IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL N0. 24 OF 2018

LUCAS NANDI ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, at Sumbawanga)

(Mambi, J.)

dated the 8th day of December, 2017
in
Criminal Appeal No. 62 of 2016

.....

JUDGMENT OF THE COURT

19th & 26th February, 2021

LILA, J.A.:

The Appellant, Lucas Nandi, was charged before the Resident Magistrates' Court of Katavi with the offence of rape contrary to section 130 (1) and (2) (e) and 131 of the Penal Code [Cap 16 R.E 2002]. It was alleged that on 23rd February, 2016 at Mwamkulu area within Mpanda Municipality in the Region of Katavi, the appellant did have sexual intercourse with a girl aged 13 years. We shall refer to her as LN, the

victim or PW1 in the course of this judgment so as avoid stigmatization. He denied the charge. Trial ensued and at the end, he was convicted and sentenced to serve a statutory mandatory jail term of thirty (30) years.

To prove the charge, the prosecution marshalled five (5) witnesses and produced one (1) documentary exhibit. For the defence, the appellant was the sole witness.

The gist of the prosecution case as gleaned from the record of appeal is that; on the material night, at around 20:00hrs on 23/2/2016, the victim (LN) who gave evidence as PW1 was on the way to her grandmother. In between she met the appellant who was on his night errands. The appellant seized that opportunity to invite her to his house. That invitation was turned down. Disturbed by the refusal, the appellant dragged her into his room, laid her on his bed, undressed her, forced her to put her legs apart and had sexual intercourse with her while threatening to beat her if she was to scream for help. She experienced pain. She spent two days in the appellant's house. Having missed her daughter for two days, on 24/2/2016 Henry Lusambo (PW2) sent people to trace her but without success. Mashaka Masanya (PW4) who happened to be the landlord in the house in which the appellant lived, noted that the appellant was living with

PW1. He approached the appellant and asked him if the matter was known to the victim's family. The appellant denied and, instead, asked him (PW4) to do so on his behalf. PW4 took up the matter and reported to the victim's mother who, however, was not ready to hear the news. The following day, PW3 went to PW4's house where she found PW1 in the appellant's room. She took the appellant's bicycle and called out PW1. PW1 got out. The matter was reported to the Village Executive Officer (VEO) and the appellant was then arrested at the maize field by a militiaman. On 13/3/2016 PW1 was sent to Mpanda District Hospital, where Hashim Issa Manji, (PW5), a Clinical Assistant, medically examined PW1 and filled a PF3 (exhibit P1). He found semen in the private parts of the victim which, after the laboratory analysis, it was revealed that they were not sperms but normal fluids.

In his sworn defence, the appellant contended that the whole case was fabricated as he had a conflict with PW2 over what he said they "opened the water when they were building a church", whatever that meant. That, she promised to teach him a lesson by reducing the age of her daughter and then report him to have raped the girl so as to ensure

that he is imprisoned. He, generally, fully disassociated himself with the commission of the crime.

After a full trial, the trial court was satisfied that the charge was established. The appellant was convicted and he was sentenced to serve thirty years imprisonment as shown above.

Dissatisfied, the appellant lodged two sets of memoranda of appeal in the High Court. His memorandum of appeal filed on 13/10/2016 comprised substantially four (4) grounds of appeal. They read thus:-

1. *"That the trial court erred in law and facts by convicting the appellant ion very flimsy and weak evidence adduced by the prosecution witnesses.*
2. *That the trial court grossly erred both in facts and law to rely on the evidence of PW2 and PW3 which was hearsay evidence.*
3. *That the trial court grossly erred both in points of law and facts to convict the appellant without proving the case beyond reasonable doubt.*
4. *That the trial court erred both law and facts to convict the appellant by assuming the role of prosecution side and admitting the so called sperms tested by PW5 to be emmitted by the appellant without scientific proof.*

5. *That appellant prays to be present during the hearing of this appeal."*

Subsequently, the appellant lodged a supplementary petition of appeal on 31/7/2017 containing five grounds of appeal. It seems the learned State Attorney was not aware of this one. The grounds raised therein are relatively long and detailed. However, the substance of the complaints may be paraphrased thus:-

1. *Voire dire test was not properly conducted for not being taken in the form of questions and answers.*
2. *The appellant was not medically examined so as to determine whether or not the sperms belonged to him.*
3. *The offence section did not specify the category of rape he committed for not citing section 130(1)(2)(e) and 131(1) hence the charge was defective.*
4. *The provisions of section 135(a)(i) and (ii) of the Criminal Procedure Act, Cap. 20 R. E. 2002 for not specifying the category of the offence of rape he committed when he was convicted.*

The High Court (Mambi, J.) dismissed the appeal. Like the trial court, the learned judge was also satisfied that the victim sufficiently established

being penetrated by the appellant, the appellant was found living with the victim and that the victim's evidence was corroborated by PW2, PW3, PW4 and PW5. He accordingly found the appeal unmerited and dismissed it.

Still aggrieved, the appellant lodged an appeal to this Court. He has brought to the fore a memorandum of appeal comprising, numerically, eight (8) grounds of complaint. They are, so to speak, difficult to comprehend. However, upon painstakingly engaging our brains, we have managed to extract therefrom at most eight main grounds as hereunder:-

1. *The appellant was convicted on a weak prosecution evidence because the birth certificate got burnt with fire and the PF3 was filled by unqualified person hence there was nothing to corroborate rape.*
2. *The judge wrongly relied on the hearsay evidence of PW2 and PW3 to dismiss his appeal.*
3. *That the judge wrongly relied on the PF3 because the victim was examined after two weeks and there was no finding that there were sperms.*
4. *The PF3 was filled by unqualified person.*
5. *The doctor (PW5) being a Clinical Assistant, was qualified for medicines only not human parts.*

6. *The testimony of PW1 contradicted that of PW3, PW4, and the PF3.*

7. *That in the absence of documentary proof (birth certificate) it was insufficient for the victim's mother to prove the age of the victim by oral evidence.*

8. *The defence evidence was not considered.*

At the hearing before us, the appellant who was linked through video facilities from the Ruanda Prison in Mbeya, was fending himself, unrepresented. Ms. Njoloyota Mwashubila, learned Senior State Attorney, and Ms. Safi Kashindi Aman, learned State Attorney, stood for the respondent, the Director of Public Prosecutions.

Upon being accorded his right to begin elaborating his grounds of appeal, the appellant adopted the memorandum of appeal without more and urged the Court to allow the appeal and order his release from prison. He reserved his right to rejoin after the responses by the respondent.

For her part, Ms. Aman strongly resisted the appeal. At the outset, she directed her arsenals to grounds 3, 5, 6 and 7 which she argued that they were new, not canvassed and determined by the High Court. She contended that tha was irregular and to bolster her argument she referred

to us the unreported case of **Galus Kitaya vs Republic**, Criminal Appeal No. 196 of 2015.

As regards the complaint in ground one (1) of appeal that the prosecution evidence was weak hence could not found a valid conviction, the learned State Attorney did not find purchase in that complaint. She strongly argued that the case for the prosecution was built by PW1 who gave a detailed account of the incident which proved penetration. Such evidence was fully corroborated by PW2 and PW4 who stated that the victim was found in the appellant's room and that PW5 medically found that there was penetration although no sperms were detected.

The learned State Attorney's argument on the medical findings indicated on the PF3 (exhibit P1), prompted us to, *suo motu,* ask her to address us on whether it was proper to act on it considering that it was not read out in court after it was cleared for admission. Without mincing words, the learned State Attorney readily conceded that the PF3 suffered from that anomaly hence liable to be expunged from the record. That said, she went further to argue that the effect of expunging the PF3 has serious legal consequences to the outcome of appellant's complaints in grounds 1, 3, 4 and 5 of appeal which touched on the validity of the PF3. She was

inclined that they should be allowed. She, however, hurriedly argued that there still remained sufficient oral evidence by the victim, PW2, PW3 and P4 on which the appellant's conviction can be founded.

Proof of the victim's age was taken as an issue by the appellant in ground seven (7) and part of ground one (1) of appeal. Responding to it, Ms. Aman was forthcoming that age is not necessarily proved by documentary evidence. She insisted that even the evidence by the victim's mother suffices. Referring to page 16 of the record, Ms. Aman argued that PW3, the victim's mother when giving evidence on 23/2/2016, told the trial court that the victim was born on 26/9/2002, which by a simple arithmetic calculation, then the victim was around fourteen (14) years old, hence under eighteen. She argued that the age of the victim was, therefore, sufficiently proved.

Lastly, the learned State Attorney dismissed as baseless the appellant's complaint in respect of the defence evidence not being considered by the learned first appellate judge. She made reference to page 35 of the record (page 8 of the trial court's judgment) wherein the trial magistrate considered the defence evidence and found it not only wanting in substance but also highly improbable. She argued further that

the judge also considered the defence at page 56 and 59 (page 5 and 8 of the judgment) and concurred with the trial court's finding.

The appellant had nothing substantial in rejoinder. He simply pressed us to allow his appeal and order his release from prison.

We have duly considered the appellant's grounds of complaints and the opposing arguments by the learned State Attorney.

Admittedly, this is a second appeal. After studying the record and comparing the grounds of appeal filed by the appellant in the High Court and in this Court, we are of the settled minds that grounds 3, 5, 6 and 7 of appeal were not canvassed before the High Court and determined. We accordingly agree with the learned State Attorney that they are new grounds. Being not points of law which can be raised at any stage and the Court is obligated to entertain, in terms of section 4(1) of the Appellate Jurisdiction Act, Cap. 141 R. ER. 2019 (the AJA), the Court lacks jurisdiction to entertain them. confronted with a similar issue, in **Galus Kitaya's** case (supra), the Court cited the case of **Nurdin Mussa Wailu vs Republic**, Criminal Appeal No. 164 of 2004 (unreported) in which the Court had stated that:-

"...usually the Court will look into matters which came in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."

(See also **Hassan Bundala @ Swaga vs Republic**, Criminal Appeal No. 386 of 2015 cited in the case of **George Claude Kasanda vs The Director of Public Prosecutions**, Criminal Appeal No.376 of 2017, **Jafari Mohamed vs. Republic** Criminal Appeal No. 112 of 2006 and **Hussein Ramadhani vs. Republic** Criminal Appeal No. 195 of 2015 (all unreported).

That said, we shall not therefore consider grounds 3, 5, 6 and 7 of appeal.

Notwithstanding the above finding, before we proceed any further, we have found it apposite to comment, albeit briefly, on grounds 1, 3 and 4 of appeal which touch on the PF3 (exhibit P1). The record, as rightly argued by the leaned State Attorney, speaks out loudly at page 23. The naked truth is that it was not read out to the appellant after it was admitted. The appellant was thereby denied the right to know the contents thereof. The Court has consistently stated that the irregularity is fatal and incurable with

the effect that it should be discarded from the record (See **Robison Mwanjisi v. Republic**, [2003] TLR 218).

Having expunged the PF3 we are left with nothing that would support the appellant's complaints in grounds 1, 3, and 4 of appeal. Such complaints are thereby rendered redundant; hence no need to consider them. On this, we are in agreement with the learned State Attorney.

We now turn to the issue of the victim's age. The record bears out clearly that no certificate of birth was tendered to prove the victim's age. PW3, when testifying before the trial court on 21/3/2016, came out clearly that the victim's birth certificate was destroyed by fire but stated that she was born on 26/9/2002. It seems, in the appellant's view, there was no proof of age. That forms the basis of his complaints in grounds 1 and 7 of appeal. We need not be unduly detained on this complaint. As was rightly argued by the learned State Attorney, there are several ways of proving age. The Court, clearly illustrated that settled position of the law in the case of **Issaya Renatus vs Republic** (supra) in which it was stated that:-

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so, under the provision, it*

is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to the proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate..."

Given the aforesaid legal position, we entirely agree with Ms. Aman that production of a birth certificate is just one way of proving age but the evidence from the victim's mother (PW3) was sufficient to prove the victim's age. We, further, entertain no doubt that considering that the offence was committed on 23/2/2016, by then the victim was under eighteen of age which is a crucial ingredient for the offence of statutory rape with which the appellant was charged.

As shown above, the appellant, in ground eight (8) of appeal, complained that his defence evidence was not considered in the same way the judge did to the prosecution evidence. We remain alive of the settled legal position that failure to consider the defence case is fatal and usually leads to a conviction being vitiated [See **Siza Patrice vs Republic**, Criminal Appeal No. 19 of 2010 (unreported)]. In the instant case, it is on record that the appellant denied committing the offence. He claimed, in defence, that the case was a concocted one by PW3, the victim's mother.

We have perused the record and, in particular, the trial court's and first appellate court's judgments. We find the appellant's complaint patently lacking in merits. The pages referenced by the learned State Attorney vividly show that his defence was duly considered and was found unable to shake the all strong prosecution evidence against the appellant. This complaint is therefore baseless.

In the remaining part of ground one (1) of appeal, the appellant's major complaint is that he was convicted on flimsy and weak prosecution evidence. We are settled in our minds that the determinant issue is whether or not there is sufficient evidence establishing that the appellant raped PW1. Ms. Aman was firm that despite the expunging the PF3 from the record, that did inflict a fatal blow on the prosecution case as there was clear and sufficient evidence from PW1, PW2, PW4 and P4 establishing the appellant's guilt. After dispassionately studying the entire evidence on record, without any hesitation, we agree with her. We shall give reasons.

One, according to the charge, the appellant was accused of raping PW1, the victim. Rape is one of the sexual offences for which it is trite law that the best evidence comes from the prosecutrix, the victim of the offence (see **Selemani Makumba v. Republic** [2006] TLR 379). In the

present case PW1 explained in detail the ordeal that befell on her. She was direct that as she was proceeding to her grandmother, she met the appellant who, upon turning down his offer to visit his residence, the appellant dragged her into his room, undressed her after laying her on the bed and penetrated her in the course of which she experienced pains. PW1 related that the ordeal continued for two successive days. Such evidence establishes not only that there was penetration of the male organ into the victim's vagina but also the appellant had unwelcomed sexual intercourse, although, this being a statutory rape is irrelevant. In terms of section 130(4) of the Penal Code, penetration however slight is sufficient to prove rape. **Two**, the victim was found in the appellant's room by PW3 who called her out and she emerged from the appellant's room. **Three**, PW4, the appellant's landlord, came out openly that he saw the appellant staying with the victim for two days and was asked by the appellant to report the matter to the victim's parents and that he wanted to marry her. **Five**, the evidence by PW1, PW2, PW3 and PW4 was so pejorative on the appellant and unfortunately it was not seriously challenged by the appellant either through cross-examination or during defence. The principle has always been that failure to cross-examine a witness on an important point implies

that he is admitting the truthfulness of the testimony on that point (See **Fabian Chumila vs Republic**, Criminal Appeal No. 136 of 2014, **Nyerere Nyague vs. Republic,** Criminal Appeal No. 67 of 2010 and **George Maili Kemboge vs. Republic,** Criminal Appeal No. 327 of 2013 (all unreported).

The appellant's defence that the case was a frame up one was considered by both courts below and in our view rightly found to be highly improbable for one crucial point that such allegation was not posed to PW3 when she gave her testimony so that she could have opportunity to explain. Hence the prosecution was denied the right to respond on that allegation. The appellant was thereby estopped from asserting that the case was nothing but a frame up case during his defence. In addition PW1, PW2, PW3 and PW4 were not doubted by the trial magistrate who had the opportunity to assess their demeanour in court. Assessment of credibility by demeanour is the exclusive domain of the trial court. We, also, find nothing on record casting doubts on their credibility. All the circumstances considered, we agree with the lead State Attorney that the appellant's conviction was well founded and the sentence meted out by the trial court

and sustained by the High Court was the statutory minimum in terms of section 131(1) of the Penal Code.

All said, we find no merit in this appeal. We accordingly dismiss it.

DATED at **MBEYA** this 26th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 25th day of February, 2021 in the presence of the Appellant in person, unrepresented through video conference and Ms. Prosista Paul, 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