IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 235 OF 2019

LEONARD s/o SAKATA.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

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

(Mashauri, J.)

dated the 8th day of April, 2019

in

DC Criminal Appeal No. 83 of 2018

.....

JUDGMENT OF THE COURT

11th & 17TH February 2022

GALEBA, J.A.:

The genesis of this appeal, according to the prosecution, is that around 19.00 hours on 5nd September 2017, while on the way to Baraka's home, a young girl, whose identity we will conceal in this judgment and refer to her as RM or the victim or PW1, was raped by Leonard Sakata, the appellant. It was alleged that the appellant met the victim on her way to Baraka's home and deceived her that she should first accompany him to the house of the minister pastoring the local Assemblies of God Church, which suggestion she complied with. However, instead of going to the house of the Pastor, the appellant led the victim straight to the Pastor's toilet where he forcefully had carnal

knowledge of the girl, who, at the time, was in Standard II at Itindi Primary School.

The appellant was accordingly arrested in the same evening by the people's militia. He apologised and requested for forgiveness from PW3, the victim's father but no pardon would come forth. The next day he was taken to the police who later charged him before the District Court of Nkasi sitting at Namanyele in Criminal Case No. 107 of 2017 for contravening sections 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code). Although the appellant denied to have committed the offence before the trial court, after a full trial the appellant was found guilty of the offence charged. He was henceforth convicted for raping the victim and was sentenced to thirty years imprisonment. His first appeal to the High Court was dismissed, hence the present appeal in which he has raised four grounds of appeal contesting the decision of the High Court.

The grounds upon which this appeal is predicated are, **one,** that the first appellate court erred in law for upholding a conviction based on the prosecution evidence which was contradictory and problematic because: **(a)** the age of the victim was not proved. The charge sheet and PF3 indicated that the victim was 8 years while the victim herself stated that she was 9 years at the time the offence was committed: **(b)**

Although PW2, the clinical officer stated that she found no bruises in the victim's private parts, she concluded that there was penetration: **two,** the first appellate court erred in law to uphold the appellant's conviction whereas, the Pastor, although a key witness, was not called to adduce evidence: **three**, the first appellate court erred in law when it upheld the appellant's conviction while the prosecution led no sufficient evidence to found a valid conviction at the trial and **four,** that the first appellate court erred in law when it upheld the appellant's conviction whereas neither court analysed the evidence tendered.

At the hearing of this appeal, the appellant appeared in person without legal representation, whereas Mr. John Kabengula, learned State Attorney appeared for the respondent, Director of Public Prosecutions. 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 and permit the learned State Attorney to reply to them and that, if necessary, he would rejoin.

At the outset Mr. Kabengula, submitted that grounds 1(b) and 2 were new grounds complaining about new factual matters, whose substance was not dealt with at the High Court. She moved the Court to refrain from entertaining the said grounds. In that respect, we have carefully reviewed the said grounds of appeal, and we are in agreement

with Mr. Kabengula, that indeed, the complaints in grounds 1(b) and 2 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 first appellate court and were decided upon and not matters that were neither raised nor determined by the court from which the appeal emanates, 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, Mr. Kabengula, and correctly so, in our view, did not bother himself to respond to grounds 1(b) and 2. To close that first aspect of this judgment, we decline to consider for determination of the merits or otherwise, of those grounds, for this Court has no jurisdiction to do so.

The learned State Attorney therefore argued grounds 1(a), 3 and 4. As for ground 1(a) Mr. Kabengula submitted that although there was no witness who testified on the age of the victim, the latter was a child of tender age. He contended that during *voire dire* examination PW1, the victim stated that she was, at the time, in class II at Itindi Primary School and that the trial court was convinced that the victim was a child of tender age that is why it carried out a *voire dire* test. He submitted further that, notwithstanding that the exact age of the child was not positively proved by any witness, the victim was a child below the age of

18 years, who, if raped the sentence for the offence is thirty years in prison. He submitted that, had the appellant been sentenced to life imprisonment, he would have prayed for substitution of the sentence with that of thirty years, which is the sentence that the trial court imposed and the High Court upheld. In brief, his argument was that, although age was not proved by direct evidence from any prosecution witness, the victim was a child of below 18 years of age in which case, her consent to the illicit sex is immaterial and what is necessary is proof of penetration, which was proved in this case. To firmly hinge his argument, Mr. Kabengula supplied to the Court, our own decision in **Barnaba Changalo v. DPP,** Criminal Appeal No. 165 of 2018 (unreported). In the circumstances, he implored us to dismiss ground 1(a) because under section 122 of the Evidence Act [Cap 6 R.E. 2019] (the Evidence Act), all the surrounding circumstances at the trial suggested that the victim was a young girl below eighteen years of age and the imprisonment of 30 years was a fit sentence which should not be disturbed.

To approach resolution of this ground, we will first describe what statutory rape is, then proceed to the law and slowly go to a discussion on what this Court has been holding on the ways that the prosecution

may do to exhaustively prove that the offence of statutory rape is committed. Our focus will specifically be proof of the victim's age.

In the case of **George Claud Kasanda v. R,** Criminal Appeal No. 376 of 2017 (unreported), in an endeavour to describe statutory rape, this Court, in not so many words, stated: -

> *"In essence that provision (section 130(2)(e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence."*

In this appeal, the appellant was charged for that offence because the allegations are that the victim was a young girl of below 18 years. This aspect distinguishes it from rape of girls or women of above 18 years of age where, if consent of the girl or woman is proved to exist, rape is negated. As the appellant in this appeal was charged under the section 130(1)(2)(e) of the Penal Code, the charge was for statutory rape. That section provides as follows: -

> *"(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:

(a) to (d) N/A

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

In **Solomon Mazala v. R**, Criminal Appeal No. 136 of 2012 (unreported), the charge sheet and the description of PW1, the victim indicated that she was aged 7 years at the time of the commission of the offence. However, neither herself, nor PW2, her aunt, nor PW3 her grandmother adduced any evidence as to her age. The trial court had convicted and sentenced the appellant and the first appellate Court had followed suit by upholding such conviction and sentence. This Court overturned both decisions, and observed as follows:

"The cited provision of law makes it mandatory that before a conviction is grounded in terms of section 130(2)(e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the offence....Even if we go further and take liberty to assume that the fact that the trial court conducted a ***voire dire*** *examination, after being satisfied that PW1 was under eighteen years of*

age, that assumption, in our view, would be contrary to the dictates of the law."

In the above case, the fact that *voire dire* was conducted and the fact that the charge and introductory information of the victim showed that the victim was seven years, all did not count. The other decision with the same position is **Alex Ndendya v. R**, Criminal Appeal No. 340 of 2017 (unreported) where the Court stated:

"In light of the above, age is of utmost importance and in a situation where the appellant was charged with statutory rape then age of the victim must specifically be proved before convicting the appellant."

Consistent with the above position, this Court in yet another case of **George Claud Kasanda (supra)**, insisted that:

*"...we have no doubt that preliminary answers given during **voire dire** examination and facts narrated by the prosecution during preliminary hearing under section 192(1), (2), (3) and (4) of the CPA are not an exception unless admitted and listed in the memorandum of undisputed facts which is later signed by all the parties to the case. The reason is that they are also not given on oath. That said, in a situation like ours, concrete evidence on the true age of the victim*

was therefore required from, as indicated, the parent, relative, teacher, close friend or any other person who knew well the victim."

Other cases in the category insisting on strict proof of age of the victim in cases of statutory rape, include but not limited to **Winston Obeid v. R,** Criminal Appeal No. 23 of 2016, **Edson Simon Mwombeki v. R**, Criminal Appeal No. 94 of 2016 and **Alyoce Maridadi v. R**, Criminal Appeal No. 208 of 2016 (all unreported).

Whereas the above decisions, take proof of age of the victim as sacrosanct and inviolable, there is yet another twin position. In the second set of decisions, the position is that even in circumstances where there is no witness who testifies on the victim's age, the trial court can still legally convict the offender. We will now turn to consider the latter category of the decisions.

One of the decisions we have been able to lay hands on which did not insist on the strict proof of age in statutory rape is **Isaya Renatus v. R**, Criminal Appeal No. 542 of 2015 (unreported). In this case, a young girl who was the victim of the sexual assault was, on the fateful day, in their farm at Twabagondonzi Village in Kibondo District harvesting some sweet potatoes for the family, whereupon Isaya Renatus emerged from nowhere, advanced towards the girl, suddenly

grabbed and pulled her to the nearby thicket where, after threatening her into subdual with a bush knife, he forcefully undressed and raped her. Following the victim's alarm during the act, two ladies, PW2 and PW3 rushed to the scene of crime and found the offender in the middle of the act of rape, whereupon the criminal withdrew, threatened the two Good Samaritans with the same knife and took to his heels. Based on that and other pieces of evidence, the appellant in that case was convicted of rape by the trial court and upon appealing to the High Court, his appeal was dismissed. In that case, like in the present case, no witness testified on the age of the victim except reference in the charge sheet where it was disclosed that the victim was 11 years and also in an introductory clause before the victim was to testify, where her age was disclosed also as 11 years. One of the grounds to this Court which is relevant to this appeal is that the offence being statutory rape, age of the victim was not proved and therefore his conviction was illegal. After thoroughly considering all the surrounding circumstances, this Court stated:

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(1)(2)(e), the more so as, under the provision, it is a requirement that the victim must be under the*

age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer existence of any fact including age of the victim on the authority of section 122 of TEA.....In the case under consideration there was evidence to the effect that, at the time of testimony, the victim was a class five pupil at Twabagondozi Primary School. Furthermore, PW1 was introduced into the witness box as a child of tender age following which the trial court conducted a ***voire dire*** *test. Thus, given the circumstances of this case, it is, in the least deducible that the victim was within the ambit of a person under the age of eighteen. To this end, we find the first ground of appeal to be devoid of merits."*

The next decision with departure from the first set of cases is **Barnaba Changalo (supra).** In this case, the appellant, a traditional healer visited the home of PW1, the victim at Milala Village in Mpanda District within Katavi Region. On 27th October 2014, the victim came

back from school but as she had a wound on her hand the appellant attended to her, by rubbing it with some unknown traditional herbs. Thereafter the appellant pulled her into the toilet of their family, closed the door behind them, pulled his own pair of trousers down, covered the victim's mouth, undressed her and raped the girl, who according to the charge sheet, was 6 years. Meanwhile, PW2 the victim's elder brother had also the call of nature that he had to attend in the same toilet. Upon going to the toilet, he noted the door to the toiled was closed. He decided to knock on the door however, from inside the toilet, the appellant informed PW2 that he was inside. PW2 was patient, but the appellant would not come out of the toilet. Later, PW2 ran out patience and decided to peep inside the toilet through some opening of the door and saw the appellant having carnal knowledge of his young sister, the victim. He reported to the child's mother PW3, who upon inspecting her daughter, found her private parts swollen. PW5, a medical practitioner found bruises in the victim's private parts with a raptured hymen. The appellant was arrested, charged and at the end of the trial he was convicted of rape of the victim and the latter being under 10 years of age, he was sentenced to life imprisonment. His appeal was dismissed by the High Court for want of merit. He lodged the second appeal to this Court challenging the decision of the first appellate court predicating the

appeal on four grounds which were all dismissed for want of merit. However, before the Court could pen off, it *suo motu* required Mr. Njoloyota Mwashubila the learned Senior State Attorney, who was appearing for the respondent, to address it on whether a sentence of life imprisonment was valid as there was no prosecution witness who adduced evidence to prove the age of the victim. Learned counsel admitted that there was no witness who proved the age, but considering what happened at the trial, including the fact that the trial court held a *voire dire* examination, it meant that the trial court was satisfied that the victim before it was a child of tender age. However, the learned Senior State Attorney also admitted that the age of the victim would still not be ascertained from such circumstances. He was therefore of the position that the sentence of life imprisonment be set aside and be substituted with a sentence of thirty years which is a sentence for rape of girls and women of below eighteen years of age. In that case this Court made the following decision: -

> *"With respect, whilst there may be other ways of proving age such as by evidence given by the victim, relative, parent, medical practitioner or where available by production of a birth certificate, like any other fact, age may be deduced from the evidence availed to the court*

*in terms of section 122 of the TEA [see **Isaya Renatus v. R**, Criminal Appeal No. 542 of 2015 (unreported)]. Applying the same principle to our case, the victim appeared a child such that the court conducted a **voire dire** test during which it became apparent that she was a standard two pupil at Milala Primary School. That inquiry was sufficiently following by a finding that she was competent to testify but not on oath. No doubt all these circumstances considered, lend assurance that she was a child of tender age. But, like the learned Senior State Attorney, we do not think that, it is safe to extend that to the extent of holding with certainty that she was under ten years of age. The appellant should benefit from the doubt. We accordingly hold that she was above ten years of age."*

Our critical evaluation of the above two sets of decisions, clearly reveal that there are presently two schools of thought on the interpretation of section 130(2)(e) of the Penal Code. The first school is of the view that, for an accused to be convicted of statutory rape, there must be proof from a witness or witnesses that the victim was below 18 years of age at the time of the offence. The view of the second school, as we have demonstrated, is existence of circumstances implying or suggesting that the victim is below 18 years is just as good without

necessarily proving the victim's exact age. According to the second school, the offender may be convicted of statutory rape based on section 122 of the Evidence Act and he cannot be sentence to life imprisonment under section 131(3) of the Penal Code because, there would be lack of positive evidence ascertaining the exact age of the victim to be below 10 years. So, the sentence, in the circumstances is thirty years imprisonment.

In this appeal, Mr. Kabengula implored us to invoke the second school, and hold that because, the victim in this appeal was a standard II pupil and the fact that the court conducted a *voire dire* examination, all those meant that indeed, the victim was a child of tender age, which by no means, was below eighteen years. He therefore contended that the sentence of thirty years imposed upon him by the trial court and upheld by the first appellate court need not be disturbed.

We have given Mr. Kabengula's submission some considerable thought and we are convinced that, it has both sense and substance. Before the trial court the victim of the assault clearly appeared a minor and that is why, the court decided to carry out a *voire dire* test. It is also on record that the girl was a standard II pupil at Itindi Primary School. These factors are similar to the ones that were considered in both the

cases of **Isaya Renatus** (supra) and **Barnaba Changalo** (supra), so we are not inventing any new wheel in this appeal.

We must however state that the fact that, in resolving ground 1(a) of this appeal based on the two decisions above, we are not anywhere closer to implying or suggesting that the first school of thought is obsolete, wrong or redundant, the necessity of positively proving age in statutory rape cases remain a king post in firmly grounding a prosecution case. The stance we are taking is covered under section 122 of the Evidence Act and it is an exception in circumstances where direct evidence had not been adduced. It is a statutory endeavour to ensure that courts do not leave offenders scot-free, even where there are clear circumstances that unerringly and without doubt point to their guilt.

In this appeal we have not followed our path in **Solomon Mazala,** a 2014 decision in which the provisions of section 122 of the Evidence Act were not considered and have instead opted for a wider approach taken by the Court in **Barnaba Changalo** (supra) decided in 2020. The position of the Court is that where there are two competing positions on the same aspect, the court would go by the position it adopted in the latest decision, see **Zacharia Henry Mahush and Three Others v. R,** Criminal Appeal No. 204 of 2010 and **Arcopar**

(O.M.) SA v. Harbert Marwa and Family Investments Co. Limited, Civil Application No. 94 of 2013 (both unreported).

In the final analysis, we agree with Mr. Kabengula that ground 1(a) has no merit and we dismiss it.

We then move to the 3rd ground which is a complaint that there was no sufficient evidence tendered by the prosecution in the trial court to justify the appellant's conviction. The appellant's point being that the High Court was wrong to uphold such a conviction. Mr. Kabengula submitted that there was sufficient evidence in the trial court upon which the court grounded a conviction including that of the victim and the clinical officer.

In a quest to resolve this ground of appeal, we have carefully reviewed the record of appeal particularly the evidence of both parties, the judgments of both courts below, the grounds of appeal and the submission of counsel. The judgement of the trial court was based, mainly on the evidence of PW1, the victim and PW2 the clinical officer who examined her, in the aftermath of the sexual abuse of that evening. According to the victim, when she was going at Baraka's home, she met the appellant at around 7.00 o'clock in the evening whereupon the latter deceived and led her to the local Pastor's toilet where he ravished her.

Immediately after getting home, she mentioned to her father, PW3 that the appellant was the person who raped her. It is key to note at this point, that, the fact that a witness mentions the suspect at the earliest possible opportunity implies impeccable credibility of that witness, see our decisions in **Bakari Abdallah Masudi v. R,** Criminal Appeal No. 126 of 2017 (unreported) and **Jaribu Abdallah v. R**, [2003] TLR 271 among many such decisions.

Additionally, although time was around 19.00 hours in the evening, our keen examination of the evidence of the victim shows that, despite time being that late in the day, the victim was able to identify the appellant as the perpetrator of the crime, because, **one**, the act was not sudden, the two had a conversation in which the appellant managed to convince the victim to accompany him to the Pastor's home instead of continuing to her original destination, **two**, the two walked together, from the point they met to the local Pastor's home. The time spent during those two encounters is an assurance that indeed the victim was able to certainly identify the appellant as her assailant. That evidence of the victim, which is taken as the best in sexual related offences as per this Court's decision in **Seleman Makumba v. R**, [2006] TLR 379, was corroborated by that of PW2, Dorice Kilenga, the clinical officer who found out that there was penetration of the victim's private parts.

Coupled with the evidence of PW3, the victim's father, that immediately after her daughter was raped, she came home in company of the local Pastor and told him that it was the appellant who raped her, we are satisfied that the appellant's complaint in the 3rd ground of appeal, that there was no sufficient evidence to convict him of the offence as charged has no merit and we dismiss it.

The last was ground 4. The complaint in that ground was that the High Court upheld the appellant's conviction despite the fact that the trial court failed to analyse the evidence adduced before it. In reply Mr. Kabengula submitted that both courts, the trial and the first appellate court analysed the evidence of both parties to the matter.

In our view, analysis of evidence entails summarising it and objectively discussing its weight or credibility as opposed to its weaknesses and from then believe it and uphold the position it is supporting or disbelieve it and decline to accord it weight to the detriment of the position it is seeking to stand for or to support. We will then determine whether the trial court performed that task. After summarising the evidence tendered by the prosecution and referred to that of the defence, the trial court at page 28 and the whole of page 29 analysed the evidence and came to a conclusion that indeed, the child was raped and the person responsible for perpetration of the offence

was the appellant. We must make one observation here, it would not be easy for the trial court to analyse the evidence of the defence because, the evidence was a two-line, linear denial with no actual substance disputing the offence. We reproduce the defence evidence in order to clarify the reason why it was difficulty for the trial court to summarise or even analyse it. The defence evidence as per the record of appeal at page 22 is as follows: -

> *"I have never committed the offence it was cooked case against me. I have no father, lives with only my mother. That is all."*

Based on the above discussion, in our considered view, it is not correct to allege that the trial court failed to analyse the evidence, it did analyse it and came to a conclusion, and properly so, in our view, that the appellant was guilty of the offence charged and convicted him as it did. The defence offered did not cast any doubt on the strong prosecution case, although that failure alone would not benefit the prosecution if its case was to be weak. In the circumstances, the first appellate court cannot be faulted for upholding the trial court's conviction which was based on properly summarised and analysed evidence. We however agree with the appellant that the first appellate court did not analyse the evidence, but that, in our view, was

unnecessary for it can only be necessary and of use if the trial court did not perform the task, which is not the case in this matter. In the circumstances, the 4th ground of appeal has no merit and the same is dismissed.

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

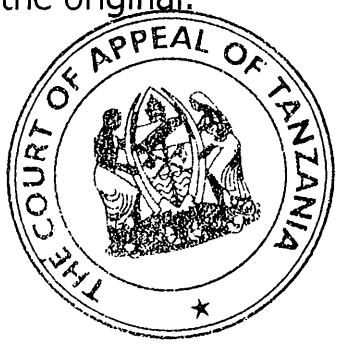
DATED at **MBEYA**, this 17th day of February, 2022

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