IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 27 OF 2017

DALALI s/o MWALONGO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mambi, J.)

dated the 22nd day of December, 2016
in
HC. Criminal Appeal No. 47 of 2016

JUDGMENT OF THE COURT

21st & 23rd August, 2019

MUGASHA, J.A.:

In the District Court of Mbarali at Rujewa, the appellant was charged with Incest by male offence contrary to section 158 (1) (a) of the Penal Code [CAP 16 RE.2002].

It was alleged that, between August and September 2013 at Uturo village within Mbarali District in the region of Mbeya, the appellant did have sexual intercourse with A.D. a girl aged seventeen (17) years who was to his knowledge his daughter.

To establish its case the prosecution paraded five witnesses who were A.D, the victim **(PW1), OMARI WAZIRI VIGERO (PW2), MURSALI KATIMBA (PW3) LEOKADIA USWEGE (PW4), W.P 7323 CHRISTIAN (PW5),** The prosecution also tendered documentary exhibits: a post natal clinic card of M.D (Exhibit P1); a letter from Uturo village office (Exhibit P2); a letter from the NGO - *Shirika Lisilo La Kiserikali La Kuwahudumia Akina Mama Wajawazito Majumbani office* (SKMAVMM) (Exhibit P3); and the cautioned statement of the appellant (Exhibit P4).

A brief account of the evidence which led to the conviction of the appellant is briefly as follows: A.D is the daughter of the appellant who lived with both parents. She recounted that, her father had sexual intercourse with her for almost a year and threatened her not to reveal the episode to anybody or else she would be thrown out of the house. In the course of the illicit relationship, the victim conceived and delivered a baby girl, M.D whose surname was registered in the name of the appellant. Subsequently, after A.D was beaten by the appellant who threw her out of the house and threatened to kill her, the victim narrated what had befallen her to the village leaders. This account was confirmed by PW2 a ten cell leader who on being aware of the fateful incident,

informed other leaders within the vicinity and the matter was reported to the police and the SKMAVMM which was dealing with the victims of sexual violence where A.D was availed some assistance. According to the Director of the SKMAVMM who testified as PW4, the victim revealed that, her father began to sexually molest her at the age of thirteen years until when she conceived and delivered a baby girl. PW4 pursued the matter having reported it to the Rujewa Police Gender Desk and Children affairs.

The appellant denied the charge. He claimed to have thrown out A.D from the house because she had refused to go to the farm and had sold two tins of paddy without his permission. He also acknowledged to have had a prohibited sexual relationship with the other daughter in 2008 whereby he was penalized by the village authority to pay a fine of TZS. 200,000 and he obliged.

The trial court convicted the appellant having concluded that he had sexual intercourse with his daughter which was corroborated by the appellant's own admission that he earlier had sexual intercourse with another daughter. Thus, the appellant was sentenced to imprisonment to a term of thirty (30) years.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed on account of credible evidence of the victim which did prove a charge against the appellant. Still aggrieved, the appellant has preferred this second appeal. In the Memorandum of Appeal he has raised seven grounds which are conveniently paraphrased as hereunder:

1. That, the prosecution failed to prove the case against the appellant beyond reasonable doubt.
2. That, the first appellate court wrongly sustained the conviction in the absence of a PF3 in order to prove the allegations of PW1.
3. That, the first appellate court erred to conclude that the appellant had made a confession in the cautioned statement whereas the extra judicial statement was not recorded to the same effect.
4. That, the first appellate court wrongly sustained the conviction in the absence of DNA test report to establish the paternity of the child.

5. That, the first appellate court wrongly sustained the conviction having relied on the hearsay evidence of PW2, PW3 and PW4.

6. That, the first appellate court wrongly dismissed the appeal without considering that at the trial the appellant was not given an opportunity to comment on the tendering of exhibits P1, P2 and P3.

7. That, the first appellate court wrongly dismissed the appeal without considering that at the trial court capitalized on the weaknesses of the defence.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Ms. Rhoda Ngole, learned Senior State Attorney assisted by Ms. Xaviera Makombe, learned State Attorney.

The appellant urged the Court to adopt his grounds of complaint contained in the Memorandum of Appeal.

The learned Senior State Attorney did not support the appeal. She submitted that the appellant's conviction of the of incest by male was properly founded on the strength of the credible evidence of the victim

who testified that her father had sexual intercourse with her which was supported by own appellant's account that PW1 born in 1998 was his daughter. It was further pointed out that, the victim did not reveal about the incident because she was scared of being thrown out of the house as threatened by the appellant.

In addressing the second ground of appeal, Ms. Ngole submitted that, the absence of the PF3 did not impeach the victim's evidence which is the best in the sexual related offences as articulated in the case of **SELEMANI MAKUMBA VS REPUBLIC** [2006] T.L.R 379 where the Court made it clear that a PF3 does not substantiate the commission of the sexual offence.

As to the complaint on the third ground relating to the absence of the extrajudicial statement on account that it could have established if the appellant had confessed to have sexually molested PW1, Ms. Ngole asked the Court not to consider it since it was never raised in the first appellate court. To support her proposition she referred us to the case of **JUMA MANJANO VS REPUBLIC,** Criminal Appeal No. 211 of 2009 (unreported). When probed by the Court if the cautioned statement of

the appellant was properly admitted and acted upon by the courts below, she conceded that it was not because it was read out to the appellant before being cleared of its admission. As such, she urged us to expunge the cautioned statement on the strength of what the Court decided in the case of **ROBINSON MWANJISI AND THREE OTHERS VS REPUBLIC** [2003] T.L.R 218.

Attacking the appellant's complaint that, the charge was not proved because the Deoxyribonucleic Acid (the DNA) report was not availed, the learned Senior State Attorney contended the complaint as baseless. She argued that, since the appellant was charged with the offence of incest by males which was proved by the prosecution beyond any reasonable doubt, the issue of proving the paternity of the child had no bearing and it is insignificant.

Pertaining to the appellant's complaint on the dismissal of the appeal by the first appellate court for not having considered the trial court's reliance on the hearsay evidence of PW2, PW3 and PW4, Ms. Ngole argued that, the courts below were justified to have relied on the credible evidence which solely did prove the charge. As such, in the circumstances, the issue of corroboration is not significant. To support

this proposition she cited to us the case of **EDWARD NZABUGA VS REPUBLIC,** Criminal Appeal No. 136 of 2008 (unreported).

Relating to complaints contained in the 5th, 6th and 7th grounds, the learned Senior State Attorney submitted that those grounds were not initially raised before the first appellate court and as such, they ought to be ignored. However, she contended that the appellant's evidence to have had a sexual relationship with another daughter was considered by the trial magistrate who concluded the same to be a continuation of the shameful acts of the appellant committed against his daughters including the victim herein. In conclusion, the learned Senior State Attorney prayed that the appeal be dismissed in its entirety.

The appellant repeated what is contained in the Memorandum of appeal and reiterated that he did not commit the offence. As such, he urged the Court to allow the appeal and set him free.

The conviction of the appellant as upheld by the first appellate court is based on credibility of the victim's evidence that it is the appellant who had sexual intercourse with her.

We aware of the principle that, in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because we have not had the opportunity of seeing, hearing and assessing the demeanour of the witnesses. (See **SEIF MOHAMED E.L ABADAN vs REPUBLIC,** Criminal Appeal No. 320 of 2009 (unreported). However, the Court will interfere with concurrent findings if there has been misapprehension of the nature, and quality of the evidence and other recognized factors occasioning miscarriage of justice. This position was well stated in **WANKURU MWITA VS REPUBLIC,** Criminal Appeal No. 219 of 2012 (unreported) where the Court said:

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some*

principle of law or procedure or have occasioned a miscarriage of justice."

We shall be guided by the said principle in disposing this appeal. At the outset, we wish to begin with the cautioned statement of appellant (Exhibit P4) which was acted upon by the courts below to conclude that, the appellant had confessed to have sexual intercourse with her own daughter. The impropriety of such reliance was pointed out by the learned Senior State Attorney after being probed by the Court. The procedure for admission of a confession is regulated by the Evidence Act and case law. Therefore, like any other documentary evidence whenever it is intended to be introduced in evidence, it must be initially cleared for admission and then actually admitted before it can be read out. (See: **ROBINSON MWANJISI AND THREE OTHERS VS REPUBLIC** (supra) **WALII ABDALLAH KIBUTWA AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 181 of 2006 and **OMARI IDDI MBEZI VS REPUBLIC,** Criminal Appeal No. 227 of 2009 (both unreported).

In the trial under scrutiny, at page 11 of this record, the cautioned statement of the appellant was irregularly initially read out before it was admitted as Exhibit P4. This was a fatal irregularity because the

cautioned statement was not in the evidence on record and it was improper for the first appellate court to act on it. We agree with the learned Senior State Attorney and accordingly expunge the cautioned statement. Having expunged the appellant's cautioned statement, the question to be answered is whether there is evidence to support the charge. The trial magistrate found the charge proved beyond reasonable doubt as reflected at page 33 of the record of appeal. The first appellate court also arrived at a similar conclusion and in addition, found the victim's evidence credible and sufficient to sustain the appellant's conviction.

It is settled law that, the true and best evidence of a sexual offence is that of a victim. (See **SELEMANI MAKUMBA VS REPUBLIC** [2006] TLR 379.) The principle is in line with section 127 (7) of the Evidence Act [CAP 6 RE.2002] (the Evidence Act) which states:

> *"Notwithstanding the preceding provisions of this section, where* ***in criminal proceedings involving sexual offence, the only independent evidence is that*** *of a child of tender years or* ***of a victim of the sexual offence,*** *the court shall receive the evidence*

and may, after assessing the credibility of the evidence of *the child of tender years or as the case may be* ***the victim of sexual offence, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reason to be recorded in the proceedings the court is satisfied*** *that the child of tender years or* ***the victim of the sexual offence is telling nothing but the truth".***

[Emphasis supplied]

The cited provision was considered in the case of **JOSEPH MAPUNDA AND HAMISI SELEMANI VS REPUBLIC** [2003] TLR 367 and the Court held:

> " *In view of the provisions of section 127 of the Evidence Act as amended by section 27 of the Sexual Offences (Special Provisions) Act 1998, the criterion now in sexual offences is more on the credibility of the victim of the offence and the Court can act on the uncorroborated testimony of a single witness if it is satisfied that the witness is telling nothing but the truth."*

In view of the stated position of the law, we have deemed it crucial to revisit what was said by the victim at the trial before making our conclusion. At pages 6 and 7 of the record she testified that, her father used to take her from the sitting room to the bedroom where they had sexual intercourse. The victim is also on record to have explained what made her not to reveal about the shameful act as reflected at page 6 of the record of appeal:

> *" I didn't tell anybody because the accused has (sic) been threatening to kill me but one day he ordered me to vacate the house and beaten(sic) me..."*

In response to the cross-examination by the appellant and a question asked by the trial court, at page 7 of the record of appeal the victim she stated that, the appellant regularly demanded to have sexual intercourse with her and sometimes he used a condom. We are aware that in **GOODLUCK KYANDO VS REPUBLIC,** [2006] TLR 363, the Court laid down the following principle:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."*

Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See- **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No. 62 of 2004 (unreported).

Having fully subscribed to the stated position of the law, we on our part are of the considered opinion that, the evidence adduced by the victim was credible and it sufficiently proved that the appellant committed the offence charged with. We are fortified in that account because apart from the victim giving a coherent narration of the sad and shameful incident, she clearly stated that the appellant regularly had sexual intercourse with her. Apparently the victim's account was not materially contradicted by the defence. On account of the credible account of PW1 like it was the case for the two courts below, we have no cogent reasons not to believe the victim's account which proved beyond reasonable doubt that, the appellant had prohibited sexual intercourse with his own biological daughter regardless of whether or not a child was not born out the illicit relationship. In this regard, the appellant's complaint that, in the

absence of the PF3 or the DNA report the allegations of PW1 were not proved is farfetched.

Furthermore, in view of PW1's credible account as to how she was sexually molested by her father, whereas the testimony of PW2, PW3 and PW4 is indicative on their proactive intervention to assist PW1 to have the appellant booked for the offence he committed, the appellant's complaint in faulting the trial court to have relied on such evidence apart from not being true is without basis.

We agree with the learned Senior State Attorney that, before the Court the appellant has raised new complaints which are to the effect that, at the trial he was not availed opportunity to comment on the admission of exhibits P1, P2 and P3 and that he was convicted merely because of the weakness of the defence case. We are fortified in that regard because 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 because we lack of jurisdiction to do so. See: **ABDUL ATHUMANI VS REPUBLIC** [2004] T.L.R 151 and **JUMA MANJANO VS THE DPP**, Criminal Appeal No. 211 of 2009 and **HASSAN BUNDALA @ SWAGA VS REPUBLIC**, Criminal Appeal No. 386 of 2015 (both unreported). In the case of

HASSAN BUNDALA @ SWAGA VS REPUBLIC (supra) the Court was confronted with a scenario whereby, the appellant raised new grounds of appeal to the Court which were not initially raised before the High Court. The Court emphasized on the essence of not entertaining new grounds of appeal having said:

> *"...if the High Court did not deal with those grounds for reason of the failure by the appellant to raise them there, how will this Court determine where the High Court went wrong? It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; no matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

Moreover, this Court in **FELEX KICHELE AND EMMANUEL TIENYI @ MARWA VS. REPUBLIC,** Criminal Appeal No. 159 of 2005 (unreported) among other things said: -

> *"... Indeed, there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the High Court. That is part of the reason why under section 7(6) (a) of the Appellate*

Jurisdiction Act, 1979 it is provided that a party to proceedings under Part X of the CPA, 1985 may appeal to the Court of Appeal on a matter of law but not on a matter of fact".

We subscribe to the above decisions. Having critically scrutinized the appellant's complaints in the 5th, 6th and 7th grounds, we are satisfied that as these are matters of fact and not law, we find ourselves to lack jurisdiction to entertain them and at any rate, we cannot gauge as to where the first appellate court went wrong. Thus, we decline to consider those new grounds of complaint.

In the premises, as earlier pointed out, the credible evidence of PW1 solely is sufficient to ground a conviction of the appellant in terms of section 127(7) of the Evidence Act. Besides, in the instant case, the conduct of the appellant leaves a lot to be desired because having paid a fine of TZS. 200,000/= for abusing his other daughter, he found justification to repeat the shameful act to the victim herein and get away with it.

In view of the aforesaid, we do not find cogent reasons to disturb the concurrent findings of the two courts below. We thus uphold the

conviction and the sentence of the appellant and accordingly dismiss the appeal.

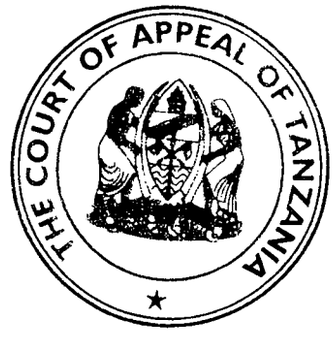
DATED at **MBEYA** this 22nd day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent Republic and the appellant in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL