IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MURUKE, J.A.)

CRIMINAL APPEAL NO. 630 OF 2020

ALPHONCE BISEGE MWASANDUBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Ndunguru, J.)

dated the 15th day of October, 2020

in

Criminal Appeal No. 76 of 2019

.....

JUDGMENT OF THE COURT

7th & 12th February, 2024

MURUKE, J.A.:

The appellant, Alphonce Bisege Mwasandube was charged with rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 RE. 2002 (Now R.E. 2022). It was alleged that the appellant, on 21st December, 2018 at Kasanga village within Rungwe District in Mbeya Region, had carnal knowledge of a girl aged 6 years, a standard one student. To protect her identity, we will refer to her as "the victim". Upon a full trial, the appellant was found guilty, convicted and sentenced to thirty years imprisonment.

The appellant was dissatisfied with the aforesaid conviction and sentence, thus he appealed to the High Court in which Ndunguru, J, upheld the conviction and sentence, and furthermore enhanced the sentence to life imprisonment in terms of section 131(3) of the Penal Code on the reason that the victim was below ten years of age at the commission of the offence charged. Dissatisfied, the appellant preferred this second appeal on six (6) grounds, which we have taken the liberty to paraphrase as follows;

1. *The first appellate court erred to confirm the trial court's decision while the prosecution evidence was doubtful.*
2. *That the evidence of PW1 was improperly taken by the trial court contrary to the dictates of section 127(1) of the Evidence Act and there was no corroboration of the evidence of PW1 and PW2.*
3. *That the first appellate Judge erred by not considering the failure by the prosecution to summon the doctor who examined the victim to testify on the alleged offence as well as the failure to tender the PF3 report by the prosecution.*
4. *That the first appellate court erred in dismissing the appeal while the case was unproved since there was no report on medical test or Deoxyribonucleic Acid (DNA) to corroborate the victim's medical test.*
5. *That the lower courts erred in law to rely on the clinic card (exhibit P1) to determine the victim's age without properly considering the variance of the age found on the clinic card (exhibit P1) with the age written in the charge sheet.*

6. *That the first appellate court erred in law and fact by its failure to discredit the evidence of PW3.*

From the nature of the appeal before us, the background of this matter is of the essence. The victim, a girl aged 6 years old at the commission of offence was living at Igalamu village, Rungwe District with her parents. She knew the appellant as he lived at Kalambo on the same Village. On 21st December, 2018, the appellant went to the victim's house and took her to a tree called Mndola. While there the accused undressed his cloth and the victim's and then he inserted his male organ into the victim's private parts. In the course of the sexual intercourse the victim felt pain and cried.

Atupakisye Nyangupe, PW3 who was on way to her neighbour heard a child yelling and crying "nikatite, nikatite". She approached the scene and saw the appellant half naked with his trousers on his knee, while the victim's dress was raised to the chest. Upon seeing that, PW3, rushed to gather people around, who then went to the scene. The appellant upon seeing that, ran away living the victim crying. She was returned home by villagers including PW3. The victim's mother Sara Kajuta (PW2), rushed home after she was informed of the incident by PW3. She found her daughter very dirty with a lot of people around. She took the victim to the hospital, where it was proved that she was raped.

The appellant was arrested on the same day of the incident 21st December, 2018 and arraigned before the District Court of Rungwe at Tukuyu as alluded earlier in which he denied the charge.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent, was represented by Ms. Mwajabu Tengeneza, learned Senior State Attorney, assisted by Veneranda Masai, learned State Attorney.

When the appellant was invited to expound on the grounds of appeal, he in the first place prayed the Court to consider his grounds in the memorandum of appeal and opted to hear the response from the learned State Attorney and reserved his right to re-join later.

In response to the appeal, Ms. Masai at the outset declared her stance that the respondent is not in support of the appeal, rather they are supporting the findings, conviction and sentence by the first appellate court. At the very outset, Ms. Masai intimated to the Court that, ground one was neither filed at the High court nor was it argued, thus it cannot be argued at this stage before the Court.

On merits of the appeal beginning with ground two, Ms. Masai submitted that PW1's evidence was properly taken and that it was sufficiently corroborated by PW3 who drew the attention of neighbours to the scene of crime. On the third ground, the respondent's counsel

argued that, Doctor's evidence is an expert opinion which does not bind the Court. Referring to the case of **Hatari Masharubu @ Babu Ayubu v. Republic** Criminal Appeal No. 590 of 2017, [2021] TZCA41 (26 February, 2021, TANZLII), she submitted that rape could be proved by evidence other than medical evidence. It was further argued by respondent's counsel that evidence that was produced by prosecution witnesses proved the offence without medical report. More so, the appellant did not cross examine the prosecution witnesses particularly PW1. She also referred to the case of **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (unreported), in which it was held that failure to cross-examine a witness on a certain fact, that fact is deemed to be accepted.

Ms. Masai refuted ground four of appeal, submitting that there was no need of conducting DNA test because the evidence of the victim PW1 proved penetration and that it was believed by the trial court and 1st appellate Court. Credibility of the victim evidence is what proved the prosecution case supported by the testimonies of PW2 and PW3.

Ms. Masai submitted on ground five that the victim's age was sufficiently proved. She argued that PW2 testified that her age was seven years, while the charge sheet says the victim was aged six years. She argued that, the said variation is not fatal, because section 131 (3)

of the Penal Code is very clear, as it provides for life imprisonment for rape on a victim who is below ten years. So, whether the victim was six years old or seven years old, it is immaterial. When asked clarification questions by the Court on the age, learned State Attorney replied that charge sheet was of 2018 while PW2 victim's mother gave evidence in 2019.

Responding to the complaint on ground six of appeal, Ms Masai insisted that PW3 is reliable as she was able to alert the neighbours who rushed to the scene and found the appellant in the midst of the sexual act. More importantly, the appellant did not contradict PW3's evidence in cross examination. So PW3's evidence was believable. In conclusion, the respondent's counsel prayed for dismissal of the appeal for lack of merits.

When given floor to rejoin to the respondent counsel's submission, appellant just said I quote:

> *"Doctor did not testify. I did not commit the offence. This case is just fixed. I pray that the Court allow the appeal and release me from custody."*

Having heard both sides it is worth noting that this is a second appeal. It is a settled position of the law that, the Court will not

interfere with concurrent findings of the courts below, unless there has been misapprehension of the nature and quality of the evidence occasioning miscarriage of justice. For this position, see for instance, **Isaya Mohamed Isack v. The Republic**, Criminal Appeal No. 38 of 2008 (unreported), **DPP v. Jaffar Mfaume Kawawa** [1981] T.L.R. 149 and **Wankuru Mwita v. The Republic**, Criminal Appeal NO. 219 of 2012 (unreported). In the latter case, the position was emphasized thus:

> *"...The law is well-settled that on second appeal, the court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; a violation of some principle of law or procedure or having occasioned a miscarriage of justice."*

It is also settled law that, although assessing the credibility of a witness basing on demeanor is the exclusive domain of the trial court, it can still be determined by the appellate court when assessing the coherence and consistency of the witness and when such witness is considered in relation to the testimony of other witnesses including that of an accused person. For this position, the cases of **Shaban Daudi v.**

The Republic, Criminal Appeal No. 28 of 2001(unreported) and **Daniel Malogo Makasi & Others v. The Republic** (Consolidated Criminal Appeals No. 346 of 2021) [2022] TZCA 230 (2 May 2022, TANZLII) are relevant. In this regard, the assessment of the credibility of a witness is crucial because, every witness is entitled to be believed unless the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses.

The other principle relevant to this case is that, in sexual offences, the best evidence is that of the victim (see **Selemani Makumba v. The Republic**, [2006] T.L.R. 379). Moreover, in terms of section 127 (6) of the Evidence Act Cap. 6 R.E. 2019, the court can ground conviction based on the evidence of victim of sexual offence if it forms an opinion that her evidence is credible. Besides, it is settled that every witness is entitled to credence of his/her evidence unless there are good and cogent reasons to hold otherwise as expounded by the Court in **Goodluck Kyando v. Republic** [2006] T.L.R. 363.

It is common knowledge that in cases involving statutory rape like the one at hand, it is very necessary that the age of the victim be proved, and this is the appellant's complaint in ground two of his appeal. In the case of **Alex s/o Ndendya v. The Republic**, (Criminal

Appeal 340 of 2017) [2020] TZCA 201 (6 May 2020, TANZLII), the Court stated that:

> *"...in a situation where the appellant was charged with statutory rape then, age of the victim must specifically be proved before convicting the appellant".*

On our part, we have duly considered the positions of the learned counsel for the respondent as well as the grounds of appeal and we propose to start with the first ground. As rightly submitted by respondent counsel that, the same is a new ground, as it did not feature in the petition of appeal before the High Court nor did it form any part of the three grounds formulated in the High Court as reflected at page 41 of the record. Therefore, the first ground of appeal being new and factual should not be entertained in this second appeal by the Court.

The Court was confronted with the same issue as above in the case of **Godfrey Wilson v. The Republic**, (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019, TANZLII), where Court held as follows:

> *"... we think that those grounds being new grounds for having not been raised and decided by*

> *the first appellate Court,* ***we cannot look at them.*** *In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate Court went wrong or right. Hence,* ***we refrain ourselves from considering them."*** [Emphasis added].

See also the cases of **Hadija Ally v. George Masunga Msingi** (Civil Appeal 384 of 2019) [2023] TZCA 17270 (22 May 2023, TANZLII), **Galus Kitaya v. Republic** (Criminal Appeal 196 of 2015) [2016] TZCA 301 (13 April 2016).

On the second ground the appellant is complaining that, the evidence of PW1 was taken in contravention of section 127(1) of the Evidence Act and that PW1's evidence was not corroborated by PW2. We think the gist of this complaint is that, PW1 being the child of tender age her evidence required corroboration so as to be acted on by the trial court. And since it was not corroborated by the evidence of PW2 the court ought not to have acted on it. The record shows that PW1 gave her evidence upon promising to tell the truth, and fluently narrated on what happened to her. Therefore, the complaint that the evidence of PW1 was not corroborated by that of PW2 does not hold water. Moreover, the law, section 127(6) of the Evidence Act is so clear

that in sexual offences, the court may enter conviction basing on uncorroborated evidence of the child of tender age given that the court is satisfied the child is telling nothing but the truth. Therefore, this ground has no merits.

Regarding the third ground of appeal, the appellant complained to the effect that, the doctor and the PF3 report were so vital in proving the charge levelled against the appellant, thus, the prosecution should have called the said doctor who alleged to have examined the victim to testify and tender the said PF3 report. This complaint has no substance as the record at page 9 reveals that the prosecution intended to call the said doctor to testify and summons to appear was issued by the trial court. However, the record reflects that, the said doctor did not enter appearance to testify on the allegation and consequently, the PF3 report could not be tendered. In that case, the non-appearance of the doctor to testify upon the issued summons should not be equated to the failure to call a material witness by the prosecution. As the record stands, the prosecution had all interest to procure the doctor's attendance thus, the principle of drawing adverse inference may not stand in the matter at hand. Consequently, the ground lacks merit.

In the fifth ground; the appellant faulted the two lower courts for relying on the clinic card (exhibit P1) at page 15 to determine the

victim's age without properly considering the variance on the victim's age as indicated in the charge and as stated by PW2. Apparently, the appellant was charged with statutory rape, thus the prosecution only had the duty to prove penetration and the victim's age as stated in the case of **Alex Ndendya** (supra)

The appellant contended that the victim's age indicated in the charge sheet as six years is at variance with PW2's statement that she was seven years old. At first, we would agree with Ms. Masai that whether the victim was aged six years or seven years at the commission of the crime, it was immaterial as the penalty for raping a girl aged under ten years is life imprisonment in terms of section 131(3) of the Evidence Act.

Furthermore, even if we ignore the clinic card (exhibit P1) because it was not read out after its admission at the trial, going by the unassailed testimony of the victim's mother (PW2) that , she gave birth to her daughter on 23/08/2012, it defies dispute that the victim was six years and four months on the fateful day. In the light of the above, the fifth ground of appeal has no merits.

In ground six of this appeal the complaint is that, the evidence of PW3 ought to have been corroborated by other villagers who alleged to witness the incident. He faulted the first appellate court in believing

PW3's testimony that, she witnessed the appellant together with the victim while under the tree. He questioned on the failure by PW3 to rescue the victim even by raising alarm instead of leaving the place for assistance. Without much ado, we find this ground with no merit since, PW3 was not cross-examined on that aspect by the appellant. Even if PW3's evidence was disregarded, still the offence charged was proved on the required standard. Thus, the ground has no merit.

Regarding the fourth ground, the complaint is that, the case was not proved beyond reasonable doubt. The appellant lamented on the failure to produce forensic evidence in form of DNA test and medical evidence on STD to support the prosecution case. In our view this complaint is baseless. In cases involving sexual offences, the best evidence comes from the victim and that the law does not strictly demand the use of such forensic or medical evidence to prove rape. In the case of **Aman Ally @ Joka v. Republic**, Criminal Appeal No. 353 of 2019 [2021] TZCA 170 (4 May,2021, TANZLII) the Court pronounced that;

> *"We also find untenable the claim that no DNA or STD evidence on the appellant was introduced to corroborate the victim's medical test results. We endorse the learned state counsel's submissions*

that there is no legal requirement for use of such evidence..."

It is a settled law that, the best evidence of sexual offences comes from the victim see **Selemani Makumba** (supra). Similarly, the provisions of section 127 (6) of the Evidence Act states that, where the court is satisfied that the evidence of a victim of rape is credible, such evidence does not require corroboration to form conviction, even if a victim is a child of tender age. In the appeal at hand, PW1 at page 4 testified to have been penetrated by the appellant. To describe the incident, she narrated that, the appellant took her to the Mndola tree under which he had sexual intercourse with her. The record shows that the appellant never challenged her evidence as he did not cross examine her (at page 4). That failure connotes acceptance of the veracity of PW1's story. In **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (unreported), the Court relying on the case of **Cyprian A. Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 (unreported) it held that;

"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."

In view of the aforesaid position, PW1 was a credible witness. Her testimony proved that the appellant had sexual intercourse with her. In our view the offence was proved beyond reasonable doubt.

For the foregoing reasons, we find the appeal lacking merits. Consequently, we dismiss it in its entirely.

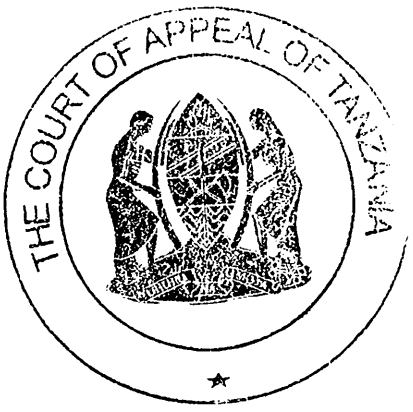
DATED at **MBEYA** this 10th day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE.
JUSTICE OF APPEAL

The Judgment delivered this 12th day of February, 2024 in the presence of the Appellant in person and Ms. Lilian Chagula, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL