IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 316 OF 2021

KORONEL JUMA ABDALLAH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mtwara)

(Ngwembe, J)

dated the 5th day of May, 2021

in

Criminal Appeal No. 95 of 2020

JUDGMENT OF THE COURT

29th & 30th March, 2023

MWANDAMBO, J.A.:

The District Court of Ruangwa convicted the appellant Koronel Juma Abdallah of the offence of statutory rape involving a child girl of three years and sentenced him to the mandatory life imprisonment. His appeal to the High Court was dismissed for lack of merit. The appellant is now before the Court in a second and final appeal in his quest to indicate his innocence.

The appellant's appeal before the first appellate court sitting at Mtwara was predicated upon ten grounds of appeal with various complaints but, the learned first appellate judge saw it fit to determine

the appeal on three grounds as evident at page 39 of the record. These are; **one,** the prosecution failed to investigate properly the allegations including the use of DNA thereby failing to prove the case beyond reasonable doubt; **two,** failure to not only call material witnesses particularly, WP 7950 DC Angelina but also tendering a cautioned statement and; **three,** grounding conviction on the weakness of the defence rather than strong prosecution case. At the end of the day, the first appellate court satisfied itself that the grounds it considered to be sufficient to dispose of the appeal were devoid of merit resulting into sustaining the appellant's conviction and sentence.

By way of the background, the appellant stayed in the neighbourhood with the parents of the victim whom we shall be referring to as KW to conceal her identity. The case for the prosecution before the trial court was that on 21/05/2020, the victim's mother (PW2) left to a nearby shop leaving behind her three years child girl playing with other children. At the time PW2 was leaving, the appellant was allegedly been around. Upon her return, PW2 found her child complaining that 'Koro' had touched her private parts. PW2 inspected the victim's private parts only to find her pants wet with what she referred to as sperms. The medical examination of the victim, at Ruangwa District Hospital by Dr. Alex Petro Mwambe (PW4) conducted eight hours later after obtaining a PF3 at a

police station revealed existence of bruises on her with relaxed/enlarged vaginal muscles which was indicative of penetration. The findings which PW4 posted in a PF3 (exhibit P2) revealed lost hymen with severe injury eight hours of the incident. According to PW2, upon her return from the shop, the appellant was at large and never returned until he was arrested after Waziri Athuman (PW1), the father of the victim, had been informed and obtained an RB from the police. For her part, due to her young age, the victim KW who testified as PW3 had scanty version having promised to tell the truth in compliance with section 127 (2) of the Evidence Act. PW3 had it that she knew Koronel whom she identified in the dock as the person who put 'dudu' on her private parts after her mother had left to a shop.

In his unsworn testimony following a ruling that he had a case to answer, the appellant denied the accusations levelled against him. He stated that he was arrested in the night by police on an offence he did not know and after three days he was forced to sign a document before being taken to court to stand trial on a charge he came to know while in court. He feigned ignorance of the victim as well as her place of residence even though he had stayed at Nandenje village; the same village the victim stayed with her parents, for three years.

The trial court found the evidence adduced by the prosecution proved the charge to the required standard. It is significant that, the trial court determined the case before it on the issue whether the accused (appellant) had canal knowledge of KW a girl of three years. Based on PW2's evidence and a birth certificate she tendered in evidence (exhibit P1), the trial court found the victim's age, an essential ingredient in the offences involving statutory rape sufficiently proved. It also found sufficient evidence of penetration from the victim herself and PW4. As to the person responsible for the offence, the trial court found the victim's evidence proved that it was no other person than the appellant who committed the offence regardless of the victim's scanty narration considering her young age.

Having lost before the first appellate court, the appellant is now before the Court upon a memorandum of appeal comprising five grievances challenging his conviction on the grounds namely; **one,** reliance on exhibit P2 which was irregularly admitted; **two,** reliance on uncorroborated evidence of the family members (PW1, PW2 and PW3); **three,** failure to evaluate properly the contradictory evidence by PW2 and PW4 regarding presence of sperms on the victim's private parts; **four,** failure to assess PW3's credibility with a view to determining her

truthfulness and; **five,** convicting the appellant on the basis of weakness of his defence rather than the strength of the prosecution case.

The appellant appeared in person, unrepresented when the appeal was called on for hearing on 20/03/2023 and urged the Court to consider his grounds of appeal as strong enough to allow the appeal. Other than that, he had nothing in addition but let the respondent Republic represented by Ms. Jacqueline Werema, learned State Attorney to reply to his grounds reserving his right to a final word after the respondent's submissions.

Ms. Werema took off by expressing her position to resist the appeal but preferred to begin her address with an issue outside the grounds of appeal, that is to say; failure to consider all grounds of appeal in the petition of appeal. leaving out several complaints undetermined. While admitting that the first appellate court was not bound to decide each and every ground, she contended that in doing what it did, the three issue which the High Court formulated as representing the appellant's complaints against trial court's decision did not cover all of his grievances which was fatal to the judgment, subject of the appeal. The learned State Attorney singled out grounds two, three, five, six and seven in the petition of appeal whose substance of complaints are not covered by the three issues upon which the first appellate court determined the appeal.

To bolster her argument, the learned State Attorney cited the Court's decision in **Frank Michael Nyoni v. Republic,** Criminal Appeal No. 503 of 2020 (unreported) to argue that where the High Court fails to decide all grounds in a petition of appeal the judgment becomes a nullity liable to be quashed with an order for a fresh determination of the appeal by the first appellate court. Even though it was open for the Court to determine the undecided grounds itself as the Court did in the case cited to us, Ms. Werema saw it better for us to remit the record to the High Court for determination of the appeal before another judge.

Considering the nature of the issue raised by the respondent' s attorney, the appellant coved do no more than leave it to the Court for its determination.

When the Court retired and after serious deliberations, it became apparent that, the appeal could not be disposed of on the issue raised by the learned State Attorney. This is so because, it became clear to us that despite the first appellate court's disposal of the appeal on three issues, the determination encompassed all substantive grounds in the petition of appeal. It will be recalled that, the issues upon which the first appellate court determined the appeal are reflected at page 39 of the record of appeal. They are as follows:

1. *The prosecution failed to investigate properly the allegations including the use of DNA, thus, failed to prove the case beyond reasonable doubt;*
2. *That the prosecution failed to call material witnesses, including WP 7950 DC Angelina and failed to tender caution statement; and*
3. *The trial magistrate erred in law and in fact in relying to the weak defense of the appellant, instead of relying on strong prosecution case.*

Upon our close examination of the petition of appeal, and the judgment of the High Court, we are satisfied that, the unconsidered grounds pointed out by the learned State Attorney were not material to the determination of the appeal to warrant nullification of the judgment. For instance, ground three complained that a letter claimed by PW3 from the Village Executive officer (VEO) was not tendered whereas ground five faulted the trial court for failure to call the ten-cell leader, hamlet chairman and VEO to testify and instead, it relied on the evidence of PW1, PW2 and PW3 who were family members. This is a substantive ground of complaint in this appeal.

It is significant that, the offence, subject of the charge before the trial court involved statutory rape of a three years child girl which could be established by the prosecution proving the age of the victim, penetration and the responsible culprit. The age of the victim could be proved by, amongst others, the parents as it happened in this appeal. On the other

hand, penetration could not be proved without the victim and possibly corroborated by another person such as a parent and or a medic as it were. Neither the letter from the VEO was relevant nor a ten-cell leader, Hamlet Chairman or VEO were material witnesses proving the offence. Accordingly, failure to consider the two grounds specifically was innocuous. The same applies to ground six which faulted the trial court for failure to call a police officer who issued a PF3. The absence of such officer had no bearing on the determination of the appeal and the failure by the first appellate court to consider the complaint was inconsequential. The remaining grounds two and seven were directed at failure to evaluate the testimonies of PW2 and PW4 on the existence of sperms in victim's private parts and reliance on PW3's evidence mentioning Koro's name need not be considered separately. They were covered in ground one formulated by the High Court. As we said in **Malmo Montagekonsult AB Tanzania Branch v. Margaret Gama**, Civil Appeal No. 86 of 2001 (unreported)it was not necessary for the first appellate court to determine each ground of appeal separately provided that the grounds it formulated out of ten grounds of appeal were decisive of the appeal.

It is for the foregoing that we declined to take the route Ms. Werema invited us to take; nullifying the judgment and remit the record to the High Court for a fresh determination. On the contrary, we were of the firm

view that the High Court judgment is free from blemishes and hence no justification exits warranting its nullification. Going forward, we considered it appropriate to re-open the hearing of the appeal in the ongoing sessions mindful that, doing otherwise would result in unnecessary delays in determining the appeal.

At the resumed hearing on 29/03/2023, the appellant appeared in person, unrepresented. The respondent Republic had Mr. Enoshi Gabriel Kigoryo who reiterated the respondent Republic's stand point opposing the appeal. Yet again, the appellant opted to hear the respondent first before he could have his final word. At the end of the submissions by the learned State Attorney, the appellant made several complaints which were, nonetheless, largely meant to invite the Court receive fresh evidence at this stage a cause not sanctioned by the law.

The complaint in ground one is against the trial court's reliance on exhibit P2, a PF3 tendered by PW4 whose contents were not read after it was cleared for admission. The first appellate court dealt with the complaint and expunged it with effect that it ceased to be part of the record to attract a complaint as the appellant does. Again, as rightly submitted by Mr. Kigoryo, the expungement of the PF3 had no adverse effect on PW4's oral evidence on the authority of our decisions in **Bashiru Salim Sudi v. Republic,** Criminal Appeal No. 379 of 2018 **Director of**

Public Prosecutions v. Erasto Kibwana & 2 Others, Criminal Appeal No. 579 of 2016 ((unreported). This ground lacks merit and we dismiss it.

Ground two faults the first appellate court for sustaining conviction of the appellant based on uncorroborated evidence of PW1, PW2 and PW3 who were family members. Again, as rightly submitted by Mr. Kigoryo fully supported by decided cases, it is not the law that evidence of relatives cannot be acted upon unless it is corroborated for as long as they are competent to testify. Indeed, based on section 127 (1) of the Evidence Act, Mr. Kigoryo is right that what was important was the credibility of such witnesses and thus, there was no need for any corroboration. He cited the Court's decision in **Charles Kalungu & Another v. Republic,** Criminal Appeal No. 96 of 2015 (unreported) in which the Court reiterated its viewpoint in **T. Taray v. Republic,** Criminal Appeal No. 216 of 2016 in support of that proposition. The Court has similarly addressed itself on this aspect in other decisions, amongst others, **Mustapha Ramadhani Kihiyo v. Republic** [2006] T.L.R 323, **Festo Mgimwa v. Republic,** Criminal Appeal No. 378 of 2016 and **Jaspini s/o Daniel @ Sikazwe v. Director of Public Prosecutions,** Criminal Appeal No. 519 of 2019 (both unreported). It is trite from the decided cases that, relative witnesses are as competent as non-relatives and may testify in any case

unless there is evidence that they conspired to scheme a plot to promote an untruthful story. There is no suggestion in the instant appeal that there was any such conspiracy. At any rate, the appellant's conviction was not solely grounded on the three relative witnesses. It also relied on PW3, a medic who examined PW3 sent to the Hospital for medical examination by her mother (PW2) and found bruises on her genital parts with a lost hymen which proved penetration, an essential ingredient in rape cases. The complaint lacks merit and we dismiss it.

The complaint in ground three is directed against the first appellate court's alleged failure to scrutinize properly the evidence of PW2 and PW4 which was contradictory on the existence of sperms on the victim's private parts. The appellant's elaborations in this ground are to the effect that, whereas PW2 said she saw sperms in the victim's private parts, PW4 did not see such sperms. According to the appellant, this was a material contradiction which should have been resolved in his favour. Yet again, the learned State Attorney urged us to dismiss the ground for being baseless. It was his submission that there was no such contradiction in the evidence of PW2 and PW3 and if any, it was not material to the respondent's case. Apparently, this ground featured in the petition of appeal before the first appellate court as ground two. The learned first appellate Judge did not specifically deal with this aspect because he took

the view that the most important ingredient in sexual offences is penetration and, where it involves adults, consent.

The charge before the trial court was statutory rape which entailed proof of the victim's age parallel with penetration. We respectfully share the same view. What was required to be proved was not the existence of sperms rather, penetration which was sufficiently proved by PW3 and PW4. As argued by Mr. Kigoryo, if there was any such contradiction, it was inconsequential as it did not go to the root of the case against the appellant. The Court has said so in many of its previous decisions particularly, **Dickson Elia Nshamba Shapwata & Another v. Republic,** Criminal Appeal No. 92 of 2008 (unreported). This ground is devoid of merit and we dismiss it.

The attack on the victim's credibility features in ground four. The first appellate judge is faulted for sustaining conviction without assessing the victim's credibility. Having heard opposing arguments from the learned state attorney and examined the record of appeal we can't mince our words that this ground must fail for three reasons. **First,** it was not one of the appellant's complaints before the first appellate court neither does it involve a matter of law for which this Court would have jurisdiction mandated by section 6(7) (a) of the AJA. **Secondly,** credibility is not in the domain of an appellate court but the trial court which sees witnesses

as they testify and assess their demeanour in the witness box. See for instance: **Siza Patrice v. Republic,** Criminal Appeal No. 190 of 2010 (unreported), **Third,** consistent with our decision in **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2010 (unreported), the first appellate judge evaluated PW3's evidence and was satisfied that she was unshaken as to what 'Koro' did to her on the material date and broke the news to her mother moments after her return from her errands on the basis of which, PW2 inspected her and found her pants wet with sperms. As seen earlier, what PW3 told her mother was confirmed to be true upon a medical examination by PW4 later in the day. In the final analysis, we have found no merit in this ground and dismiss it as well.

Finally, in ground five, the complaint is that the appellant was convicted on the basis of the weakness in his defence rather than the strength of the case for the prosecution. Mr. Kigoryo argued that contrary to the appellant's complaint, the entire evidence was considered by the two courts below which proved the victim's age through PW2 and a birth certificate she tendered in evidence as exhibit P1; penetration through PW3 and PW4 supported by PW2 who inspected the victim before the medical examination; and, through PW3's testimony, the culprit was none other than the appellant who disappeared to another place immediately after the incident a conduct which was incompatible with innocence. The

learned first appellate judge discarded this complaint and was satisfied, as we are, that it has no merit. This is so because, as we have discussed above, the prosecution proved its case to the required standard by proving penetration into PW3's vagina, a child girl of three years by no other person than the appellant. Like the first appellate court we dismiss this ground for lacking in merit.

In the event, we find no merit in the appeal and dismiss it in its entirety.

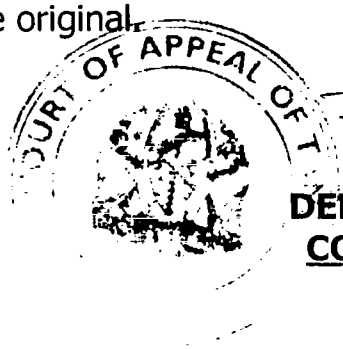
DATED at **MTWARA** this 30th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered this 30th day of March, 2023 in the presence of the Appellant in person and Ms. Florence Mbamba Anyosisye, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL