IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(MKUYE, J.A., LEVIRA, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 408 OF 2021

IDDI OMARY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of Resident Magistrate's Court of Tabora at Tabora)

(Kato, SRM - Ext. Jur.)

dated the 5th day of July, 2021

in

(DC) Criminal Appeal No. 36 of 2021

.....

JUDGEMENT OF THE COURT

19th September & 3rd October, 2023

LEVIRA, JA.:

This is a second appeal in which, the appellant, Iddi Omary is challenging the decision of the Resident Magistrate's Court of Tabora at Tabora (the first appellate court) by Hon. J. Kato, Senior Resident Magistrate with Extended Jurisdiction dated 5th July, 2021 in (DC) Criminal Appeal No. 36 of 2021. We note that, the appeal was initially lodged in the High Court of Tanzania at Tabora and later was transferred to the Resident Magistrate's Court of Tabora. In the impugned decision,

the appellant's appeal originating from Criminal Case No. 94 of 2018 of the District Court of Tabora at Tabora (the trial court) was dismissed. His conviction and sentence of thirty (30) years imprisonment for the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002 now R.E. 2022] were upheld by the first appellate court.

The record of appeal unveils that, on 16th day of December, 2018 at night hours, the appellant who was a traditional healer at Inala One area within the Municipality and Region of Tabora was requested by the mother of the victim, a twelve (12) years old girl (whom we shall refer to as the victim or PW1) to give her child a medicine. The victim was suffering from persistent stomach pain. Unexpectedly, instead of giving her the medicine, the appellant ended up raping the victim. Testifying as PW1, the victim stated that, on the fateful night at around 22:00 hours, the appellant and her mother went to the house of the victim's grandmother where she was residing to take her for medication. The said grandmother agreed and the trio left to the mother's house. Upon arriving there, the appellant asked the mother of the victim to give him some water which would be used to clean the victim with the medicine. Having been given the water, the appellant and the victim left to the

bush, allegedly, to effect the cleaning process. The mother was left behind as the appellant told her that, there was no need for her to accompany them to the bush. PW1 narrated further that, while at the bush, the appellant asked her to take off her clothes and lie on the ground on a piece of cloth (kanga), which she complied. Thereafter, the appellant poured water on her body and inserted his penis into the victim's vagina claiming it was a medication process. Having finished, he cautioned her not to tell anyone, otherwise the medicine would not work.

At the end of that exercise, the appellant escorted the victim back to her grandmother's residence. The victim kept the secret as instructed by the appellant until the following morning, when she decided to tell her grandmother about what had befallen her when she went for medication. The grandmother informed the victim's mother and the Village Executive Officer (VEO). Later, the appellant was arrested and taken to Kanyenye Police Station together with PW1. At the police, PW1 was issued with a PF3 (exhibit P1) for medical examination at Kitete Referral Hospital, where she was examined by Francis Crete Changwa Linus (PW5), a Clinical Officer. According to his testimony, PW5 having examined PW1's vagina, he found bruises, flowing blood and her hymen

was raptured suggesting that she was carnally known or her private part was penetrated. Save for what had happened in the bush, PW1's testimony was corroborated by that of Rehema Juma (PW3), her mother who entrusted her to the traditional healer and Mwajuma Sisya (PW2), the grandmother who was the first to receive and reveal news about what had befallen PW1. Investigation was conducted by No. G.5869 DC Meshack (PW4) at the scene of crime. He also interrogated both the victim and the appellant. According to PW4, the appellant told him that, he (the appellant) only cleaned PW1 with medicated water and denied to have raped her.

In his defence, the appellant (DW1) denied also to have raped PW1. He claimed that, his expected brother-in-law was behind his arrest as he did not want him to marry his sister. Having analyzed the evidence adduced before it, the trial court was satisfied that the prosecution proved its case against the appellant beyond reasonable doubt. It therefore, convicted and sentenced him to thirty (30) years imprisonment as alluded to above. Feeling that justice was not done on his part, the appellant has preferred the present appeal. The following are the grounds of appeal:

1. *That, the case for prosecution was not proved against him beyond reasonable doubt as required by law.*
2. *That, in the circumstances of the case, the charge preferred against him was not proper.*
3. *That, the learned appellate magistrate with extended jurisdiction erred in law to uphold the decision of the trial court in which the judgment was not properly analysed and evaluated.*
4. *That, exhibit P1, the medical examination report purported to be of the victim, was not read aloud in court in order to reveal its contents.*
5. *That, the person who arrested the appellant was not summoned in court, neither the VEO, in order to shade light whether his arrest, indeed, had any connection with the commission of the offence charged.*

The appellant, who was unrepresented appeared in person during hearing of the appeal. Being a layperson, he preferred to first hear a response to his grounds of appeal from the respondent as he reserved his right to rejoin afterwards, should it be necessary. The appeal was resisted by Ms. Veronica Moshi, learned State Attorney who appeared for the respondent Republic.

Ms. Moshi commenced her submission by indicating that the fifth ground of appeal was a new ground, as the same was not dealt upon by the first appellate court. Therefore, she said, since it is not a point of law, the Court lacks jurisdiction to entertain it as it was decided by the Court in **Galus Kitaya v. Republic,** Criminal Appeal No. 196 of 2015 (unreported). She, thus, desisted from arguing it. We wish to point out at the outset that, the appellant had nothing to reply as far as the alleged new ground of appeal is concerned.

We have carefully gone through the grounds of appeal which were raised before the first appellate court. It is apparent that the appellant challenged the decision of the trial court on five grounds which did not include the fifth ground in the present appeal. But it included a ground which is not currently raised; that, his defence was wrongly ignored. Having examined the record of appeal, we agree with Ms. Moshi that, the fifth ground of appeal is a new ground. We are aware of the settled position that this being a second appeal, we are not mandated to hear and determine a new ground which was not raised in the subordinate courts, as we stated in a number of our decisions including the one cited to us by Ms. Moshi. We are also satisfied that the fifth ground of appeal is not a pure point of law. For that reason, we will not consider it.

For convenience purposes, we shall first determine the second ground of appeal followed by the third, fourth and finally, the first ground of appeal.

The appellant's claim in the second ground of appeal is that the charge preferred against him was not proper. As intimated above, the appellant was charged with rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code. Ms. Moshi submitted in respect of the provisions preferred against the appellant to the effect that, they were proper and the prosecution managed to prove the charge. We somewhat agree with Ms. Moshi basing on the record of appeal that, since PW1 was a girl of 12 years old, it was proper for the appellant to be charged under the provisions preferred by the prosecution.

However, in passing, as the appellant had nothing to explain on this ground of appeal, we have stretched our mind to what is obvious on the record of appeal to the extent that the appellant was a traditional healer as per the evidence of PW1, PW2, PW3 and DW1. Therefore, he might as well, have been charged under section 130 (3) (d) of the Penal Code which is specific for traditional healers who commit rape. All the same, we take note that had it been that the said provision was included in his charge, the outcome could have been the same. This we say, is because

the victim was a child of the age below 18 years. Besides, we do not find any prejudice on the part of the appellant as the ultimate punishment could be the same because the ingredients of the offence were proved. As a result, even if we accept that the charge was defective in the circumstances, the said defect is not fatal. It is curable under section 388 of the Criminal Procedure Act, Cap 20 RE 2019. We thus, find merit on this ground to the extent explained above, which we say, does not affect the outcome of the appeal.

In respect of the third ground of appeal, Ms. Moshi submitted that there was no error committed by the first appellate court in considering the analysis of evidence done by the trial court. As such, she said, the trial court properly analysed and evaluated the evidence in its judgment as reflected from page 25 to 34 of the record of appeal.

There was no rejoinder from the appellant on the submission by Ms. Moshi on this ground of appeal.

On our part, we took liberty to thoroughly examine the decision of the trial court. We agree with Ms. Moshi that, indeed, the trial Magistrate made sufficient evaluation and analysis of the evidence and applicable law before concluding that the prosecution had proved the charge against the appellant beyond reasonable doubt. We as well agree with

what the learned first appellate Judge said, at page 54 of the record of appeal and we quote:

> *"Having gone through the judgment of the trial Magistrate, it is clear that, there is enough evaluation of evidence, hence the judgment is proper by comparing the judgment and proceedings of the trial court."*

In the circumstances, we as well, hold that this ground of appeal has no merit and we dismiss it.

Regarding the fourth ground of appeal, that exhibit P1 (the medical examination report) of the victim was not read out in court in order to reveal its contents after being admitted, Ms. Moshi conceded to this ground straight away and urged us to expunge it from the record. As usual, the appellant had nothing to rejoin on this ground.

We have gone through the record of appeal, particularly, at page 16 where PW5 prayed to tender the PF3 as an exhibit. There was no objection from the appellant and thus the same was admitted as exhibit P1. Thereafter, the trial Magistrate signed and PW5 continued to give his testimony on how he prescribed drugs to the victim for the injuries she had sustained without having read out the contents of the said exhibit.

We find merit in this ground of appeal. Without much ado, we proceed to expunge exhibit P1 from the record of appeal as we did in **Robson Mwanjisi v. Republic** [2003] T. L. R. 218.

Regarding the first ground of appeal that the case for prosecution was not proved against the appellant beyond reasonable doubt, Ms. Moshi submitted that the appellant was charged with rape. Therefore, the prosecution had to prove, which they did, the age of the victim, penetration and who committed the offence.

Starting with the age of the victim, Ms. Moshi referred us to page 9 of the record of appeal where PW1 testified that she was twelve (12) years old at the time of giving evidence. She added that, the age of the victim was also proved by her mother (PW3) when she stated that PW1 was born in 2007, as it can be seen at page 12 of the record of appeal. She argued that the age of the victim can be proved by the victim, her parent, as it is the case herein or the medical practitioner as stated in the case of **Shani Chamwela Suleiman v. Republic**, Criminal Appeal No. 481 of 2021 (unreported).

The issue for our determination in this ground of appeal is, whether the charge against the appellant was proved beyond reasonable doubt. We do not need to cite any other authority restating the

established position, which in our view, was well articulated by Ms. Moshi, that, the age of the victim can be prove by the victim, parent, guardian and/or medical practitioner. We entertain no doubt that, the age of PW1 was proved by herself and her mother (PW3) to the required standard.

Another element which the prosecution was required to prove according to Ms. Moshi, was penetration. She referred us to page 9 of the record of appeal where PW1 stated clearly that, the appellant inserted his penis into her vagina. She went on to state that, the evidence of PW1 was corroborated by that of PW5 who medically examined the victim as it can be seen at page 16 of the record of appeal. He confirmed that, indeed, she was penetrated. She, thus, urged us to find that the prosecution proved to the required standard that PW1 was penetrated.

As there was no rejoinder from the appellant on this aspect, we shall let PW1 speak for herself of what had befallen her on the material day from page 9 of the record of appeal:

> *"I left with the accused person with a bucket of water to the bush when we arrived to the bush, the accused person instructed me to take off my*

*clothes. He instructed me further to dress my khanga on the ground and sit on it. I took off my clothes and dressed khanga on the ground .... **The accused person folded my mouth and inserted his penis into my vagina** .... I screamed for pain as the accused person asked me to shut up as it was a medication process."*
[Emphasis added].

The above extract of PW1's evidence was corroborated by that of PW5, when he stated at page 16 of the record of appeal as follows:

*"I conducted both physical and laboratory examination. **Under physical examination we examined her vagina. I found bruises as the blood was stiil flowlng. Her hymen was raptured.** On the basis of those findings, I concluded that the girl was carnally known."*
[Emphasis added]

Basing on the material contained in those excerpts above, the first appellate court was satisfied, as we do, that penetration was proved by the prosecution to the required standard. We are fortified with our previous decision in **Selemani Makumba v. Republic** [2006] T.L.R. 373; that in rape cases, the best evidence is that of the victim.

Therefore, we do not find any reason to fault the first appellate court as far as proof of penetration is concerned.

We now revert to determine the third aspect as to whether it was the appellant who raped PW1. It was Ms. Moshi's submission that the evidence of PW1 is very clear that the appellant was the one who raped her. She referred us to pages 8 and 9 of the record of appeal and urged us to consider that, PW1 narrated on how she was raped by the appellant, that they were close and she knew him even before the incidence.

Apart from that, she said, the appellant and PW3 went to PW2's residence to take PW1 with a view of going to treat her persistent stomach pains. The evidence of PW1 was corroborated by that of PW2 and PW3. She therefore insisted that, the prosecution proved that PW1 was raped by none, but the appellant.

Having thoroughly gone through the record of appeal, we are satisfied, first, like Ms. Moshi and the first appellate court, that apart from the direct oral evidence of PW1, circumstances of the case as narrated by PW2 and PW3 prove beyond reasonable doubt that, it was the appellant who raped PW1.

All said and done, this appeal has no merit, we therefore dismiss it.

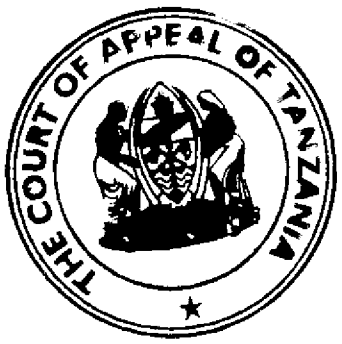
DATED at **TABORA** this 2nd day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of October, 2023 in the presence of the appellant in person, and Mr. Nurdin Mmary, State Attorney for the Respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL