IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KIMARO,J.A., MUGASHA,J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 195 OF 2015

HUSSEIN RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Khaday, J)

dated the 19th day of February, 2014
in
Criminal Appeal No. 12 of 2010

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JUDGMENT OF THE COURT

19th & 22nd April, 2016.

KIMARO, J.A.:-

The appellant lost his first appeal in the High Court. The trial District Court of Mpanda convicted the appellant of the offence of rape contrary to section 130 (2) (a) and 131 of the Penal Code [CAP 16 R.E. 2002]. The charge sheet alleged that the appellant had an unlawful carnal knowledge of Chiku Joseph, a girl aged 10 years.

After the trial of the case, the trial magistrate was satisfied that the prosecution evidence weighed more than the defence of the appellant. The appellant was convicted and sentenced to a term of imprisonment for a period of thirty years.

Still aggrieved by the decision of the first appellate court the appellant came with eight grounds of appeal challenging the legality of the first appellate court upholding the conviction and the sentence. What the appellant complained of in the judgment of the High Court is; "voire dire" examination was not conducted before the evidence of Chiku Moleli (PW1)the complainant was received, variance in the charge sheet and the evidence of PW1 that she said in her testimony that she was sodomized while the charge sheet was that of rape, flouting of the procedure in admission of PF3, there was no correct identification of the appellant, lack of corroboration in the evidence of the prosecution that the appellant confessed commission of the offence before a committee, there was a discrepancy in the name of the victim in the charge sheet and the evidence of the complainant (PW1), the defence of the appellant was not considered and the case for the prosecution was not proved beyond reasonable doubt.

The appellant attended in court in person when the appeal came for hearing. The respondent /Republic had the privilege of being represented by Mr. Stambuli Ahmed, learned Senior State Attorney, assisted by Mr. Hebel Kihaka ,learned State Attorney. An added ground of appeal by the appellant was that the whole evidence against him was fabricated. He took the option of replying to his grounds of appeal after the respondent. Mr. Kihaka, learned State Attorney requested the Court not to consider grounds 1, 2, 4, 5, 6 and 7 of the appellant's appeal because they are new grounds not raised in the first appellate court. He referred the Court to the case of **Hassan Bundala @ Swaga V Republic** Criminal Appeal No.386 of 2015 CAT Bukoba (unreported).

Nonetheless he supported the appeal. The learned State Attorney admitted that the procedure was not followed in the admission of evidence of the PF3. The right of the appellant to have the doctor who examined the complainant was not explained to him. The case of **Jumapili Msyete V Republic** Criminal Appeal No. 110 of 2014(unreported) was cited to support his position. Furthermore, said the learned State Attorney, the case for the prosecution was not proved beyond reasonable doubt. He mentioned disparity in the evidence of the prosecution case concerning the date of the commission of the offence as given by the prosecution witnesses and the date that was shown in the charge sheet. While the charge sheet showed that the offence was committed on 19th November, 2011, all prosecution witnesses said it was committed on 29th November 2005. He said since the charge was not amended to indicate the actual date of the commission of the offence that affected the prosecution case.

The learned State Attorney also admitted that the defence of the appellant was not considered and that resulted in miscarriage of justice on the appellant. The case of **Jeremiah John and four others V Republic** Criminal Appeal No. 416 of 2014 was cited to augment his position on this matter. The last point canvassed by the learned State Attorney is a defect in the charge sheet. He said the charge was that of rape. However, the evidence that was given by the complainant was that of sodomy, hence a disparity in the charge sheet and the evidence that was adduced to support the prosecution case. Such a shortfall, said the learned State Attorney, makes it obvious that the case against the appellant was not proved beyond reasonable doubt. He prayed that the appeal be allowed,

the conviction quashed and the sentence set aside. The appellant had no reply after the learned State Attorney had supported the appeal.

From the deficiencies pointed out by the learned State Attorney, it is obvious that the prosecution failed to prove its case proved beyond reasonable doubt. Starting with the evidence of the PF3, it was admitted in court without following the procedure of admission of exhibits. The law confers a right on an accused person to comment on the admission of any exhibit before its reception in evidence. In addition, for admission of any medical report like PF3, the trial court has an obligation under section 240(3) of the Criminal Procedure Act [CAP 20 R.E. 2002] to inform the accused that he has a right to have the author of the medical report be called for cross-examination. This is an area rich of Court authorities on this matter. It is a mandatory provision which trial courts have to comply with. Since there was no such compliance, we expunge the PF3 from the record. The cases of **Mahona Sele V Republic** Criminal Appeal No. 188 of 2008, **Hassan Amri V Republic** Criminal Appeal No. 304 of 2010 and **Tatizo Juma V Republic** Criminal Appeal No. 10 of 2013 (all unreported) are some of the authorities on the matter.

The second weakness in the prosecution case was the charge sheet. The first anomaly in the charge sheet is the name of the complainant. The charge sheet shows that the offence was committed on Chiku D/O Mollel. The offence is that of rape. However, it was Chiku Mollel (PW1) who testified as a complainant and no efforts were made in examination in chief or cross-examination to show that she was also Chiku Joseph. Secondly, while at the witness box, PW1 testified that :

> *".... We reached there where he talked of. I saw the unfinished house too, with none there. He said I put down the vegetables at a place in it he showed to me. In my doing so, he muzzled my mouth and nose and he lay me down. He began to fack me. I lying up face. Then he turned me down face and facked my anus. He having finished his sexual want he let me free and said I take the bag with the vegetables and that he was taking me home. He also took from me that Tshs. 2000/= he had given me."*

Such evidence supports a charge of unnatural offence under Section 154(1) (a) of the Penal Code and not the offence of rape.

Another anomaly is the date of the commission of the offence. The complainant (PW)1, Alex Michael (PW2) who assisted the complainant after the commission of the offence and her mother Frola Erich (PW3) all gave evidence that the offence was committed on 29th November, 2005 while the charge sheet shows that the offence was committed on 19th November, 2005. The record of appeal does not show that there was any time the prosecution amended the charge sheet.

Section 234 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002] is a curing section for defective charges. It confers power on the trial court to allow amendment of the charges to meet the pertaining circumstances. The section says:

> *"Where in any stage of the trial, it appears to the court that the charge sheet is defective, either in substance or in form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or additional of new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this sub section shall be made upon such terms as the court shall seem just."*

This means that the prosecution having noted the variance in the date of the commission of the offence, the charge sheet and the evidence of the complainant and other witnesses, they had to amend the charge. This was not done. The case of **Jeremiah John and four others** (supra) though is cited by the learned State Attorney and is listed as number 6 in the list of authorities submitted by the learned State Attorney is not annexed to the list of authorities. However, in the case of **Masasi Mathias V Republic** Criminal Appeal No. 274 of 2009 (unreported) the Court noted a discrepancy in the charge sheet and the evidence that was adduced in support of the prosecution case. The Court held:

> *"The record of appeal does not reflect that there was any amendment to the charge sheet in compliance with section 234 (1) of the Criminal*

Procedure Act. We are therefore of a considered opinion that the charge in the 2nd count remains defective. In the event, we are constrained to allow the appeal on the 2nd count having found that the same is defective."

The learned State Attorney also requested the Court not to deal with grounds 1,2,4,6 and 7 of the appeal because they are new. We have made a comparison between the grounds of appeal that were filed in the High Court and in this Court. We agree with the learned State Attorney that the grounds mentioned are new. The principle of the law is that an appellate court will not deal which new grounds of appeal not raised and determined by the trial court and first appeal court. This is found in the cases of **Hassan Bundala @ Swaga V Republic** Criminal Appeal No. 416 of 2013 CAT **Bukoba, Jafari Mohamed V Republic** Criminal Appeal No. 112 of 2006 (both unreported). The Court said in the case of **Hassan Bundala @ Swaga V Republic** (supra) that:

"It is now settled 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."

With the above exposition on how the proceedings in the trial court were conducted, the irregularities pointed out, the prosecution case was admittedly not proved on the standard of proof required. In the case of

Mohamed Said Matula V Republic [1995] T.L.R. 3 the Court held that in a charge of murder the burden is always on the prosecution and the proof has to be beyond reasonable doubt. Al though this is not a murder charge the principle is the same in all criminal cases save where the law provides otherwise. We therefore allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from prison unless he is held there for other lawful purposes.

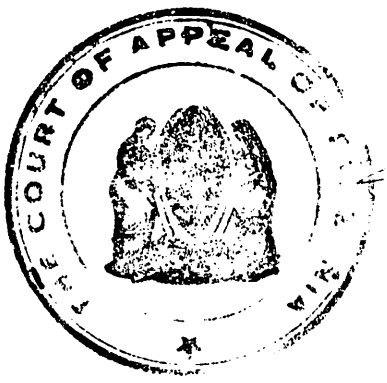
DATED at MBEYA this 21st day of April, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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



E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL