**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: JUMA, C.J., MKUYE, J.A. And MLACHA, J.A.)**

**CRIMINAL APPEAL NO. 379 OF 2020**

**NSATO MAGINGA @ KENGUNYA..... APPELLANT**

**VERSUS**

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

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

**(Ismail, J.)**

**dated the 6th day of May, 2019**
**in**
**Criminal Appeal No. 247 of 2018**

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# JUDGMENT OF THE COURT

13th & 16th February, 2024

**JUMA, C.J.:**

The appellant, Nsato Maginga @ Kengunya, was on 11 July 2018 convicted by the District Court of Serengeti at Mugumu (A.L. Mushi-RM) for the offence of rape contrary to section 130 (1)(2)(b) and 131 of the Penal Code, Cap 16 R.E. 2002 and sentenced to serve thirty (30) years in prison. In addition to the prison sentence the trial Magistrate ordered the appellant to compensate the victim two million shillings.

The particulars of the charge were that on 21/09/2017 at around 01:00 hrs at Merenga village in Serengeti District in Mara Region, the appellant had

sexual intercourse with a 41-year-old woman without her consent. We shall refer to the victim as PW1.

Being aggrieved with conviction and sentence, he preferred an appeal to the High Court at Mwanza in Criminal Appeal No. 247 of 2018. Ismail, J. (as he then was), who heard the appeal, despite expunging from the prosecution evidence the medical examination report (exhibit P1) that a Dispensary Nurse (PW3) had prepared and tendered at the trial court, dismissed the appellant's appeal after finding that the prosecution had all the same proved its case beyond reasonable doubt.

Aggrieved with the High Court dismissing his appeal, the appellant brought this second appeal based on five grounds of complaints. In the first ground of appeal, the appellant faults his conviction on prosecution evidence that he believed did not prove the charge beyond a reasonable doubt. The second ground contends that the prosecution did not prove penetration, a necessary element, to prove rape beyond a reasonable doubt. In the third ground of his appeal, the appellant casts doubt on the uncorroborated evidence of the victim, PW1, which he described as lacking in coherence. In the fourth ground, the appellant faults the two courts below for relying on the hearsay evidence of the victim's daughter-in-law (PW2) and the nurse at

Merenga Dispensary (PW3). In the fifth ground, the appellant faults the first appellate Judge for believing the evidence of PW1 that he (the appellant) perforated her hymen (a thin piece of tissue covering the vaginal opening of a woman who had never had sexual intercourse).

It is appropriate we look at events leading up to this second appeal. It is evident from the record of this appeal that the victim (PW1) and the appellant knew each other before the incident. Apart from residing in Merenga village, the appellant's sister once married PW1's brother-in-law.

Around 01:00 hrs. on 21/09/2017, PW1 was sleeping at her home when she heard the appellant calling her from outside, introducing himself, and knocking on the door. It was rather late, but PW1 had nothing to fear because she knew the appellant. Once in, the appellant explained that he wanted to leave his luggage at PW1's house until morning. Matters changed for the worse when the appellant suddenly pulled out a knife and closed the door behind him. He ordered PW1 out of her house and directed her to lock the door and accompany him. The appellant held PW1's hand as they walked into the darkness. At a nearby bush, the appellant undressed and raped her twice without her consent. Upon her pleas that she was thirsty and wanted water to drink, the appellant allowed PW1 to walk to the house of her

daughter-in-law, Wegesa Magenge (PW2), who opened the door. Before leaving, the appellant warned PW1 not to divulge what he had done to her. However, PW1 disclosed to her daughter-in-law (PW2) and reported the rape at Mto Mara Police Station. The police gave her a Police Form Number 3 as her reference to Merenga Health Centre for medical examination and treatment.

PW2 recalled that day when PW1 knocked at her door around 01:00 hrs. Upon opening the door, PW2 saw her mother-in-law (PW1) in the appellant's company. PW1 asked for water to drink. PW2 testified that before the appellant left, he cryptically reminded PW1 that: "he would not like to hear about that matter." PW2 testified she inquired what the appellant meant, and her mother-in-law complained that the appellant had raped her.

Several hours after the alleged rape, at 14:00 hrs. on 21/09/2017, PW1 arrived at Merenga Dispensary. A nurse, Sara Ombati (PW3), was busy helping a woman who was expecting to deliver a baby and asked PW1 to return home and return to the dispensary the following day. In addition, PW3 asked PW1 not to bathe until after a medical examination on 22/9/2017. PW1 returned to the dispensary the next day around 09:45 hrs. PW3

examined her, and filled out the medical examination report, which she tendered as exhibit P1.

The appellant gave a sworn defence as DW1. He did not call any defence witness. He recalled that for the whole of 21/07/2017, he was busy working on the farm from 07:00 hrs. He was surprised when, on 23/09/2017 at around 14:00 hrs., members of the people's militia arrested him. He denied raping PW1.

At the appeal hearing on 13/2/2024, the appellant appeared in person, unrepresented. The learned Senior State Attorney, Ms. Martha Mwadenya, appeared for the respondent Republic. The appellant adopted his five grounds of appeal and expressed his wish that the learned State Attorney should first respond to his grounds of appeal.

The learned Senior State Attorney opposed the appeal and prayed for its dismissal. She also urged us to strike out the first and fifth grounds of the appellant's memorandum of appeal because they are new grounds that, by settled law, the first appellate High Court should have considered before coming to this Court on a second appeal. To support her position that we should discard grounds number one and five, Ms. Mwadenya referred to the case of **HUSSEIN RAMADHANI V. R,** CRIMINAL APPEAL NO 195 OF 2015

(unreported), where this Court referred to the principle of law that an appellate court will not deal with new grounds of appeal which parties did not raise and which trial and first appellate courts did not determine.

Upon closer look, we do not agree with the learned Senior State Attorney that the first and fifth grounds are new grounds of appeal. The first ground of appeal alleging that the prosecution has failed to prove its case beyond a reasonable doubt questions the evaluation of evidence concerning the ingredients of rape; hence it is a complaint properly before us. Likewise, the fifth ground of appeal is not a new ground in so far as it questions whether the prosecution proved sexual penetration without consent. When the appellant, in his fifth ground of appeal, faulted the first appellate court for believing that he perforated PW1's hymen, the appellant may as well be questioning whether the prosecution proved penetration through the evidence of rupturing of PW1's hymen during sexual penetration.

The learned Senior State Attorney next addressed the second ground of appeal, where the appellant contends that the first appellate Judge erred in law for failing to find that the prosecution did not prove sexual penetration, an essential ingredient in rape offences. The appellant also blamed the first appellate court for accepting the victim's generalized evidence that he raped

her. In urging us to dismiss this ground, Ms. Mwadenya submitted that PW1's evidence on pages 23 and 24 of the record of proved how the appellant penetrated her sexually without her consent. Ms. Mwadenya sought the support of earlier decisions of this Court to point out that PW1 did not need to recount in graphic detail how the appellant raped her. She referred to the case of **HASSAN KAMUNYU VS. R,** CRIMINAL APPEAL NO. 277 OF 2016 (unreported), which describes the position of this Court to the effect that *"it is not always expected the victim will graphically describe how the penis was inserted into the victim's vagina."*

The learned Senior State Attorney also asked us to dismiss the third ground of appeal, which faults the first appellate Judge for relying on what the appellant had described as incoherent, unreliable, and uncorroborated evidence of the victim (PW1), which lacked credibility. As far as Ms. Mwadenya is concerned, PW1's evidence was lucid, demonstrating her as a witness of truth. In cementing her stand that the evidence of PW1, a victim of a sexual offence, is the best evidence that can convict without requiring corroboration, Ms. Mwadenya referred to a statement of law in **SELEMANI MAKUMBA V. R.**, CRIMINAL APPEAL NO. 94 OF 1999 (unreported), to the effect that: *"True evidence of rape has to come from the victim, if an adult,*

*that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."*

The fourth ground of appeal faults the first appellate Judge for relying on what the appellant branded as hearsay evidence of PW2 and PW3. Ms. Mwadenya rebutted this claim, pointing out that PW2's evidence was not hearsay because PW2 testified on what she saw and heard when her mother-in-law (PW1) and the appellant arrived at her home at night looking for water. Ms. Mwadenya urged us to dismiss the fourth ground of appeal for three reasons. First, the first appellate Judge did not rely on the evidence of PW2 and PW3 to convict the appellant; instead, he relied on the evidence of the victim of a sexual offence (PW1) to convict the appellant. Secondly, PW2's evidence was not hearsay because she testified on what she saw and heard when her mother-in-law (PW1) and the appellant arrived at her home at night looking for water. Thirdly, the first appellate Judge discarded the oral evidence of PW3 and medical examination report she had prepared because, as a nurse, PW3 was not qualified to conduct a medical examination and prepare a medical examination report.

Before resting her submissions, the learned Senior State Attorney urged us to dismiss this appeal in its entirety. The appellant should continue serving the remainder of his thirty-year sentence.

In his response to Ms. Mwadenya's submissions, the appellant reiterated that his five grounds of appeal are sufficient for us to allow his appeal and to order his return home to his family. The appellant expounded his first ground of appeal to explain why he thought the failure to bring evidence to show the source of light PW1 used to identify him and its intensity created doubt in the prosecution case against him. He wondered why, if PW1 was so believable, she failed even to describe his clothes that night.

Regarding the fourth ground of appeal, the appellant maintained that evidence of PW2 and PW3 was not only hearsay, but it wasn't easy to determine who between them was telling the truth.

Having considered the appellant's grounds of appeal and the submissions the appellant made in support, as well as the learned Senior State Attorney's response, the main issue for our determination is whether we can fault the concurrent finding of facts by the trial and the first appellate courts, that the prosecution proved beyond reasonable doubt that the appellant had sexual intercourse with PW1 without her consent. We agree with Ms. Mwadenya that the first appellate Judge relied on the evidence of

PW1, the victim of a sexual offence, to convict the appellant. We disagree with the appellant that his identification as the person who raped PW1 can arise. The appellant and PW1 knew each other before the incident of rape.

In this appeal before us, both the trial District Court of Serengeti at Mugumu and the first appellate High Court at Mwanza believed the evidence of the victim of rape (PW1) and reached a concurrent finding that the appellant had sexual intercourse with PW1 without her consent. We agree with Ms. Mwadenya, learned Senior State Attorney, that we cannot, on the second appeal, fault the conclusion that the appellant had sexual intercourse with PW1 without her consent.

There is evidence of PW1 on how the appellant tricked his way inside her house and forced her out of her home at knife-point to a nearby bush, where he had sexual intercourse with her without her consent. PW2 heard when the appellant cryptically warned PW1 not to report the rape. When PW2 asked, PW1 narrated her ordeal that led to the appellant raping her in the bushes without her consent.

The appellant has raised a complaint that the prosecution failed to prove penetration, an essential ingredient of the offence of rape. We agree with the learned Senior State Attorney that this claim of lack of sexual

penetration, which the appellant raised through his second and fifth grounds of appeal, does not hold water in light of the victim's evidence on record. There is PW1's evidence to prove penetration. While still sitting on her bed before being forced out to the bushes, the appellant told PW1 he had abducted her, warning her that she should not shout for help, or else he would stab through her neck (*kuanzia sasa nimeshakuteka usipige kelele ukipiga kelele tu nitakumaliza kwa kukuchoma kisu cha shingo).*

The appellant was so determined to rape PW1 that he was never deterred about her claim of running stomach. PW1's evidence proved penetration when she gave such details as "We passed near a river, along the road he ordered me to stop near the bush, I (PW1) saw no need to cry for help since it was deep into the night. He undressed me and raped me. He had sexual intercourse without my will. He ejaculated once, and he did not ejaculate a second time." We wonder what more proof of sexual penetration without consent, the appellant needs than what the victim of sexual offence testified on.

Under section 127 (6) of the Evidence Act, Cap 6 R.E. 2022, evidence of PW1 is that of a victim of the sexual offence. We do not have any reason

to fault the way the first appellate Judge assessed the credibility of PW1's evidence and being satisfied that the victim was telling the truth.

The appellant's five-sentence cross-examination did not shake PW1's evidence, proving the appellant kidnapped PW1 from her room to the bushes, where he had sexual intercourse with her twice without her consent.

In the upshot, this second appeal lacks merit. We accordingly dismiss it.

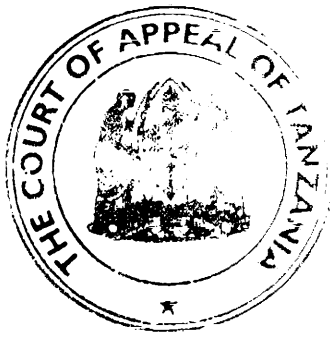
**DATED** at **MWANZA** this 15th day of February, 2024.

I. H. JUMA
**CHIEF JUSTICE**

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

L. M. MLACHA
**JUSTICE OF APPEAL**

The Judgment delivered this 16th day of February, 2024 in the presence of the appellant appeared in person and Ms. Monica Mwery, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**