IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUSSA, J.A., LILA, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 476 OF 2016

ABEID MPONZI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Sameji, J.)

Dated the 16th day of September, 2016

In

DC Criminal Appeal No. 47 of 2016

JUDGMENT OF THE COURT

13th & 16th May, 2019

WAMBALI, J.A.:

The appellant, Obeid Mponzi appeared before the District Court of Iringa where he faced a charge on the offence of rape contrary to section 130(1) and (2) (a) and 131(1) of the Penal Code, Cap 16 R.E. 2002 (the Code). He denied the allegation and was the only witness in his defence. The prosecution featured five witnesses, including the victim Maulina Kipalile (PW1) and tendered three exhibits, namely PF3 (P1), clothes of the appellant (P2) and the cautioned statement of the

appellant (P3). At the end of the trial, the trial magistrate was fully satisfied that the prosecution proved its case beyond reasonable doubt. He thus, convicted and sentenced the appellant to imprisonment for thirty (30) years and ordered him to pay the victim compensation amounting to TShs. 500,000/=.

On appeal to the High Court, the appellant was only successful on one complaint concerning the delay in recording the cautioned statement as the same was expunged from the record. However, the appeal was dismissed on other complaints as the first appellate court was duly convinced that the prosecution proved the case beyond reasonable doubt.

The brief facts as found by the trial court and confirmed by the High Court on appeal are that at about 20.00 hours, while PW1 was in her bed in her house, she heard a door being pushed from outside and suddenly the appellant entered while naked with no trouser and underpants but with only a T-shirt. She recognized him before he undressed her clothes and forced his penis into her vagina. PW1 raised alarm where upon Joseph Kiwone (PW2) and Witness Madanda (PW4) responded immediately and arrived at the scene. The appellant by then had hide himself in a corner of another room while still naked and they managed to identify him. PW2 informed Abdul Chang'a (PW3) the

Street Chairman, who came and found him inside, while his trouser and underpants were outside the house near the door. The appellant told those who responded to the alarm (PW2, PW4 and PW5) that he agreed to have sexual intercourse with the victim, PW1. He was taken to the police station and later charged. PW1 was sent to Ilula Lutheran Hospital where she was examined by Michael Mbishila, clinical officer, who found some bruises on her vagina and further tests indicated that she had been infected with HIV-AIDS. He prepared a medical report contained in a PF3.

The appellant in his brief defence exonerated himself from the allegations, arguing that the case was fabricated by the Village Executive Officer (VEO), who promised to embarrass him. At the climax of the case, the trial court fully believed the prosecution's story and disbelieved the appellant's defence. As a result, he was convicted and sentenced as alluded to above.

In this second appeal, the appellant still feels that his case was not proved to the required standard. He has therefore presented six grounds of appeal, which we think can be compressed as follows:-

1. *That the Honourable Judge of the High Court contradicted herself for relying on the PF3 (exhibit P1) without considering that PW1*

was not sent to police station and given the PF3 before she was examined by PW3 as required by law.

2. *That the Honourble Judge of the High Court erred in law and fact in relying on the evidence of PW1 and PW3 without considering that the law requires a victim of rape not to wash her private parts before 72 hours passes after the alleged incident as the elements of rape could not be established.*

3. *That the Honourable Judge of the High Court erred in law and wrongly did not consider the cautioned statement of DW1 who stated that he always used alcohol which led him to be intoxicated on the alleged day of the incident to the extent of not controlling his mind when he did any act.*

4. *That the Honourble Judge of the High Court misdirected herself for not talking into account that the victim (PW1) was the appellant's mother in law and therefore she failed to order him to undergo medical examination on his mental status when he allegedly committed the offence of rape.*

5. *That the Honourable Judge of the High Court wrongly decided to uphold the prosecution evidence without considering that the*

appellant could not have risked his life to rape PW1, who most of her relatives and himself knew to be a victim of HIV-AIDS.

6. *That the Honourable Judge of the High Court wrongly failed to consider the evidence of the defence side that the cautioned statement was taken out of time, that is, three days, after the arrest of the appellant.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, while Ms. Magreth Mahundi assisted by Ms. Alice Thomas, both learned State Attorneys represented the respondent Republic. The appellant opted to give opportunity to the learned State Attorney to respond to his grounds of appeal with a view of rejoining later if necessary.

On her part, Ms. Mahundi did not support the appeal as she was of the view that the prosecution proved its case against the appellant beyond reasonable doubt.

Responding to ground six, which is premised on the complaint that the High Court did not consider the fact that the cautioned statement was recorded after three days which is after the period set down by law, Ms. Mahundi submitted that the complaint is misplaced as the matter was fully resolved by the High Court when it expunged the said

document from the evidence. In the result, she urged us to dismiss the complaint for being unfounded.

With regard to the first ground, the learned State Attorney submitted that although it is true that PW1 was not sent to the police station where the PF3 (exhibit P1) was obtained for the purpose of going to hospital, there is ample evidence that those who went to police station took the clothes of the appellant and showed them to the responsible police officer as a sign of the commission of the offence as PW1 was still in agony at home nursing her pain which were necessitated by the forceful sexual intercourse by the appellant. She thus argued that as PW1 went to hospital later and was examined by PW3, the complaint on how the PF3 was issued and accessed by PW3 is baseless and should be dismissed.

Lastly, Ms. Mahundi submitted that grounds 2, 3, 4 and 5 cannot be entertained by the Court as they have been raised for the first time in this Court. She argued that the High Court did not have an opportunity to determine the complaints contained therein and this is contrary to the law. In support of her submission, she referred us to the decision of this Court in **Hussein Ramadhani v. Republic,** Criminal Appeal No. 195 of 2015 (unreported) in which reference was made to the other decisions of this Court in **Hassan Bundala @ Swaga v. Republic,**

Criminal Appeal No. 416 of 2013 and **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006 (both unreported). On the strength of those decisions she implored us not to entertain the said grounds. She concluded by urging us to dismiss the appeal in its entirety.

On his part, the appellant insisted that his grounds of appeal have merits and therefore the Court should consider them, allow the appeal and set him at liberty.

The issue to be determined after hearing the appellant and the learned State Attorney for the respondent Republic is whether the appeal has merit or otherwise.

Firstly, we do not entertain any doubt that ground six on the status of the cautioned statement is misconceived. As pointed out by Ms. Mahundi, the first appellate High Court expunged the cautioned statement based on the complaint of the appellant that it was not recorded within the time prescribed by law. The cautioned statement, therefore, is no longer part of the evidence of the prosecution. That being the position, the appellant cannot again come to this Court and complain on the same matter which has been decided conclusively and the prosecution has not appealed on the said finding of the High Court. We are also of the settled view that ground three of appeal which concerns the contents of the cautioned statement is misconceived,

based on the decision reached on grounds six. In the circumstances, grounds three and six are accordingly dismissed.

Secondly, we find that ground one is also not merited. There is no dispute, as per the evidence of PW5 that they went to the police station to report the commission of the crime of rape and showed the appellant's clothes while PW1 remained at home as she was unable to wakeup due to the pain she experienced after the incident. It is also not doubted that the police issued the PF3 which enabled PW3 to attend PW1 by examining her at Ilula Lutheran Hospital before he prepared the medical report which was later admitted in evidence as exhibit P3. Besides, PW3 who prepared the report testified at the trial court and the appellant did not ask him anything concerning the issue how the PF3 found its way in to his hands. Indeed, the appellant did not ask any relevant question on how the PF3 was obtained from E. 8924 D/CPL Athuman (PW6), the police officer, who investigated the case and testified at the trial. We accordingly agree with Ms. Mahundi that the complaint in ground one is unmerited and we dismiss it.

Lastly, having examined grounds 2,4 and 5 we are satisfied that the general complaints on whether it was possible for the appellant to have raped PW1, her mother in law, who he knew to be a HIV victim, and that he was not subjected to medical examination to see his mental

status when he allegedly committed the offence of rape are misplaced. These complaints were not raised at the first appellate High Court. Indeed, they are not matters of law which could have attracted the attention of the Court to intervene and determine the controversy as stated by this Court in **Patrick Lazaro and Nestory Bernado v. The Republic,** Criminal Appeal No. 229 of 2014 (unreported).

In the present appeal, however, we are settled that the raised matters in those grounds, do not constitute any point of law. We thus fully subscribe to what was stated by the Court in **Hasan Bundala @ Swaga** (supra) that:-

> *"It is now settled law that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal".*

See also the decisions of the Court in **Yusuph Masalu @ Jiduvi** Criminal Appeal No. 163 of 2017; **Juma Manjano v. Republic**, Criminal Appeal No. 211 of 2009 and **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004 (all unreported).

The thrust against that stance is that the power of the Court on appeal under section 6(2) of the Appellate Jurisdiction Act, Cap 141 R.E.

2002, is to hear appeals from the decisions of the High Court. In this regard, we wish to reproduce the following excerpt from the decision of the Court in **Samwel Sawe** (supra) which we find worth reciting hereunder:

> *"As a second appellate Court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athumani v. R.*** *[2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. The ground of appeal therefore is struck out."*

In the circumstances, we agree with Ms. Mahundi that the matters raised in grounds 2, 4 and 5 of the Memorandum of Appeal lodged by the appellant before this Court were not canvassed in the first appellate court. In the light of the fairly settled law demonstrated in the decisions referred above, we are of the settled view that, we do not have jurisdiction to entertain those grounds which are not on points of law. In the premises, we find that, they are not legally before us for

determination and therefore they lack merit. We accordingly strike them out.

All in all, from the record of appeal, there is justification that the appellant was properly convicted as he did not dispute that he was identified by PW1 at the scene of the crime and also by PW2, PW4 and PW5 who responded to the alarm raised by the victim (PW1).

In the light of what we have stated above concerning the grounds of appeal, we agree with the concurrent findings of the two courts below and find the appeal to be devoid of merits. We accordingly dismiss it.

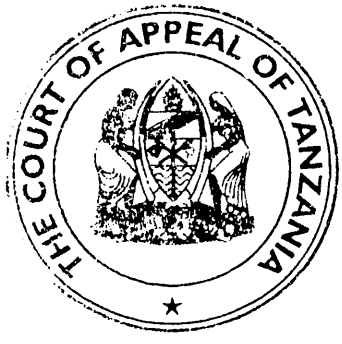
DATED at **IRINGA** this 16th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL