IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 94 OF 2017

(CORAM: MUGASHA J.A., MWANGESI J.A. And MWANDAMBO, J.A.)

KASSIM TWAHA @ HASSANI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam

(Mzuna, J.)

dated 25th day of November, 2016
in
Criminal Appeal No. 176 of 2015
.....

JUDGMENT OF THE COURT

16th& 26th July, 2019

MWANDAMBO, J.A.:

Kassim Twaha @ Hassani, the appellant herein has preferred a second appeal to this Court against the judgment of the High Court sitting at Dar es Salaam in Criminal Appeal No. 176 of 2016. The appellant faults the High Court for dismissing his appeal against the decision of the District Court of Morogoro (the trial court) which tried and convicted him of unnatural offence contrary to section 154(1) (a) (2) of the Penal Code Cap 16 [R.E. 2002]. The appeal is predicated on five grounds of appeal

contained in the original memorandum of appeal and two additional grounds contained in a supplementary memorandum of appeal he filed on 12th June, 2019.

The facts from which the instant appeal has been instituted are not complex. The appellant stood charged with unnatural offence at the trial court before which, the prosecution alleged that the appellant, a watchman, had carnal knowledge of a boy of tender age of 12 years against the order of nature. The victim's name shall not be disclosed but we shall refer him as **XYZ** or **PW1** interchangeably. It was common ground before the trial court that on the material date, that is; on 10th October, 2013 at a place called Bwagala in Mvomero District, XYZ and his friend going by the name of Isaya Paulo had gone to sell groundnuts during night hours. On their way back home, they passed by a place called Assey where the appellant who was familiar to them, was on duty as a night guard. The appellant intercepted them and ordered Isaya Paulo to go home whilst he remained with XYZ till some time later that very night. The reason for holding the victim was not immediately disclosed until a moment later when the appellant claimed that the mother of XYZ, allegedly a close relative, had asked him (the appellant) to get hold of XYZ

and take him to his mother's home where he was purportedly been missing. It was not in controversy too that the appellant seized the opportunity and took XYZ to a nearby football pitch during that night where he ordered him to undress and thereafter he had carnal knowledge of him against the order of nature. It was common ground also that after quenching his lust, the appellant took PW1 to the home of PW2, who was Isaya Paulo's mother and left, promising to return the following morrow to collect XYZ with a view to taking him (PW1) to his mother. No sooner had the appellant pretended to leave then PW1 narrated to PW2 what the appellant had done to him. The appellant who had hid somewhere outside the house heard what PW1 told PW2 and the rest in the house and the appellant uttered words warning PW1 against what he had already narrated that very night. A moment later, the appellant was apprehended and taken to a local village leadership. After PW1 revealing what the appellant had done to him, PW2 inspected XYZ's anus and found that it had bruises. Ultimately, the appellant was taken to the police and later he was arraigned before the trial court to stand the charge of unnatural offence.

Satisfied that the prosecution had, through three witnesses including XYZ who testified as PW1, proved its case beyond reasonable doubt, the trial court entered a finding of guilt followed by conviction and mandatory custodial sentence of 30 years. The appellant's appeal to the High Court predicated on eight grounds of appeal was barren of fruits, for that Court dismissed the same after finding that it had no merit.

The judgment of the first appellate court shows that the learned High Court Judge clustered the grounds of appeal in several issues. The first one covering grounds 1, 4 and 5 related to the prosecution's failure to call material witnesses. The High Court, guided by this court's decision in **Yohanis Msigwa vs R.** [1990] TLR 148, held that the failure did not dilute the evidence from PW1, the victim of the offence who was the best witness in such an offence. The second issue related to irregularity in admission of the sketch map (Exhibit PII) and failure to tender in evidence a boxer. These were the subject of ground 2 and 3. It was the first appellate court's firm view that the sketch map was properly admitted into the evidence and the failure to tender the boxer did not weaken the prosecution's case. The third issue which was the subject of ground 4, challenged the admission of the PF3 (Exhibit PII) without summoning the

author for cross examination. On this, the first appellate court found that the trial court acted on the appellant's own instance to dispense with calling of the said witness but in any case, if exhibit PII was to be expunged, still that could not have weakened the credible evidence of XYZ. The fourth one related to the general complaint that the charge was not proved beyond reasonable doubt. Having analyzed the evidence before the trial court in the light of section 127(7) of the Evidence Act, Cap 6 [R.E. 2002] as well as case law exemplified by; **Mohamed Maumba vs Republic Criminal Appeal No. 270 of 2007** and **Nguza Viking @ Babu Seya & 3 Others vs Republic**, Criminal Appeal No. 56 of 2005 (both unreported), the first appellate court concurred with the findings made by the trial court and the conclusion it reached was that the charge against the appellant was proved to the hilt and hence the dismissal of his appeal.

Still resentful, the appellant appeals to this Court on five (5) grounds as indicated earlier on. Paraphrased, the grounds of appeal are predicated on the following areas of grievances:

1. *The first appellate court erred in holding that the prosecution had proved its case regardless of its failure to call material witnesses.*
2. *The first appellate Judge erred by not holding that it would not have been possible for PW2's sons to have left the victim to the appellant who was a stranger.*
3. *The first appellate court wrongly admitted the evidence of the victim's mother after the closure of the defence case.*
4. *The 1st appellate court erred by admitting into evidence a P.F. 3(Exhibit PII) without informing him his right to call the medical doctor for cross examination.*
5. *The first appellate court erred by holding that the prosecution had proved the charge beyond reasonable doubt in a case which poorly investigated and prosecuted.*

The additional grounds in the supplementary memorandum are as follows:

1. *The first appellate Judge erred in sustaining the appellant's conviction based on a defective charge.*
2. *The first learned appellate judge erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt as charged.*

We find it appropriate to say something at this juncture in relation to the grounds of appeal. Ground two in the supplementary memorandum is a

completely new ground which did not feature before the High Court. All the same we are bound to consider it as it involves an issue of law. The rest of the grounds were, to a large extent considered by the High Court.

At the hearing of the appeal, the appellant who has all along fended for himself, appeared in person to prosecute his appeal and adopted the grounds of appeal in both the original and supplementary memoranda of appeal. The appellant reserved his elaboration on the grounds of appeal and let the State Attorney to submit on them before he could rejoin if such need arose. The respondent Republic had Ms. Ester Martin assisted by Joyce Nyumayo both learned State Attorneys resisting the appeal. Before the hearing kicked off, Ms. Martin drew our attention to a discrepancy in the notice of appeal which indicates that the appeal was against conviction and sentence in an offence of rape contrary to section 130 and 131 of the Penal Code, Cap 16 R.E. 2002. On the informal application by the appellant, we granted him leave to amend the notice of appeal to reflect the correct offence with which the appellant was charged and convicted before the trial court. We did so on the authority of rule 68(8) of Tanzania Court of Appeal Rules, 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, GN No. 344 of 2019 which empowers the Court to

allow amendment of a notice of appeal where the same deviates from the prescribed form.

Following the amendment of the notice of appeal as indicated above, the learned State Attorney took the floor addressing us on the grounds of appeal. Considering that the appellant challenged the validity of the charge sheet in his supplementary memorandum, we invited the learned State Attorney to canvass that ground first having regard to the principle that a charge is a foundation of a trial and so if we found the charge sheet to be incurably defective, that would be sufficient to dispose of the appeal.

Ms. Martin argued, and rightly so in our view, that there was nothing wrong in the charge sheet other than the inclusion of subsection (2) of section 154 of the Penal Code which was inapplicable appellant in an offence involving a child of 12 years. The learned State Attorney urged us to hold that the citation of subsection (2) did not vitiate the charge sheet and so the same could easily be ignored. With respect we agree with the learned State Attorney's submission. It is plain that subsection (2) of section 154 of the Penal Code is a punishment provision in relation to an accused person convicted of unnatural offence involving a child below ten (10) years. The victim of the offence in this appeal was twelve (12) years

and so the relevant punishment provision was section 154(1) (a) of the Penal Code. Indeed, the trial court sentenced the appellant to thirty (30) years imprisonment a mandatory sentence prescribed under section 154(1) (a) of the Penal Code. As rightly submitted by the learned State Attorney, much as the inclusion of subsection (2) in the charge sheet was uncalled for, it was not fatal to the charge and so we find no basis in the appellant's complaint which we dismiss accordingly

Regarding the first ground faulting the first appellate Court for sustaining conviction in a case where the prosecution failed to call material witnesses, the learned State Attorney invited us to dismiss it for being baseless. Ms. Martin submitted that in terms of section 143 of the Evidence Act Cap 6 [R.E. 2002] the prosecution was not bound to produce any specified number of witnesses to prove its case. In this case, the learned State Attorney argued, the prosecution paraded XYZ (PW1) the victim of the offence whose testimony was supported by PW2. It was the learned State Attorney's submission that the evidence of PW1 was found by the trial court to be credible and the best evidence in terms of section 127(7) of Cap 6 well supported by the evidence of PW2. In the circumstances, the learned State Attorney argued, since the evidence of the two witnesses

proved the charge beyond reasonable doubt, there was no need to call any other witness.

As to ground two, the appellant's complaint hinged on the first appellate court's failure to find that the trial court should have found that it could not have been possible for PW2's sons to leave the victim to a stranger. The learned State Attorney's submission on this was that the said sons were children of tender age who could not have overpowered the appellant but in any case, no sooner than PW2 decided to go for XYZ then the appellant brought the victim to her house. At the Court's prompting, the learned state Attorney submitted that in any event this ground failed to meet the threshold under rule 72(2) of the Tanzania Court of Appeal Rules, 2009, for it is predicated on matters of fact rather than on issues of law. All in all, Ms. Martin invited us to dismiss this ground as well. Next, Ms. Martin canvassed ground three which faults the first appellate court for its failure to hold that the evidence given by the victim's mother was irregular.

Initially, the learned State Attorney was adamant that the evidence adduced by PW1's mother after the closure of the defence case was taken in accordance with section 195(1) of the Criminal Procedure Act Cap. 20 [R.E. 2002] (the CPA) which empowers the trial court to call any witness

not called by any of the parties. This was so, the learned State Attorney argued, because the appellant had claimed in his defence that the victim's mother was his close relative and so the evidence of PW1's mother was necessary to clarify that piece of the defence case. In the course of her submissions upon being prompted by the Court, the learned State Attorney conceded that the trial court did not comply with the requirement prescribed under section 195(1) of the CPA in calling the victim's mother to give evidence. However, Ms. Martin was quick to point out that the irregularity did not dent the case for the prosecution and the same was curable under section 388(1) of the CPA because neither the trial court nor the first appellate court relied on the evidence of the additional witness. On that basis, the Court was invited to dismiss this ground.

With regard to ground four, the learned State Attorney conceded that the ground had merit in that the author of the PF3 (Exhibit PII) was not summoned for cross-examination contrary to the appellant's clear indication to that effect. However, the learned state Attorney argued that if the PF3 is expunged from the record, the remaining evidence through PW1 and PW2 will not be affected leaving the trial court's finding of guilt intact.

Finally, the learned State Attorney's submission in ground five combined with ground two in the supplementary memorandum was that the same have no merit because the High Court rightly concurred with the trial court that the prosecution's evidence through PW1 and PW2 proved the charge against the appellant beyond reasonable doubt. The learned state Attorney wound up her submissions by inviting the Court to hold that the appeal was devoid of merit and should be dismissed.

Being a layman and unrepresented, the appellant had nothing in rejoinder except to urge the Court to consider his grounds in the memorandum of appeal as meritorious and allow the appeal with an order setting him free.

Having heard the submissions by the learned state Attorney, it is now our duty to consider the merits and demerits in each of the grounds of appeal except the complaint on the defectiveness of the charge sheet which we have already disposed of. Before we commence our discussion and determination of the grounds of appeal, we find it compelling to revisit our power in a second appeal such as this one. It is trite law that the second appellate court's power is limited to the determination of issues of law and this is the spirit behind rule 72(2) of the Rules. That rule provides:

> "(2) The *memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against specifying, in the case of a first appeal, the points of law or fact and,* ***in the case of any other appeal, the points of law, which are alleged to have been wrongly decided."*** *(emphasis is ours).*

There is a plethora of authorities that the Court sitting as a second appellate Court as it were, should be loath to interfere with concurrence of findings of facts by the trial court and the first appellate court unless it is shown that in evaluating the evidence, the two courts below misdirected themselves and in so doing occasioned a miscarriage of justice to the appellant. See for instance: **Salum Mhando vs R.** [1993] TLR 170, **Zabron Masunga and Dominick Mahondo v R.,** Criminal Appeal No. 232 of 2011, **Hassan s/o Kitunda vs R.,** Criminal Appeal No. 479 of 2015 and **Wankuru Mwita vs R.,** Criminal Appeal No. 217 of 2012 (all unreported) to mention but a few. This being a second appeal, we shall be guided by our previous decisions in determining the grounds of appeal under consideration.

The first ground relates to the alleged error in sustaining conviction in a case where the prosecution failed to call material witnesses to prove the charge. The learned State Attorney rightly submitted that having regard to the provisions of section 143 of Cap 6 the prosecution was not required to call more witnesses to prove its case because the evidence by PW1 and PW2 was sufficient to prove the charge. Indeed, the learned first appellate Judge addressed this point at page 8 of the judgment relying on **Yohanis Msigwa v. Republic** (supra) and held, rightly so in our view, that the failure to call the alleged witnesses did not dent the prosecution's case. For our part, we find no justification to interfere with the concurrent findings of the courts below on this point. It is evident that both courts concurred that the evidence by PW1 who was the victim of the awful act was not only credible but also the best evidence independent of any other evidence from another witness. In addition, the two courts concurred that the PW1's testimony was well supported by PW2's evidence and thus the charge against the appellant was sufficiently proved beyond reasonable doubt. Accordingly, like the High Court we find no merit in this ground which is hereby dismissed.

With regard to ground two, having examined the judgments of the two courts below, we are satisfied that the same has failed to meet the threshold under rule 72(2) of the Rules as rightly submitted by the learned State Attorney. At any rate, it is our settled view having scanned the evidence on record, that the theory invented by the appellant regarding the impossibility of committing the offence was meant to punch a hole in the prosecution's case. However, that move did not succeed in displacing the prosecution's evidence through PW1 and PW2 which the first appellate court found to be watertight, concurring with the trial court as evident from page 81 to 83 of the record of appeal. We have found no reason to interfere with the findings of the two courts below with the result that this ground fails for lack of merit. Having disposed ground two, we now turn our attention to ground three whereby the appellant faulted the first appellate Court for sustaining the decision of the trial court which wrongly admitted the evidence of XYZ'S mother after the closure of the defence case.

As seen above, the learned state Attorney had initially defended the course of action taken by the trial court only to shift her goal post later on. To appreciate the essence of this ground, we take the liberty to reproduce

section 195 (1) of the CPA to which the learned State Attorney made reference thus:

> "Any *court may, at any stage of a trial or other proceeding under this Act, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.*"

It is plain from the foregoing section that whilst the trial court is empowered to summon any person who has not been called by either the prosecution or defence as a witness, the power to do so can be exercised at any stage of the trial or any other proceedings. To us, the phrase at any stage of the trial the legislature must have meant before the closure of the trial. It is common ground that on 22nd May 2014, the appellant intimated to the trial court that he would defend the case on oath with no other witness than himself. On 2nd July 2014, the appellant gave evidence on oath and answered questions in cross- examination. Ordinarily, upon such evidence, that would have marked the end of the trial. The record does not indicate that the trial Resident Magistrate entered any order marking the closure of the defence case and so the trial. Instead, the record shows that

the trial Resident Magistrate adjourned the hearing to 5th July 2014 without indicating the purpose of the hearing on that date. All the same, on 15th July 2014, one Agnes Elias who introduced herself as the mother of XYZ gave evidence and later on, the trial court made an explanation (at page 37 of the record) why that witness was called. The record shows (at page 38) that upon such explanation, the appellant was given an opportunity to cross examine the said witness.

Having examined the record, we are satisfied that despite minor discrepancies in the record, the course of action taken by the trial court was substantially in conformity with the spirit behind section 195 (1) of the CPA. We say so being alive to the fact that contrary to the appellant's complaint, the trial was not marked closed after the appellant had finished his evidence in defence. Of course, in the ordinary course of things, the trial court had a duty to inform the parties of the intention to summon another witness whom it considered to be necessary before such witness gave her evidence as it were. However, we do not see that the omission was fatal and prejudicial to the appellant, for he was afforded an opportunity to cross examine that witness. That being the case we find no merit in the complaint regardless of the concession made by the learned

State Attorney. In any event, that complaint is bound to fail considering, as rightly submitted by the learned State Attorney, that the trial court convicted the appellant on the strength of the evidence of PW1 and PW2. There is nothing in the trial court's judgment showing that the evidence of PW1's mother was considered in convicting the appellant. Furthermore, even if such evidence was considered in convicting the appellant which is not the case, the best we could do is to discount that evidence. However, in view of what we have already said above, that would not add any value on the appellant's appeal. On the whole, there is no merit in this ground and we dismiss it.

In ground four, the first appellate court is criticized for not holding that the admission into evidence of PF3 (exhibit PII) tendered by PW3 without affording the appellant the right to cross examine the medical personnel was an error of law. The learned State Attorney readily conceded that failure to call the maker of Exhibit PII was fatal and urged us to expunge the PF3 from the Record. With respect we agree with her. It is plain from the record (at page 25) the appellant demanded the attendance of the maker of PF3 for cross-examination upon PW3 tendering the same in the evidence.

Despite the foregoing, the prosecution failed to procure the author of the PF3 for cross examination. All what is clear from the record is that on three occasions, hearing was adjourned by reason of the said witness's absence. On the third occasion (on 19th May 2014) the prosecution prayed for adjournment because of the failure to find the witness. That prompted the appellant to ask the trial court to proceed with the hearing because he was tired of the adjournment considering that his mother had passed away while in custody. The trial court appears to have taken that the appellant had waived his right to cross examine the author of Exhibit PII and eventually the prosecution closed its case. Apparently, the first appellate court strayed into the same error when discussing the first issue in relation to the irregularities alleged to have been committed by the trial court as can be seen at page 77 of the record. However, the first appellate court took the view that expunging the PF3 would not have weakened the prosecution's case which was anchored on the credible evidence of PW1. We, on our part are unable to go along with the first appellate court that the appellant's request to call the author of PFII was complied with by the trial court. We do not share the first appellate court's view that the appellant waived his right to cross examine the author of the PF3. What

appears to be obvious is that the appellant made the prayer in protest after the prosecution had failed to procure the witness three times without any apparent reason.

Had the trial court directed its mind properly to the issue, it should not have treated the appellant's prayer to proceed with hearing as a waiver of his right to cross- examine the said witness. It is to be observed that the first appellate court did not expunge the PF3 much as it took the view that the absence of the PF3 had no bearing on the prosecution's case. We agree with the learned first appellate judge but we would go a step further. Since we are satisfied that the prosecution's failure to produce the author of PF3 for cross- examination was tantamount to denying the appellant his right to cross-examine the witness contrary to section 240 (3) of the CPA, the PF3 cannot not be part of the record. From the thick wall of authorities of this Court, the effect of the failure to comply with section 240 (3) of the CPA is to expunge the PF3 from the evidence. See for instance: **Selemani Mwitu vs. R.** Criminal Appeal No. 90 of 2000, **Alfred Valentino vs .R,** Criminal Appeal No. 92 of 2006, **Kassim Said & 2 Others vs. R**, Criminal Appeal No. 2008 of 2003, **Simon Lucas vs. R**, Criminal Appeal No. 286 of 2013, **Joseph Safari Massay vs. R,** Criminal Appeal No. 125 of 2013,

Peter Yusto vs. R, Criminal Appeal No. 105 of 2008 and **Ally Athuman vs. R,** Criminal Appeal No. 282 of 2007 (all unreported). Realizing that anomaly, Ms. Martin was quick to concede and urged the Court to expunge exhibit PII from the record. Guided by the aforesaid authorities we can do no less than what the learned State Attorney urged us to do and thus the PF3 is hereby expunged from the record. However, as rightly submitted by the learned State Attorney, the absence of the PF3 from the record has no adverse bearing on the trial court's judgment and that of the High Court. This is so because, the trial court did not base its conviction on the PF3 rather on the uncontroverted evidence of PW1 and PW2. That disposes of ground four in the appellant's favour subject to the caveat we have shortly made.

Finally on ground five which criticizes the High Court for sustaining the trial court's decision in a case in which the prosecution's case was not proved beyond reasonable doubt. The learned State Attorney urged us to dismiss this ground on the strength of the evidence of PW1 and PW2. We on our part find no reason to belabor on this ground. We have already concluded above that the two courts below rightly concurred on the finding that the evidence of PW1 and PW2 was water tight and proved the charge

against the appellant beyond reasonable doubt. We have found no reason to disturb the said finding and so this ground fails.

In the event and for the foregoing, the appeal lacks merit and is hereby dismissed.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th day of July, 2019.

S.E.A MUGASHA
JUSTICE OF APPEAL

S.S MWANGESI
JUSTICE OF APPEAL

L.J.S MWANDAMBO
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL