IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI., J.A. And RUMANYIKA., J.A.)

CRIMINAL APPEAL NO. 361 OF 2020

DEO JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]

(Masabo, J.)

dated the 15th day of July, 2020

in

HC. CRIMINAL APPEAL No. 57 of 2020

JUDGMENT OF THE COURT

8th & 24th February, 2022

KITUSI, J.A.:

The appellant Deo John appeals from the judgment of the High Court Dar es Salaam Registry, confirming the conviction of the appellant, earlier entered by the District Court of Mvomero in Morogoro. Before that court, the appellant faced a charge of rape under section 130 (1) (2) (e) of the Penal Code, it being alleged that he had carnal knowledge of a seven-year-old girl who testified as PW1.

Stamili Katea (PW2) stated that on the date of the alleged rape at around 18.00 hours, she sent PW1, the fourth born of her six children, to a nearby shop to buy kitchen salt. However, the little girl did not

immediately return home, causing anxiety and suspicion on PW2. But she waited, hoping that her daughter would return.

At 19.00 hours, when PW2 could not bear it any longer, she went out to look for her daughter, beginning with the shopping centre where she was informed by PW5, the shop owner, that the girl had left much earlier. PW2 continued with the search but when it bore no results, she reported the disappearance of her daughter to the village authorities and went home. According to PW2, her daughter returned home at 21.00 hours and gave an account of what had taken place while at the shop and subsequently.

PW1 said she found the appellant at the shop buying cigarettes, and that he offered her a hand in effecting the purchase of the kitchen salt because she was too short to reach the shop counter. PW5 confirmed those two sets of facts and the fact that he had left the appellant outside the shop with PW1, when he went behind the shop. According to PW1, as she was setting out for home, the appellant, playing the Good Samaritan again, told her that she was taking a wrong route, so he suggested to her an alternative. While walking along the route that had been suggested by the appellant, they found themselves at a bushy area according to PW1, where the appellant took hold of

PW1, undressed her underwear before he removed his own, laid her down on her back and penetrated her private parts with something she did not see. Out of the pain she felt, PW1 let out a cry which was, however, discouraged by a slap and a throttle of her neck by the appellant. Fortunately, a Maasai passing by intervened and told the appellant to let go of PW1, and he obeyed. The appellant dressed up and left, and so did PW1.

At home when PW2 demanded PW1 to explain her disappearance she disclosed the ordeal she had suffered in the appellant's hands. PW2 and her neighbor PW4 checked the girl's private parts and detected blood stains and feaces within her underwear. PW2 reported the matter to the police, obtained a PF3 and had the girl examined by a medic, Fatuma Yusuf Msuya (PW3). The medical finding was that PW1's hymen had been perforated and her vagina bruised by a blunt object.

When cross-examined by the appellant, PW2 admitted that the said appellant was not a stranger to her as she used to see him around, but she denied the appellant's allegation that she had ever quarreled with him.

The alleged quarrel with PW2 turned out to be the mainstay of the appellant's defence when it was his time to tell his story. He said he

made and sold charcoal for a living and that after the day's work on the material date he went home, ate his supper and went to hang around at a coffee centre within the village. Later that evening when he was in bed, he was arrested by a mob of people who wanted to know how he had spent his evening. He told them about being at the coffee area after work, but the people did not believe his story because they questioned why he did not turn up like others when an alarm was raised earlier upon disappearance of PW1. So, the appellant maintained that PW2 must have been behind his being a suspect. In addition, going by his account of how he had spent his day, the appellant was disputing having been at the scene of the crime at the time material to this case.

In responding to questions put to him by the prosecution, the appellant admitted having gone to PW5's shop and seeing PW1, but he pointed out that no one testified to seeing him leave with that girl. He concluded by saying that all this could be prompted by the fact that everybody in the village, hates him.

The trial court found PW1's account coherent and that it was materially supported by PW5. It convicted the appellant and sentenced him to 30 years for the rape of a seven-year-old girl.

This finding was sustained by the High Court, Hon. Masabo, J, who found PW1's account of the agonizing sexual intercourse corroborated by her mother PW2 and PW4 who checked her private parts immediately and heard her mention the appellant as the perpetrator. Also, it found support in the evidence of PW5 who saw the appellant and PW1 at his shop, and that of PW3 who conducted medical examination on PW1.

However, the High Court faulted the trial court on the sentence. Citing section 130 (3) of the Penal Code, which provides for imposition of life imprisonment to a person found guilty of raping a girl under the age of ten years, the learned judge substituted the sentence of 30 years with that of life imprisonment.

This appeal seeks to challenge the decision of the High Court for sustaining the conviction and for enhancing the sentence.

The appellant has presented a total of 21 grounds of appeal; 17 in the original memorandum of appeal and 4 in his supplementary memorandum of appeal. The appellant had also lodged written arguments in support of his appeal. At the hearing he simply adopted the two sets of memoranda of appeal as well as the written arguments and rested his case.

Mr. Fadhili Mwandoloma, learned Senior State Attorney, appearing for the respondent Republic along with Ms. Upendo Mona, learned State Attorney, resisted the appeal starting by addressing the grounds in the supplementary memorandum of appeal. The rationale for taking that course, he submitted, is that if we go along with his argument, a good deal of the grounds in the original memorandum of appeal are new, therefore do not qualify to be addressed by the Court unless they raise matters of law. We readily agreed to his scheme.

We begin with ground 1 in the supplementary memorandum of appeal, which attacks the two courts below for not observing the dictates of section 127 (2) of the Evidence Act, Cap 6 ('the TEA'). This issue is also raised in grounds 5 and 6 of the original memorandum of appeal. In the appellant's written arguments, he faulted the two courts below for relying on PW1 whose evidence was recorded in violation of the procedure provided in that section of the TEA. Citing the provisions of section 127 (2) of the TEA as amended by the Written Laws (Miscellaneous Amendments (No. 2) (Act No. 4 of 2016), which we shall henceforth refer to as Act No. 4, and the case of **Godfrey Wilson V. Republic,** Criminal Appeal No. 108 of 2018 (unreported), he submitted that for the trial court to comply with the law reflected in that case, PW1

should have been made to promise to tell the truth and not lies. It was not enough, he submitted, for PW1 to promise to tell the truth as she did, without qualifying that she would not tell lies. He submitted that consequently the evidence of PW1 has no evidential value and should be expunged.

In relation to that issue touching on the procedure in recording the evidence of PW1, Mr. Mwandoloma submitted that her promise to tell the truth was sufficient even though she did not go further to declare that she would not tell lies. He argued that, in any event, the appellant was not prejudiced by the omission. The learned Senior State Attorney cited the case of **Faraji Said V. Republic**, Criminal Appeal No. 172 of 2018 (unreported), to support his position.

We shall determine this ground instantly because it has a bearing in the determination of some of the grounds of appeal that follow. Since the coming into force of Act No. 4 on 8th July, 2016, witnesses of below the age of 14 years who used to be subjected to the procedure of voire dire, only need to *"....promise to tell the truth to the court and not to tell lies".*

In this case, right at the beginning of her testimony, PW1 was recorded saying: -

"PW1 I promise to speak the truth"

The appellant's central argument is that this promise was insufficient for not making a corresponding promise not to tell lies. We partly agree with the appellant. So far, the settled law is that where a witness of tender age does not give evidence on oath or affirmation, he or she must promise to tell the truth and undertake not to tell lies. See our decision in the case of **Issa Salum Nambaluka V. Republic**, Criminal Appeal No. 272 of 2918 (unreported). Although that is what the letter of the law stipulates, we take the instant complaint by the appellant to be too much of splitting of hairs and unacceptable. We agree with the learned Senior State Attorney that the appellant was not prejudiced and, in any event, if PW1 told any lie in her testimony, the appellant had an opportunity to reveal it in cross-examination as well as in his defence. Besides, we are totally unable to share with the appellant the view that a promise to tell the truth is not an assurance enough if there is no promise not to tell lies because logically, the promise not to tell lies is inherent in the promise to tell the truth. The principle in **Goodluck Kyando V. Republic** [2006] T.L.R 363 that every witness is entitled to credence applies, in our view, even to witnesses of below the age of 14 years unless there are suggestions to the contrary. For those reasons we dismiss this ground for lacking merit.

The next point, raised by the appellant in ground 2 of the supplementary memorandum of appeal, is that the evidence of PW2, PW3 and PW5 cannot stand alone to prove the offence of rape without the evidence of PW1. In his written arguments the appellant pointed out that PW2 would not link him with what she observed in PW1's private parts, without the evidence of PW1 telling who caused those injuries in her. The same argument was put forward in relation to the medical findings by PW3. As for PW5, the appellant argued that he did not see him leave the shop with PW2.

The response of Mr. Mwandoloma on this point was brief. He submitted that PW2, PW3 and PW5, like every witness, are entitled to credence. He cited the case of **Goodluck Kyando** (supra) and **Mathias Bundala V. R** Criminal Appeal No. 62 of 2004 (unreported).

With respect to the appellant, having failed in getting PW1's evidence expunged or discredited as concluded in ground 1 of the supplementary memorandum of appeal and grounds 5 and 6 in the original memorandum, the instant argument that PW2, PW3 and PW5 could not be standalone witnesses, rests on very thin grounds. Instead of looking at the pieces of evidence given by these witnesses as referring to isolated incidents, we see them as building a common story. PW2 sent out PW1 to the shop but she

never returned home immediately until late in the night when a search for her had failed. PW5 the shop owner, saw the appellant and PW1 at his shop. PW1 stated that she walked away from the shop in the company of the appellant taking an unfamiliar route suggested to her by the appellant, and somewhere along the way he had forced sexual intercourse with her. She walked home bleeding and told PW2 and PW4 that it was one Deo the appellant, who had raped her. PW2 and PW4 checked PW1's private parts and saw blood stains. Later when PW3 made medical examination of PW1 she confirmed what PW2 and PW4 had seen earlier. This chronology has no ring of concoction, in our view, and it makes us agree with Mr. Mwandoloma that these witnesses are entitled to credence. We consider the appellant's allegation of bad blood with PW2 and his later assertion that he is hated by everybody in the village, as being sweeping statements that would not justify us holding PW2, PW3 and PW5 not agents of truth. We also consider the appellant's alibi too improbable in view of the undisputed fact that he was at the shop at the very time PW1 was there. This ground has no merit and we dismiss it for that reason.

Then, in ground 3 of the supplementary memorandum of appeal, the appellant raised an issue with the evidence of PW1, PW2 and PW3 failing to identify him on the dock by touching. Mr. Mwandoloma argued that this

ground raises a new matter and invited us to ignore it because it does not raise a point of law. With respect, not only is this ground new as correctly argued by the learned Senior State Attorney, but it is, in our view, misconceived also. PW1 stated in her testimony that she knew the appellant as Deo, and PW2 testified that the appellant was a familiar person to her, although she denied having quarreled with him in the past. Even the appellant's suggestion that there existed a misunderstanding between him and PW2, which we have rejected, goes to confirm the fact that he was not a stranger to her. Identification by touching would, in the circumstances, be uncalled for, more so considering that dock identification is always of insignificant value.

Mr. Mwandoloma drew our attention to other new grounds which he also invited us to ignore. These are grounds 2, 4, 6, 7, 8, 9, 10, 15 and 16 in the original memorandum.

We are aware of the settled law that this Court may not determine grounds of appeal which were not raised and determined by the High Court or a Resident Magistrate's Court exercising extended jurisdiction, unless such grounds raise points of law. See **Dickson Anyosisye V. Republic,** Criminal Appeal No. 155 of 2017 and **Omary Saimon V. Republic**, Criminal Appeal No. 558 of 2016 (both unreported).

With respect however, some of the grounds that the learned Senior State Attorney referred to as new, are not entirely new. This is because the 4th and 5th grounds of appeal at the High Court faulted the trial court for not objectively appraising the evidence for the prosecution, same as grounds 2 and 4 in the original memorandum of appeal. These grounds are, in essence, similar except their wording, so they will be determined in due course. Ground 6 is on compliance with section 127 (2) of TEA and it has already been determined along with grounds 5 in the original memorandum of appeal and 1 in the supplementary memorandum.

Grounds 7 and 8 raising the issue of DNA test are totally new and do not raise a point of law, so they will not be considered. Grounds 9 and 10 seeking to fault the High Court for not concluding that there was insufficient evidence of visual identification are also new. Similarly ground 15 which draws our attention to an error on the date of recording the appellant's plea is new, even though it only needed us to go through the original record to satisfy ourselves that the proceedings were credible and unimpeachable. The 16th ground raises issue with the trial magistrate's citation of section 230 of the Criminal Procedure Act (CPA) in inviting the appellant to state whether he would testify on oath or not upon closure of

the prosecution case. Certainly, this is a new ground of appeal but it raises a point of law, which we are going to deal with immediately.

The appellant did not submit on ground 16, neither did the learned Senior State Attorney. We understand the legal requirement, upon closure of the case for the prosecution, for a trial magistrate to inform the accused of options available to him under section 231 of the CPA. In this case, instead of citing section 231 of the CPA, the learned trial magistrate inadvertently cited section 230 of the CPA. Nonetheless, we find the complaint to be based on a cosmetic error because what matters most is that the appellant understood the nature of the magistrate's address to him and what it was required of him, and is on record as having stated: -

> *"Accused: I shall defend myself under oath. I intend to call no witness. I pray to proceed with the defence".*

Case law is settled that not every contravention of the CPA will lead to invalidation of proceedings. See the **DPP V. James Msumule @ Jembe and 4 Others,** Criminal Appeal No. 397 of 2018 and; **Yanga Omari Yanga V. Republic,** Criminal Appeal No 132 of 2021 (both unreported). We hold a similar view in relation to ground 16 of appeal, with the result that we dismiss it.

Lastly, we consider grounds 3, 11, 12, 13 14 and 17 of the original memorandum of appeal. The first five grounds of appeal attack the decision of the two courts below for being based on contradictory evidence which lacked credibility. Ground 17 faults the two courts for convicting and sentencing the appellant in a case that was not proved beyond reasonable doubt because the Maasai was not called to testify for the prosecution. We shall consider these grounds simultaneously with grounds 4 and 5 on appraisal of evidence, which we had promised to turn to later.

In the written arguments, the appellant sought to shoot down PW2's evidence for purporting to corroborate PW1 whose evidence needed corroboration. He drew our attention to the evidence of PW5 and submitted that the learned High Court judge erred in saying that he saw the appellant leave with PW1. Turning to PW3, he submitted that the medical findings posted in the PF3 had nothing to do with him as the alleged perpetrator.

Responding, Mr. Mwandoloma submitted that the case was proved against the appellant beyond reasonable doubt, on the basis of the evidence of PW1, PW2, PW4 and PW5. He went on to submit that PW5 stated that he saw the appellant with PW1. He also submitted that PW1 named the appellant at the earliest opportunity and in support of his

argument, he cited the case of **Godfrey Gabinus @ Ndimba and 2 Others v. Republic,** Criminal Appeal No. 273 of 2017 (unreported). The learned Senior State Attorney wound up by submitting that the appellant's defence of bad blood was considered to be an afterthought and rejected. He cited the case of **Martin Misar v. Republic,** Criminal Appeal No. 428 of 2016 (unreported).

Mr. Mwandoloma further submitted that every witness is entitled to credence as argued in the previous grounds of appeal. He submitted that PW1, PW2, PW3, PW4 and PW5 were all credible witnesses since nothing had been said to suggest otherwise, the appellant's allegation of bad blood having been rejected, as shown above.

We should commence from the premise that we have already concluded that PW1's evidence was correctly recorded after she promised to tell the truth, so the appellant's argument that her evidence required corroboration no longer holds. In addition, we have considered the threads of evidence as provided by PW1, PW2, PW3, PW4 and PW5 as blocks that have built a common strong story. The appellant's defence remained hollow in view of the prosecution evidence as well as his own, placing him at PW5's shop at the same time as PW1. Our conclusion is that these last grounds of appeal have no merits. We accordingly dismiss them.

As for the sentence, we respectfully agree with the learned judge that the sentence that had been imposed against the appellant was illegal because section 130 (3) of the Penal Code provides life imprisonment as the sentence for a person convicted of rape of a girl of below the age of ten years. See also our decision in the case of **Hamisi Maliki Ngoda v. Republic,** Criminal Appeal No. 7 of 2017 (unreported).

In the end, we hold the entire appeal devoid of merits and we dismiss it.

DATED at **DAR ES SALAAM** this 22nd day of February, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered on 24th day of February, 2022 in the presence of the appellant in person, via video link from Ukonga Prison and Ms. Dhamiri Masinde, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL