IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

CORAM: MWANDAMBO, J.A., KAIRO, J.A. And ISSA J.A.

CRIMINAL APPEAL NO. 538 OF 2021

PILI ARON MWABEZA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngunyale, J)

dated the 10th day of September, 2021

in

Criminal Appeal No. 59 of 2021

JUDGMENT OF THE COURT

2nd & 10th December, 2024

KAIRO, J.A.:

This appeal is against the judgement of the High Court at Mbeya in Criminal Appeal No. 59 of 2021. The appellant was charged with rape in the District Court of Ileje at Itumba in Criminal Case No. 8 of 2021 contrary to sections 130 (1), (2) (e), and c/s 131 (1) of the Penal Code, Cap 16 (the Penal Code).

It was alleged that, on 5th February, 2021 at Itale village within Ileje District in Songwe Region, the appellant had a carnal knowledge of a girl of 7 years of age who was a pupil of standard one at Itale Primary

School. For the purpose of this judgment, we shall refer her as the "victim" or "PW1" to conceal her true identity.

The brief facts leading to this appeal is that, on the fateful date the victim (PW1) was going back home from school. On the way, she saw the appellant coming in front of her. The appellant approached the victim and asked her if she was going home, and the victim answered in the affirmative. Suddenly, the appellant grabbed and dragged the victim to the bush (milingotini) where he laid her down, took off her clothes and underwear while forcing her legs apart. He then took out his penis and inserted into the victim's vagina with force. The victim felt so much pain and shouted for assistance, but the appellant covered her mouth.

After ravishing her, the appellant went away. The victim went back home and found her mother (PW2) had gone to the farm. She followed her there while crying and narrated her ordeal, mentioning the appellant as the offender. PW2 inspected the victim and found blood dripping from her private parts to the thighs and had bruises in her vagina. She reported the matter to the Village Executive Officer (VEO), one Queen Jaiwel Msomba (PW5) who facilitated the appellant's arrest through militiamen.

The matter was reported to Ileje police station where the victim was issued with PF3 to go to the hospital for examination. It was Dr.

Joshua Mwalongo (PW3) who examined the victim and found that her hymen was perforated, the victim's vagina was torn and she was bleeding. The victim who was born on 15th March, 2012 as per her birth certificate (exh. P1), had to be admitted for treatment. Later, PW3 filled a PF3 and the same was tendered and admitted in evidence as exhibit P2.

The case was investigated by police officers; WP 7279 D/C Yasinta (PW4) and E4198 D/CPL Bruno (PW6) and later the appellant was arraigned in court to answer the charge of rape.

In his defence, the appellant denied to have committed the offence and raised the defence of alibi. He further stated that, the case was fabricated. However, the appellant admitted to know the victim.

After the trial, the court was satisfied that the appellant was guilty of the offence he was charged with. Thus, he was convicted and sentenced to serve life imprisonment. The appellant was unhappy with the decision of the trial court. However, his attempt to challenge the same at the High court was unsuccessful. Hence, this second appeal seeking to challenge both the conviction and sentence vide two sets of memoranda of appeal. The first set is in the memorandum of appeal lodged on 14th April, 2022 containing the following five (5) grounds:-

1. That High Court erred in law for dismissing the appeal relying only on a single witness without corroboration.

2. That the High court Judge erred in law for dismissing the appeal without taking into account the contradictions/difference between the oral testimony of PW3 and in his written examination (exh. P2).

3. That the High court Judge erred in law in dismissing the appeal of the appellant without evaluating well the petition of the appeal filed by the appellant.

4. That the high court judge erred in law when it dismissed the appeal disregarding the fact that PW5 was notified about the incident by PW2 but he did not interview PW1 so as to prove the same.

5. That the high court judge erred in law by dismissing the appeal without solving the matter of visual identification since the one who was explaining the said allegation was PW2 and not PW1.

6. That the trial court and first appellate court erred in law for convicting the appellant and upholding the said decision while the prosecution failed to tender the sketch map of the scene of incident at the trial court. Further that, the case was fabricated by family members for their own benefits as the said date and day was a holiday and no one attended school.

The appellant's further supplementary memorandum of appeal on 18th November, 2024 raises two (2) grounds, namely: -

1. That the first appellate court erred in law and fact for upholding the decision of the trial court without considering that PW1 was testifying in local language which the appellant did not understand. Yet, nowhere in the record of appeal was it shown that, the trial court engaged an interpreter to interpret to the appellant. Failure to do so has prejudiced the appellant resulting to unfair trial.

2. *That the first appellate court erred in law and fact in upholding the decision of the trial court basing on dock identification by PW1 without taking into consideration that the victim, PW1 at first failed to identify the appellant. Thus, creates doubts on the said identification.*

At the hearing of the appeal, the appellant appeared in person with no legal representation. On the other hand, Mr Simon Peres, learned Senior State Attorney represented the respondent Republic and expressed his position to oppose the appeal.

When invited to amplify his grounds of appeal, the appellant opted to let the learned State Attorney respond first, but reserved his right to make a rejoinder, if the need would arise.

Mr. Peres started by informing the Court that, the 4th ground in the memorandum of appeal is a new one based on factual matters whose substance was not dealt with at the High Court. He thus moved the Court

to refrain from entertaining it for lack of jurisdiction. The appellant, responded nothing in this respect.

Indeed, the complaint in the 4th ground in the memorandum of appeal contain matters of facts not raised before the High Court. It is settled law that, the Court is mandated to decide only on matters that came up in the first appellate court from which the appeal emanates, unless, they contain points of law. There is a plethora of decisions in this regard including: **Abdul Athuman vs Republic** [2004] T.L.R. 151 and **Juma Manjano vs DPP**, Criminal Appeal No. 211 of 2009 [2012] TZCA 52 (1 March 2012) TanzLii, to mention some. On that account, we desist from determining it.

In the 1st ground of appeal, the appellant complains that, it was an error for the High Court Judge to dismiss his appeal relying on the sole evidence of PW1 which was not corroborated.

Responding, Mr. Peres submitted that, the case concerns a sexual offence committed to a child under 10 years of age under which the prosecution is obligated to prove three ingredients; **one**; penetration, **two**; age and **three**; the offender. He went on to submit that, the victim in the case at hand testified that, she was penetrated by the appellant and narrated the whole incident. He went on to submit that, PW1's

evidence on penetration and the responsible offender was corroborated by PW2 who was the eye witness on the condition of the victim following her inspection on her private parts after the incident, to whom also she mentioned the appellant as the perpetrator. It was his further submission that, penetration was further corroborated by PW3 and found that her underpants were soaked in blood, the victim's hymen perforated and her vagina was torn.

Coming to the age aspect, Mr. Peres submitted that, the victim stated her age when testifying and corroborated by PW2 who also tendered her birth certificate (exhibit P1) to prove it.

On reliance on a single witness' evidence in proving the case, Mr. Peres argued that, it is settled law in sexual offences that, true evidence has to come from the victim. He cited the case of **Denis Joseph @Saa Moja vs Republic**, Criminal Appeal No. 303 of 2019 [2021] TZCA 121 TanzLii to buttress his argument. He therefore urged that, in the case at hand, what was stated by PW1 is regarded as the testimony of what transpired which was also corroborated by PW2 and PW3.

In his further argument, the learned Senior State Attorney submitted that, under section 127 (6) of the Evidence Act, Cap 6 (the Evidence Act) the evidence of a victim is sufficient to ground conviction

even where there is no corroboration, provided the court is satisfied that, the victim speaks nothing but the truth. He contended that, PW1 in this case spoke the truth on what transpired, and thus, her evidence was sufficient to ground conviction under the cited provision. On those bases, he implored the Court to find the 1st ground in the memorandum of appeal baseless.

The issue for our determination therefore is whether or not uncorroborated evidence of the victim can be relied on to mount conviction.

We agree with Mr. Peres that, it is not a legal requirement for the victim's evidence in sexual offences to be corroborated. Section 127 (6) of the Evidence Act empowers a trial court to rely on an uncorroborated testimony of a child of a tender age to convict an accused person in a sexual offence, provided it is convinced that the child is truthful. [See: **Alphonce Bisege Mwasandube v. Republic,** Criminal Appeal No. 630 of 2020 [2024] TZCA 28 TanzLii. Likewise, in this case, PW1's coherent and consistent testimony, her prompt mentioning of the offender to PW2 is an assurance of reliability of her evidence. On that account, we are of the firm view that, PW1 spoke nothing but the truth. Thus, her sole evidence could be safely relied on to mount conviction even without corroboration. Nevertheless, as rightly argued by Mr. Peres, the victim has

proved all of the three ingredients required to be proved in the offence. That aside, her evidence was corroborated by PW2 and PW3. We find nothing therefore to fault the High Court Judge in this aspect. The ground is devoid of merit, and we dismiss it.

Regarding to the 2nd ground in the memorandum of appeal, the appellant complains that, it was an error for the Hight Court Judge to dismiss his appeal without taking into account the difference between the testimony of PW3 during trial and his findings in the PF3 recorded in exhibit P2. Mr. Peres refuted the complaint. He submitted that, after examining the victim, PW3 recorded his findings in PF3 which was admitted in evidence as exhibit P2 and testified on the said findings in court which to him, had no any difference.

We have gone through the testimony of PW3 and exhibit P2 and found that, in essence there is no difference as rightly submitted by Mr. Peres. It is on record that, PW3 testified in court that, PW1 had no hymen, her underpants had blood and her vagina was torn. Looking at exhibit P2, the report in part (v) under the title *"GENERAL INFORMATION"* was written *"underwear stained with blood"*, further to that, explanation under the title *"MEDICAL PRACTITIONERS REMARKS"* was written *"hymen not intact"* among other remarks, which in our view

denote no material difference to dent the prosecution case. Thus, the ground is unfounded and we dismiss it.

Next is the 3rd ground in the memorandum of appeal wherein the complaint concerns failure by the High Court Judge to evaluate the petition of appeal. In his submission, Mr. Peres referred us to pages 65-66 of the record of appeal where the appellant's petition of appeal is. He went on to submit that, the High Court in its judgment addressed all of the six grounds raised therein and for verification of his assertion, he referred us to pages 74 to 77 of the record of appeal. Mr. Peres thus implored the Court to find the 3rd ground of appeal without merit as well.

As correctly submitted by Mr. Peres, the petition of appeal had six grounds. The record of appeal reveals that, after the parties' submissions for and against the appeal, the High Court Judge clustered the grounds into two main issues, **one;** whether the prosecution proved the case beyond reasonable doubt which covered the 1st, 2nd ,4th and 6th grounds. **Two;** whether the testimony of PW1 was sufficient to establish that the appellant committed the offence which addressed the 3rd and 5th grounds. The record further shows that, the learned Judge re-evaluated the evidence on record when determining the issues framed before dismissing the appeal. As such, we find nothing to fault the learned Judge in that respect. We find the complaint under consideration baseless.

Next is the grievance on visual and dock identification raised in the 5th ground of the memorandum of appeal and the 2nd ground in the supplementary memorandum of appeal respectively. The learned Senior State Attorney argued them conjointly. Starting with the 5th ground, the grievance was on the alleged failure by the High Court Judge to solve the issue of visual identification raised by PW2. Mr. Peres maintained that, in sexual offences, true evidence in sexual offences comes from the victim. Elaborating, he argued that, the offence in the case at hand was committed during daytime, and the victim was consistent throughout that he knew the appellant before the incident, having met him several times in pombe clubs while in the company of her mother (PW2). According to Mr. Peres, the victim showed that she knew the appellant well by explaining his descriptions to PW4 and the same were confirmed to be true by PW4 when testifying. He concluded that the issue of visual identification in the circumstances was irrelevant. Similarly, contended Mr. Peres, the argument by the appellant on the dock identification holds no water in the circumstances of this case and invited the Court to find both grounds baseless.

We subscribe to Mr. Peres' submissions on this aspect. Indeed, both visual and dock identification are irrelevant in determining this case. It is indisputable the offence was committed during the day time. Further, the

victim was consistent that she knew her assailant very well before the incident and went ahead to explain his descriptions to PW4 which, according to him, were correct that the appellant was black and has a scar on his face. As such, in our view, there was nothing which the learned Judge was required to resolve on visual identification.

Likewise, the complaint as regards dock identification is untenable as well in the circumstances. It is instructive to state here that, dock identification refers to identification by a witness of an accused person for the first time in court, which was not the case in the matter at hand [See: **Jacob Mayani @Boyi vs Republic**, Criminal Appeal No. 566 of 2016 (unreported). We therefore find both grounds meritless. We accordingly dismiss them.

In the 6th ground in the memorandum of appeal, the appellant faults the High Court Judge to dismiss his appeal without taking into account the failure to tender a sketch map of the alleged scene of crime. In response, Mr. Peres urged us to find the ground without merit arguing that, the sketch map, though necessary in some cases, it has no bearing in establishing the offence of rape.

We subscribe to Mr. Peres that, in this case there is no relationship between the offence of rape and a sketch map of the scene of crime.

[See: **Julius John Shabani vs Republic**, Criminal Appeal No. 53 of 2010] (unreported). We find no merit in this ground as well.

Responding to the 1st ground of the supplementary memorandum of appeal wherein the appellant complains on the failure to call an interpreter to translate the local language spoken by PW1 when adducing evidence, Mr. Peres submitted that, the record of appeal, shows that, there were only two words uttered in local language by PW1. He went on to submit that the said words were "*finu*" and "*ikundu*" meaning the private parts of the male and female respectively. However, argued Mr. Peres, PW1 was physically pointing out to the parts of the body she was referring to when uttering those words. He further argued that, the words were also interpreted by PW2 when testifying. He therefore concluded that, the issue of unfair hearing does not arise and pleaded with the Court to find the ground meritless as well.

We agree with the submissions of the learned Senior State Attorney on this aspect that the two words spoken in local language by PW1 in her testimony were interpreted in two ways, **first;** physically by PW1 herself through pointing to specific parts of the body they refer to, and **second;** by PW2 during her testimony. As such, issue of unfair hearing does not arise in the circumstances as correctly argued by Mr. Peres. In this event, the ground under review is unfounded and we reject it.

Having exhausted the examination and analysis of the appellant's grounds of appeal, we are of the considered opinion that there is no reason to fault the concurrent findings of the two courts below.

In fine, we find the appeal lacks merit and is hereby dismissed in its entirety.

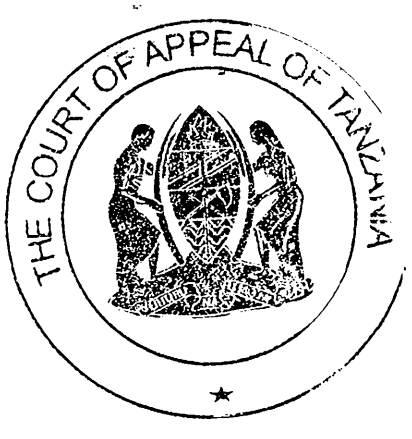
DATED at **MBEYA** this 7th day of December, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2024 in the presence of the Appellant in person and Mr. Augustino John Magessa, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL