IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 166 OF 2018

HAMIS s/o KAYANDA.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Sumbawanga)

(Mgetta, J.)

dated the 16th day of May, 2018

in

(RM) Criminal Appeal No. 35 of 2016

.....

JUDGMENT OF THE COURT

14th & 16September 2021

GALEBA, J.A.:

Hamis s/o Kayanda is an elderly man, at the hearing of this appeal he might have been 83 years old because in January 2016, at the time the offence was committed, the old man was 78. Nevertheless, he was charged before the Resident Magistrates' Court of Katavi sitting at Mpanda in Criminal Case No. 9 of 2016 and was convicted on a single count of rape contrary to sections 130(1)(2)(e) and 131(3) of the Penal Code [Cap 16 R.E. 2002], now [R.E. 2019] (the Penal Code). According to the prosecution the appellant committed the offence at Kusi Village within Mpanda District in Katavi Region on 2nd January 2016. The victim of the sexual assault was a young girl of 5 years who, for purposes of

concealing her identity in this judgment, we will refer to her as PW4 or, just the victim.

The facts material to this appeal as can be gathered from the record of appeal is that on 2nd January 2016, Vestina Nyabenda, PW5 the mother of the victim left the latter at the child's grandmother's house and went to the farm to work. The appellant also was residing in the same house that the victim was left by her mother and the occupants of that house were sharing a sitting room.

It all came to light when Mathias Jeremia PW1, a young boy aged 13, while playing football was called by his friend, one Imani informing him that the appellant was sexually abusing the victim. PW1 and his fellows rushed to the house and upon peeping through the hole in the door leading to the living room of the victim's grandmother's house, they saw the appellant holding the victim on his lap raping her. Upon noting the unusual scene, PW1 rushed to Perpetua Erick, PW2, who like PW1 rushed to the scene of crime and through the same hole in the door, she was able to see the appellant naked raping the victim. She heard the latter crying and the appellant telling her to permit him to insert his manhood in her female sexual organ while promising to buy her biscuits and half cakes. She decided to call the victim aloud but the appellant replied that, he was trying to comfort the child into sleep only that she

was not heeding. PW2 took a bold step. She intervened the process, snatched the girl from her aggressor and took her to her house where she called Experance Kamikasi Binyigwa, PW3 the area vice chairman. The latter examined the victim and found sperms in her private parts which parts were swollen.

The victim's brief account of what befell her was that the appellant inserted *"his dudu in her urinating place."* She was then taken to Mishamo Health Center where Richard Samson Kajika, PW6 found bruises in the victim's *labia majora* which was also swollen. He filled in the PF3 which was later admitted as exhibit P1 at the trial.

Meanwhile, the appellant was apprehended taken to the police and his account of what transpired was that the case was framed as the child was raped by a different person because he found her crying and since he was her grandfather, when PW1 and PW2 saw him through the door, he was trying to calm her down.

The appellant was tried and based on the substance of the above facts, he was convicted and consequently sentenced to life imprisonment by the Resident Magistrates' Court at Katavi. His appeal to the High Court was dismissed in its entirety, hence the present appeal where he is challenging dismissal of his appeal by the High Court. This appeal is predicated on six grounds of appeal in terms of the

memorandum of appeal that was lodged on 30th January 2019. However, on 21st May 2019, the appellant lodged an amended memorandum of appeal with five grounds of appeal which are identical to the those in the original memorandum except for ground five which was omitted from the amended memorandum. However, at the hearing, the appellant abandoned the latter memorandum with five grounds, and implored us to stick to his original memorandum of appeal which was lodged on 30th January 2019 with six grounds of appeal.

The grounds upon which the appellant beseeched us to consider in his appeal were, **one,** that, the honorable judge erred in law and fact for dismissing his appeal basing on the evidence of PW1 which was taken after conducting an improper *voire dire* examination, **two,** that the honorable judge misdirected himself in law and fact to uphold PW6's evidence while he was not a qualified medical practitioner, **three,** that there were contradictions in the evidence adduced by the prosecution witnesses, **four,** that the case was poorly investigated since the cautioned statement was not tendered in court, **five,** that there was no independent witness brought by the prosecution to prove the case and **six,** that the case was not proved beyond reasonable doubt.

When this appeal was called on for hearing, the appellant appeared in person without legal representation, whereas Ms.

Scholastica Lugongo, learned Senior State Attorney assisted by Mr. Simon Peres, learned State Attorney, teamed up for the respondent.

When asked to elaborate on his grounds of appeal, the appellant submitted that the Court be pleased to consider his grounds as lodged in Court. That being the position, we permitted Ms. Lugongo to address us on the grounds as presented.

At the outset she, submitted that grounds 3, 4 and 5 are new grounds complaining about factual matters, whose substance was not dealt with at the High Court. She moved the Court to desist and refrain from entertaining the new grounds. We have carefully reviewed the said grounds of appeal, and we are in agreement with Ms. Lugongo, that indeed, the complaints in those grounds were not made before the High Court. The settled position of law is that, this Court can only look into matters that came up in the lower court and were decided and not matters that were neither raised nor decided unless they are points of law, - See **Felix Kichele and Another v. R,** Criminal Appeal No. 159 of 2015 and **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (both unreported). For that reason, Ms. Lugongo, and correctly so, in our view, did not bother herself to respond to grounds 3, 4 and 5. Likewise, we will not deal with those grounds, for this Court has no jurisdiction to determine them.

The learned Senior State Attorney therefore argued the first, second and sixth grounds of appeal. As for the first ground of appeal in which the complaint was that *voire dire* examination for PW1 was improperly carried out, she submitted that *voire dire* test on that child witness was properly performed. She wondered what was the actual complaint of the appellant on the process because, looking at the record of appeal, the process was properly carried out. In supporting her point she relied on the case of **Barnaba Changalo v. The DPP**, Criminal Appeal No. 165 of 2018 (unreported). She implored us to dismiss the first ground of appeal for want of merit.

We have carefully examined the record of appeal, particularly at pages 35 and 36 where in a quest to test the witness' intelligence and understanding, the trial court, asked PW2 normal and natural questions. Both questions and answers were recorded quite in observance of the *voire dire* test procedure. At the end of the questions, the trial court made a finding of fact that indeed the child, PW1 had sufficient intelligence to give evidence in court and went ahead to take his evidence normally. With due respect to the appellant, we find nothing unusual regarding the manner that the trial court conducted, *voire dire* test to PW1. That said, we find the first ground of appeal to have no merit and we dismiss it.

The second ground of appeal is that the honourable judge erred for upholding the evidence of PW6, a nursing officer, because, he was not qualified to carry out examination of the victim and fill in the PF3. In reply to that ground Ms. Lugongo was quick to admit that indeed, PW6, a registered nurse was not a qualified medical practitioner to fill any details in the PF3 which was presented to him when he attended to the victim. In the circumstances, she submitted that exhibit P1 which was the PF3, ought to be expunged from the record for having been completed by an incompetent medical practitioner. She however submitted that, although she admitted expunging the exhibit, the witness' oral account should not be expunged, provided that such evidence should not be considered to be evidence of a medical expert.

In this case, PW6 testified to have received the victim and examined her, and as stated above, he observed her and found that she had semen in her sexual organ and noted further that the victim's *labia majora* was bruised and swollen. These details are contained in his oral account as well as recorded in the PF3. In the case of **Jamal Ally Salum v. R**, Criminal Appeal No. 52 of 2017 (unreported), this Court held that a nurse midwife is not a medical practitioner for purposes of medical examination reports. The Court expunged exhibit P2 which was a PF3 that had been prepared by the nurse. On this aspect we must

follow suit, and without any further ado we hereby expunge exhibit P6, the Medical Examination Report dated 3rd January 2016.

However, as indicated above, Ms. Lugongo beseeched us to spare the oral evidence of PW6, because like any other witnesses, he testified on what he witnessed. We agree with the prayer by the learned Senior State Attorney, only to the extent that the oral evidence of PW6 is not to be treated as expert evidence. It is the evidence like that of any other lay witness who had opportunity to inspect the victim and recalled what he observed. In the circumstances, the second ground of appeal is partly allowed and partly dismissed to the extent explained above.

The complaint in the sixth ground of appeal was that the case against the appellant was not proved beyond reasonable doubt. In reply to this ground, citing the case of **Selemani Makumba v. R** [2006] TLR 379, Ms. Lugongo, contended that the best evidence in sexual assault cases, is that of the victim, referring to the evidence of the victim in this case, which she submitted was corroborated by that of PW1, PW2, PW3 and PW6, hence the case was proved beyond reasonable doubt.

In the course of disposing of this ground, we will have to revisit the prosecution evidence albeit briefly because, the substance of it has already been fully covered in the background to this appeal above. In that respect, we will start with the best evidence, that of the victim. At

page 43 of the record of appeal, in proof of penetration, which is a crucial ingredient of the offence of rape, the victim testified:

> *"He told me that he will give me biscuits and half cake. He inserted his dudu into my urinating place. He injured me and I cried."*

In our view, the above piece of evidence proved penetration of the victim's genitalia by the appellant's male sexual organ. There are many expressions by victims of sexual violence and those various forms, however implicit and encrypted, are all acceptable in courts. In the case of **Hassan Kamunyu v. R**, Criminal Appeal No. 277 of 2016 (unreported), this Court observed that:

> *"Thus words like "[he] removed my underwear and started intercoursing me" in **Matendele Nchanga @ Awilo** (supra), "sexual intercourse" or "have sex" in **Hassan Bakari @ Mamajicho** (supra), "[he] undressed me and started to have sex with me" in **Nkanga Daudi Nkanga** (supra), "kanifanyia tabia mbaya" in **Athumani Hassan** (supra), "alinifanya matusi" in **Jumanne Shabani Mrondo** (supra) or "he put his dudu in my vagina" in **Simon Erro** (supra) or "did sex me by force", "this accused raped me without my consent", "while this accused was sexing me I alarmed" and "fortunately one B s/o T came to my home and he found this accused still sexing" in **Baha Dagari** (supra) were, though not explicitly described, taken by the Court to make reference to penetration*

of the penis of the accused person into the vagina of the victim."

The point we want driven home from the above quoted text, is that the term applied by the victim that the appellant *"inserted his dudu"* into her private parts proved that the appellant inserted his male organ into that child's female sex organ to complete the immoral act of raping the child. We have further, carefully and meticulously reviewed the evidence of other prosecution witnesses and noted that there were two more eye witnesses, PW1 and PW2. At short intervals of time between them, these witnesses saw the appellant naked while raping the screaming baby. PW2 snatched the victim from her aggressor and took her to her home where PW3 examined the victim and found her with sperms in her private areas which were swollen. All this evidence of PW1, PW2, PW3 plus that of PW6, who also found the victim's *labia majora* swollen and bruised, corroborate that of the victim, PW4. To cap it all, the appellant did not deny to be with the victim at the alleged time of the rape, only that the case was framed against him and the victim was raped by another person.

With such strong prosecution case on one hand and with no meaningful defence from the appellant capable of casting any doubt on the prosecution case, on the other, we are in full agreement with Ms. Lugongo that the case against the appellant was proved to the hilt. The

sixth ground of appeal, therefore, has no merit and it is hereby dismissed.

For the foregoing reasons, this appeal fails and we dismiss it in its entirety for want of merit.

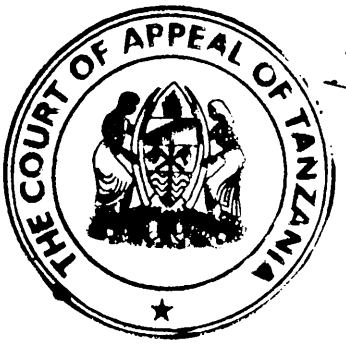
DATED at **MBEYA**, this 16th day of September, 2021

S. A. E. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgement delivered this 17th day of September, 2021 in presence of the appellant in person – unrepresented and Mr. Hebel Kihaka, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL