IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 138 OF 2018
MASHAKA MARWA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Gwae, J.)

Dated the 7th day of May, 2017
in
Criminal Appeal No. 99 of 2017

.....

JUDGMENT OF THE COURT

11th & 12th July, 2022

MUGASHA, J.A.:

In the District Court of Tarime at Tarime, the appellant was charged, with the offence of rape contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code, Cap. 16, R.E., 2022. It was alleged by the prosecution that, on 12/1/2016 at about 1500 hours, at Msati High way Street within Tarime District in Mara Region, the appellant had carnal knowledge of a thirteen years old girl. For the purposes of concealing her identity, the girl shall be referred to as the victim or PW1.

The appellant denied the charge, following which the prosecution paraded four witness and tendered a PF3 which was admitted in evidence as Exhibit P1. The appellant was the sole witness for the defence. After a full trial, he was convicted and sentenced to 30 years' imprisonment and ordered to compensate the victim a sum of TZS. 4,000,000.00. He unsuccessfully appealed to the High Court and hence the present appeal to the Court.

A factual account underlying the present appeal is briefly as follows: On the fateful day, about 15.00 hours, the victim was at home with her younger sister. She wanted to attend the call of nature but was scared to go to the pit latrine which was not in order and opted to go to her grandfather's maize farm. While attending the call of nature, someone came from behind and held her collar and when she turned back, she saw the appellant holding a knife. The appellant ordered her to sit down and he threatened to kill her and thereafter, he ordered her to undress the underwear, she declined and he hit her with a stone on the head. Then, the appellant undressed the victim, he undressed, laid down the victim and inserted his manhood into her vagina. The victim felt pains and blood was oozing from her vagina while the appellant's manhood was discharging fluids. Having satisfied his lust, the appellant took the victim's

underpants and placed it in his pocket. As the victim was crying in pain, the appellant began to search for maize to hit her but she managed to escape leaving behind the appellant in the maize farm. The victim was crying while she was going home and upon arrival, she reported the incident to her grandfather Sion'go Marwa (PW2) and mentioned the appellant as the one who ravished her. They went to the scene of crime and the victim showed the place where the appellant raped her. Thereafter, they went to the appellant's mother and the trio went to the scene of crime and PW2 reported the incident to the street chairperson Josephat Maseke (PW5) who referred the matter to Tarime Police station. At the police, WP 9207 DC Farida (PW3) interrogated the victim who narrated the rape incident and mentioned the appellant as the culprit and recorded her statement. She also inspected the victim and found blood stains and sperms in her private parts and proceeded to issue the victim with the PF3 and she was taken to Tarime Government Hospital for medical examination. Upon being examined by Dr. Samwel Obiero (PW4) a medical doctor, bruises were found in the victim's private parts and further medical examination into the laboratory revealed that the victim was infected with gonorrhoea. Thereafter, the victim was given medication and the Doctor filled in the PF3 which was tendered in

evidence as (exhibit P.1.). Subsequently, the appellant was arrested and arraigned in court as earlier stated.

In his defence, the appellant denied each and every detail by the prosecution. He denied to know the victim and claimed to have seen her for the first time in Court. He as well claimed not to have been at the scene of crime because for the whole day he was laying bricks and thereafter, between 1.00 and 4.00hours he was resting at home and that, it is her mother who told him about the accusations. Moreover, he recounted that, it was on the following day when the victim's father surfaced holding a panga with accusations about the rape incident and that later, he was arrested by the police and sent to Tarime Police station.

In its judgment, the trial court found the appellant culpable of the offence as it was satisfied that the evidence of PW1 and PW2 as corroborated by PW3, PW4, PW5, and PW6 was credible and did prove the offence charged. The first appellate court sustained the conviction and the sentence and as earlier stated, the appellant is yet unhappy and has lodged a second appeal to this Court.

In the memorandum of appeal, the appellant enumerated six grounds as follows;

1. *That the 1st appellate court erred in law and fact to uphold conviction based on prosecution evidence while not observing that the same was contradictory, problematic, and consisting full of shadows and susceptible of proof whereas:*
    a. *That PW1 and PW2 testified that PW1 was 13 years old without tendering any documentary evidence before the court to prove her age as required by law.*
    b. *PW1 and PW2 testified that the victim aged 13 years old was her first time to have sex without tendering any documentary evidence to prove the alleged age.*
    c. *PW4 failed to testify in detail on how the alleged bruises were caused and how the alleged venereal diseases had been detected within 3 hours.*
2. *That, the first appellate Court misdirected itself in law and fact to dismiss the appeal based on prosecution evidence while it failed to note that the case lacked material fact and proper investigation as no caution statement of the appellant was tendered before the trial court and the police officer who investigated the case did not appear before the trial court to prove the alleged rape.*
3. *That the judgment is in contravention of the provisions of section 312 (2) of the CPA. Whereas the conviction and sentence provided on incompetent and in compliment of provisional of law. (sic)*

Also, on 26/6/2022 the appellant lodged in Court the supplementary grounds of appeal containing the following grounds;

1. *That, the charge was not proved due to the evidence of the particular witness (PW1) and PW2 were at variance about the date and the scene (street) of the incident while they are basic ingredients.*
2. *That the victim's evidence was taken illegally at open Court contrary to SOSPA, by wrong recording of the voire dire test and without stating the promise than false by the victim contrary to the amended Criminal Procedure Act.*
3. *That, the medical evidence from PW4 and the PF3 were not required to corroborate the victim (PW1)'s evidence as the PF3 was admitted without its contents to be read before the Court and the appellant.*
4. *That, none of the appellants recorded plea in the record or reminding the charge before the Preliminary hearing and later before the PW1's testimony and also none of the appellant's signature after the facts and the exhibit states are omission which vitiated the trial proceedings.*
5. *That, the lower Courts were prejudiced to consider and determine the alibi defence of the appellant while the court was aware of the alibi without observing comments on the obvious variance of the scene.*
6. *That, the 8th ground of petition was not considered and determined in the High Court judgment and therefore there was unfair trial against the appellant.*

At the hearing, the appellant appeared in person, unrepresented whereas Ms. Maryasinta Lazaro Sebukoto, learned Senior State Attorney

appeared for the respondent Republic. Upon taking the floor and following a brief dialogue with the Court, the appellant abandoned ground 3 in the Memorandum of Appeal and ground 4 in the Supplementary Memorandum of Appeal. Thereafter, having adopted the memoranda of appeal he opted to initially hear the submission of the learned Senior State Attorney, and reserved a right to rejoin if need arises.

Ms. Sebukoto from the outset, intimated to us that the Republic was not supporting the appeal. Initially, she first opted to submit on the new grounds of appeal raised before the Court and which were neither raised nor decided by the two courts below. On this, she pointed out that the complaint in grounds of appeal 1 (a) and (c) and 2 and 1 in the Memorandum and the Supplementary memorandum of appeal, respectively are on factual issues and not on points of law and as such, the Court has no jurisdiction to entertain them.

Regarding the complaint on the age of the victim, constituting ground 1 (b) of the Memorandum of appeal, Ms. Lazaro challenged the same by arguing that, the victim was below 18 years pursuant to the trial court's finding which having conducted a *voire dire* examination, it was satisfied that the victim was below 18 years. Besides, she added that, at

the trial the appellant did not cross examine the victim about her age and as such, he acquiesced that she was below the age of 18 years. To cement her argument, she referred us to the case of **ISSAYA RENATUS vs. REPUBLIC**, Criminal Appeal No. 542 of 2015 (unreported).

Pertaining to the complaint that the trial was not conducted in camera, this was conceded to by Ms. Sebukoto. However, she was quick to argue that, the appellant was not prejudiced because he was not denied a fair trial. Regarding the appellant's complaint that PW1 did not promise to tell the truth, Ms. Sebukoto argued that, since PW1 gave a sworn account, this was in order considering that although the victim was subjected to *voire dire,* yet the trial magistrate was satisfied that the victim possessed sufficient intelligence to justify reception of her evidence under oath. In this regard, Ms. Sebukoto argued that the law was not contravened.

On the question of documentary medical account contained in the PF3, Ms. Sebukoto conceded that it was not read out to the appellant during trial and it deserves to be expunged. However, she contended that in the absence of the PF3, PW4's oral account on findings and observations on the medical examination of the victim suffice to establish that the victim was actually raped.

As to the complaint on non-consideration of the defence of alibi, it was Ms. Sebukoto's contention that, although it was not considered by the two courts below, the totality of the prosecution evidence is sufficient to sustain the conviction of the appellant. Finally, Ms. Sebukoto submitted that the charge of rape was proved beyond reasonable doubt against the appellant on account of credible evidence of PW1, who besides narrating to her grandfather that she was raped by the appellant, she mentioned him to be the culprit at the earliest moment to her grandfather and the matter was promptly reported to the police. Relying on the case of **SELEMANI MAKUMBA VS REPUBLIC (2006) TLR 379,** she concluded that, the victim is the best witness on the rape ordeal she endured which is corroborated by other prosecution witnesses which rendered the charge proved beyond reasonable doubt against the appellant. She thus urged the Court to dismiss the appeal.

In rejoinder, the appellant had nothing useful to add besides urging us to consider his grounds of appeal and set him at liberty.

After a careful consideration of the submissions from either side, grounds of appeal and the record before us, basically the determination of this appeal hinges on three major issues namely, **One**, whether the

appellant was denied a fair trial; **two**, whether the trial was flawed with procedural irregularities such as, failure to read out the contents of the admitted document (PF3); omission to conduct *voire dire* before PW1 gave her testimony; omission to conduct the trial in camera; and **three**, whether the charge against the appellant was proved beyond reasonable doubt.

We begin with the complaint on the right to legal representation. At the outset and without prejudice, we agree with the appellant that, although the complaint was raised in the petition of appeal before the High Court, it was not determined. Thus, since the complaint raises a pertinent question of law on a fair trial, we shall in the circumstances, step into the shoes of the High Court so as to determine what ought to have been decided by the High Court.

The right to legal representation is regulated by the provisions of section 33 (1) of the Legal Aid Act [CAP 21 R.E. 2019] which stipulate as hereunder:

> *"33 (1)- Where in any criminal proceedings, it appears to the presiding Judge or Magistrate that:*

(a) in the interests of justice an accused person should have legal aid in the preparation and conduct of his defence or appeal as the case may be; and

(b) his means are insufficient to enable him to obtain legal services,

The presiding judge or magistrate, as the case may be, shall certify that the accused ought to have such legal aid and upon such certificate being issued, assign to the accused a legal aid provider which has an advocate for the purpose of preparation and conduct of his defence or appeal, as the case may be."

According to the cited provision, a person in need of legal aid service has a duty to engage an advocate or apply for legal aid in terms of the cited provision if she is unable to hire an advocate. In the case at hand, it is glaring on the record that the appellant neither applied for legal aid for the purposes of the preparation and conduct of his defence at the trial court, nor informed the trial court or the first appellate court that he wished to engage an advocate for the purpose of preparation and conduct of his defence or appeal. The Court was confronted with a like scenario in the case of **JONASI LESIDOO VS REPUBLIC,** Criminal Appeal No. 561 of 2020 (unreported) and stated thus,

> "Since *the appellant neither informed the trial court that he wished to engage an advocate nor apply for legal aid, he cannot be heard to have been denied legal representation at both the trial and in the first appeal... Thus, the appellant was not denied a fair trial and as such, his complaint is not merited and it is hereby dismissed."*

That apart, in the present case the appellant who was present throughout the trial had an opportunity to listen to the prosecution evidence and cross-examine the prosecution witnesses. Moreover, at the close of the prosecution case and after the trial court made a finding that he had a case to answer, the appellant was addressed and given opportunity to elect the manner of giving his defence and call witnesses as per the dictates of section 231 of the CPA. In the premises, we agree with the learned Senior State Attorney that the appellant was not denied a fair trial and ground 6 in the supplementary memorandum of appeal is not merited.

Next is the complaint on failure to read out the contents of the admitted document (PF3). Apparently, this was conceded to by Ms. Sebukoto who urged the Court to expunge the exhibit from the record. The respective exhibit was tendered in evidence by PW4, the medical

doctor as reflected at page 17 of the record of appeal. However, following its admission, it was not read out to the appellant. It is settled position of the law that, failure to read out the contents of an exhibit after its admission, is a fatal omission as it violates the accused's right to a fair trial. See: **ROBINSON MWANJISI AND THREE OTHERS VS REPUBLIC** [2003] T.L.R 218; **ANANIA CLAVERY BETELA VS REPUBLIC,** Criminal Appeal No. 355 of 2017, **ZHENG ZHI CHAO VS THE DIRECTOR OF PUBLIC PROSECUTIONS**, Criminal Appeal No.506 of 2019 and **SIMON SHAURI AWAKI VS REPUBLIC,** Criminal Appeal No.62 of 2020 (all unreported). In the case at hand, although the appellant was present throughout the trial, he was convicted on the basis of documentary evidence he was not aware and as such, he could not exercise his right to cross-examine such evidence which was indeed prejudicial to him. Thus, we accordingly discard the exhibit in question. However, as correctly argued by Ms. Sebukoto, even without the PF3 the oral account of PW4 is quite sufficient to cover the contents of the PF3 as his account explained in detail what is covered therein.

This takes us to the last complaint relating to the procedural irregularities on the trial not being conducted in camera. Apart from Ms. Sebukoto conceding to the said omission, he was of the view that, in the

event the appellant was not denied a fair trial, he was not prejudiced in the circumstances. We understand that, conducting trial relating to sexual offences in camera is a requirement prescribed under provisions of section 186 (3) of the CPA which stipulates as follows:

> *" 186 (3) Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions."*

It is not disputed that, the trial court did not comply with the cited provision which imposes mandatory requirements that, the whole of the evidence must be received in camera. That being the case, the follow up question is whether the trial was vitiated. In the case of **GOODLUCK KYANDO VS REPUBLIC** [2006] TLR 363 the Court had the occasion to make a following observation at page 368:

*"It is not dispute that the appellant who was then a child under the Children and Young Person Act, should have had his trial conducted **in camera** as prescribed under the said Act. The preamble to the Sexual Offences Special Provisions Act, 1998 in the following terms-*

"An Act to amend several written laws, making special provisions in this laws with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children".

*Thus the enactment of Act No. 4 of 1998 was against this general consideration. The provisions of the Act were designed to safeguard the personal integrity, dignity, liberty and security of women and children. It is therefore not surprising that in sexual offences, under section 3 (5) of the Children and Young Persons Act, such trials are to be conducted **in camera** so that children as defined under the Act are not for instance exposed to publicity which may inhibit a fair trial, subject them to fear stigma and the like."*

Given the said observation which is applicable in the present matter and considering that the appellant did not make any protest at the trial or complain in the first appellate court, he cannot now complain that he was

prejudiced by the said omission. The record is completely silent if the appellant raised the issue during the trial and on this we reiterate what we said in the case of **GODLOVE AZAEL @ MBISE VS REPUBLIC**, Criminal Appeal No. 312 of 2007 (unreported) thus,

> *"In what way was the appellant prejudiced under section 186(3) of the CPA. Even at the late stage when he made his defence as DW1, he did not protest that since he was charged with sexual offence, his evidence should be received in camera."*

If at all, it is the victim who was entitled to complain and not the appellant who seeks to benefit from what would ordinarily benefit the victim. Therefore, the trial was not vitiated and equally so, the appellant was not prejudiced which renders ground 2 of the supplementary memorandum not merited.

Having disposed the grounds relating to the complaint on procedural irregularities, we now have to determine a crucial issue as to whether the charge was proved against the appellant beyond reasonable doubt. The appellant is faulting the two courts below to have grounded his conviction relying on unreliable prosecution account which suffered ailments and did not prove the charge to the hilt.

At the outset, it was Ms. Sebukoto's submission that, some of the grounds of appeal raised by the appellant on factual matters are new as neither were they raised nor determined by the two courts below and since they are not based on points of law, the Court is not clothed with jurisdiction to determine them. He pointed out those grounds to include: **one,** proof if venereal disease could be detected in 3 hours after the rape incident**; two,** failure by the investigator to adduce evidence and that no cautioned statement was tendered; and **three,** that the evidence of PW1 and PW2 are at variance on the date and place of occurrence of the rape incident.

Apparently, these grounds of complaint were not raised before the first appellate court and have been raised before the Court for the first time. This Court has in numerous occasions stated that, it has no jurisdiction to deal with an issue raised for the first time which was neither raised nor decided upon by the lower courts unless it raises a point of law because the jurisdiction of the Court is confined to matters which came up in the lower court and were decided. See: **JAFARI MOHAMED VS REPUBLIC,** Criminal Appeal No. 112 of 2006, **GODFREY WILSON VS REPUBLIC,** Criminal Appeal No. 168 of 2018 and **GALUS KITAYA VS REPUBLIC,** Criminal Appeal No. 196 of 2015 (all unreported). In the

latter case confronted with an issue as to whether it can determine a matter neither raised nor decided by the High Court, we stated:

> *"On comparing the grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, grounds one to five are new grounds. As the Court said in the case of* ***Nurdin Musa Wailu v. Republic*** *supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal. This however, does not mean that the Court will not satisfy itself on the fairness of the appellant's trial and his conviction."*

Yet, in another case of **HASSAN BUNDALA VS SWAGA,** Criminal Appeal No, 386 of 2015, (unreported) when the Court was confronted with a similar situation, stated as follows:

> *"Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the first appellate court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought.*

Indeed, as argued by the learned Principal State Attorney, if the High Court did not deal with those grounds for reason of failure by the appellant to raise them there, how will this Court determine where the High Court went wrong? It is now settled that as a matter of general principle 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."

Besides, in the present case since the new grounds are matters of fact, in the case of **FELIX KICHELE AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 159 of 2015 (unreported), the Court among other things, categorically stated:

"...Indeed, there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the High Court. That is part of the reason why under section 7(6) (a) of the Appellate Jurisdiction Act, 1979 it is provided that a party to proceedings under Part X of the CPA, 1985 may appeal to the Court of Appeal on a matter of law but not on a matter of fact."

In the light of the settled position of the law, in the present matter the complaints in which the venereal disease could be detected in three hours after the rape incident; the investigator not adducing the evidence and the cautioned statement not being tendered and the variation in the evidence of PW1 and PW2 on the date and the scene of crime are disputes on facts which ought to have been initially raised and resolved at the High Court. Thus, since such factual matters do not raise any point of law, we cannot at any rate consider them at this stage. As such, grounds 1 and 2 in the memorandum of appeal and ground 1 in the supplementary memorandum of appeal will not be considered and are hereby discarded. This however, does not mean that the Court will not satisfy itself on the fairness of the appellant's trial and his conviction.

This takes us to ground 2 in the supplementary memorandum of appeal whereby the appellant is faulting the trial court to have convicted him basing on the evidence of PW1 who prior did not promise to tell the truth. It was Ms. Sebukoto's argument that, in the event PW1 gave a sworn account, her evidence cannot be invalidated merely because prior, she did not promise to tell the truth.

It is glaring at page 10 of the record of appeal that, the trial court conducted *voire dire* examination on PW1 prior to recording her sworn

evidence after making a finding that she understood the nature of the oath. That is the old procedure which ceased to be applicable after the amendment of section 127 (2) of the Evidence Act vide the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016. After the amendment, section 127 (2) of the Evidence Act now reads as follows: -

> *"127 (2) - (1) ...N/A*
>
> *(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

From the wording of the cited provision reproduced above, besides, doing away with the requirement of conducting *voire dire* test, the fact that the trial court determined PW1's ability to give evidence on oath on the basis of the practice which is obtained under the repealed law, did not invalidate that evidence. See: for instance, the cases of **SELEMANI MOSES SOTEL @ WHITE V. REPUBLIC**, Criminal Appeal No. 385 of 2018 and **BASHIRU SALUM SUDI V. REPUBLIC**, Criminal Appeal No. 379 of 2018 (both unreported). In the latter case, the Court observed as follows: -

> *" It is true that her (PW1) evidence was received on affirmation after the trial court had conducted*

a voire dire test despite the fact that it is no longer a requirement. However, we are settled in our mind that the fact that the trial court determined PW1 's ability to give evidence on oath or affirmation on the basis of the practice obtained under the repealed law, did not invalidate that evidence. This is because, as observed in ***Godfrey Wilson v. R*** *[Criminal Appeal No. 168 of 2018] and later is* ***Issa Salum Nambabuka v. R.*** *[Criminal Appeal No. 272 of 2018] (both unreported), the law is silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not"*

In this case, since the victim and a witness of tender age was examined on oath, her evidence was validly obtained and thus, the complaint in ground 2 of the supplementary memorandum of appeal is not merited. We shall revert to this point at a later stage of this judgment.

Finally, we have to determine as to whether the charge was proved to the hilt against the appellant. It is glaring that, the conviction of the appellant which was upheld by the first appellate court hinges on **One,** the credible evidence of the PW1 who told the trial court that it is the appellant who raped her in the maize farm and **two,** the appellant was not a stranger and she mentioned the appellant to be the assailant to her

grandfather (PW2) and the police officer (PW3). In this regard, this being a second appeal, it is trite law that the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless there has been a misapprehension of the evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. See - **DPP VS JAFFAR MFAUME KAWAWA** [1981] TLR 149 and **FELIX KICHELE AND ANOTHER VS REPUBLIC**, (supra).

We are also aware that the credibility of a witness, apart from that being a monopoly of the trial court only in so far as the demeanour is concerned, it can still be determined by the second appellate court when assessing the coherence of that witness in relation to the evidence of other witnesses including that of an accused person – See **SHABAN DAUDI VS REPUBLIC,** Criminal Appeal No. 28 of 2001 (unreported).

We shall be guided by among others, the above cited principles to determine the present appeal.

Having re-evaluated the evidence, we deem it crucial to state that, in order to establish the offence of statutory rape, it must be proved that the victim is below the age of 18 years which is in terms of the provisions of section 130(1) (2) (e) of the Penal Code [CAP R.E.2022]. In this regard, it is most desirable that the evidence as to proof of age be given by the

victim, parent, guardian, medical practitioner or where available by production of birth certificate. In the case of **ISSAYA RENATUS VS REPUBLIC** (supra) which was cited to us by the learned Senior State Attorney, the Court stated:

> *"There may be cases, in our view, where the court may infer on existence of any fact including the age of the victim on the authority of section 122 of the TEA which goes thus:*
>
> > *"The Court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*
>
> *In the case under our 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 any merits."***

[Emphasis supplied]

Therefore, in the present case, given that the victim testified as a witness of tender age, and in the wake of the evidence that she was a class seven pupil at Sabasaba Primary School, it can safely be inferred that the victim was below the age of 18 when she was raped by the appellant. Thus, the complaint in the ground 1 (b) of the Memorandum of Appeal is not merited.

Next for consideration is that, in sexual offences, the best evidence is the credible account of the victim who is better positioned to explain how she was raped and the person responsible. In that regard, having revisited the evidence of PW1 we are satisfied that, she was a credible witness and testified on how she was ravished by the appellant in the maize field where she went to attend the call of nature. She was coherent and consistent in her account which was not contradicted by any witness including the appellant as reflected at page 13 of the record of appeal when cross-examined by the appellant, she firmly replied as follows:

> *"I did not make noise loudly simply because "ulikuwa una kisu na ulikuwa unanuka bangi. I only cried. You are the first person to have sexual intercourse with me...."*

Upon being re-examined by the prosecutor she is on record to have said:

"I did not make noise simply because the accused threatened to kill me. The accused person handled a knife I went back at home crying".

Moreover, on arrival at home she narrated to her grandfather (PW2) that she was raped by the appellant and proceeded to take PW2 at the scene of crime which was the earliest moment. Thus, the victim was better placed to explain her ordeal in the rape incident and the person responsible. See **- SELEMANI MAKUMBA VS REPUBLIC** (supra) and **EDSON SIMON MWOMBEKI VS REPUBLIC,** Criminal Appeal No. 94 of 2016 (unreported). Apart from the victim's credible account, her testimony was corroborated by PW2 who took trouble to visit the scene of crime and the police officer PW3 who inspected her private parts and found blood stains and whitish discharge. This was confirmed by PW4, the medical doctor who examined her and found bruises which in our considered view is proof that, there was indeed actual penetration on the vagina of the victim. Therefore, regardless of the appellant's claim that on the fateful day he was not at the scene of crime as he was resting at his residence after laying bricks, the credible account of PW1 who was familiar to the appellant points to his guilt being the one who ravished the victim and no other. This renders the 5th ground in the supplementary memorandum of appeal not merited.

Thus, in the wake of credible account by PW1, PW2, PW3 and PW4 we find no cogent reasons for not believing the same as it points to the guilt of the appellant and as such the offence charged was proved to the hilt against the appellant. In view of what we have endeavoured to discuss we do not find cogent reasons to vary the concurrent verdicts of the courts below. Thus, save for ground 3 in the supplementary memorandum, we find the appeal not merited and proceed to dismiss it.

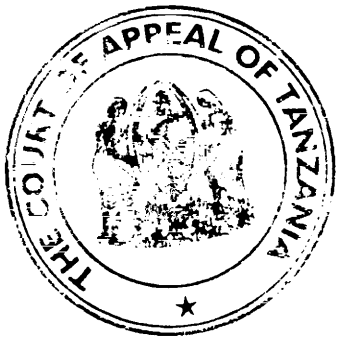
DATED at **MWANZA** this 12th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2022 in the presence of appellant in person and Mr. Deogratius Richard Rumanyika, learned State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL