with the trial court's findings, the first appellate court at page 60 of the record, in addressing the appellant's sentence held that:

> *"... However, looking on the sentence that was imposed by the trial magistrate is less from the prescribed sentences for a person who commits an offence of rape of a girl who is under teen years. The prescribed sentence according to section 131(3) of the Penal Code is life imprisonment. In term of section 361(1)(b) of the Criminal Procedure Act, this court substitutes*

the sentence of thirty (30) years imposed by the trial court and sentence the appellant to the life imprisonment."

We agree with holding in the above excerpt except for the provision provided to move the court to enhance the sentence. As rightly pointed out by the learned State Attorney, the first appellate court made a slip of a pen and cited a wrong provision which moved them to enhance the sentence, an anomaly we find curable under section 388 of the Criminal Procedure Act, Cap 20 R.E 2002, now R.E 2019 (the CPA) since no injustice was occasioned. The proper provision is section 366(1)(b) of the CPA. For the foregoing, the first complaint falls.

The second complaint faults the first appellate court for its reliance on the evidence of PW3, a child of tender age arguing that prior to recording her testimony, the trial court had not ensured that PW3 promised not to tell lies pursuant to section 127(2) of the Evidence Act. In his written submission, the appellant argued that the provision is mandatory and failure to comply with it is fatal and prayed that her evidence be expunged. He cited the case of **Hemedi Omary Ally @Dallah vs Republic**, Criminal Appeal No. 181 of 2018 (unreported) to bolster his argument and prayer.

On his part, in response, the learned Senior State Attorney reasoned that the complaint arose from misapprehension of the record of appeal, since at page 19, it shows that the trial court questioned PW3 who responded that lying is not good. Subsequent to this, he argued, the trial court made a finding that PW3 promised to tell the truth. He thus implored us to find that what transpired, and the court's finding clearly meant that PW3 promised to tell the truth and not to tell lies in terms of section 127(2) of the Evidence Act.

In deliberating this ground, for better conceptualization of the complaint we reproduce section 127(2) of the Evidence Act which reads:

> *"(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"*

Suffice to say, the above provision was ushered in by the Written Laws (Miscellaneous Amendments) (No 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016. On the import of the amendment, we align ourselves with our decisions in the cases of **Msiba Leonard Mchere Kumwaga vs Republic**, Criminal Appeal No. 550 of 2015, **Issa Salum Nambaluka vs Republic**, Criminal Appeal No. 272 of

2018 and **Godfrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 (all unreported). In **Godfrey Wilson** (supra) we stated:

> *"To our understanding, the above cited provision as amended, provides for two conditions. One, it allows the child of a tender age to give evidence without oath or affirmation. Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies."*

On the complaint that the evidence of PW3 was taken un-procedurally, the first appellate court at page 59 of the record stated:

> *"... The trial court typed proceedings on page 12-18 indicates that the trial magistrate put some questions to the victim and she promised to tell the truth. In that regards the trial court magistrate complied with the requirement of the law as he was satisfied that the victim promised to tell the truth".*

At this juncture, for ease of reference we find it apposite to reproduce what transpired in the trial court related to the complaint.

> *"PW3 (name of victim)*
> *Court:*

The child is so young hence she is a child of tender age as to the effect of section of TEA Cap 6 R.E 2002 as amended by section 26 of (miscellaneous amend) Act no. 2 of 2016 the child is acquired (sic) to promise the court to tell the truth and not otherwise. I will therefore put some questions to her, so that to determine if she is promising to tell the truth.

Signed: H.I. Mwailolo-RM

01/08/2019

Question: What is your name?

Witness: I am (PW3)

Question: Do you go to medrase (sic)

Witness: No

Question: Where do you live and who are your family members?

Witness: I am living with my bibi, baba mdogo na baba

Question: Do you use to tell the truth?

Witness: ***Yes, I tell the truth as to lie is so bad mom will beat me.***

Question: Will you tell the truth?

Witness: ***Yes mama, I will tell you the truth.***

Question:

Through the questions put to the witnesses (sic) its clear that she promises to tell the

truth. I will therefore receive he testimony with no affirmation.

Signed: H.I. Mwailolo- RM

01/08/2019" [Emphasis Added]

Having revisited the record of appeal, we are satisfied that taking into consideration the particular circumstances of the case, such as the fact that PW3 was 3 years at the time and her responses, there is no doubt that PW3 promised to tell truth and not to tell lies. We have considered the case cited by the appellant, that is, **Hemed Omary Ally @ Dallah** (supra) and we find it to be distinguishable. In that case, the trial court conducted a *voire dire* contrary to what the amended section 127(2) of the Evidence Act provided and there was no promise to tell the truth by the victim. We thus find nothing to move us to depart from the concurrent findings of the trial and first appellate courts that PW3 did promise to tell the truth and not to tell lies in compliance with the provision of section 127(2) of the Evidence Act. Therefore, the second complaint is misconceived and lacks merit.

Having dealt with the complaints addressing issues of law, we find it pertinent at this juncture to deliberate on the complaint number 4 that faults the first appellate court for failure to consider the defence evidence and only relying on the prosecution evidence. It is a complaint

where we were invited by the learned Senior State Attorney to refrain from determining it for reason that it was a new ground that had not been raised or determined by the first appellate court and was not an issue of law. On the part of the appellant, being a lay person, he had nothing to submit on this, apart from imploring us to consider all his grievances.

Suffice to say, this Court has been confronted numerous times with situation of the position where we are called upon to determine grounds which were neither raised nor determined by the first appellate court. In the case of **Galus Kitaya vs Republic**, Criminal Appeal No. 196 of 2015 (unreported), we stated as follows:

> "*On comparing the grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, grounds one to five are new grounds. As the Court said in the case of Nurdin Musa Wailu v. Republic supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal*".

We have examined the record of the first appellate court and are satisfied that complaint number three was neither raised nor determined by the first appellate court nor does it raise any legal issues. We find ourselves to lack jurisdiction to entertain it as it is a matter based on facts and we are unable to see where the first appellate court went wrong or right. Hence, we shall refrain from considering the complaint. Thus, grievance number four lacks merit.

The appellant's third complaint condemned the first appellate court for failure to re-evaluate and analyze inconsistent and contradictory evidence of prosecution witnesses. In the written submissions, the appellant challenges the veracity of PW2's evidence, especially the delay to notice PW3 was sexually abused for the seven days she stayed with her after arriving from her grandparents. He also argued that penetration was unproven arguing that the fact that the victim seem not to have shown signs of having been abused earlier, such as, inability to walk properly or pain which should have assisted PW2 to notice earlier and report should lead the Court to find that there was no penetration as alleged.

Another concern by the appellant was the failure of the first appellate court to consider the improperly admitted exhibits that is,

exhibits P1 and P2 since they were not read out upon being admitted, he thus prayed that they be expunged. In general, the appellant's argument was that the case against him was not proved beyond reasonable doubt.

The response from the learned Senior State Attorney was that both the trial and the first appellate courts properly analyzed and evaluated the evidence before it and that there were no contradictions in the evidence of PW1, PW2 and PW3 as each witness narrated what he observed or heard. He reasoned that there were concurrent findings by the trial and first appellate courts that the evidence of PW3 was reliable and truthful. He thus implored us to be guided by the provision of section 127(2) of the Evidence Act and what was held by the Court in **Selemani Makumba vs Republic** [2006] T.L.R 379, that the best evidence in sexual offences is that of the victim of the offence. He contended that the prosecution did prove its case to the standard required and that the complaint lacks merit and the Court be guided to find thus.

In determining this ground, in the first instance, we agree with the appellant's side on a fact readily conceded by the learned Senior State Attorney, that both exhibits P1 and P2 were not read out in court upon

being admitted. Indeed, the settled position of the law is that upon a document being cleared for admission and admitted in evidence, the next process is to be read out in court to enable the appellant to fully understand and appreciate the substance of the said admitted document. The Court had occasions to reiterate this fact, and apart from the case cited by the appellant, we discussed the settled direction in cases such as: **Robinson Mwanjisi and Three Others vs Republic** [2003] T.L.R. 218; **Lack s/o Kilingani vs Republic**, Criminal Appeal No. 405 of 2015; **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017 and **Kassim Salum vs Republic**, Criminal Appeal No. 186 of 2018 (All unreported)). Again, in **John Mghandi @ Ndovo vs Republic,** Criminal Appeal No. 352 of 2018 (unreported) we stated reasons for reading out the admitted documents and the consequences were the same is not done, that:

> "... *whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission, we are left with no other option than to*

expunge the document from the record of the evidence."

Consequently, the fact that exhibits P1 and P2 were not read out in the court after being admitted, renders them not to have been properly admitted. Henceforth, we shall disregard the two exhibits in the cause of determination of this appeal. Suffice to say, that despite having expunged exhibit P1 and P2 did not dent the prosecution case materially for reasons which shall soon become apparent when addressing whether or not the prosecution did prove the charges against the appellant beyond reasonable doubt. At this juncture, we address the limb of the third complaint on whether the first appellate court failed to properly analyze and revaluate contradictory and unreliable prosecution evidence.

We have also scrutinized the record and have not discerned any material contradictions by the prosecution witnesses to lead us to discredit any evidence relied upon to convict the appellant. We find that the prosecution did prove the case beyond reasonable doubt for the following reasons: **one**, the credibility and reliability of the evidence of PW1, PW2, PW3 was subject to concurrent findings by the trial and the first appellate courts; **two**, the age of the victim, that is being three years old and thus below the age of ten was proved by PW1 and PW2.

The above excerpts show that there was penetration of the appellant's male organ into PW3's private parts. PW3's evidence is corroborated by the evidence of PW1, who stated that upon examination of the victim she detected bruises in her vagina which led her to determine that *"a blunt object penetrated in the vagina of the victim."*. In consideration of the evidence above, we find no reason to depart from the concurrent findings of the trial and the first appellate court that penetration was proved; **fourth**, on whether it was the appellant who committed the offence. It is well settled that in sexual offences, the best evidence is derived from the victim. The excerpts reproduced above emanating from the record of the evidence of PW3, reveals that she categorically identified the appellant as the culprit, stating she was hurt on her private parts by "baba Tai". It is worth noting that the fact that the appellant was known as "baba Tai" was not in question. The name "Tai" is found in the charge as an alias of the appellant, and at no time did he dispute it. The fact that the appellant was the victim's uncle has not been disputed and PW3, at three years of age called him, "baba Tai"

Therefore, on the foregoing, we are of firm the view that the person referred to as "baba Tai" is indeed the appellant. Considering

that all the ingredients of rape were proved, the case for the prosecution was indeed proven beyond reasonable doubt. In consequence, complaint number four, lacks merit.

For the foregoing reasons, having dismissed all the grievances advanced by the appellant, we hold that the appeal is devoid of merit and dismiss it.

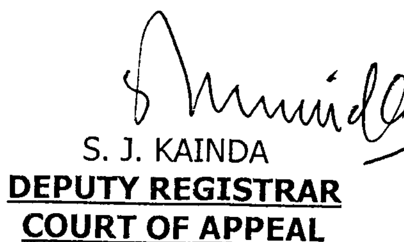
DATED at **DAR ES SALAAM** this 10th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

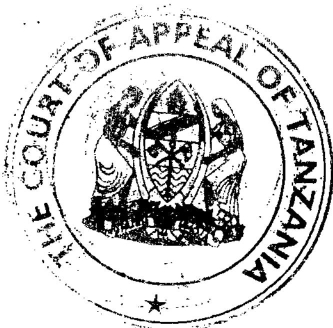
W. B. KOROSSO
JUSTICE OF APPEAL

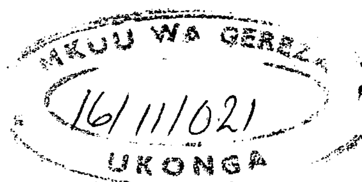
P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 12th day of November, 2021 in the presence of appellant linked to the Court through video facility from Ukonga Prison and in the absence of the counsel for the respondent/Republic duly served is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL





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