IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LILA, J.A., KITUSI, J.A. And KAIRO J.A.)

CRIMINAL APPEAL NO. 594 OF 2017

MANYINYI GABRIEL @ GERISA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania at Mwanza]

(Gwae, J.)

Dated the 27th day of November, 2017

in

Criminal Appeal No. 135 of 2016

.....

JUDGMENT OF THE COURT

23rd November & 2nd December, 2021

LILA JA:

This appeal arises from the judgment of the High Court of Tanzania sitting at Mwanza in DC Criminal Appeal No. 135 of 2016 dismissing the appellant's first appeal against conviction and sentence handed down by the District Court of Serengeti. The appellant was charged with the offence of rape contrary to sections 130 (1), (2) (b) and 131 (1) of the Penal Code, Cap. 16 RE 2002 (the Penal Code). He refuted the accusation and trial ensued. At the conclusion of the trial he was convicted of attempted rape contrary to section 132 (1) of the penal code and a sentence of thirty (30) years jail term meted against him. On appeal, the

High Court dismissed the appeal, overturned the conviction of attempted rape and substituted it with a conviction of the offence of rape as he was charged but sustained the sentence meted out by the trial court. Having not achieved his desired goal, the appellant has come to this Court on second appeal.

The essence of the appellant's incarceration in prison as particularized in the charge was that; on 4th day of November, 2014 at Mesaga village, within Serengeti District in Mara Region, he had carnal knowledge of a woman aged 59 years whom we shall refer to as the victim or PW1 to masquerade her identity, without her consent.

The incident started with the missing goats on 4/11/2014 at about 17:00 hrs for which the victim mounted a search in the bushes. In the course, she met the appellant who treated the occasion as a God's blessing as he was looking for such moment for a long time. As a starting point, he greeted her and pretended that he had her love message from a certain Njomo whom the victim denied having affair with. Thereafter he offered to have sex with her but the victim turned down the offer explaining that the appellant was like her son. The appellant pressed to have his offer accepted but the victim was firm in her stance. As he was not ready to miss the opportunity, the appellant approached and dragged

her down. He then ripped the victim's underpants, undressed his trouser and inserted his penis into the victim's vagina, the act which caused her to experience pains. The appellant who held a knife and a stone and also held her by the neck threatened to stab her if she was to shout for help. Upon being satisfied, the appellant ran away leaving the victim calling for help but as the houses were afar, she could not be heard. Explaining further, PW1 stated that on the material date the appellant wore a black trouser.

PW1, thereafter, went to her in-law one Joji Kisaka (PW4) to whom she related the incident in details and was taken to her home. She reported the matter to the Majimoto police station the next day where she was issued with a PF3 by a policeman one H. 380 PC Daudi (PW2) and went to Iramba Dispensary where she was medically examined by William Antony (PW6). PW6 found no bruises or redness in the hymen on account of the victim being an adult which findings he reduced on the PF3 (exhibit PE2). The appellant was arrested on 5/11/2014 by one Manchonchori (PW5) who was assisted by PW4 and taken to Mugumu police station where he confessed to the commission of the offence and his cautioned statement was recorded by a policemen one H. 90 DC Faraja which was admitted in court as exhibit P1.

In his defence, the appellant raised a defence of alibi contending that on 3/11/2014 he attended ceremony at Iramba Village and went back home at Mesaga Village on 5/11/2014 when he was arrested and accused of raping PW1 which he denied but he confessed because he was beaten by the OCS. He thereby completely disassociated himself with the commission of the charged offence.

On account of the PF3 not establishing that there were bruises and red colour in the victim's female organ, the trial court found the charge of rape was not proved beyond doubt. It, instead, convicted the appellant of the offence of attempted rape contrary to section 132 (1) Penal Code and sentenced him to serve thirty (30) years imprisonment.

The trial court's decision aggrieved the appellant. He filed an appeal to the High Court. Upon a re- assessment of the prosecution evidence on record and that of PW1 in particular, the judge was convinced that that the charge of rape was sufficiently established against the appellant notwithstanding the PF3 not indicating that there were bruises or spermatozoa in the victim's genital parts or absence of medical evidence. He relied in the Court's decision in the case of **Mussa Mohamed vs. Republic**, Criminal Appeal No. 216 of 2005 (unreported). He accordingly substituted the conviction of attempted rape with the offence of rape.

However, as the two offences, in law (sections 131(1) and 132(1) of the Penal Code) impose the same minimum sentence, the sentence meted out by the trial court was not disturbed.

Still lingering on the belief that he is innocent, he is before the Court armed with an eight point memorandum of appeal which seek to challenge the High Court decision. They may, however, be paraphrased thus:

1. *That, the charged offence against the appellant was not proved beyond reasonable doubt and to the required standard.*
2. *That the case was poorly investigated because PW3 who investigated the case did not visit at the scene to ascertain what was complained by PW1.*
3. *That, the alleged victim being an extremely of old age her credence was not tested and the trial magistrate did not warn himself on the danger of relying upon uncorroborated evidence of PW1 who lied against the appellant.*
4. *That, the claimed torn underpants by PW1 was not tendered as exhibit in court and no any reasons were assigned.*
5. *That the first appellate judge introduced new facts into the case that PW1 did take bath or wash herself before*

medical examination being conducted which words were never stated by PW1.

6. *That, the judge overlooked that PW6 revealed medically that he never found any injury, bruises, discharge of any substance and redness/pain upon genital to prove penetration.*
7. *That, the bruises on the face and right shoulder of PW1 as per exhibit P2 – B1 could be occasioned by any other source other than rape or attempted rape hence could not be relied on to sustain and justify the appellant's conviction.*
8. *That the appellant being layman and indigent, was not afforded legal representation and he was tortured after being detained at police station.*

The appellant appeared in person and unrepresented before us for hearing of the appeal whereas Ms. Monica Hokororo, learned Senior State Attorney, and Mr. Frank Nchanila, learned State Attorney, represented the respondent Republic.

There was no elaboration of the grounds of appeal by the appellant who adopted them and urged the Court to consider them and allow the appeal.

Ms. Hokororo resisted the appeal and responded to grounds one, three, six and eight separately and grounds two, four and seven jointly and together.

Beginning with ground one of appeal that the charge was not proved at the required standard of proof beyond reasonable doubt, Ms. Hokororo submitted that all the ingredients of the offence of rape were established. While referring to the evidence by the victim, she argued that PW1 gave a detailed account of the ordeal first by telling the trial court that the appellant was her neighbour and that the offence was committed during the day time hence she knew the appellant well and had conversation with him when he told her that he had a love message from one Njomo and when soliciting to have sex with her before turning against her and ravished her. As for being penetrated by the appellant, she submitted that PW1 said the appellant grabbed her, fell her down, tore her underpants and then undressed himself and inserted his male organ into her female organ something that caused her suffer pains while threatening her not to shout lest she be stabbed with knife or injured with a stone he held by his hand. She concluded that force was used by the appellant to procure sexual intercourse and relying on the Court's decision in **Selemani Makumba vs Republic** [2006] TLR 379 that, in sexual

offences, best evidence comes from the victim, the victim's evidence sufficiently established that she was penetrated by the appellant.

The learned Senior State Attorney submitted that the appellant's contention that failure to produce the torn underpants and failure to establish presence of bruises affected the prosecution case in proving rape as complained in grounds two, four and seven, were factual issues which were not canvassed before the first appellate court and determined hence the Court lacks jurisdiction to entertain them. She urged the Court to disregard them. She referred us to the case of **Abdul Athuman vs Republic** [2004] TLR 151 to bolster her argument.

The appellant's complaint in ground three that the victim was not credible and her evidence ought not to have been relied by the trial court without warning itself due to old age was seriously attacked by Ms. Hokororo who submitted that although she was 59 years when she testified, she was competent, consistent and was coherent on what she told the trial court and her testimony, in law, required no corroboration. The more so, she submitted that her credibility was not shaken by cross examination and she reported the incident to PW4 immediately and named the appellant as her assailant which fact was confirmed by PW4. She argued that such conduct added credence on what she told the trial

court. In supporting her aasertion, the learned Senior State Attorney relied on the Court's decisions in the case of **Goodluck Kyando vs Republic** [2006] TLR 263 and **Marwa Wangiti and Another vs Republic** [2002] TLR 39.

Ms. Hokororo readily conceded to the appellant's complaint in ground six of appeal that the PF3 did not show that there were bruises in the victim's genital parts and added that it was not read out after admission as exhibit hence should be expunged from the record of appeal. She was, however, quick to argue that even the High Court did not rely on it in convicting the appellant with the offence of rape but on the victim's evidence. For her, absence of the PF3 or bruises in the victim's female organ did not adversely affect the prosecution case as it was stated by PW6 and agreed by the learned judge that bruises could not be the natural consequence of being penetrated particularly where the victim is an adult.

In ground eight, the complaint is on failure to be availed with legal representation which could not find substance in the learned Senior State Attorney's mind. She argued that, in terms of sections 21 and 22 of the Legal Aid Act, 2017, it was upon the appellant to apply to be availed such

service and as he did not do so, he cannot be heard complaining about it now.

Ms. Hokororo did not stop there. She agreed with the learned judge that the appellant's defence of *alibi* deserved no consideration because no notice to rely on it was given as per the law and the judge rightly exercised his discretion not to consider the same.

Despite the appeal being strongly resisted, the appellant did not make any material rejoinder. He simply maintained his denial in committing the offence and complained that he was not also subjected to medical examination so as to establish things like existence of spermatozoa which could link him with the commission of the offence.

Upon our close scrutiny of the grounds of appeal and the learned Senior State Attorney's submissions thereof, we are of the settled view that before we deal with ground one of appeal that the charge was not proved at the required standard of proof beyond reasonable doubt, it is logical that we deal with other grounds of appeal first.

According to our view above, we propose to start resolving the appellant's complaint in ground six of appeal. We are not hesitant to agree with the learned State Attorney that the record is clear that the medical report as well as PW6's evidence did not indicate or establish

that the victim sustained any injuries in her female organ in the course of being penetrated. The learned judge, as opposed to the appellant's assertion, extensively considered such evidence and agreed with PW6 that such injuries would not be expected where the victim is an adult. We entirely share the same view for if bruises are to be the natural and probable consequences of sexual intercourse women would better opt to completely abstain from it. Crucial in cases of this nature is penetration however slight it may be and the person better placed to tell is the one on whom it is practiced which is in line with the Swahili saying "maumivu ya kukanyagwa anayajua aliyekanyagwa". That said, in cases like the instant one, the word of the victim, if believed, suffices. This is the import of the Court's decision in **Selemani Makumba vs Republic** (supra) rightly cited to us by the learned Senior State Attorney. Therefore, absence of a medical evidence (PF3) for being expunged, as we hereby do, on account of it not having been read out after being admitted as exhibit or failure to indicate existence of bruises does not adversely affect the prosecution case. We need not overemphasize that medical evidence as to injuries is useful in corroborating the complainant's or victim's evidence only. Admittedly, the medical evidence was not of assistance to the prosecution case in the present case, but that is not to say that the complainant's evidence

which inevitably established the offence of rape should not have been accepted and acted on. (See **Mwendesha v. R,** [1971] HCD no. 387). The learned judge very properly, in our view, directed himself on this position of the law and cannot therefore be faulted. This ground fails.

Secondly, we wish to deal with ground eight of appeal. We, in the first place take note that the offence, in the present case, was committed on 4/11/2014. Provision of legal aid services to indigent accused persons facing criminal charges was, by then governed by the Legal Aid (Criminal Proceedings) Act No 21 of 1969 (Act no. 21 of 1969) as was amended by Act No. 19 of 1992 and Act No. 11 of 2003. Section 3 of that Act vested a certifying authority which, in case the proceedings are conducted in the District Court or a Court of Resident Magistrate was the Chief justice, the Principal Judge or the Judge in charge of the district registry where the proceeding is conducted, with the mandate to direct free legal service be provided to that category of accused persons. We are also alive to the provisions of section 310 of the CPA which also gives a similar right to legal representation to an accused person.

The section states:-

> *"310. Any person, accused before any criminal court, other than a primary court, may of right be*

defended by an advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by advocate."

Undoubtedly, the appellant's complaint is founded on this provision of the law. It is plain that the right to an accused to be accorded legal representation is discretional and is subject to the provisions of any written laws to that effect and one such law is the Legal Aid (Criminal Proceedings) Act No 21 of 1969. The overlapping nature of the two laws was with lucidity elaborated by the Court in the case of **Moses Mhagama Laurence vs The Government of Zanzibar**, Criminal Appeal No. 17 of 2002 and **Samwel Kitau vs Republic**, Criminal Appeal No. 390 of 2015 (Both unreported) in which it was stated that enjoyment of the right to be accorded legal aid is subject to the appellant claiming to be indigent and therefore in need of free legal aid. In interpreting that section, in **Samwel Kitau vs Republic** (supra), the Court categorically stated that:-

"...However for other cases, legal assistance can be obtained upon request and only when the certifying authority considers that there is a need. It is therefore not automatic. There has been a number of situations where an accused person has been granted legal aid after putting in a special request.

However, this position only apply to free legal aid, otherwise an accused person is at liberty to engage an advocate."

Whether or not the court is obligated to inform the accused or appellant of his entitlement to free legal aid and its omission renders the whole trial a nullity, the Court had an occasion to consider that issue in the case of **Moses Mhagama Laurence vs The Government of Zanzibar** (supra). In that case, Mr. Patel acting for the appellant contended that the right to be defended by an advocate goes with the right to be informed by the court of that right. The late Mwalusanya J. agreed with him that indigent persons have the right to be informed by the court of the right to legal aid. On appeal, the Court, after discussing at length the imports of section 310 of the CPA, 1985 and section 3 of the Legal Aid (Criminal Proceedings) Act No. 21 of 1969 and quoting the relevant excerpt of the decision, stated that:-

"We understand judge Mwalusanya to be saying that the poor who are entitled to free legal aid should be informed by the court that they have such a right. The appellant in this appeal did not claim to be indigent and, therefore, in need of free legal aid. In fact he engaged an advocate in both the High Court and in this Court. We do not think, therefore, that

the omission by the trial court to inform him that he had a right to engage an advocate, if he wanted to, had the effect of nullifying the whole trial. We dismiss that ground of appeal."

Like in the two cited cases, in the present case, the appellant did not indicate that he is an indigent person needing legal aid and did not apply to the certifying authority for it to direct that he be availed with legal aid. He cannot be heard now complaining about it. This ground, also fails and is dismissed.

It is noteworthy that Act No. 21 of 1969 was repealed and replaced by the Legal Aid (Criminal Proceedings) Act No. 1 of 2017 (henceforth the Legal Aid Act) to which the learned Senior State Attorney referred us to sections 21 and 22 of it. We should quickly remark that reference to it was wrong as it was not applicable at the time the present offence was committed or the criminal proceedings were conducted against the appellant. Suffice it to say that under those provisions, an indigent person, either himself, any person authorised by him or an institution on his behalf, may approach and apply to the legal aid provider to be provided legal aid service and the latter, if satisfied that such person is eligible for legal aid, may proceed to process the case. While that is the position generally, in criminal matters, the provisions of section 33 of the Legal

Aid Act mandate the presiding judge or magistrate, where it appears that for the interest of justice and the person accused of committing an offence being of insufficient means to obtain legal services, to certify to the Registrar of legal Aid service providers and the latter is obligated to assign to the accused a legal aid provider which has an advocate so as to prepare and conduct his defence or appeal. This is the current stance of the law on legal aid provision.

We now move to credibility and competence of PW1 as complained in ground three of appeal. In terms of section 127(1) of the Tanzania Evidence Act, Cap. 6 R. E. 2002 (now 2019) (the EA), competence of a witness is gauged by his ability to comprehend questions put to him and give rational answers. The law also takes cognizance of the fact that old or tender age may, no doubt, affect one's understanding and giving proper responses. In the instant case, PW1 was recorded to have been 59 years old when she testified on 24/8/2015. Like the learned Senior State Attorney, we do not think such age rendered PW1 incompetent. Her testimony is not only consistent but also coherent and explained in detail and flowed well on what befell on her and the steps she immediately took of reporting to her in-law and also engaged state machinery to take necessary steps against the suspect. We find nothing suggesting that her

age disqualified her from testifying. Otherwise, we know no other law in our jurisdiction, and the appellant did not suggest one, restricting people of a certain age from testifying in courts of law or requiring evidence of witnesses of the appellant's age to require the court warn itself or be corroborated before acting on it. We find no merit on this ground and we dismiss it.

Ms. Hokororo attacked the appellant's complaints in grounds two, four and seven for being new and being factual, the Court lacks jurisdiction to entertain them. She cited the case of **Abdul Athuman vs Republic** [2004] TLR 151 to augment that stance of the law. We have painstakingly revisited the record of appeal to ascertain the validity or otherwise of that contention and we hasten to agree with Ms. Hokororo that the appellant's grounds of complaint to the High Court as reflected in his petition of appeal found at page 38 bore no complaints in respect of the torn underpants not being produced in evidence and failure by PF3 to show bruises not being considered by the High Court as well as poor investigation and failure to visit the *locus in quo*. Such complaints which are obviously factual are being raised before this Court for the first time. They are new grounds. As rightly argued by Ms. Hokororo, the mandate of this Court is, in terms of sections 4(1) and 6(7)(a) of the Appellate

Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) read together with Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), limited to matters raised and adjudicated by the High Court and subordinate court exercising extended jurisdiction only. In addition to the case of **Abdul Athuman vs Republic** (supra) referred to us by Ms. Hokororo, the Court cemented that stance of the law in the case of **Jafari Mohamed vs Republic**, Criminal Appeal No. 112 of 2006 (unreported) in these words:-

> *"We have found it convenient to begin our discussion by disposing of first the grounds of complaint listed (c) to (h) above. We have done so because these complaints are being improperly raised for the first time in this Court. For this reason, being issues of fact, their determination does not fall within our jurisdiction in an appeal of this nature – see Section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141.*
>
> *We take it to be settled law, which we are not inclined to depart from, that* ***"this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal..."*** *per the Court in* ***Elias Msaki v. Yesaya Ntateu Matee,*** *Civil Application No. 2 of*

1982 (ARS). See, also ***Richard s/o Mgaya @ Sikubali Mgaya v R.****, Criminal Appeal No. 335 of 2008 (both unreported).* ***The logic behind this should be obvious. This Court is conferred with jurisdiction to hear appeals from or revise proceedings or decisions by the High Court in the exercise of its original, appellate or revisionai and/or review jurisdictions. We cannot, therefore, competently render a decision on any issue which was never decided by the High Court."*** (Emphasis added).

In yet another case of **Galus Kitaya vs Republic,** Criminal Appeal No. 196 of 2015 in which the Court referred to the Court's earlier decision in **Nurdin Mussa Wailu vs Republic**, Criminal Appeal No. 164 of 2004 (both unreported) the Court 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."*

Given the above position of the law, we are inclined to agree with the learned Senior State Attorney that grounds two, four and seven are

new and the Court lacks jurisdiction to entertain them. We accordingly disregard them.

Ground five of appeal is definitely without substance. We have examined the record and judgment of the High Court and we have noted nothing suggesting inclusion of evidence not adduced in court by the learned first appellate judge. The complaint fails.

We now revert to the appellant's complaint in ground one of appeal that the charge was not proved at the required standard of proof beyond reasonable doubt. In this case the appellant was charged with rape contrary to section 130(1) and (2)(b) and 131(1) of the Penal Code.

The section provides:-

> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
> *(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention.*

The offence of rape is therefore established where these ingredients are cumulatively proved by the prosecution that is to say:-

i. Sexual intercourse,

ii. With a girl or woman,

iii. With her consent which is obtained by force, threats or intimidation by putting her in fear of death or hurt or is in unlawful detention.

In the instant case, the victim is recorded to have told the trial court that, we quote:-

> *"I know the accused to be Manyinyi s/o Gabriel he reside at Mesaga village I know him he used to be my neighbour. On 04/11/2014 at about 17:00 hours, I was tracing my goats it was missing in the bushes and mountains of Messaga village. I met with the accused person in the bushes, he saluted/greeted me, he then told me he had my message of love. That he was sent by one person called Njomo, I replied that I had no relationshlp with him. He told me he needed me for a longtime, God has made us to meet. I told him that he was like my son, he insisted he wanted to have sexual intercourse with him. I told him I was like his mother. We were about five (5) witness apart, he approached me and dragged me down and torn my under pant "chupi" I had wore black skirt and black T- Shirt; tried to call for help but he got hold of my me, he threatened to stab me with a knife, the accused wore black trouser, the accused person had a stone and threatened to stub me with knife, he took me to the*

bushes, he dragged me down I fell down and the accused removed his trouser and took his penis and inserted into my vagina and began to rape me. I failed to call for help as he got hold of my neck, then after the accused person run away I called for help, the houses are far, I felt pain, I went to my in-law one Joji Kisaka, he took me home. I told him all what transpired. We failed to go to police to Majimoto it was far and no transport. The next day on 05/11/2014. The said Joji Kisaka called Bodaboda one John Nyananaru at about 07:00 he took me to Majimoto Police Station. I was given P.F no. 3 to go to Iramba Dispensary I was checked HIV and given pills to take for 24 days. I was told later that Machonchori assisted by George s/o Kisaka. OCS called me and told me the accused person was arrested and he was at Mugumu Police that he was sent to the Police Station."

Closely examined, it is crystal clear from the above excerpt that what the victim had stated in her testimony, as rightly argued by Ms. Hokororo, encompassed all the elements or ingredients of the offence of rape. Such testimony, in fact, is clear that apart from luring the victim that he had a love message from one Njomo, the appellant grabbed her, chopped her down, undressed the victim and himself and, while holding a knife and a stone threatening her not to shout lest he stab her, had

sexual intercourse with the victim. It having not been disputed that the appellant and the victim lived in the same village and knew each other, identification of the appellant was not in issue. More so and notwithstanding the information being embarrassing, she narrated the ordeal and named the appellant as his ravisher at the earliest opportunity to PW4, her in-law which, in turn, was supported by PW4 in his testimony. This Court has consistently held that naming a suspect at the earliest opportunity lends credence to the witness whereas the contrary renders the evidence of that witness highly suspect and unreliable. (See **Marwa Wangiti Mwita and Another v. R.,** [2002] T.L.R. 39 and **Joseph Mkumbwa & Another v. R.,** Criminal Appeal No. 94 of 2007 (unreported). Both courts were satisfied that the victim was a truthful witness which is a factual finding which we see no justification to interfere with. Based on the case of **Selemani Makumba vs Republic** (supra) that best evidence comes from the victim, the High Court was fully justified to hold that the appellant was responsible of the offence of rape.

We need not labour so much on the defence of alibi relied by the appellant which was unprocedurally raised at the defence stage and the High Court exercised its discretion in terms of section 194(6) of the CPA to disregard it. We endorse the course taken and the reasons given which

were also not challenged in this appeal. In the upshot, the appellant's complaint is without basis.

Ultimately, we agree with Ms. Hokororo that the charge was proved beyond reasonable doubt. The complaint in ground one of appeal is baseless and is hereby dismissed.

Save for our order expunging exhibit PE2 and our finding in ground six of appeal in which we agreed with the appellant's complaint which does not affect the outcome of the appeal, the appeal is hereby dismissed.

DATED at **MWANZA** this 1st day of December, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2021 in the presence of Appellant in person and Ms. Georgina Kinabo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL