IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MKUYE, J.A., GALEBA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 234 OF 2019

JAFARI S/O MUSA ..... APPELLANT

VERSUS

DPP ..... RESPONDENT

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

(Mashauri, J.)

dated the 17th day of May, 2019
in
DC. Criminal Appeal No. 158 of 2018

.....

JUDGMENT OF THE COURT

9th & 17th February, 2022

MKUYE, J.A.:

Before the District Court of Mpanda at Mpanda the appellant Jafari Musa was charged with two counts to wit, in the first count, abduction contrary to section 134 of the Penal Code Cap. 16 [R.E. 2002; now R.E. 2019] (the Penal Code); and in the second count, the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. Upon a full trial he was convicted with both counts and sentenced to seven (7) years imprisonment for the first count and thirty (30) years imprisonment for the second count. Both sentences were ordered to run concurrently.

Aggrieved by that decision, the appellant appealed to the High Court of Tanzania at Sumbawanga but his appeal was dismissed for lack of merit. Still dissatisfied, he has now filed this second appeal before this Court.

The facts leading to his appeal are as follows:

The appellant and the victim M d/o A (PW1) (name withheld to hide her identity) were known to each other as they lived in the same village at Kambuzi. According to PW1, the appellant met the victim along the road and informed her that he wanted to abduct her. After a short conversation they left together heading to Kilometa Tisini village. On reaching there they went to a room occupied by one of the appellant's friend, one, Bakari. PW1 said, they ate food and together went to sleep. In the room the appellant asked to have sexual intercourse with her. Thereafter he undressed her, touched her and had carnal knowledge of her. As it was her first time to have sexual intercourse she felt much pain. In the next day he had sex with her and they stayed together for six days.

On 3rd June, 2018, the appellant and the victim left and presented themselves at the home of Shida Mashaka, the victim's mother (PW2) at Kambuzi village. Upon seeing them PW2 shouted at her. She then informed Adidas Wiyago (PW3), the Ward Executive Officer (WEO) and the appellant was apprehended. The matter was reported to the police

whereupon the appellant was arrested and PW1 was issued with a PF3 for medical examination. Elia Madel (PW7) examined her and observed that she was raped.

In defence, the appellant gave a general denial to the commission of the offence. He testified that he was apprehended at the victim's home where he had gone to collect his money from PW1's father.

Aggrieved by the decision of the High Court, the appellant has fronted four (4) grounds of appeal which can be paraphrased as hereunder:

1) The prosecution evidence was contradictory and problematic as follows:
    (a) the age of the victim in the charge sheet indicates that she was 15 years old; PW1 testified her age to be 16 years old; and the PF3 shows the victim's age was 17 years.
    (b) the alleged rape was not proved as PW7 examined the victim a week after the commission of the offence.
    (c) PW4, PW5 and PW6 testified that PW2 reported that the victim was sick since November, 2017 prior to the commission of the offence and therefore the appellant could not have abducted her.
2) The prosecution evidence in the case lacked proper investigation as no caution statement was tendered and the investigator did not testify in court.

3) The first appellate judge failed to evaluate the prosecution evidence.
4) The first appellate judge relied on prosecution evidence while the appellant's evidence was discounted.

At the hearing of the appeal the appellant appeared in person and unrepresented whereas; the respondent Republic was represented by Mr. Gregory Muhangwa and Ms. Marietha Maguta, both learned State Attorneys.

When the appellant was invited to expound his appeal, he in the first place prayed to the Court to adopt his memorandum of appeal. After having done so, he sought the indulgence of the Court to let the learned State Attorneys respond first while reserving his right to rejoin later, if need would arise.

In response to the appeal, Ms. Maguta at the outset declared her stance that they supported both the conviction and sentence meted out against the appellant. She then pointed out that, essentially all grounds of appeal are new as they were not canvassed at the High Court. She contended that except for grounds 1(a) and 4 which are on points of law, the remaining grounds No. 1(b) and (c), 2 and 3 which are new, this Court has no jurisdiction to entertain them as per section 4(1) of the Appellate Jurisdiction Act, Cap 141 [R.E. 2019] (the AJA). She therefore, implored the Court to disregard them.

We have perused the record of appeal and compared the grounds in the petition of appeal which was filed in the High Court and those filed in this Court and we have observed that, indeed, grounds 1 (a), (b) and (c), 2, 3 and 4 were not among the grounds that were discussed and determined by the High Court. As such, as was rightly argued by the learned State Attorney, the Court lacks jurisdiction to entertain them under section 4(1) of the AJA. In the case of **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (unreported) when the Court was faced with akin scenario, it cited the case of **Nurdin Mussa Wailu v. Republic**, Criminal Appeal No. 164 of 2004 (unreported) and stated as follows:

> *"... 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."*

The same position was taken in the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015; and **George Claude Kasanda v. The Director of Public Prosecutions**, Criminal Appeal No. 376 of 2017; **Omary Saimon v. Republic**, Criminal Appeal No. 358 of 2016; and **Jumanne Mondela v. Republic**, Criminal Appeal No. 10 of 2018 (all unreported).

Of course, we are aware that the above position has been relaxed to accommodate new grounds of appeal which are on points of law – See **John Madata v. Republic**, Criminal Appeal No. 453 of 2017; and **Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017 (both unreported). In the latter case, for example, it was stated as follows:

> *"...those grounds are new. As often stated, where such is the case unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction."*

Applying the principles stated in the above authorities, it is our finding that except for grounds 1(a) and 4 which are based on point of law, we refrain from entertaining grounds 1(b) and (c), 2 and 3. We thus disregard them.

We now proceed to deal with ground of appeal No. 1(a) and 4. As regards ground No. 1(a) the appellant's complaint is that there was a contradiction on the age of the victim. It is his contention that whereas in the charge sheet the age of the victim is shown to be 15 years old, PW1 testified that her age was 16 years old and PF3 shows that she was 17 years old.

In response, Ms. Maguta conceded to a certain extent that there was a variance on the age shown in the charge sheet, PW'1 testimony

and in the PF3. She pointed out that the charge sheet shows that she was 15 years old, PW1 said that she was born on 11th October, 2003 and the PF3 showed 17 years old. However, she was quick to argue that there was no contradiction because PW1 and PW2 who proved that she was 15 years old. In support of her argument, she referred us to the case of **George Claude Kasanda** (supra). She added that, the particulars of PW1 showing that she was 16 years and the PF3 are not part of evidence. After all she said, even if it was so, since the PF3 was not read out after its admission in court it has to be expunged. In this regard, she implored the Court to find that this ground has no merit and dismiss it.

Indeed, we note that the charge sheet indicates the age of the victim to be 15 years old; but the record of appeal at page 12 shows that the victim gave her particulars before giving her testimony indicating that she was 16 years old. Yet, the PF3 (Exh. P4) at page 56 of the record of appeal indicated that the victim's age is 17 years. A quick glance may give an impression that there was a contradiction on the age of the victim. However, we hasten to state at this juncture that, as was rightly submitted by Ms. Maguta, the age that was indicated in the PF3 is not part of evidence. Apart from that, even if the age that was shown in PF3 would have been valid, since the PF3 was not read out after being cleared for admission, it has to be expunged from the record of appeal. The effect of

the expungement of the PF3 is that it makes it redundant and of no evidential value.

As regards the age of the victim which was indicated in the charge sheet and in the particulars of the victim (PW1) before she testified, that also is not evidence of the age of the victim. This stance was taken by the Court in the case of **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 (unreported) where it was stated as under:

> *"It is trite law that the citation in the charge sheet relating to the age of an accused person is not evidence.* ***Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age.***" [Emphasis added].

Similarly, in the case of **Tano Mbika v. Republic**, Criminal Appeal No. 152 of 2016 (unreported), when the Court was confronted with a similar situation, it was stated that:

> *"Applying the above principle in the case and reasoning by* ***analogy the citations of the age of the victim in the charge sheet and before giving evidence are not part of the evidence and cannot be used to prove the age of the victim.***" [Emphasis added].

Being guided by the above authorities, it is clear that the age of the victim shown in the charge sheet and in the recording of the personal

particulars of the victim witness before he/she testified in court is not proof of her age. In that case, the two aspects complained of by the appellant cannot form the basis of any contradiction regarding the age of the victim as that does not amount to evidence.

If we may move a step further for completeness the proof of age particularly in sexual offences as expounded by case law, is proved by either production of the victim's birth certificate or may come from the victim herself/himself, relative, parent, medical practitioner, a teacher, close friend or any other person who knows the victim - See **Elia John v. Republic,** Criminal Appeal No. 306 of 2016; and **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (both unreported).

In this case, it is clear that the age was proved by PW1 (victim) when she testified that she was born on 11th October, 2003 as shown at page 12 of the record of appeal. On top of that, PW2, her mother, also gave a similar testimony that the victim was born on 11th October, 2003 of which by simple arithmetic by the time the offence was committed on 29th May, 2018 to 3rd June, 2018, she was about 15 years old. In this regard, since the age of the victim was proved we find this complaint to have no merit and we dismiss it.

The appellant's complaint in the 4th ground of appeal is that the first appellate judge erred in law and fact in upholding the conviction on the basis of the prosecution evidence while discounting the appellant's defence.

The learned State Attorney readily conceded that the first appellate court did not consider the defence evidence and that this Court can invoke its powers under section 4(2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) and consider it. She went on arguing that in this case, the prosecution proved its case beyond reasonable doubt as PW1 explained on how she was abducted from 29/5/2018 to 3/6/2018 and how she was raped. While referring to the case of **Athuman Rashid v. Republic**, Criminal Appeal No. 296 of 2016 (unreported), she argued that the best evidence in sexual offences comes from the victim.

She submitted further that PW1's evidence was corroborated by PW2 who witnessed when PW1 was brought back home by the appellant; and PW3, the WEO who testified that the appellant admitted the commission of the offence before him. In the end, the learned State Attorney implored the Court to find the appeal unmerited and dismiss it in its entirety.

We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be a fatal irregularity. However, with the wake of progressive jurisprudence brought by case law, the position has changed. The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion. This position was taken in the case of **Julius Josephat** (supra) where the Court while being guided by the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) appraised the appellant's defence evidence and weighed it against the prosecution's evidence and came to its own conclusion.

In this case we have gone through the first appellate court's judgment and we have noted that, indeed, the said court did not consider the defence case. Much as the first appellate court appreciated the prosecution evidence it did not say anything in relation to the defence evidence. However, having examined the petition of appeal, we observed that failure to consider the defence evidence was not among the grounds of appeal to which the first appellate court was called upon to consider and determine. Nevertheless, looking at the approach the learned first appellate judge took by summarising the evidence of all prosecution

witnesses, we think, he ought to have treated the defence evidence the same way. Unfortunately, that he did not do. Failure to do so was a fatal omission.

That apart, we have gone through the trial court's decision and we have found that the trial magistrate amply dealt with the defence case. For instance, on page 39 of the record of appeal, the trial magistrate clearly stated that he had gone through the defence of the appellant who claimed to have been arrested when he went at the victim's home to collect his money from the victim's father and rejected it. The trial magistrate rejected it in view of PW1's evidence who explained how she was abducted by the appellant and sent to Kilomita Tisini village where she was raped. The trial magistrate found that the evidence of PW1 was corroborated by her mother (PW2) who testified that the victim was missing and later brought back by the appellant. He also relied on PW6 whose testimony was to the effect that the appellant confessed to him to have brought the victim home while he had bags and bottles of water. The trial magistrate reasoned that the fact that the appellant went there with bags and bottles of water indicated that the two (victim and appellant) came back from relatively a long journey. He was of the view that the appellant could not have gone there to collect his money with those bags. He also questioned why the appellant sought for an apology.

The trial magistrate also considered the appellant's defence of general denial on the offence of rape as shown at page 41 of the record of appeal and found it to have no merit in view of PW1's consistent evidence that she was raped by him which evidence was corroborated by PW7 who examined her and observed that she had signs of vagina penetration since there was no hymen and that she had no history of sexual intercourse before. In conclusion the trial magistrate stated at page 41 of the record of appeal as follows:-

> *"It is trite principle of law in rape cases that the evidence of the victim is sufficient to prove rape as said before the victim mentioned the accused person as the one who raped her and that it was her first time to do sexual act, she has maintained and consistently mentioned the accused person and nobody else. The mere defence of the accused person that he did not do anything bad to the victim has no merit as there is evidence that he sought for apology."*

From the above excerpt it is clear that the trial magistrate sufficiently considered the defence evidence to which we subscribe. To that end, while we agree with the learned State Attorney that the first appellate court did not consider the defence evidence, we do not find it necessary to invoke section 4(2) of the AJA and re-evaluate the defence

evidence since we are of the considered view that the trial magistrate sufficiently evaluated the said evidence for the defence. Thus, we find that the appellant's complaint that the defence evidence was not considered devoid of merit and we dismiss it.

In the final event, we find the appeal devoid of merit. We hereby dismiss it in its entirety.

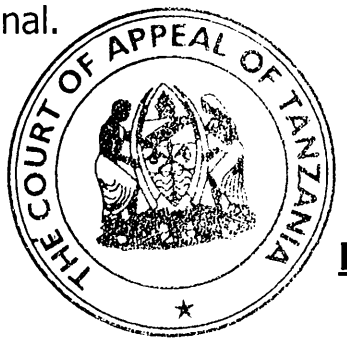
DATED at **MBEYA** this 16th day of February, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered this 17th day of February, 2022 in the presence of the Appellant in person and Ms. Nancy Mushumbusi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL