IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MZIRAY, J.A, MKUYE, J.A And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 155 OF 2017

DICKSON ANYOSISYE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Msuya, J.)

dated the 14th day of September, 2009
in
Criminal Appeal No 53 of 2008

JUDGMENT OF THE COURT

29th October & 5th November, 2019

MWAMBEGELE, J. A.:

The District Court of Mbeya found the appellant Dickson Anyosisye guilty of unnatural offence contrary to section 154 (1) (a) of the Penal Code, Cap. 16 of the Revised Edition, 2002. It accordingly convicted and sentenced him to a prison term of thirty years. Aggrieved, he unsuccessfully appealed to the High Court where Msuya, J. upheld the conviction and sentence meted out to him. Undeterred, he has knocked the door of this Court on a second appeal seeking to assail the decision of

the High Court on six grounds of complaint which may be paraphrased as under:

1. That the High Court erred in law and facts in dismissing the appeal without considering the variance between the charge sheet and evidence which rendered the charge defective, due to the fact that the charge sheet shows that the offence was committed on 12.12.2003 while the evidence shows that the incident occurred on 12.12.2002;
2. That the learned judge of the High Court erred in law and facts when she dismissed the appellant's appeal relying and depending on the evidence of PW1, PW2, PW4 and PW5 who stated before the trial court that the said victim was found into the room of the appellant which contradicted with the evidence of PW6 (ten cell leader) and PW7 who both testified that the said victim was not found into the room while searching his room on the fateful date of incident;
3. That the judge of the High Court grossly erred in law and in facts when she dismissed the appellant's appeal relying on the evidence of

PW1, PW2 PW3 PW4 and PW5 who had interest with this case against appellant ;

4. That the learned judge of the High Court grossly erred in law point and fact when dismissed the appellant's appeal relying on the evidence of PW8 (doctor) who alleged to have examined the appellant without taking into account that the victim was examined on 13.12.2002 while the appellants was examined on 16.12.2002;
5. That the learned trial judge of the High Court grossly erred in law and fact when she dismissed the appellant's appeal t without taking into account that the prosecution side failed completely to prove the charge against appellant beyond reasonable doubts as per requirements of law; and
6. That the defence evidence was not considered by the trial court.

The appeal was argued before us on 29.10.2019 during which the appellant appeared in person, unrepresented. The respondent Republic appeared through Mr. Baraka Mgaya, learned State Attorney. Fending for himself, the appellant sought to adopt his six-ground memorandum of appeal without more. He asked the State Attorney to respond to them and reserved his right to rejoin in case need arose.

Before responding to the memorandum of appeal in earnest, Mr. Mgaya intimated to the Court that the first, fourth and six grounds were not canvassed in the first appellate court and, therefore, the Court lacked jurisdiction to entertain them. For this stance, the learned State Attorney cited and supplied to us **Diha Matofali v. Republic**, Criminal Appeal No. 245 of 2015 (unreported) in which we held that as a matter of general principle the Court will only look into a matter which came up during trial and was decided on first appeal.

The learned State Attorney thus asked us to expunge them. To that prayer, the appellant had no objection and the Court, accordingly, expunged the first, fourth and six grounds of appeal. We shall revert to this point later in this judgment. The learned State Attorney thus argued only the remaining three grounds. He expressed his stance at the very outset that the respondent Republic supported the appeal.

With regard to the contradictions in the testimony of witnesses, the subject of the second ground of appeal, Mr. Mgaya submitted that, indeed, there were such contradictions which went to the root of the matter. He submitted that while No. D9655 D/C Hendry (PW1), Tusajigwe Yohana (PW2), Florida Mungasulwa (PW3) and Yohana Mungasulwa

(PW5) testified that the victim was found in the appellant's room and was crying, Juma Ngonyani (PW6) and Upendo Edwin (PW7) testified that he was outside with PW2, PW3 and PW5. He added that while PW1, PW2, PW3 and PW5 testified that the victim had sperms in the anus, PW6 and PW7 did not say anything about the victim being seen with the sperms. These, he argued, are material contradictions which watered down the strength of the prosecution case. The learned State Attorney referred us to our unreported decision in **Chrisant John v. Republic**, Criminal Appeal No. 313 of 2015 to buttress the point that contradictions which go to the root of the matter will weaken the case. The learned State Attorney was of the view that this ground was meritorious.

Regarding the third ground which is a complaint against the testimonies of PW2, PW3 and PW5 that they are relatives who had interest to serve, the learned State Attorney argued that the ground was without merits in that relatives are not barred by law from testifying on an event they witnessed or saw. He told the Court that such stance was taken in **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008 (unreported); the decision of the Court wherein, the Court was confronted with an akin complaint to the effect that witnesses were near relatives of

the victim of rape. The learned Sate Attorney directed us to p. 7 where we observed:

> *"... there is no law in this country barring near relatives from testifying on an event they witnessed or saw .... What matters in a criminal trial is the weight or credibility to be attached to the evidence of the witnesses before grounding a conviction."*

Regarding the general ground that the prosecution did not prove the case beyond reasonable doubt, the learned State Attorney conceded. He added that despite the fact that it was quite appropriate for the relative witnesses to testify, their testimony materially contradicted with that of PW6 and PW7 which, as already stated, tainted the prosecution case hence his supporting the appeal.

Having said as above, the learned State Attorney prayed that the appeal be allowed and the appellant set free.

In view of the response of the learned State Attorney, the appellant had nothing in rejoinder. He just joined hands with him and prayed to be set free as prayed.

Before we delve into the determination of the grounds of appeal, we, first, find it apt to address, albeit briefly the point raised by the learned State Attorney on the aspect of new grounds of appeal which surfaced in this Court; not decided in the first appellate court. As rightly submitted by the learned State Attorney and conceded by the appellant, as a matter of practice founded upon prudence, this Court will not deal with matters which were not decided upon by the High Court on first appeal. The position on the point is fairly settled. There is a long list of authorities on this point one of them being **Diha Matofali** (supra) and **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 (unreported) cited therein on which the learned State Attorney placed heavy reliance to bolster the proposition. Others in the list are **Abdul Athuman v. Republic** [2004] TLR. 151, **Samwel Sawe v. Republic,** Criminal Appeal No, 135 of 2004, CAT and **Juma Manjano v. Republic,** Criminal Appeal No. 211 of 2009, CAT (both unreported) cited in **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016 (unreported). In **George Mwanyingili** (supra) we cited the following excerpt in **Samwel Sawe** (supra) which we think merits recitation here:

"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 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 Athuman vs 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 first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

In the case at hand, as rightly submitted by Mr. Mgaya and readily conceded by the appellant, the first, fourth and six grounds of appeal were not canvassed in the first appellate court. On the authority of our decisions referred to above, we are not clothed with jurisdiction to entertain them. That is the reason why we allowed the learned State Attorney to respond on only the remaining three grounds of complaint.

Adverting to the remaining grounds of appeal, the first one is a complaint that the testimony of the prosecution witnesses was marred with contradictions which went to the root of the matter. The

contradictions under reference are; **first**, while PW1, PW2, PW3 and PW5 testified that the victim was found in the appellant's room, the testimony of PW6 and PW7 was diametrically opposed to that, for, they testified that he was outside with PW2, PW3 and PW5. **Secondly**, while PW1, PW2, PW3 and PW5 testified that the victim had sperms in the anus, PW6 and PW7 did not testify on that aspect. In the circumstance, the learned State Attorney had the view that the ground of appeal was meritorious. We profoundly disagree. We shall demonstrate.

We have pronounced ourselves in a number of decisions that contradictions in the testimony of witnesses which will affect the prosecution case are not those which are minor but only those which go to the root of the case. We grappled with the point in **Athumani James v. Republic**, Criminal Appeal No. 69 of 2017; an unreported decision we have made within the ongoing sessions of the Court here at Mbeya which was pronounced to the parties on 29.10.2019. There, we relied on several of our previous decisions to restate the stance. The same position was taken in **Chrisant John**; the case cited to us by the learned State Attorney. Other authorities on the point are **Said Ally Ismail v. Republic,** Criminal Appeal No. 249 of 2008, **Maramo Slaa Hofu & 3**

Others v. Republic, Criminal Appeal No. 246 of 2011, **Slahi Maulid Jumanne v. Republic**, Criminal Appeal No. 292 of 2016 and **Rajabu Ponda v. Republic**, Criminal Appeal No. 342 of 2017 (all unreported decisions of the Court), to mention but a few. In **Said Ally Ismail** (supra), for instance, we observed:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled'"*

Determining the point a little bit further, we, at this juncture, find ourselves inept to resist the urge of echoing what we observed in **Maramo Slaa Hofu** (supra):

> *"... normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions or inconsistencies, embellishments or improvements on trivial matters which do not affect the case for the prosecution should not be made a ground*

on which the evidence can be rejected in its entirety."

The question which comes to the fore at this juncture and which question we are enjoined to answer is whether the contradictions in evidence in the case at hand were so material as to go to the root of the matter and thus affect the prosecution case? We seriously doubt. We have scanned through the discrepancies complained of which we have reproduced above. Indeed PW1, PW2, PW3 and PW5, in unison, tell the story to the effect that when they went to the appellant's room, the victim was crying from inside together with the appellant and the latter refused to open the door. PW1; a policeman, wanted to break the door but PW7; daughter of the appellant's landlady pleaded with him that the door should be left intact and that a window should be broken in its stead. Hardly had they broken the window when the appellant opened the door. They entered the room and found the victim therein with sperms in the anus and that a pungent smell reigned the room.

On that aspect of evidence, PW6 and PW7 did not testify in their examinations-in-chief as to where the victim was. They did so in cross-

examination by the appellant. When cross-examined, PW6 is recorded as saying:

> *"... I found the child outside and I was told that you had just released him."*

And when cross-examined, by the appellant, PW7 is recorded as saying:

> *"When the house was broken, the child was not inside. He was already out."*

We have examined the above responses by PW6 and PW7 in the context of the entire testimonies of other prosecution witnesses. Having so done, we are certain in our mind that the testimonies of PW6 and PW7 were not in contradiction with what other witnesses testified. PW6 testified that he was told that the victim **had just been released**. As for PW7, he testified that the victim **was already out** thereby suggesting that before that, he was inside the room. We thus found no inconsistencies in the testimonies of PW1, PW2, PW3 and PW5 on the one hand and PW6 and PW7 on the other.

Admittedly, the two witnesses; PW6 and PW7, did not narrate the story as elegantly as other witnesses did. However, this is not surprising.

Due to the frailty of human memory witnesses are not expected to retell stories in the same manner. There certainly will be some minute discrepancies on details here and there. As we held in **Athumani James** (supra) in which we relied on our previous decision in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) to observe that:

> *"... due to the frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies."*

In the case at hand, indeed, PW6 and PW7 did not testify regarding the victim being seen with sperms in his anus. However, PW1, PW2, PW3 and PW5 testified on that aspect. And to clinch it all, Dr. Robert Nkuba (PW8) who examined the victim and the appellant as well, found the former's anus wet with bruises and the latter's penis with bruises as well. We think the question whether or not the victim was found with sperms was not relevant to prove the charge levelled against the appellant but was sufficiently established by PW1, PW2, PW3 and PW5. In view of the above, we, unlike the learned State Attorney, find this ground without merit and dismiss it.

Next for consideration is the third ground which is a complaint against the testimonies of PW2, PW3 and PW5 that they are near relatives who had interest to serve. This ground will not detain us. We are in agreement with the learned State Attorney that there is no law in our jurisdiction that bars near relatives from testifying on an event they witnessed or saw. There is a litany of authorities on the point; one of them being **Edward Nzabuga** (supra); the case referred to us by the learned State Attorney. The principle in our jurisdiction was perhaps first enunciated in **R. v. Lulakombe s/o Mikwalo & Another** (1936) 3 EACA 43 wherein Sir Sidney Abraham, C.J. held at p. 44:

> *"There is no rule of law or practice which permits the evidence of near relatives to be discounted because of their relationship to an accused person."*
> (As cited in **Mustafa Ramadhani Kihiyo v. Republic** [2006] TLR 323 at p. 328)

The principle has been religiously followed in subsequent decisions in this jurisdiction – see: **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008 and **Sprian Justine Tarimo v. Republic**, Criminal Appeal

No. 226 of 2007(both unreported). In **Sprian Justine Tarimo** (supra), for instance, we held:

> *"The complaint that the two courts below erred in law in acting on the evidence of witnesses who are closely related, has found no purchase with us. We are not aware and we were not referred to any law which bars close relatives, family members, etc. from giving evidence in support of the prosecution. What counts, after all, is the competence of the witnesses and their credibility and not the degree of their relationship."*

We are guided by the above decisions. In the case at hand, we agree with the appellant that PW2, PW3 and PW5 were close relatives of the victim. However, this close relationship, as rightly submitted by the learned State Attorney and on the authorities cited above, did not bar them from testifying for or against the prosecution. What is relevant is their credibility. We, like the learned State Attorney, find this ground wanting in merits. We dismiss it.

The last ground is the general complaint to the effect that the case for the prosecution was not proved beyond reasonable doubt. Mr. Mgaya

was of the view that the ground had merits. With unfeigned respect, we, again, profoundly disagree. PW1, PW2, PW3, PW4 (the victim) and PW5 testified on what befell the victim. So did PW6 and PW7 who were also at the *locus in quo* at the time of arrest of the appellant. And PW8, the doctor who examined the victim as well as the appellant, testified that he found the former's anus wet with bruises and the latter's penis with bruises as well. He filled a PF3 in respect of each; the victim and the appellant. The PF3 of the appellant has these finding as appearing at p. 20 of the record of appeal:

"Bruised and hyperaemic penis"

He also made the following remarks:

"Sodomy done"

The PF3 in respect of the victim has this finding at p. 21 of the record of appeal:

"Wet on the anus with bruises on the perineum.
Rectal swab no spermatozoa"

We think the evidence of the prosecution witnesses as well as that of the two PF.3s proved the case against the appellant to the hilt. We,

unlike the learned State Attorney, find this general ground without merits. We also dismiss it.

The above said and done, we find this appeal seriously wanting in merits. It is dismissed in its entirety.

Order accordingly.

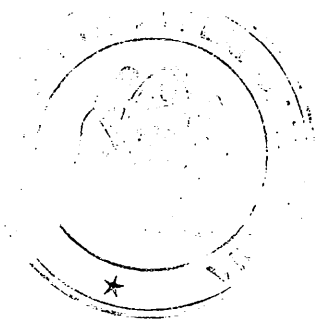
DATED at **MBEYA** this 4th day of November, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 5th day of November, 2019 in the presence of Dickson Anyosisye, the Appellant appeared in person and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL