IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 457 OF 2021

ZAKARIA SAMWELI KASUGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Dyansobera, J)

dated the 23rd day of August, 2021

in

Criminal Appeal No. 77 of 2020

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JUDGMENT OF THE COURT

20th March & 24th April, 2023

MKUYE, J.A.:

The appellant, Zakaria Samueli Kasuga, was charged before the District Court of Lindi District at Lindi with the offence of rape contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code. According to the particulars of offence, the appellant on 26th day of November, 2019 at Chilala Village within the District and Region of Lindi had carnal knowledge of one M d/o B (name withheld to conceal her identity) a girl aged 16

years. Upon a full trial, the appellant was convicted and sentenced to thirty years imprisonment.

Aggrieved, the appellant appealed to the High Court but his appeal was unsuccessful. Still dissatisfied with the decision of the High Court, he has preferred this second appeal to this Court.

A brief background leading to this appeal is as follows: M d/o B (to be referred to as "PW2" or "victim") was a student at Chilala Secondary School staying with her parents in Luhoma village which was a bit far from the school. Realising the importance of PW2 to attend school, her father (PW1) secured a rented room from one of his relatives (PW3) for her to be close to the school. Meanwhile, it would appear that, the appellant who was a local peasant residing in that area, forged an illicit love affair with the victim which was noticed by PW3.

On the material day, PW3 noticed the appellant gain ingress into PW2's room. He notified PW1 so as to witness what was happening. PW1 immediately arrived at the scene whereupon he overheard voices of two people from the room. He recognized his daughter's voice but was not able to recognize the other voice. PW1 and PW3 decided to look for assistance to nett the intruder. Then, PW1 remained to guard at the entrance to foil the intruder's escape while PW3 went to seek assistance

from police and secured PW5; a police officer. On arriving at the scene, PW5 managed to arrest the appellant and took him to the police station before he was later arraigned in court.

On the other hand, PW2 disclosed to have had sexual intercourse with the appellant on several occasions. She was taken to the hospital and PW4 who examined her revealed that she was penetrated and also noticed some sperms seen inside her vagina as per PF3 (Exh.P2).

In defence, the appellant denied the commission of the offence. His evidence was based on a grudge he had with PW1 for having worked on his shamba but refused to pay him.

The trial court was satisfied that the case was proved beyond reasonable doubt and entered a verdict of conviction as alluded to earlier on. On appeal, the High Court concurred with the trial court that the conviction was well founded and dismissed the appeal.

Before the Court, the appellant has lodged a memorandum of appeal consisting six (6) grounds which can be paraphrased as follows:

(1) *The High Court upheld the conviction without considering the contradiction of the evidence adduced by the prosecution witnesses.*

(2) *That the High Court erred in sustaining the conviction without taking into consideration that the appellant was arrested in the absence of a hamlet leader.*

(3) *That the High Court erred in sustaining conviction amidist contradiction between the summary of facts and prosecution witnesses.*

(4) *That the High Court erred when it failed to scrutinize the trial court's judgment which shows that the appellant was convicted and sentenced for the offence committed against the primary school girl who is standard four while the prosecution witnesses testified that the victim was a secondary school student.*

(5) *That the High Court upheld the conviction which was entered by the trial court without considering the defence evidence.*

(6) *That the High Court erred in sustaining the conviction while the case was not proved beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant appeared in person without any representation. The respondent Republic was represented by Ms. Jacqueline Werema, learned State Attorney.

The appellant adopted his grounds of appeal and opted to let the learned State Attorney respond first while reserving his right to re-join later, if such need would arise.

Ms. Werema expressed the respondent Republic's stance to support both the conviction and sentence. Having done so, she drew the attention of the Court that some of the grounds raised by the appellant were new as they were not raised by the parties and determined by the High Court. She pointed out that grounds No. 1, 2, 3 and 4 were new grounds based on pure factual issues and that, in terms of section 6 (7) (a) of the Appellate Jurisdiction Act (the AJA), this Court lacks jurisdiction to entertain them except for grounds involving matters of law. In this regard, she urged to the Court to disregard them.

Ms. Werema began her submission with the 5th ground to which she considered that the appellant's complaint that his defence was not considered yet the High Court did not address this complaint in its judgment. She elaborated that the appellant's defence that he owed the victim's father for the work he had done on his farm was considered. She argued that, even if such evidence was not considered, the remedy is for this Court to step into the shoes of the first appellate court and consider it.

In ground No. 6, the appellant's complaint is that the case against him was not proved beyond reasonable doubt since the ingredients of the offence were not proved. The learned State Attorney argued that, the ingredients of the offence of this nature are; the age of the victim, penetration and that the appellant committed the offence were all proved.

In relation to the victim's age, Ms. Werema contended that it was proved by PW1 (the victim's father) through the Clinic Card which was tendered by PW2 and admitted as Exhibit P1 proving that the victim was 16 years old.

Ms. Werema went on to submit that, penetration was proved by PW2 who testified that they used to make love. To fortify her argument, she referred us to the case of **Hassan Kamunyu v. Republic**, Criminal Appeal No. 277 of 2016 (unreported) in which the Court restated the principle of law in the case of **Baha Dagari v. Republic**, Criminal Appeal No. 39 of 2014 (unreported) where it was stated, that a victim of rape need not state graphically in great detail how a male sexual organ was inserted into her vagina.

Ms. Werema submitted thus that, the fact that PW2 said that they made love and taking into account that she was 16 years of age, penetration was proved to which she could not have consented.

As to whether the appellant committed the offence, the learned State Attorney firmly argued that there was ample evidence to show that the appellant was the one who committed the offence considering that he was arrested by PW5 in company of PW3 in the victim's room where he was found with the victim.

Finally, she concluded that the case was proved beyond reasonable doubt and urged the Court to find the appeal devoid of merit and dismiss it in its entirety.

The appellant had nothing useful to add. He only beseeched the Court to consider his grounds of appeal and allow the appeal.

We shall begin our discussion with the issue of new grounds which Ms. Werema invited us to disregard. According to section 6 (7) (a) of the AJA, the jurisdiction of this Court on the second appeals is on matters of law only and not on matters of facts. The said section provides as follows:

> "*Either party –*

(a) to proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact."

On the other hand, section of 4 (1) of the same Act vests this Court with jurisdiction to hear and determine appeals from the High Court and subordinate courts with extended jurisdiction. The Court has addressed itself on this in various cases including, **Charles Haule v. Republic**, Criminal Appeal No. 250 of 2018, **Nurdin Musa Wailu v. Republic**, Criminal Appeal No. 164 of 2004 and **Athumani Rashidi v. Repulbic,** Criminal Appeal No. 26 of 2016 (all unreported). In the case of **Nurdin Musa Wailu** (supra), the Court stated that:

"... usually, the Court will look into matters which came up in the lower courts and decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court."

The Court reiterated that stance in the case of **Emmanuel Kingamkono v. Republic**, Criminal Appeal No. 494 of 2017 (unreported) and categorically stated that it cannot entertain new grounds of appeal if they were neither raised nor addressed by the first appellate court.

We agree with Ms. Werema that grounds No. 1, 2, 3 and 4 were neither among the grounds before the first appellate court nor did that court determine them. So, on the basis of the above cited authorities, this Court cannot entertain them for lack of jurisdiction. We, therefore refrain from dealing with them.

Next for our discussion is the issue relating to failure to consider the defence evidence. The appellant's complaint is that the trial magistrate treated his defence evidence as an afterthought without analysing it. On the other hand, the learned State Attorney was firm that it was considered.

It is trite law that, the evidence of both sides be it in criminal or civil matters has to be subjected to an objective evaluation and analysis. The Court stressed that position in **Leonard Mwanashoka v. Republic**, Criminal Appeal No 226 of 2014 (unreported). Needless to say, the Court has also stated that where both courts below fail to consider the defence case, the Court is enjoined to step into the lower court's shoes and consider it and make its own findings of facts. It may not require citing authority in this regard but we need only to refer to **Hassan Mzee Mfaume v. Republic** [1981] T.L.R. 167 and **Mzee Ally Mwinyimkuu**

@ **Babu Seya v. Republic**, Criminal Appeal No. 499 of 2017 (unreported).

Upon perusing the judgment of the trial court, it is plain that the evidence from both sides was objectively analysed before arriving at the conclusion that the case was proved beyond reasonable doubt. In particular, at page 40 of the record of appeal, the trial court examined the appellant's defence that the case against him was framed up by the victim's father (PW1) who owed him money for work he had done in his farm. In our view, the trial court could not have done more than what it did since the appellant's defence evidence did not controvert the prosecution evidence proving the commission of the offence.

We agree that though the High Court did not deal with that issue, we do not comprehend how it could have done so where there was no ground of appeal raised to that effect. In this regard, we find that this ground of appeal is unmerited and we dismiss it.

The complaint in ground No. 6 is that the case against the appellant was not proved beyond reasonable doubt. On her part, the learned State Attorney is convinced that all the ingredients of statutory rape particularly; the age of the victim, penetration and the person who committed the offence were proved beyond reasonable doubt.

It is elementary that the duty to prove criminal cases lies on the prosecution and the standard of proof is beyond reasonable doubt as dictated by section 114 (1) of the Evidence Act – See also our decision in **Nehemia Rwechungura v. Republic**, Criminal Appeal No. 71 of 2020 (unreported). The phrase "prove beyond reasonable doubt" was discussed in the case of **Magendo Paul and Another v. Republic,** [1993] T.L.R. 219 where the Court stated as follows:

> *"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."*

In this case, the learned State Attorney strongly argued that the case against the appellant was proved beyond reasonable doubt and, rightly so in our view. In the offence of rape with which the appellant stood charged, the prosecution was required to prove three ingredients which are; age of the victim, penetration and the person who committed the offence.

After examining the record, particularly the evidence adduced at the trial, the judgment of the trial court and that of the first appellate court, we are satisfied that the two courts rightly concurred in their factual

finding that the prosecution proved its case beyond reasonable doubt. We have not seen any reason to interfere with their findings being satisfied that the ingredients of statutory rape were sufficiently proved. As found by the two courts below, the victim's age was proved by PW1 who stated that she was 16 years. PW1 was a competent witness to prove her age in line with our decision in **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported).

Besides, it was similarly uncontroverted that PW4 was a secondary school student in Form II. We are equally satisfied that the first appellate court, upon evaluation of the evidence on record, came to the right finding as the trial court did that through PW2's evidence supported by PW4, a medical doctor who examined PW2 proved penetration beyond reasonable doubt. Finally, as to the person responsible for the offence, again, as found by the trial court and the High Court, there was incontrovertible evidence that it was none other than the appellant who was responsible for that act. The evidence by PW1, PW3 and PW5 established that on the material date, the appellant was found and arrested in a room which PW2 rented from PW3. Apart from that, her evidence that the appellant was her lover with whom they used to make love on several occasions was not challenged in cross-examination.

As alluded to earlier on, the appellant's defence was considered but it was found to be an afterthought which could not have shaken the prosecution case. We share the same view notwithstanding the fact that this was not a complaint before the first appellate court. Consequently, we find no merit in ground No. 6 and dismiss it.

Looking at the totality of the evidence, we are satisfied that the prosecution proved the case beyond reasonable doubt. We, therefore, dismiss the appeal for want of merit.

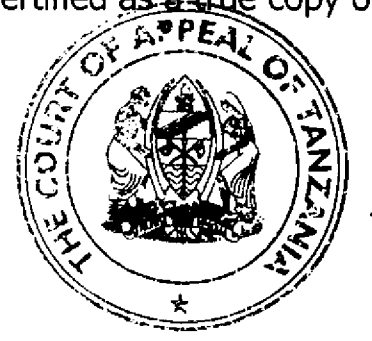
DATED at **MTWARA** this 19th day of April, 2023.

R.K. MKUYE
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

S.M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of April, 2023 via video facility connected from Mtwara High Court in the presence of Mr. Melkiory Hurubano, State Attorney for the Respondent and the appellant in person is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL