IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 531 OF 2017

SIMON EMMANUEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Shinyanga)

(Makani, J.)

dated the 23rd day of June, 2016

in

DC Criminal Appeal No. 108 of 2015

JUDGMENT OF THE COURT

20th & 25th August, 2021

MASHAKA, J.A.:

Simon Emmanuel, the appellant, was charged and convicted of rape by the District Court of Kahama at Kahama of a girl aged eight. The accusation laid against the appellant was that on the 30th January, 2009 he raped the victim at Nyandekwa village. He was sentenced to life imprisonment. It is important to appreciate that as the victim was, at the material time, a child, to conceal her modesty and identity, henceforth we shall refer to her simply as the victim or PW1. His first appeal to the High Court was dismissed.

Hence, he is before this Court to challenge the decision upon a memorandum of appeal comprised of nine (9) grounds, paraphrased as follows: -

1. *That, the Honorable Appellate Judge misdirected himself in both matter of law and facts of the case to dismiss the appellant's appeal basing on evidence from a family member which needs corroboration.*

2. *That, the Honorable Judge wrongly convicted the appellant as the prosecution failed to prove to the required standard how the appellant was connected to the exhibit P1 as the appellant was not linked through his blood group or DNA test which could not warrant the conviction against the appellant.*

3. *That, the Honorable Appellate Judge deliberately erred in both law and fact to believe and accept the evidence from the prosecution witnesses that the victim was 8 years old while there was no birth certificate/clinical attendance card to prove the age of the victim.*

4. *That, the Honorable Appellate Judge had erred in law and fact to rely upon prosecution evidence that the appellant raped the victim PW1 without taking into account the following important*

matters which were not established to the required standard to wit:

(a) No one saw the appellant rape the victim during the material day as testified by the prosecution witnesses.

(b) No local government leader especially the WEO being the first leader to receive first report from PW2 and this charge remains baseless.

(c)The uncle of the victim did not testify during trial to prove the matter as alleged by PW1 and PW2.

5. That, the Honorable Appellate Judge did err in both fact and law to dismiss appellant's appeal without taking into account that he was not given a fair hearing as he was not given opportunity to cross examine the medical officer or doctor who filled the exhibit P2, a contravention of section 240(3) of the CPA [Cap 20 R.E. 2002].

6. That, the PF3 exhibit P2 was admitted contrary to section 240(3) of the CPA.

7. *That, the first appellate court erred in law to sustain the conviction as the arraignment of the appellant was delayed after arrest which was unprocedural.*

8. *That, the PF3 exhibit P2 was material evidence but not properly filled and worse enough the offence occurred on 30/1/2009, while it was filled and signed on 4/02/2009 contrary to the law as the sperms expired after 72 hours, hence the exhibit to be expunged from the record.*

9. *That, the evidence remaining on record is too weak to sustain the appellant's conviction.*

The brief facts of the case go thus. PW1 is the daughter of PW2 and stepdaughter of the appellant. On the fateful day, the appellant came home drunk at 16:00 hours, he asked PW1 to go and get him a paper from his bedroom to roll tobacco for him to smoke. As PW1 could not find the paper, the appellant followed her in the bedroom, dragged PW1 to the bed, held her legs and had sexual intercourse with her. PW1 began to cry, she was bleeding and felt great pain in her vagina. Though she cried for help, there was no one around to come to her aid. Her mother Celina d/o Shabani (PW2) had gone to sell local brew, the owner of the house was at the farm and her

siblings were at school. When PW2 returned home at 18:00 hours she found her daughter crying in pain bleeding from her vagina and her dress was stained with blood.

Then, PW1 narrated what happened to PW2 and named the appellant to have raped her. PW2 checked her and found severe bruises in her vagina. She administered first aid. The dress with blood stains was admitted in evidence as exhibit P1 and the appellant did not contest its admission. Later, PW2 went to report the incident to her uncle, the Ward Executive Officer (WEO) and finally to the Police. A PF3 was issued by the Police and PW1 was taken to the hospital for examination and treatment.

The appellant, in his sworn evidence denied the charge. It was his defence that, he was arrested on the 05/02/2009 and told that he had raped his daughter but he was not aware of the rape allegations. He contended that, if the allegations were true, then his wife PW2 would have reported the allegations on the same day 30/01/2009 the alleged incident took place. The appellant admitted that PW2 is his wife, they have three kids together and PW1 is his stepdaughter.

Having heard a detailed account of what transpired, as earlier stated, the trial court convicted the appellant as charged and sentenced him to life

imprisonment. The trial court found the evidence of PW1 credible and that it was corroborated by the testimony of PW2. The trial court also considered the PF3 exhibit P2 which revealed that PW1's hymen was perforated. Aggrieved by the conviction and sentence, the appellant unsuccessfully appealed to the High Court, hence this appeal.

At the hearing of the appeal, the appellant was present and had no legal representation, whereas the respondent Republic enjoyed the services of Ms. Wampumbulya Shani assisted by Ms. Immaculata Mapunda, both learned State Attorneys. The appellant prayed to the Court to adopt the grounds of appeal and allowed learned State Attorney to respond and he would rejoin.

As Ms. Shani submitted for the respondent Republic, at the outset she did not support the appeal and submitted that among the nine grounds of appeal, there are new grounds which were not raised at the first appellate court. She pointed out the respective grounds as four and seven. She further submitted that grounds five, six and eight are based on the PF3 exhibit P2 which was expunged at the first appeal according to what is reflected at page 49 of the record of appeal. Thus, she said the remaining grounds of appeal are one, two, three and nine for consideration by the Court. Arguing ground

one, Ms. Shani explained that there is no provision of the law which prevents or restricts relatives and family members to testify in criminal cases involving relatives. That, such evidence is admissible and she referred us to the case of **Charles Kalungu and Charles Kalinga v. the Republic**, Criminal Appeal No. 96 of 2015 (unreported). She argued, the lower courts relied on the evidence of prosecution witnesses in entering conviction of the appellant clearly explained why the witnesses were trusted having been satisfied with their competency and credibility.

On ground two that the blood-stained dress does not connect the appellant in the absence of DNA report, Ms. Shani argued this was baseless because exhibit P1 was properly admitted in evidence and the appellant did not object to its admission. She contended that although no DNA test was conducted to prove the victim's blood; and even if the exhibit P1 is expunged, there is still enough evidence to prove the offence of rape against the appellant. Besides, she argued that the DNA test is not proof of rape.

Moving to the next ground three, is a complaint on failure of the prosecution to prove the age of PW1 in the absence of the birth certificate or clinic attendance card. In countering this ground, Ms. Shani maintained that the evidence of PW2 the mother testified on the age of PW1 that her daughter

was eight years old when she was raped. That apart, she contended the evidence on the age of a child may be provided by the parent, hence conclusively stated that PW1 was eight years old. She prayed to the Court to dismiss this ground of appeal.

On the last ground nine, the complaint is that the evidence remaining on record is too weak to sustain the conviction. Ms. Shani's ardent contention is that; one, the testimony of PW1 is credible and strong on being raped by the appellant, two on the same day immediately when PW2 returned home, PW1 narrated what happened and how the appellant raped her. Three, PW2 checked the vagina of PW1 and found the victim bleeding with severe bruises and her dress stained with blood. She further contended that as the testimony of PW1 was not made under oath due to her tender age, it required corroboration which was adequately covered by the testimony of PW2. To back up her argument she cited to us the case of **Kazimili Samwel v. the Republic**, Criminal Appeal No. 570 of 2016 (unreported).

Ms. Shani concluded that, on account of overwhelming prosecution evidence, the charge was proved to the hilt. Therefore, the appeal deserves to be dismissed.

In rejoinder, the appellant conceded that there are new grounds of appeal which should not be considered by the Court as alluded to by Ms. Shani. However, apart from disassociating himself from the allegations, he maintained his innocence and that the grounds of appeal are merited. He urged the Court to allow his appeal, quash and set aside the conviction and sentence and set him free.

Having heard the contending arguments by both parties to this appeal, we will approach the grounds of appeal in the same manner addressed by learned State Attorney. We agree with the learned State Attorney that since grounds four, five, six, seven and eight of appeal were not raised at the first appellate court, the appellant is precluded from raising them before the Court. We are fortified in that regard because the Court has no jurisdiction to determine matters which were not first placed before the first appellate court for determination. The rationale is that the Court only sits on appeals against decisions arising from the High Court or magistrates' courts in their extended powers. This is in accordance with section 6 (1) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019], (the AJA). We are settled that as a matter of general principle, this Court will only look into the matters which came up in the lower courts and were decided and not new matters which were not

raised or decided by neither the trial court nor the High Court on appeal. However, to add on the same note, this principle does not apply when the matter involves a point of law. See: **Yusuph Masalu @ Jiduvi v. the Republic**, Criminal Appeal No. 163 of 2017, **Abeid Mponzi v. the Republic**, Criminal Appeal No. 476 of 2016, **Hassan Bundala @ Swaga v. the Republic**, Criminal Appeal No. 386 of 2015, **Samwel Sawe v. the Republic**, Criminal Appeal No. 135 of 2004 (all unreported). In the circumstances, as those new grounds are not on points of law, we shall not determine them. Thus, grounds four, five, six, seven and eight fail.

We now turn to address the remaining grounds of appeal. We commence with the complaint based on ground one concerning the evidence of PW2, being a family member. The law prescribes who is competent to testify. Section 127 (1) of the Evidence Act, [Cap. 6 R.E. 2019], stipulates as follows: -

> *"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause".*

There is no provision of the law which prevents a relative or family member to testify in cases involving relatives. The Court agreed with the principle of law in the case of **P. Taray v. the Republic**, Criminal Appeal No. 216 of 1994 (unreported), we emphasized that: -

> *"We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them".*

Before the High Court, the learned appellate judge relied on the evidence of PW1 and PW2 having explained clearly at page 54 of the record that irrespective of whether or not the witnesses were from the same family, what is essential is the credibility and reliability of the witnesses on the occasion to testify what they claimed to have seen. While it is the domain of a trial court judge or magistrate to determine the demeanor of the witness, the learned appellate judge was satisfied on the competence and credibility that PW1 and PW2 were truthful and reliable witnesses and there was no

reason to interfere with the finding of the trial court. Thus, we hold that members of the same family are not barred to testify but it is the duty of the court to assess the credibility before giving credence to respective evidence, unless there are good and cogent reasons for not believing the witness. See: **Goodluck Kyando v. the Republic** [2006] TLR 363 and **Birahi Nyakongo and Kijiji Isiagi v. Republic**, Criminal Appeal No. 182 of 2010 (unreported). We find this ground of appeal is unmerited.

We move to ground two whereby the learned High Court is faulted in relying on exhibit P1, the dress with blood stains to convict in the absence of DNA or blood test. At page 52 of the record, the learned appellate judge found this complaint with no merit for the prosecution has the duty to prove its case and can decide what evidence is relevant to support their case. It is settled law that a medical report even a DNA report is not conclusive proof on rape. It is settled law that the true and best evidence of rape has to come from the victim. See: **Seiemani Makumba v. Republic,** [2006] TLR 379 and **Edson Simon Mwombeki v. the Republic,** Criminal Appeal No. 94 of 2016 (unreported). We endorse the finding of the learned appellate judge and accordingly find the second ground of appeal without merit.

On ground three of appeal, the complaint relates to the age of PW1, that it was not proved due to the non-production of the birth certificate to prove that she was a girl of tender age. This complaint was not raised during the first appellate stage, but it is on a point of law, on the age of the victim, so we shall address it. Beginning with the charge sheet the particulars of the offence stated that: -

> *"That Simon s/o Emmanuel is charged on the 30th day of January, 2009 at about 16:00 hrs at Nyandekwa village within Kahama District in Shinyanga Region did have carnal knowledge with one NT, a girl aged 8 years old."*

So not only was the age of the PW1 mentioned in the charge sheet, likewise PW2 the mother proved that PW1 was eight years old when she was raped by the appellant. We held in the case of **Edward Joseph v. the Republic**, Criminal Appeal No. 19 of 2009 (unreported) that the evidence of a parent is better than that of a medical doctor as regards child's age. The appellant in this appeal claims that no birth certificate was tendered to prove the age of PW1. As we underscored in the case of **Iddi s/o Amani v. the Republic**, Criminal Appeal No. 184 of 2013 (unreported) that the evidence of a parent is better to prove the age of the victim and after all, the contents

of the birth certificate depend on the information received from parents. In the absence of appellant's serious contention about the age of the PW1 and the unchallenged evidence of PW2 in support of the charge sheet, we are satisfied that the prosecution proved that PW1 was a girl of tender age, eight years, when she was raped by the appellant. Thus, this ground is without merit.

The last ground nine is that the evidence remaining on record is too weak to sustain the appellant's conviction. We agree with Ms. Shani that the credible evidence of PW1 and PW2 was reliable to prove the offence of rape by the appellant. We find the detailed account by PW1 how the appellant raped her is coherent and reliable as well as the evidence of PW2 and there is no reason why we should interfere with the concurrent findings of the lower courts regarding the veracity of PW1 and PW2. We see no justification for not believing the evidence of PW1 and PW2 which the prosecution was based on, they are entitled to credence. See **Edson Simon Mwombeki v. the Republic** (supra). The appellant's defence has not been able to shake up or contest the evidence of PW1 and PW2. On the same fateful day, when PW2 returned home was given a detailed account by the PW1 that the appellant raped her, she checked and saw severe bruises in PW1's vagina, that she was raped by the appellant.

After our consideration, we are satisfied that the prosecution proved beyond reasonable doubt that the appellant did rape the victim PW1 and as earlier stated, all the grounds of appeal are without merit. We accordingly dismiss the appeal in its entirety.

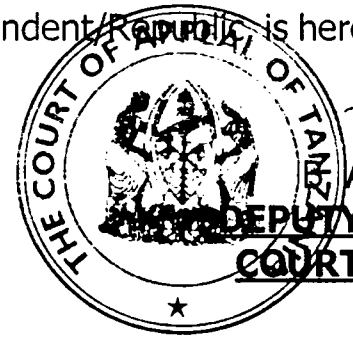
DATED at **SHINYANGA** this 24th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 25th day of August, 2021 in the presence of Appellant in person, and Ms. Wampumbulya Shani learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL