IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 320 OF 2019

WILLIAM NTUMBI .....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

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

(Mashauri, J.)

dated the 2nd day of July, 2019
in
RM. Criminal Appeal No. 121 of 2018

.....

JUDGMENT OF THE COURT

15th & 25th February, 2022

KIHWELO, J.A.:

The appellant, William Ntumbi was arraigned in the Resident Magistrate's Court of Katavi at Mpanda for the offence of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code). It was alleged that on 29.03.2017 at or about 11:00 HRS at Kasimba area within Mpanda Municipality in Katavi Region did have sexual intercourse with a girl aged 5 years, who we shall henceforth identify her as "the victim", for purposes of concealing her identity.

The trial court upon hearing the prosecution and the defence case, was impressed by the prosecution's version that the case against the appellant was proved to the hilt. Accordingly, the trial court found the appellant guilty as charged, convicted him and subsequently sentenced him to life imprisonment.

In protesting his innocence, the appellant filed his first appeal in the High Court in RM. Criminal Appeal No. 121 of 2018 whose hearing on merit was conducted on 27.05.2019, but unfortunately, the appeal was dismissed on account of being devoid of merit. Still disgruntled the appellant lodged this second appeal.

The prosecution case which was believed by the trial court was founded on the evidence of five (5) witnesses namely Jovita Senka (PW1), the victim (PW2), Kevi Mtisa (PW3), Sofia John (PW4) and Abdallah Mohamed Chamwazi (PW5). On the adversary, the defence had the appellant as the only witness.

The facts of this case whose story is very sad and disturbing can be ascertained from the record. It was the prosecution's case that on the fateful day, 29.03.2017 at around 11:00 HRS, PW1 sent the victim along with another child (PW3) to a nearby shop so as to buy buns and on their way

back the duo came across the appellant who allured the victim to go around with him in order to collect some tins but the victim declined the suspicious invitation. It is further alleged that, the appellant who could not take no for an answer, told PW3 to take home those buns and then forcibly took the victim to a deserted building around and upon arrival at that building the appellant undressed himself and the victim and then raped her. As if that was not enough, the appellant crucified the victim by forcing her to lie on her back and then placed bricks on top of each of her hands. On his part PW3 who was shocked and terrified by what he saw happening to the victim, hurriedly rushed back to PW1 and informed her that the victim was being killed. PW1 who by then was with PW4 shockingly left with PW3 and went straight towards where the victim was being "killed". Upon arriving at the deserted building which was about 100 meters away from PW1's house the appellant jumped through the window and started running while his trouser was falling loose by his knees and was forced to hold it with his hands. PW1 started yelling for help while pursuing the appellant. As a result people responded and the appellant was arrested instantly and he confessed to have raped the victim. He was then taken to the police station for further questioning.

The victim was rescued by taking out bricks which were placed on top of both her hands which were spread apart. PW1 examined her and found blood and semen on her private parts. The victim was then taken to the police station where a PF3 was issued before she was later taken to hospital for medical examination whereby PW5 medically examined the victim's private parts and found out that there had been forceful penetration into her vagina and her underpants had blood stains. Furthermore, PW5 observed that the victim's private parts had bruises, blood stains and the hymen was raptured. However, laboratory test revealed that there were no spermatozoa or any sexually transmitted disease including HIV. PW5 then filled the PF3 which was later produced in court and admitted in evidence as exhibit P1.

In his sworn defence testimony, the appellant gallantly distanced himself from the accusations made against him by the prosecution. He said that on 29.03.2017 on his way to *uwanja mpya* he met PW1 near the District Commissioner's Office and PW1 asked the appellant whether he had come across two kids and the appellant's reply was no. Shortly after leaving PW1, the appellant was arrested by four police officers who were accompanied by PW1 and he was taken to the police station where he was kept in custody. Essentially, the appellant denied any involvement in the alleged offence of

rape and instead blamed PW1 for couching the victim so that she could implicate him.

As hinted earlier on, at the height of the trial, it was found that, on the whole of the evidence, the prosecution case was proven to the hilt and therefore, the appellant was convicted and sentenced as stated above.

In this appeal before us, the appellant has amassed eight (8) grounds of grievance. We shall only give the gist of each ground so as to avoid reproducing them. They go thus:

1. *That, the first appellate court erred in upholding the appellant's conviction despite the fact that the investigator was not summoned to testify before the trial court.*
2. *That, the first appellate court erred in upholding the appellant's conviction relying on the evidence of PW2 (the victim) whose evidence was improperly received.*
3. *That, the first appellate court erred in upholding the appellant's conviction despite the fact that the trial magistrate did not cite section 235 of the Criminal Procedure Act, Cap R.E. 2002 now R.E. 2019.*
4. *That, the first appellate court erred in upholding the appellant's conviction while there were contradictions on the age of the victim.*

5. *That, the first appellate court erred in upholding the appellant's conviction basing upon the hearsay evidence of PW3 and PW4 which was not corroborated.*
6. *That, the first appellate court erred in upholding the appellant's conviction based upon the evidence of PW2 and PW5 along with exhibit P.1 without conducting any DNA and test for sexually transmitted diseases.*
7. *That, the first appellate court erred in upholding the appellant's conviction basing on the evidence of PW1, PW2, PW3 and PW4 who were family members.*
8. *That, the first appellate court erred in upholding the appellant's conviction while the prosecution did not prove the case beyond reasonable doubt.*

At the hearing, before us, the appellant was fending for himself, unrepresented, whereas Ms. Safi Kashindi Amani, learned State Attorney stood for the respondent. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submissions of the learned State Attorney, if need would arise.

In response, Ms. Amani, prefaced her submission by supporting both the conviction and sentence meted against the appellant. The learned State Attorney essentially argued that the appellant has preferred eight (8) grounds of appeal. However, looking closely at those grounds of appeal, it is conspicuously clear that grounds 3, 4, 5, 6 and 7 are new grounds. All in all, grounds 3 and 4 though new grounds, but since they raise points of law, then this Court has jurisdiction to entertain them. As for the rest of the new grounds, she said, this Court has no jurisdiction to entertain them, reliance being placed on the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported).

At the outset, we wish to state as the learned State Attorney rightly stated that, it is now settled and clear that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided, not on matters which were neither raised nor decided by either the trial court or the High Court on appeal. There is a long chain of authorities of this Court in this matter- see, for example, **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (unreported) and **Godfrey Wilson** (supra).

The mandate of this Court is, in terms of sections 4(1) and 6(7)(a) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] read together with Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 limited to matters raised and adjudicated by the High Court and subordinate courts with extended jurisdiction only. The logic is simple, we cannot therefore, completely render a decision on any issue which was never decided by the High Court. See, **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 and **Richard Mgaya @Sikubali Mgaya v. Republic**, Criminal Appeal No. 335 of 2008 (both unreported). It is for the above reason that ground five, six and seven will not be considered by this Court.

Ms. Amani, then moved to discuss first the two grounds of appeal raised which although were new grounds they raise matters of law. Starting with ground 3 in which the appellant complains about non-compliance with section 235 of the CPA, the learned State Attorney contended that, this ground has no merit for the reasons that the trial magistrate properly convicted the appellant in terms of the requirements of the law. She referred us to pages 33 and 34 of the record of appeal where the trial magistrate clearly indicated the provisions upon which the appellant was convicted. Elaborating further, the learned State Attorney argued that, in any case

section 235 does not govern conviction. She rounded up by submitting that this ground has no merit.

In response to the fourth ground of appeal in which the appellant faulted the first appellate court for dismissing the appeal while the prosecution's evidence was marred by contradictions in as far as the age of the victim was concerned, Ms. Amani, submitted while referring us to page 12 of the record of appeal that, PW1 testified that the victim was born on 05. 11. 2011 and therefore, at the time of the incidence on 29.03. 2017 the victim was under ten (10) years of age and PW1 being the mother of the victim was the appropriate person to prove the age of the victim. When prompted by the Court as to why PW1 stated at the same page 12 of the record of appeal that the victim was three (3) years old, Ms. Amani, was quick to respond that PW1 being an ordinary village woman might not have been very conversant in arithmetic but she could remember very well the dates when the victim was born.

We are able to say at the outset, with respect, that the appellant's complaint as regards the alleged contradictions on the age of the victim as rightly found by the two courts below is decidedly thin. Also, in urging us to say that the first appellate court erred in not demanding production of the

birth certificate of the victim in order to resolve the alleged contradictions between the evidence of PW1 and PW2, the appellant was truly scraping the barrel. It is a wild and barren theory, without the slightest foundation in the evidence on record as we shall explain.

It cannot be gainsaid that, the law requires that in statutory rape cases like in the instant case, the age of the victim must be proved. Ms. Amani, referred us, and rightly, so to page 17 of the typed decision in **Robert Andondile Komba v. Director of Public Prosecutions**, Criminal Appeal No. 465 of 2017 (unreported) where the Court underlined in imperative terms that in cases of statutory rape, age is an important ingredient of the offence which must be proved. There is in this regard an array of authorities to support this settled position of the law, see for example **Rwekaza Bernado v. Republic**, Criminal Appeal No. 477 of 2016, **Mwami Ngura v. Republic**, Criminal Appeal No. 63 of 2014 and **Solomon Mazala v. Republic**, Criminal Appeal No. 136 of 2012 (all unreported).

Now the issue before us is whether the age of the victim in the instant appeal was not proved for failure to tender the birth certificate as complained by the appellant who placed heavy reliance on the alleged contradiction between the testimony of PW1 and PW2. We think that, this ground should

not detain us, for, as rightly submitted by Ms. Amani, PW1 who is the mother of the victim testified at page 12 of the record of appeal that the victim was born on 05.11. 2011 which proved that the victim was below ten (10) years old at the time of the incidence. There is a considerable body of case law to show that this Court has emphasized in imperative terms that proof of age may be by parents, medical practitioners or where available, by a birth certificate- see for example, **Bashiri John v. Republic**, Criminal Appeal No. 486 of 2016, **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 and **George Claud Kasanda v. Republic**, Criminal Appeal No. 477 of 2016 (all unreported). We therefore, find that this ground is devoid of merit.

As for ground one which relates to the complaint that the police who investigated the crime was not called to testify, the learned State Attorney was fairly brief, she contended that the law does not specify any particular number of witnesses required to prove a fact and to facilitate the appreciation of the proposition put forward, she referred us to section 143 of the Tanzania Evidence Act, [Cap 6 R.E. 2019] (the EA) and the case of **Yohanis Msigwa v. Republic** [1990] TLR 148. She further argued that it is upon the prosecution to choose which witness to produce and which evidence to tender.

We wish to reaffirm the elementary principle of law under section 143 of the EA as rightly submitted by the learned State Attorney that, there is no particular number of witnesses required to prove a fact as it was aptly discussed in **Yohana Msigwa** (supra), **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007 and **Godfrey Gabinus @Ndimbo and Two Others v. Republic**, Criminal Appeal No. 273 (both unreported). The court can act even on the evidence of a single witness if that witness can be believed given all surrounding circumstances. The truth is not discovered by a majority of votes. One solitary credible witness can establish a case beyond reasonable doubt provided that the court finds the witness to be cogent and credible and the case in point is the victim of sexual offence as laid down in the landmark case of **Selemani Makumba v Republic** [2006] TLR 379.

We think, with respect, that, the complaint by the appellant that the police investigator was not summoned by the court to testify at the trial affected the weight of the prosecution's case is decidedly misconceived and thin. Our settled view is that in the circumstances of this case the fact that the police investigator did not testify in court did not water down the case for the prosecution. This complaint therefore has no merit and we equally dismiss it.

In response to the second ground of appeal on the complaint that the *voire dire* was improperly conducted, the learned State Attorney was fairly brief, she admittedly contended that the trial court abdicated its responsibility of conducing the *voire dire,* and while referring us to page 14 of the record of appeal she argued that the trial Magistrate left the Public Prosecutor to ask the victim (PW2) to promise whether she will tell the truth and that this was contrary the requirement of the law in particular section 127 (2) of the EA. On that account, the learned State Attorney argued that the testimony of PW2 has no evidential value and implored us to expunge it from the record.

We have examined the record of appeal in light of the submissions of the learned State Attorney in response to this ground, and we find that there is considerable merit in those submissions. We therefore think that, it is appropriate here to recapitulate the provision of section 127 (2) of the EA which provides:

> *"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."*
> [Emphasis added]

Quite clearly, the provision above is very categorical that a child of tender age will, before giving evidence under circumstances permitted in that provision promise to tell the truth to the court which means that it is upon the trial court to ensure that the child promises to tell the truth and not lies. That duty is not cast upon the prosecution and therefore it is the trial court which has to make sure that the process is conducted before examination in chief. In the instant case this did not happen and for the sake of clarity we wish to let the record of appeal at page 14 speak for itself:

> *"**PW2:** "Victim" 5 YEARS OLD, KASIMBA*
>
> ***PP:** "Victim" will you tell the truth.*
>
> ***PW2:** Yes, I will tell the truth in my evidence.*
>
> ***Sgd: Odira A. Amworo***
>
> ***RM***
>
> ***7/8/2017"***

The excerpt above from the record of proceedings is a clear testimony that the trial court abdicated its responsibility to the Public Prosecutor contrary to the requirement of the law and as it can be conspicuously seen, before evidence in chief began the trial court did not do anything. This ground of complaint therefore has merit.

We accordingly expunge the evidence of PW2 from the record. As to the consequences that may befall the prosecution case following the expunging of the evidence of PW2, we reserve the answer to this question for now for reasons that will become apparent shortly.

Finally, as regards to the eighth ground of complaint, that the prosecution did not prove the case to the required standard, the learned State Attorney was fairly brief and argued that this ground of complaint has no merit as the prosecution proved the two ingredients of statutory rape which is age below eighteen years and penetration. Illustrating, she contended that PW1 proved the age of the victim to be 5 years at the time of the incidence while PW5 at page 20 of the record of appeal proved penetration and that the evidence of PW5 was corroborated by that of PW1 and PW4 who saw the appellant running away from the scene of crime.

In a short rejoinder, the appellant being a layperson and unrepresented did not have much to say. He briefly submitted that the case against him was not proved beyond reasonable doubt as age of the victim was not proved, the investigator did not come to testify and also PW5 who testified that he observed bruises in the victim's private parts did not

medically examine the appellant. He therefore implored us to consider his grounds of appeal, allow the appeal, quash the conviction and set him free.

The duty of the prosecution to prove the case beyond reasonable doubt is universal. In **Woodmington v. DPP** (1935) AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it. We are fortified in this view to refer to the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 where the Court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

We hasten to state at this point that, we are firm that the prosecution proved the case to the hilt. As rightly argued by the learned State Attorney, the prosecution in the instant case was required to prove age and penetration and these were proved by PW1 who testified that the victim was born on 05.11.2011 and therefore, at the time of the incidence was 5 years

old. Furthermore, PW5 proved that upon medically examining the victim he observed that there was forceful penetration into the victim's vagina. He further observed that the underpants of the victim had blood stains and the hymen was raptured. This was corroborated by the evidence of PW1 and PW4 who found the appellant running away from the scene of the crime while holding his trouser which was falling.

Let us now revert to the effect of the evidence of PW2 which we expunged for being irregularly taken. This is not the first time that a court arrived at a conviction without the testimony of the victim of the crime. This Court has pronounced itself in numerous occasions that conviction can be sustained independent of the evidence of the victim and there is a litany of cases where the testimonies of child victims of tender years have been expunged for non-compliance with the *voire dire* test and yet the courts arrive at a conviction independent of that evidence- see, for example, **Khamis Samwel v. Republic**, Criminal Appeal No.320 of 2010 and **Harrison Mwakibinga v. Republic**, Criminal Appeal No. 196 of 2009 (both unreported).

In the light of the above considerations, we have come to the settled conclusion that the appeal is devoid of merit. Accordingly, we dismiss it. It is so ordered.

DATED at **MBEYA** this 25th day of February, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 25h day of February, 2022 in 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.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL