

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: MKUYE, J.A., GALEBA, J.A., And MASOUD, J.A.)**

**CRIMINAL APPEAL NO. 358 OF 2021**

**SHIJA MATHIAS..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania at Tabora)**

**(Bahati, J.)**

**dated the 4<sup>th</sup> day of June, 2021**

**in**

**Criminal Appeal No. 31 of 2020**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

*21<sup>st</sup> September and 4<sup>th</sup> October 2023*

**GALEBA, J.A.:**

Shija Mathias, the appellant in this appeal, was charged on two counts of rape and abduction of a girl under sixteen years of age, before the Resident Magistrates' Court of Tabora at Tabora. He was charged under sections 130 (1) (2) (e) and 131 (1) of the Penal Code for rape, and 134 of the same statute for abduction of a girl under sixteen years. He was, subsequently, tried and convicted on both counts and was sentenced to thirty years imprisonment on account of rape, and three years on account of abduction of the girl under sixteen years of age. His

first appeal to the High Court at Tabora in Criminal Appeal No. 31 of 2020 was dismissed, hence this second appeal.

The abridged facts material to the case in the trial court were that, in Kitunda Village within Sikonge District in Tabora Region, there lived a man by the name of Maneno Wekelea (PW1), who had a daughter aged thirteen years in 2019. For purposes of confidentiality, we will conceal the girl's name and refer to her as PW2 or the victim. As PW1 had domestic animals, he had employed the appellant to take care of them. The latter had been living in PW1's family since 2018, where also the victim was a member. It transpired that on 24<sup>th</sup> April, 2019, when PW1 came home in the evening after his day's work outside his home, two members of his family were missing; the appellant and the victim. According to the victim, on that day, as she had agreed with the appellant to leave their home and travel to Tabora, they left the home and travelled as far as Nyampindi where they had to stop and spend a night there, although they had to sleep in the bush. The next day, they boarded a bus to Tabora town where the appellant hired a room for their accommodation. They slept in that room and the appellant had sex with the victim. The next day they boarded another bus to Kitunda. At this destination, they stayed at mission for a week, and during that time,

the appellant and the victim had sex on multiple occasions. It is at this place that, by assistance of the appellant's own telephone, D/Cpl Pius (PW4) and PW1, travelled to Kitunda and arrested the appellant and the victim while naked at around 02:00 hours, on 5<sup>th</sup> May, 2019. Whereas the victim was taken back to rejoin her family, the appellant was charged and convicted as indicated above. His appeal to the High Court did not succeed, because it was dismissed, hence this second appeal, which is based on a total of 5 grounds of appeal.

The complaints in the grounds of appeal can be paraphrased as follows; **first**, that the case was not proved beyond reasonable doubt and; **second**, the promise to tell the truth by the victim who was a child of tender age, was illegal because the child stated that she does not know to tell the truth. **Third**, that the prosecution failed to call witnesses who witnessed the appellant's arrest; **fourth**, the appellant's cautioned statement, exhibit P2, was recorded contrary to the provisions of sections 50 and 51 of the Criminal Procedure Act (the CPA) and; **fifth**, the appellant's cautioned statement, exhibit P2, was recorded contrary to the provisions of sections 57 (2) (a) of the CPA.

At the hearing, the appellant appeared in person and requested us to consider his ground as presented. We permitted Ms. Grace Lwila,

learned State Attorney to reply on the grounds such that the appellant would rejoin should he wish to do so.

Ms. Lwila started with the third, fourth and fifth grounds. In respect of the third ground of appeal, she submitted that the substance of that ground was not presented to the High Court first for determination in which case this Court has no jurisdiction to determine it. To support her argument, she cited to us this Court's decision in **Ally Ngozi v. R**, Criminal Appeal No. 216 of 2018 (unreported). In reply, the appellant submitted that, the ground is meritorious so we determine it as it is.

On the issue raised by the learned State Attorney in respect of the third ground of appeal, we do not intend to spend a long time on it. We have taken our time to peruse the record of appeal particularly page 42 to 44 where there is a petition that was presented to the High Court, and we agree with Ms. Lwila, that indeed, the factual complaint of the appellant in ground three is not one of the grounds or complaints that were presented to the High Court. That also means that the learned first appellate Judge did not have opportunity to determine the appellant's complaint in the context of the third ground, now before us.

The position of the law is that this Court has no jurisdiction to entertain grounds concerning complaints which have not been first presented and determined by the High Court, unless they are points of law; see **Galus Kitaya v. R**, Criminal Appeal No. 196 of 2015; **Athumani Rashidi v. R**, Criminal Appeal No. 26 of 2016 and; **Mathias Robert v. R**, Criminal Appeal No. 328 of 2016 (all unreported).

Thus, since the matter raised in the third ground of appeal is a matter of fact, we disregard that ground and refrain from entertaining it.

Next are grounds four and five complaining of the validity of the cautioned statement, exhibit P2. Ms. Lwila, conceded that the cautioned statement was illegally tendered because it was recorded beyond the four hours provided under section 50 of the CPA. She therefore prayed that exhibit P2 be expunged.

We will resolve the appellant's complaint in the context of section 50 (1) (a) of the CPA which provides that a suspect of any criminal offence must have his statement recorded before expiry of four hours counting from the point he is restrained by the police. In this case, F. 8738 Detective Cpl Pius, PW4 testified that on 6<sup>th</sup> May, 2019 he travelled to Kitunda in Sikonge and during the night of that day around 02:00 hours, they started the journey to Tabora. Although it is not said as to

what time they arrived at Tabora, the interview started at 14:00 hours on 8<sup>th</sup> May, 2019. It is based on that fact that counting from 02:00 hours on 7<sup>th</sup> May, 2019 to 14:00 hours on 8<sup>th</sup> May, 2019, the time in between is 12 hours, which is more than four hours provided for under section 50 (1) (a) of the CPA.

In the circumstances, because the cautioned statement, exhibit P2, was recorded out of the time provided by law, the same was admitted in evidence illegally, so we discard it and hold that the exhibit does not have evidential value. Thus, the fourth ground of appeal is allowed.

As the cautioned statement, exhibit P2, has been discarded, which is also the objective of the fifth ground of appeal, determination of that ground has no purpose to serve. That we will not determine the ground of appeal for being overtaken by events.

Next is the second ground of appeal. The complaint in that ground is that, PW2 having stated that she did not know how to tell the truth, her evidence was recorded illegally. In that respect Ms. Lwila submitted that, the important aspect of the record is that the victim promised to tell the truth and she was even affirmed. In the circumstances, she

submitted that, the evidence of the PW2 was recorded and the same was properly relied upon.

In determining this ground, we will necessarily refer to the record of appeal. At pages 11 and 12 of the record of appeal, this is what transpired:-

***"Public Prosecutor: I pray my witnesses to be tested her understanding as she is 15 years.***

***PROMISE:***

*Name; 'victim'*

***Do you know telling the truth?***

***Answer: I don't know.***

*Question: Are you ready to tell the truth?*

***Answer: I am ready to tell the truth.***

*Question; Are you believing in God?*

*Answer: No, as I don't have religion.*

***Court: From what I heard from that witness, she is possessing understanding, and promised to tell the truth now as pagan affirmed and testified that: I reside at Mienze with my father, we reside with cattle keeper, namely Shija Matias....."***

What we note is that the victim did not only promise to tell the truth, but also after the trial court being satisfied that she possessed sufficient intelligent, she was affirmed.

Section 127 (2) of the Evidence Act provides that:

*"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."*

In view of the above section, we are of a firm position that, an act of having the victim affirmed, strengthened credibility and reliability of her evidence. For that reason, we find no merit in the second ground of appeal.

The complaint of the appellant in the first ground of appeal was that the case was not proved beyond reasonable doubt.

Now, to prove rape of a child under 18 years of age; the prosecution needs to positively prove three points. **One**, the age of the victim by showing that it was below eighteen years; **two**, penetration of the male sex organ into that of the victim and; **three**, the fact that the accused person is the one who raped the child. As for the offence of abduction of a girl under sixteen years of the age, the proof needed is to prove that the girl was below sixteen years of age at the time the



offence was committed. So, we will, in turn look at these points before we can agree or disagree with the appellant on his first ground of appeal.

Starting with age, it is now established law that in sexual offences involving children, age may be proved by a parent, the child herself, a relative and even a medical practitioner. Where a birth certificate is available, the document may be used, see **Shani Chamwela Suleiman v. R**, Criminal Appeal No. 481 of 2021 (unreported). In this case, Maneno Wekelea, PW1, who was the father of the victim stated that:

*"I know 'the victim' she is my daughter; she was born on 26/11/2005 and now she is 13 years..."*

In law, that proof is enough to establish age of the victim, although in this case even Thadeo Michael PW3, a medical expert who examined the victim stated that she was 13 years. In our view, the age was proved to be below, both 18 years for rape, and 16 years for abduction. We will now proceed to the issue of penetration.

On the issue of penetration, when giving her evidence at page 12 of the record of appeal, the victim stated thus:-

*"I agreed, then we left home...when we reached we hired a room and slept with Shija, we then sexed, he entered his penis in my vagina, in the morning we boarded a bus on the way to Sikonge, .....we stayed at that place for a week, we slept with Shija for the whole week, and we used to sex..."*

In our view, this part of the victim's evidence proves nothing but penetration, which means the second ingredient of the offence of rape is complete. Covered in the same part of the evidence is the third ingredient; the person who raped the victim. In that part of the evidence she mentions him as Shija whom they were living together at her home and whom they left together. So, even the third ingredient is proved. In his defence, the appellant admits to have stayed at the victim's home taking care of her father's cattle only that the police who went to arrest him were relative of the victim's father.

In our view, the case of rape and abduction were both proved because, the victim during cross examination stated: -

*"I know you used to work at home, and one day escaped with me and ...you were the first man to sex with me, you told me that we should leave home."*

Therefore, we are clear in our mind that the appellant travelled with the victim who was below age sixteen years without her parents' consent. Thus, we find the first ground of appeal without merit and we dismiss it.

Based on the above reasons, this appeal has no merit and we dismiss it.

**DATED at TABORA** this 4<sup>th</sup> day of October, 2023

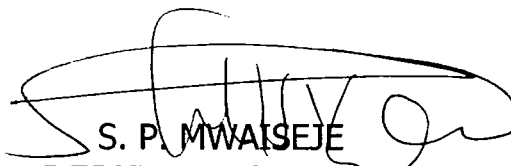
R. K. MKUYE  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

B. S. MASOUD  
**JUSTICE OF APPEAL**

The Judgment delivered this 4<sup>th</sup> day of October, 2023 in the presence of the appellant in person, and Mr. Magonza Charles, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the Original.



  
S. P. MWAISEJE  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**