IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 91 OF 2020

HURUMA SIBONIKE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Mbeya with Extended Jurisdiction at Mbeya)

(Herbert, SRM, Ext. Jur)

dated the 15th day of October, 2019

in

Criminal Appeal No. 48 of 2018

.....

JUDGMENT OF THE COURT

02nd & 7th December, 2022

MWAMPASHI, J.A.:

The appellant, Huruma Sibonike, was charged with and convicted of the offence of rape contrary to sections 130 (1) and (2)(e) and 131 (1) of the Penal Code by the Court of the Resident Magistrate at Mbeya (the trial court). He was sentenced to life imprisonment and in addition, he was ordered to pay Tshs. 1,000,000/= to the victim as compensation. Aggrieved, he appealed to the High Court and his appeal was transferred to the Court of the Resident Magistrate of Mbeya and was heard by G.H. Herbert, SRM (Ext. Jur.) (1st appellate court) who dismissed it for lack of merit, hence the instant second appeal.

It was the prosecution allegations before the trial court that, on 22.07.2017 at Mtakuja area within the District and Region of Mbeya, the appellant had an unlawful sexual intercourse with "L.T", a nine (9) years old girl (name withheld) hereinafter to be referred as PW2 or the victim.

The appellant having pleaded not guilty to the charge, the prosecution sought to prove it through the evidence of five (5) witnesses and two (2) documentary exhibits, that is, a PF3 and the appellant's cautioned statement which were tendered and admitted in evidence as exhibits P1 and P2 respectively. On the other hand, the appellant was a sole witness in his defence.

The background to this case is as follows: PW2 was a standard III pupil at Mbalizi Moja Primary School. On weekends, she used to attend choir rehearsals and bible studies at the Moravian Yeriko church where the appellant was one of the instructors. The disclosure of the incident in question was ignited on 22.07.2017 when PW2 reported late for the rehearsal which was noticed by one of her instructors in the name of Teacher Nyilenda. Having noticed it, Teacher Nyilenda sent PW1's brother, one Vincent, to report the matter to their mother. It happened that Vincent did not report the matter to their mother on that same day but he did so the next day, that is, 23.07. 2017. According to the mother, Judith Fungo who testified as PW1, after the matter had been reported to her by Vincent, she questioned PW2 as to why she was late to the church and that is when

PW2 told her that the reason behind was the appellant who had taken her to his house and raped her.

The evidence from PW2 was to the following effect; On the material day he had attended the morning rehearsals and after lunch break, she was on her way back to church when she met the appellant. They together went to the church and after getting at the gate, the appellant briefly got in and when he came out, he told PW2 that her fellow children had not yet arrived. He therefore asked her to accompany him at his house. Upon getting at the appellant's house, the appellant showed PW2 some animal pictures before he took her to his bed where he undressed her while telling her that he was in love with her. The appellant then took out his penis and inserted it into PW2's vagina. Thereafter, at about 18:00 hours, PW2 and the appellant got back to the church where they found Teacher Nyilenda who became so angry demanding explanations why she was so late. PW2 told him that she was late because the appellant had asked her to accompany him to his house. It was at this point when Teacher Nyilenda sent for PW2's brother Vincent and asked him to report the matter to their mother (PW1).

PW2 further testified that, the matter was not reported to their mother by Vincent on that same day because when they got home, their mother (PW1) was asleep. The matter was reported to PW1 the next day and that when PW2 told her what the appellant had done to her, PW1

informed PW2's father and aunt about what had befallen PW2 and the case was reported to the police where a PF3 was issued and PW2 was sent to Ifisi Hospital for medical examination. According to Dr. Ombeni Eiiud Chimbe (PW5) who examined PW2, his observation was to the effect that PW2's hymen was open. A PF3 filled by PW5 to that effect was tendered in evidence by him and admitted as exhibit P1.

According to H 669 D/C Wenceslaus who testified as PW5, after the case had been reported at Mbalizi Police Station, he was assigned to conduct investigations of the case. That was on 25.07.2017. Thereafter, he summoned PW2 who took him to the appellant's home and after arresting the appellant, he requested WP 9471 D/C Zaina (PW4) to record the appellant's cautioned statement. On her part, PW4 testified that, after being requested to record the appellant's cautioned statement by PW5 and before recording it, she informed the appellant his rights. The cautioned statement in question was tendered and admitted in evidence as exhibit P2 without any objection from the appellant.

In his very short sworn defence, the appellant's complaint was that he was forced to admit to have committed the offence in question by the police and also that he was not afforded the right for his statement to be recorded in the presence of his relatives.

After a full trial, the trial court found it was proved beyond reasonable doubt that the appellant raped PW2. Basing on PW2's evidence,

the appellant's admission as evidenced in the cautioned statement (exhibit P2) and also basing on the fact that during the preliminary hearing the appellant had admitted to have taken PW2 to his house and then to his bed where he raped her, the trial court found the appellant guilty and, as we have earlier alluded to, it convicted and sentenced him accordingly. Unfortunately, the appellant's appeal against the trial court conviction and sentence to the 1st appellate court was dismissed in its entirety. Still aggrieved, the appellant has preferred the instant appeal which is predicated on four (4) grounds of appeal raising the following complaints:

1. *That, the prosecution side failed to prove the charge against the appellant beyond reasonable doubt.*
2. *That the cautioned statement was wrongly and irregularly admitted in evidence.*
3. *That, no school teacher was called to prove that PW2 was a standard III pupil at Mbalizi Moja Primary School as claimed by PW1 and PW2.*
4. *That, the defence evidence was ignored.*

At the hearing of the appeal, the appellant appeared in person unrepresented. On the other hand, Mr. Baraka Mgaya, learned State Attorney, represented the respondent Republic.

When invited to argue his grounds of appeal, the appellant had nothing of substance to argue. He simply prayed for the Court to consider his grounds and allow the appeal.

On his part, Mr. Mgaya, who at the outset, expressed his stand that he was resisting the appeal, opted to begin with the 3rd ground of appeal in which it is complained that there was no proof that PW2 was a standard III pupil. He argued that, apart from the fact that the ground is baseless and irrelevant, the complaint was not raised before the 1st appellate court and it was therefore not decided by it. He insisted that since the ground is new, then this Court has no jurisdiction to entertain it. To cement his argument, Mr. Mgaya relied on the decision of the Court in **Diha Matofali v. Republic**, Criminal Appeal No. 245 of 2015 (unreported).

Turning to the 2nd ground, it was submitted by Mr. Mgaya that the ground is baseless because the cautioned statement was properly tendered and admitted in evidence. He referred us to page 15 of the record of appeal where it is shown that the statement was received in evidence without any objection from the appellant. On this, Mr. Mgaya, cited the decision of the Court in **Vicent Ilomo v. Republic**, Criminal Appeal No. 337 of 2027 (unreported) where the Court reiterated the position stated in **Emmanuel Lohay and Udagene Yatosha v. Republic,** Criminal Appeal No. 278 of 2010 (unreported) that if an accused person intends to object to the

admissibility of a statement or confession, he must do so before it is admitted and not during cross- examination or during defence.

As regards the 4th ground of appeal, Mr. Mgaya referred us to page 39 of the record of appeal and contended that the appellant's defence evidence was evaluated in depth and considered by the trial court. He also referred us to the petition of appeal before the 1st appellate court appearing at page 46 of the record of appeal and argued that the complaint that the defence evidence was disregarded by the trial court was not one of the grounds raised before the 1st appellate court. It was therefore submitted by Mr. Mgaya that the 1st appellate court cannot be blamed by the appellant for something which was not raised before it.

Reverting to the 1st ground of appeal that the charge against the appellant was not proved beyond reasonable doubt, it was argued by Mr. Mgaya that the charge was proved to the hilt as required by the law. He contended that the evidence given by the victim PW2 proved the ingredients of the offence of rape. He insisted that penetration was proved and as the victim was a child of tender years, it was proved that she was 9 years old and therefore under those circumstances, there was no need of proving consent. Mr. Mgaya further argued that the appellant admitted to all what was testified by PW2 because he even failed to cross-examine her.

On the failure by the appellant to cross-examine PW2, Mr. Mgaya cited the Court's decision **in Martin Misara v. Republic,** Criminal Appeal No.

428 of 2016 (unreported) where the Court in restated the position that a party who fails to cross-examine a witness on a certain matter of incriminating nature is deemed to have accepted that matter. He further made reference to the Court's earlier decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported) in support of that argument. Still insisting that the charge was proved to the required standard Mr. Mgaya did also refer us to the appellant's cautioned statement arguing that the prosecution case was also supported by the appellant himself because, in the said statement, he admitted to have raped PW2.

On the above arguments, Mr. Mgaya prayed for the appeal to be dismissed for being baseless.

In his brief rejoinder, the appellant insisted that the case against him was not proved to the hilt and that the trial court did not allow him to cross-examine PW2. He contended that he did not rape PW2 and therefore the appeal should be allowed.

Having considered the grounds of appeal, the submissions made for and against the appeal and also having examined the record of appeal, we are now ready to retire and determine the grounds raised in support of the appeal. In doing so, we are alert and mindful of the fact that, this being a 2nd appeal, normally we are required not to interfere with concurrent findings of the two lower courts on matters of facts unless there are serious misdirection, non-direction or misapprehension of the evidence leading to

miscarriage of justice or if there is a violation of any principle of law. (See- **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Salum Mhando v. Republic** [1993] T.L.R. 170 and **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387.

As Mr. Mgaya did, in arguing against the grounds of appeal, we also find it appropriate and convenient to determine the grounds in the sequence adopted by him beginning with the 3rd ground on which it is complained that no teacher from Mbalizi Moja Primary School was called as a witness to prove that PW2 was a standard III pupil at the said school. On this, we hasten to point out that, as correctly argued by Mr. Mgaya, apart from the fact that the complaint is new as it was not raised neither before the trial court nor the 1st appellate court, the complaint is plainly irrelevant and baseless. We do not see how the proof of the fact that PW2 was a standard III pupil at Mbalizi Moja Primary School would have been helpful to the appellant while the same is not one of the ingredients of the offence of rape committed against victims aged below 18 years. In offences of rape against children below 18 years where consent is not required to be proved, all what need to be proved is penetration. In such cases the class or school the children is attending, is immaterial. The ground is therefore baseless and we accordingly dismiss it.

Regarding the appellant's complaint on the 2nd ground of appeal that the cautioned statement (exhibit P2) was irregularly and wrongly admitted

in evidence by the trial court, we again agree with Mr. Mgaya that, looking at the record of appeal on how the said exhibit was tendered and admitted in evidence, the complaint is unfounded. The trial court's proceedings in that regard clearly shows, at page 15 of the record of appeal that, when the said cautioned statement was sought to be tendered and admitted in evidence, the appellant neither objected to its tendering and admission nor did he register any complaint about it. It is trite position of the law that where an accused person has any objection or complaint against a cautioned statement or extra judicial statement, he should raise it when the same is sought to be tendered and admitted in evidence. In **Emmanuel Lohay and Udagene Yatosha** (supra) the cautioned and extra judicial statements were tendered and admitted in evidence by the trial court without any objection from the appellants. On appeal, in which the appellants attempted to challenge the admissibility of the statements, the Court stated that:

> *"With respect, it is too late in the day for them to do so because their admissibility or otherwise was never raised at the trial. As a matter of general principle an appellate court cannot allow matters that were not raised and decided by the court(s) below".*

The Court further stated, in the above cited decision, that:

> *"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or during defence –* ***Shihoze Semi and Another v. Republic*** *(1992) TLR 330. In this case, the appellants "missed the boat" by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence".*

Basing on the above stated position, we find that the complaint by the appellant in the instant appeal, that the cautioned statement (exhibit P2) was wrongly admitted in evidence by the trial court which is being raised at this stage in an appeal before us and which was never raised before its admission in the trial court, is untenable for being raised too late. That being the case, the 2nd ground of appeal fails too.

The 4th ground of appeal that the appellants defence was ignored should not detain us at all. As correctly argued by Mr. Mgaya, the appellant's defence was evaluated in depth by the trial court but it was rejected for not casting any doubt on the prosecution evidence. This is clearly evident at pages 38 and 39 of the record of appeal. As we have earlier alluded to, the appellant's defence was merely that he was denied the right of the presence of his relative when his cautioned statement was being recorded at the police station and therefore his admission to have

committed the offence was procured by force. In its judgment, the trial court considered that defence when, it for instance, observed at page 38 of the record of appeal that:

> *"Coming to the accused's defence, it is my considered view that the accused's defence is just an afterthought due to several reasons. First when the cautioned statement was tendered by the prosecution side, the accused person did not raise any objection in respect of the same".*

Again, at page 39 of the record of appeal, the trial court went on evaluating and considering the appellant's defence thus:

> *"This court is asking itself that if it is true that the accused person was forced to admit whatever the victim told the Police how about the undisputed facts which were admitted by the accused before this court. Who forced the accused before this court to admit those facts. See the memorandum of undisputed facts. The said memorandum which were (sic) admitted by the accused person goes to prove that the accused person did have carnal knowledge of the victim basis of the above two reasons together with the strong evidence adduced by PW1 is my considered view that the accused's defence is a mere afterthought".*

The appellant's defence was therefore not ignored in the manner it is being complained by the appellant. The defence was properly considered but it was rejected. It should also be pointed out that although the complaint that the defence evidence was ignored by the trial court was not among the grounds of appeal before the 1st appellate court, the 1st appellate court considered it in its judgment. At pages 77 and 78 of the record of appeal, the 1st appellate court, observed that:

> *"In his defence he state not to be given chance to call his relatives upon recording his statement... Appellant's defence was an afterthought as he had ample time to challenge the admissibility of exhibit P2".*

It is for the above reasons that we find the 4th ground of appeal baseless and accordingly dismiss it. The appellant's defence was considered but it was rejected.

Finally, on the 1st ground of appeal that the case against the appellant was not proved beyond reasonable doubt, it is our considered view that having regard to the evidence from PW2 which was not challenged by the appellant in cross-examination, there is no way we can differ with the concurrent findings of facts by the two lower courts that PW2 was a credible and reliable witness. It is trite position of the law that assessment of the credibility of a witness is exclusively in the domain of the trial court. Where the finding of the trial court on credibility of a witness is

upheld by the 1st appellate court, as it is in the instant appeal, the concurrent findings by the lower courts cannot be interfered with by the 2nd appellate court unless it is satisfied that on the face of it, it is unreasonable or perverse leading to a miscarriage of justice or that there have been a misapprehension of the evidence or a violation of any principle of law occasioning miscarriage of justice. (See- - **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (supra), **Salum Mhando v. Republic** (supra) and **Mussa Mwaikunda v. Republic** (supra).

In the instant case, we find no reason at all justifying our interference with the concurrent findings by the two lower courts on PW2's credibility and reliability. The evidence given by PW2 the victim of the offence, was the best and was properly relied upon by the trial court in convicting the appellant.

We are also satisfied, as rightly submitted by Mr. Mgaya, that all the ingredients of the relevant offence, that is, the victim's age and penetration, were proved to the required standard. The fact that PW2 was 9 years old, was proved by PW1, the mother of PW2. As to penetration, the uncontroverted evidence from the victim PW2, that the appellant took her to his bed and inserted his penis into her vagina sufficiently proved that there was penetration. This was also supported by PW3 and exhibit P1. Further, the fact that the appellant penetrated PW2 was admitted by the appellant not only during the preliminary hearing but also in his cautioned

statement (exhibit P2). In the totality, the evidence given by the prosecution against the appellant proved the case against the appellant beyond reasonable doubt and the two lower courts properly directed themselves on assessment of evidence and application of the relevant law. We therefore find no merit in the 1st ground of appeal and we accordingly dismiss it.

In view of the aforesaid, we find the appeal lacking merit and we thus accordingly dismiss it in its entirety.

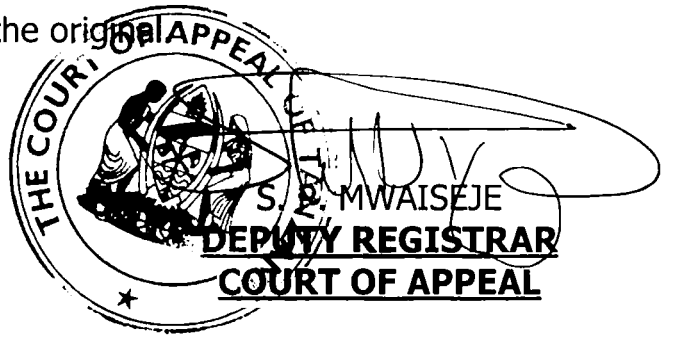
DATED at **MBEYA** this 6th day of December, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2022 in the presence of the appellant in person and Ms. Xaveria Makombe, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL