IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 264 OF 2018

EMMANUEL s/o SAMSON.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

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

(Levira, J.)

Dated the 11th day of December, 2017

in

Criminal Appeal No. 131 of 2016

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JUDGMENT OF THE COURT

14th & 21st September, 2021

GALEBA, J.A.:

Emmanuel s/o Samson, the appellant was charged before the Resident Magistrates' Court of Mbeya in Criminal Case No. 56 of 2016 on a single count of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002], now [R.E. 2019] (the Penal Code). According to the prosecution, around 3.00 o'clock in the afternoon on 26th January 2016, at Lumbila area within Iwambi Ward in Mbeya City, the appellant raped the victim, a girl of 16 years. For purposes of concealing her identity in this judgment, we will refer to her as PW1 or the victim. The appellant was subsequently convicted and the trial court

sentenced him to thirty years imprisonment. His appeal to the High Court was not successful, because it was dismissed. He has preferred this appeal to challenge the latter decision.

The brief facts of the case, are that, on 26th January 2016, Upendo Mwamlima (PW2) who is also the victim's mother, travelled to Mbozi to visit her parents, leaving at home the victim and her sibling, Liata. At around 3.00PM, the appellant who is a co-tenant to PW2, showed up to the house of PW2 and found the victim and Liata. He gave Liata money to go and buy biscuits and use the balance to go elsewhere and watch video. After Liata left, signs of sexual advances slowly started to set in, the appellant approached the victim, held her hand and inquired from her whether she would accompany him to his house. That unplanned invitation of the appellant extended to the victim was instantly declined. At this time, both the victim and the appellant were standing at the doorstep of the victim's family home. When the first plan to have the victim go with the appellant to his house failed, an alternative was already at hand and not far to find, he told her that if she could not go to his house, then let them go to the landlord's room. Still the victim would not yield to the suspicious temptation of the appellant, she once again turned down the proposal to accompany the appellant to a

destination she was not sure of. After both diplomatic approaches bore no tangible outcomes, the appellant thought of a more practical strategy which was to pull the girl by the hand towards the inside of their own house and straight to her mother's bed, where he laid her down. Next, the appellant, took off the victim's outfits, that is her dress, trousers and finally her underpants. The girl was now nude in a state shame and disgrace. At that time, to her, terrifying moments of agony and grief were looming large in the vicinity, because in no time, the appellant withdrew his manhood and inserted it in the victim's female sexual organ, thereby achieving his ill targeted master plan.

The sexual humiliation lasted for some time, and according to the victim, she would not scream for help because her aggressor, as he was ravishing her, was simultaneously holding her tight by the throat so as to subdue her into forced silence, submission and surrender. To the victim, the violence was not only a horrible and a painful one physically, but also the experience was her first encounter of that kind, because she had not known man since birth.

In the aftermath of the act, the victim was seriously warned and cautioned verbally by the assailant not to disclose her tribulation to her mother and quickly left the room. After he left, the victim upon checking

her mother's beddings, the bed sheet which was predominantly white but decorated with flowers in other colours, was stained with blood and strange fluids. The victim further noted that she was discharging fresh blood and watery substances similar to mucus draining from her private parts. In that state of dirtiness, the victim decided to take bath and wait for her mother. When the latter arrived from Mbozi around 6.00 o'clock in the evening on the same day, although the victim was crying but she managed to recount what she had gone through in her mother's absence.

PW2, went to Mama Kameta's house and told her the grieving story. The latter assisted her to relay the information to other neighbours including a ten-cell leader, one Semeni Thobias. Together with other neighbours, like Kabagia, Mama Mwashitete, Hezron Thobias (PW5) and Semeni Thobias, PW2, went to the room of the appellant and the ten-cell leader told him that he was under arrest and that they had to go to the Police Station the same night. On the way to the station, particularly when they reached Iyunga Secondary School, the appellant attempted to escape by running away but those with him made alarm and students of that school assisted to rearrest the appellant. At this time, those who were with him decided to tie him with a rope to avoid

any more chances of escape. When they arrived at Iyunga Police Station, the appellant was locked up and the victim was given a PF3 which was taken to Mbeya Referral Hospital where Aggrey William (PW6), after physical observation and examination concluded that the victim had depression, her sexual organ had bruises and her hymen was perforated, coupled with filthy discharges from her private parts. The PF3 was tendered as exhibit PC, without objection from the appellant.

The appellant's defence was that the case was framed because he had grudges with the victim's mother so the case had been fabricated in order to victimize him. It is based on the substance of the above evidence of the prosecution that the appellant was tried, convicted and sentenced as earlier on indicated.

At the hearing of the appeal, the appellant appeared in person without legal representation, whereas the respondent had the services of Mr. Hebel Kihaka, learned Senior State Attorney assisted by Ms. Rosemary Mgenyi, learned State Attorney.

At the outset, Mr. Kihaka indicated to us that although the appeal is predicated on eight grounds, but grounds 3, 7 and 8 were complaining of factual matters that were not raised at the High Court. He submitted that, in the circumstances, this Court has no jurisdiction to

determine those grounds, in the context of the decision in **Juma Kasema @ Nhumbu v. R,** Criminal Appeal No. 550 of 2016 (unreported).

Resolution of this preliminary point will not take us long. We have scrutinized the three grounds of appeal, and we are satisfied that the complaints in grounds 3, 7 and 8 were not first raised at the High Court. The complaints in those grounds do not raise issues of law which can always be entertained by the Court irrespective of whether or not they were raised at the first appellate court level. As contended by Mr. Kihaka, this Court has no jurisdiction to entertain factual complaints in the grounds of appeal as the same were not first determined by the High Court. The settled position of law is that, this Court can only consider matters that came up in the lower court and were decided upon unless they are legal matters- See **Felix Kichele and Another v. R,** Criminal Appeal No. 159 of 2015, **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 and **Sadick Marwa Kisare v. R**, Criminal Appeal No. 135 of 2004 (all unreported). For instance, in the latter case, this Court observed that:

"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate court."

For the above reasons, we shall refrain to consider grounds 3, 7 and 8 in the course of determination of this appeal.

The remaining grounds upon which this appeal shall be determined are grounds 1, 2, 4, 5 and 6 whose substance is, **firstly,** that the honorable judge erred in law and fact for dismissing the appellant's appeal while the evidence which was tendered by the prosecution did not discharge the burden of proof which is beyond reasonable doubt. **Secondly,** that the honorable judge misdirected herself for failure to note that the appellant was convicted on the weakness of his defence rather than the strength of the prosecution case. **Thirdly**, that the honorable judge erred in law and fact for failure to cite the section of law upon his conviction was based. **Fourthly,** that in dismissing his appeal, like the trial court, the High Court, believed hearsay evidence of the prosecution witnesses and **fifthly,** that the learned first appellate judge erred in law for failure to test the credibility of the victim as required by section 127(7) of the Evidence Act [Cap 6. R.E. 200] now [R.E. 2019] (the Evidence Act).

Upon inquiry by the Court on whether the appellant wished to make any submission in support of the retained grounds, or if he had any additional grounds, he submitted that the Court be pleased to consider his grounds as lodged and resolve them in his favour. That being the position, we permitted Mr. Kihaka to address the Court on the appellant's complaints in the above grounds.

The learned Senior State Attorney started with the first ground of appeal. He submitted that the complaint that the case was not proved beyond reasonable doubt had no basis. He contended that in sexual offences, two major facts must be clearly proved, **one**, is that there was penetration of the victim's sexual organ and **two**, that the person who raped the victim must be proved to be appellant. He stated that both aspects were sufficiently proved. He submitted that PW1, the victim explained how the appellant pulled her into their house, stripped her naked and sexually abused her on her own mother's bed leaving her helpless in anguish. He submitted further that, that evidence was corroborated by that of PW6 who examined her and found that she had perforated hymen with private parts bruised and discharging filthy fluids. He submitted further that PW2 also proved age of the victim to be 16 years at the time the offence was committed. The learned counsel

contended that the fact that the victim mentioned the assailant on the same day to her mother was assurance of reliability of her evidence, citing to us the case of **Chrisant John v. R**, Criminal Appeal No. 313 of 2015 (unreported). The learned Senior Stated Attorney wound up his submission in opposing the first ground of appeal by insisting that the case before the trial court was proved to the hilt, thereby beseeching us to dismiss that ground of appeal.

As for the second ground, Mr. Kihaka contended that the case was decided on the strength of the prosecution and not the weaknesses of the defence as complained by the appellant in that ground. He submitted that at page 40 and 41 of the record of appeal the court analysed the evidence of the defence and found that it could not shake the prosecution case, hence the strength and weight on the prosecution side. He contended that even the High Court reconsidered the evidence tendered at the trial and in the course of doing so, it expunged exhibits PA and PB, the bed sheets and the caution statement, respectively. The learned Senior State Attorney implored us to dismiss that ground of appeal for want of merit.

In replying to the fourth ground of appeal, Mr. Kihaka was brief that there is no law in existence that requires an appellate court to cite

law upon which the conviction was based. He submitted in retrospect that if the appellant wanted to fault the trial court, the latter court at page 42 of the record of appeal, cited the law upon which it relied to convict the appellant. Thus, the learned Senior State Attorney concluded, the fourth ground of appeal has no merit.

In respect of the fifth ground the learned Senior State Attorney submitted that the evidence upon which the appellant was convicted was not hearsay evidence as complained by him in that ground. He argued that the appellant was convicted based on the evidence of PW1 who was the victim of the sexual assault and whose evidence was therefore direct. He submitted that, the evidence of PW6, the medical doctor was likewise not hearsay, because he had seen what he was testifying. He concluded that the complaint that he was convicted on hearsay evidence has no merit and the fifth ground of appeal ought to be dismissed.

Lastly, was the sixth ground of appeal. On this ground Mr. Kihaka submitted that PW1 was not a witness of tender age. She was 16 years at the time of the trial. He submitted that under section 127(6) of the Evidence Act, the evidence of the victim may be enough to ground a conviction. He submitted that this ground has no merit.

When the learned State Attorney was done, we inquired on whether the appellant had any rejoinder, but other than praying that he be released from prison, he had nothing of substance to submit in that respect.

Before getting to the actual determination of the appeal, we wish to state at the very outset that, the principle of law is that, this Court as the second appellate court is entitled to interfere with the concurrent findings by two courts below it, only if their decisions are clearly wrong, unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence or where those courts violated some principle of law or procedure which has an effect of occasioning miscarriage of justice. For this position see, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. R,** [2006] TLR 387; **Wankuru Mwita v. R,** Criminal Appeal No. 219 of 2012 and **Omary Lugiko Ndaki v. R,** Criminal Appeal No. 544 of 2015 (unreported). For instance in **Wankuru Mwita** (supra) the Court observed:

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably*

wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

So, we will proceed, with that understanding and caution as in this case, the High Court upheld and concurred with the decision of the trial court.

As for us, we have carefully considered the grounds of appeal that were lodged by the appellant and the focused submission of the learned Senior State Attorney, together with the record before us, and we think that the argued grounds may be disposed in a manner that grounds 1, 2 and 6 will be determined together because they all have a bearing on evidence and credibility of the victim, and the 4th and 5th grounds will each be resolved separately and independent of each other.

As indicated above, we have thoroughly examined the record before us and noted that the two courts in holding the appellant liable for the offence charged, relied mainly on the evidence of PW1, the victim and PW6, the medical expert. The evidence of the victim, was plain and clear, the questions that were asked during cross examination did not shake her strong account of what befell her on the material day.

She explained how she was stripped naked and defencelessly left exposed to the unwelcome merciless sexual assault by the appellant. She explained, with precision how during the act the appellant was stifling her by the neck so that she would not scream or raise alarm for help. The fact testified by the victim that she felt pain after the rape, was corroborated by PW6 who said that he observed bruises and discharges from the girl's private parts. Thus, penetration was proved.

In our view, the evidence of the victim, was very credible and reliable as the court that is best placed to assess the credibility based on her demeanour, is the trial court- see **Maramo Slaa Hofu and Three Others v. R**, Criminal Appeal No. 246 of 2011 (unreported). We have also noted that, when giving evidence, the victim was coherent in narrative, and consistent in logic. Further, her evidence was corroborated by that of other witnesses - see **Shabani Daudi v. R,** Criminal Appeal No. 28 of 2001 (unreported), where it was stated that at appellate level a court may assess the credibility of a witness by assessing her coherence in the evidence she tendered and by comparing her evidence and that of other witnesses.

We also agree with both the trial and the first appellate court, that the victim's evidence was credible because, **first**, she was the victim of

the crime and **second,** immediately after the mother arrived, she mentioned the appellant as the assailant. It is an established principle of law in this jurisdiction that the ability to name the suspect to a third party at the earliest possible opportunity is an important assurance of that witness' reliability and credibility – see **Marwa Mwita Wangiti and Another v. R** [2002] TLR 39 and **Jaribu Abdallah v. R**, Criminal Appeal No. 220 of 1994 (unreported).

The other aspect is that in law, all witnesses' evidence is entitled to credence and belief as it was held in **Goodluck Kyando v. R** [2006] TLR 363, unless there are good and cogent reasons to disbelieve a witness. The cogent reasons to disbelieve one's evidence include where the evidence is improbable or implausible, or where it is has been materially contradicted by evidence of the other witness of same party as per our decision in **Alyoce Maridadi v. R,** Criminal Appeal No. 208 of 2016 (unreported).

In other words, the complaint of the appellant particularly at the 6th ground of appeal In any event, this Court has held on countless occasions that the best evidence is that of the victim, in sexual assault cases, see for instance **Selemani Makumba v. R** [2006] TLR 379.

We do not at all agree with the appellant that he was convicted based on weakness of his defence, although his defence was indeed weak. First, that would only be possible where the prosecution evidence is also too weak to ground a sound conviction, which was not the case in the present case, second, what we gathered from the record is that both the trial magistrate and the first appellate judge remarked that the appellant's defence did not create any doubt capable of shaking the prosecution case, and we agree because, the appellant's defence was that, he had a grudge with the mother of the victim because he engaged in solving a dispute between her and his own wife. We do not see how would have that mediation resulted into a massive grievance of the magnitude that could lead into a mediated party framing a serious case like the one under consideration. In any event, even if we were to agree with his account, how do we negate the strong evidence of the victim implicating him.

In addition to the strength of the prosecution case, there are many more shortcomings in the appellant's conduct immediately after arrest and during the trial. We will highlight two scenarios. **One** in cross examining the victim, the questions he asked were on the colour of clothes he wore, the time and day she was raped and the measures she

took after she was sexually abused. There was no question that actually challenged the act of rape. **Two,** another aspect that was to call for his cross examination, had it not been true, is from the evidence of PW5 who testified that after his arrest, on the way to the police the appellant attempted to escape by running away from them and that he was rearrested by Iyunga Secondary School students, this point, a trial to escape arrest, as per the case of **Julius Charles and Another v. R,** Criminal Appeal No. 36 of 2017, dents one's innocence leading to the inference of guilty. The appellant was expected to contradict it.

On the issue of failure of the appellant to cross examine on relevant facts, this Court in **Hatari Masharubu @ Babu Ayubu v. R,** Criminal Appeal No. 590 of 2017 (unreported) this Court observed that:

> *"It must be made clear that failure to cross examine a witness on a very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue."*

That is why, we indicated above that the relevant evidence in the prosecution case was not contracted by cross examination.

We are thus, in agreement with the appellant that his defence was weak, but where we differ with him is his contention that it is such

weakness upon which the trial court based his conviction. For the above reasons, it is our position that the case against the appellant was proved beyond reasonable doubt and the first, second and third grounds of appeal have no merit and we dismiss them.

In the fourth ground of appeal, the appellant is faulting dismissal of his appeal by the High Court without quoting the section upon which he was convicted. We do not intend to spend time discussing this ground. Like Mr. Kihaka, we are not aware of any legal requirement for the appellate court to quote a section of law upon which the appellant was convicted. This ground is misconceived and for that reason, we dismiss it.

The fifth ground of appeal was that the High Court upheld the decision of the trial court which convicted him placing reliance on hearsay evidence. With respect to the appellant, the evidence of PW1, the victim was direct evidence and the crime was committed in the afternoon and there was no mistaken identity of him. The victim is the one he raped. PW6, testified on what he saw. The evidence of PW2, PW5 and others on the arrest all testified what they saw. The offence of rape was proved by PW1 and PW6, the other evidence, corroborated the basic evidence of the victim. We are of a firm opinion that the appellant

was convicted on directed evidence, especially that of the victim. In the circumstances, the fifth ground of appeal is hereby dismissed for want of merit.

For the foregoing reasons, we are unable to interfere with the concurrent findings of the trial court and the first appellate court. Consequently, we find the appeal lacking in merit and we dismiss it in its entirety.

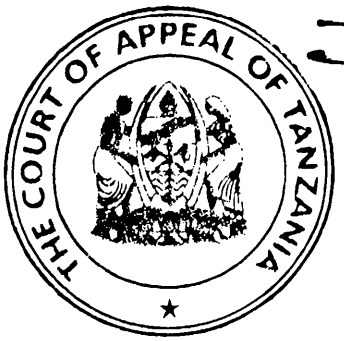
DATED at **MBEYA**, this 20th day of September, 2021

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgement delivered this 21st day of September, 2021 in presence of the appellant in person – unrepresented and Ms. Marietha Maguta, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL