IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., KOROSSO, J.A., and KITUSI, J.A.)

CRIMINAL APPEAL NO. 447 OF 2016

FESTO DOMICIAN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mlacha, J.)

Dated the 17th day of August, 2016
in
Criminal Appeal No. 180 of 2015

JUDGMENT OF THE COURT

25th October & 8th November, 2019

KOROSSO, J.A.:

Festo Domician, the appellant was arraigned before the District Court of Bunda at Bunda, tried and convicted in two counts for the offence of rape of two girls each aged 15 years, whom we shall henceforth to be referred using the initials of their names, that is "MM" and "EJ". The statement of offence stated that this was contrary to section 130(1)(e) and 131(i) of the Penal Code Cap 16 Revised Edition 2002 (the Penal Code).

Upon conviction the appellant was sentenced to thirty (30) years imprisonment for each count and it was ordered the sentences to run concurrently. Dissatisfied with the conviction and sentences imposed by the trial court, the appellant appealed to the High Court of Tanzania at Mwanza where subsequently the appeal was dismissed, hence the current appeal.

Before proceeding any further in consideration of the issues for determination before us, we find it pertinent to explore even if briefly the factual background of this case. From the testimony of a total of five (5) witnesses and two exhibits we discern that on the 14th August 2013 "MM" (who testified as PW1) and "EJ" (testified as PW2) both students at the time, while asleep in a room they shared with "PC" the younger sister to "MM", at around 1.00 hours, the door to their room was broken down and a male person with a torch and a knife entered their room. It is alleged that this person who forcefully entered in the room, was the appellant and a neighbor to "MM and EJ". That upon entering the room he ordered them to remain silent, climbed into the bed and undressed "MM" by removing her panties and grabbed her, and in the ensuing struggle "MM" was bruised by the appellant's knife on her right shoulder leading her to cry out that she has been injured and she was also cut on her left buttocks by the

same knife. That thereafter he pulled off the undies all together and raped "MM" who felt the appellant's male organ (penis) penetrate her female sexual organ (vagina). Then, the appellant turned to her friend "EJ" and raped her. "MM" alleged to have recognized the appellant from the torch light he had, his voice and the threats to kill them if they raised alarm he uttered. That after he had raped "EJ" he threatened them again and ordered them to keep calm and went to sit at the door. Before going to sit there he had taken their phones because they failed to give him the money he demanded from them as the catch to give them back the phones.

The appellant remained where he was for about 1 hour and 30 minutes and then afterwards he told them he was going to sit outside at the veranda and they remained in the room scared, until they heard voices from outside of people walking by and then realized it was morning already. That they got up and left the room and when they realized that the appellant had left, they went to inform "MM's mother on what transpired in their room, that they had been raped and the appellant was the attacker. According to PW2 ("EJ"), they also revealed the name of the assailant to the VEO and Ward Executive Officer (WEO) when they reported the incident accompanied and that it was the WEO who gave

them a letter to take to the police station. At the police station their statements were taken and they were also given PF3's to take with to the hospital so as to be medically examined and treated.

The appellant who gave his defence by way of an affirmed testimony, utterly denied the charges against him and testified that on the fateful date he was at home asleep and thus on 14th August, 2013 around 9.00 hours when Wanjara Kahema (PW3) came and told him he was wanted at the ward offices and thereafter taken to the police station. On arrival there he was surprised to be told he was accused of raping "MM" and thereafter arrested.

In this appeal before us, the appellant amassed seven grounds of appeal as follows:

1. *That, there was no sufficient evidence to hold the appellant liable for the commission of the offence of rape.*
2. *That, it is impossible for appellant to have committed the alleged offence while holding a knife which was not tendered in court as exhibit.*
3. *That, failure for appellant to be examined by PW4 renders the evidence of Samwel Paul (PW4) and PF3's exhibits of two victims lack legs to stand in the eye of the law.*

4. *That, the elementary factors of visual identification which "MM" (PW1) and PW2 ("EJ") based to identify the appellant were not established.*

5. *That, the absence of the evidence of VEO, WEO and mother of PW1 who was appeared in the scene first renders the evidence of PW1, PW2 and PW3 to be incredible untruth and unreliable in court.*

6. *That, the Honourable judge grossly and incurably erred both in law and fact in rejecting the defence of ALIBI raised by the appellant.*

7. *That, the Honourable judge did err both in law and fact for confirming the trial courts holding the case for prosecution had been proved beyond reasonable doubt.*

When the appeal came for hearing, the appellant appeared in person and fully relied on his grounds of appeal, while Mr. Hemedi Halidi Halfan, Senior State Attorney entered appearance for the respondent Republic. The appellant preferred to let the learned Senior State Attorney submit first on appellant's grounds of appeal, leaving himself to reply thereafter.

The learned Senior State Attorney's initial prayer was for the Court to take note that the charge sheet's heading had defects, in that, it states that the case is a traffic case rather than stating that it is a criminal case. He thus sought the Court to find this anomaly a minor error which does not

go to the root of the cause but a mere typing error that has not prejudiced the appellant. He also contended that this was the case because the appellant was made aware of the offence he was charged with, which is not a traffic offence. Apart from this, the learned Senior State Attorney also addressed the Court in terms of the charge itself being defective, arguing that the way it is, it contravened section 132 of the Criminal Procedure Act, Cap 20 Revised Edition (the CPA) which requires a charge to have a statement of offence and particulars of offence. He conceded that the charge against the appellant states that the appellant is charged with rape contrary to sections 130(1)(e) and 131 (i) of the Penal Code for the 1st and 2nd counts, whereas there is no section 130(1)(e) nor section131(i) of the Penal code which relates to a charge of rape. That the proper citation should have been contrary to sections 130(1)(2(e) and 131(1) of the Penal Code.

Mr. Hemedi Halid Halfani contended further that despite the obvious defects in the charge against the appellant, the Court should not find this to be fatal since the appellant was made to understand the context of the charges against him, and the evidence in the trial court meted by the prosecution revealed that the offence committed was rape of two 15 year

old girls that is, "MM" and "EJ". He also beseeched the Court to be persuaded on this stance by the holding of this Court in **Jamal Ally Salum vs Republic**, Criminal Appeal No. 52 of 2017 (unreported), the Court while finding the charge had defects found that the said defects were curable under section 388 (1) of the CPA.

The learned Senior State Attorney subsequently proceeded to address the seven grounds of appeal and that contended that when paraphrased all the grounds of appeal in effect allege that the prosecution failed to prove the case beyond reasonable doubt. He also contended that grounds 2, 5 and 6 are new grounds not addressed in the first appellate court and therefore prayed that the Court exercise its discretion under section 4(1) of the Appellate Jurisdiction Act, Cap 141 Revised Edition 2002 (the AJA) and strike out these grounds.

On the 1st and 7th grounds of appeal which the learned counsel preferred to argue them together, his argument was that the offence charged has been proved against the appellant. That the evidence of PW1 proved that there was penetration of her vagina by the appellant's penis as seen at page 8 of the record of appeal, and that this was found to be a fact by the trial Court as seen at page 31 of the record of appeal. The trial

court held that the evidence from the prosecution witnesses was believable. He submitted that in arriving at this conclusion, the trial and first appellate courts properly directed themselves and there is nowhere where it can be found that there was misapprehension of evidence by either court.

Moving to the 4th ground of appeal, the learned Senior State Attorney averred that the trial and first appellate courts found that the appellant was properly identified relying on the evidence of PW1 and PW2, where PW1 revealed that she managed to identify the appellant from the source of light emanating from the torch the appellant came with and also the appellant's voice, having known him prior to the attack. That there is the fact that the appellant did not dispute that he knew PW1 and PW2 before the incident. The learned Senior State Attorney also referred to the evidence found at page 9 of the record of appeal which can be inferred to make a description of the source of light and brightness, where PW1 stated that the torch light spread in the room. He also contended that another evidence which strengthens the evidence on identification of the appellant, is derived from the fact that PW1 and PW2 did report the incident and the name of the culprit soon after the incident, that is to PW1's mother, the

VEO and WEO, a fact supported by PW3 evidence who testified that the appellant was arrested soon after the incident upon report reaching the village office, that is, the same morning and that when he was called at the village office he found PW1 and PW2 there.

The learned Senior State Attorney also alluded to the fact that the 1st appellate court did consider whether or not the appellant was properly identified as found at page 40 of the record of appeal, where the court stated that the evidence of PW2 strengthened that of PW1 on identification and adequacy of light in the room which was the scene of crime, and that the early reporting of the incident and the name of the culprit were factors that led the first appellate court to hold that there was proper identification of the appellant.

On the question why PW1 and PW2 failed to raise an alarm when they were attacked, the learned Senior State Attorney submitted that from the evidence on record it is clear that they were threatened and that it should be borne in mind that they were children of 15 years of age and less (for the younger sister). He submitted that not raising an alarm should not be taken to affect the evidence showing that PW1 and PW2 were raped on the fateful night. That in any case there is evidence that PW1 was cut

by the knife on the shoulder and buttocks and even if the injury was not grievous but she was bruised and from their evidence they were threatened and without doubt apprehensive at the time in fear of their lives. The fact PW1 and PW2 were scared, he urged can also be discerned from the evidence of PW2 when she stated that when she was ordered to undress she did not wait but proceeded to undress herself quickly prior to the appellant raping her.

Another argument by the learned Senior State Attorney was that the evidence of "MM" and "EJ" should be relied upon since it is well settled that in cases of sexual offences it is the evidence of victims which reveals the truth. In this case there is also the evidence of the doctor (PW4) who examined them. He was firm on the injuries found when he examined "MM" and "EJ" on the 14th of August 2013. That there are also two PF3's (Exh. P1 and P2) to confirm the doctor's findings and that his examination revealed that "MM" had bruises in the vagina with spermatozoa and a wound caused by a sharp object on one buttocks and shoulder. That apart from bruises he found in "EJ" vagina, spermatozoa were also found. The learned counsel argued that PW4's evidence be found to corroborate the testimonies of PW1 and PW2, and that the said evidence prompt the Court

to hold that the prosecution side proved their case against the appellant and that the appeal should thus be dismissed.

When provided with an opportunity to offer his response to the respondent Republic's submission, the appellant was brief, objecting to the contents of the said submissions arguing that the rape of "MM" and "EJ" was not proved against him and he never went to the house of the two victims because on the fateful day he was home asleep. He thus prayed for the appeal to be allowed.

On our part, in light of the submissions from the appellant and the respondent Republic on the grounds of appeal and other points of law, we shall start by addressing the two points of law raised. That is, the outlined defects in the charges against the appellant and the claims of there being new grounds of appeal which were not raised in the first appellate court.

With regard to the charge sheet, we first consider the wrong heading of the charge sheet which instead of stating that it was a criminal case, it referred the case to be a traffic case. Having considered the submissions on this issue we agree with the learned State Attorney that the said defect does not warrant spending too much time on it, since the said defect does not in any way detract the charges outlined in the statement of offence

and particulars of offence which reveal the nature of the charge against the appellant. We also find that the appellant was not prejudiced in any way from the said omission. Other defects discerned in the charges by the learned Senior State Attorney we also share his assertion that the charge is defective for reasons that the statement of offence cites sections 130(1)(e) and 130(i) of the Penal Code.

There is no doubt that having regard to the contents of the particulars of the offence, the relevant provision which should have been cited is sections 130(1), (2)(e) and 131(1) of the Penal Code. The issue for determination under the circumstances is whether these defects that arise from wrong citation and citation of inapplicable provisions, did prevent the appellant from comprehension of the nature and gravity of the offence of rape for which he faced and thus prevented him from presenting a proper defence and thus occasioned him injustice.

It is instructive at this interval to bring forth what the particulars of the offence as found in the charge sheet reveal, it states:-

For the 1st count:

***PARTICULARS OF OFFENCE**: FESTO s/o DOMICIAN charged on 14th day of August, 2013 at about 01.00 hrs at Busambara village within Bunda District in Mara Region did rape one "MM" a girl of 15 years.*

For the 2nd count:

***PARTICULARS OF OFFENCE**: FESTO s/o DOMICIAN charged on 14th day of August, 2013 at about 01.10 hrs at Busambara village within Bunda District in Mara Region did rape one "EJ" a girl of 15 years.*

(**The names of the victims have been withheld being minors**)

While aware of the position of the law, that is, section 132 of the CPA which specifies that offences must be specified in the charges with necessary particulars, we are also mindful of the decisions of this Court on the issue. In **Charles Mlande vs Republic**, Criminal Appeal No. 270 of 2013, when discussing charges which are found to be defective, it was held:-

> *"...the statement of offence must contain a reference and, for that matter, a correct reference to the section of the enactment creating the offence. Quite obviously the statement of offence in the case at hand made an incorrect reference. We are: however, keenly aware that not every defect in the charge sheet would invalidate a trial. As to what effect the defect could lead, would depend on the particular circumstances of each case, the overriding consideration*

being whether or not the infraction worked to the prejudice of the person accused".

From the above excerpt, the particulars of the offence in the charge in our view intended to facilitate the appellant to have full appreciation of the nature and seriousness of the offence of rape for which he is charged and tried with. The particulars reveal the date it was alleged the offence was committed, the place/venue, the victims and their ages and the nature of the alleged offence committed. This together with the evidence presented by the prosecution especially PW1 and PW2 that give details of how the appellant raped them cannot in any way lead anyone to a conclusion that the appellant was not made aware of the offence he was charge with.

We subscribe to the views of our learned brothers expounded in **Jamali Ally @ Salum vs Republic** (supra), who faced a similar situation and stated:

"where the particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when offence was committed, the village

where the offence was committed, the nature of the offence, the name of the victim and her age, and where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged, and thus any irregularities over non citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA)."

Thus, for reasons stated above and having regard to the stated particulars of the offence and also the evidence presented in court, we are of the view that the appellant was made aware of the nature and gravity of the offence to enable him to enter his defence and thus non citation and wrong citation of provisions in the statement of the offence is curable under section 388(1) of the CPA.

The second issue for consideration is allegations by the learned State Attorney that the 2nd, 5th and 6th grounds of appeal are new grounds not raised or determined in the first appellate court. All these grounds in effect challenge adequacy of evidence meted in the trial court to prove the case for the prosecution and allegations that there was non-consideration of the defence. The 2nd ground of appeal addresses the fact that the knife was

not tendered in court; the 5th ground the fact that the VEO, WEO and mother of PW1 were not called as witnesses and the 6th ground of appeal addresses the defence of *alibi* raised by the defence not having been considered by the first appellate court in determination of the case. Having perused the record, we find that in the first appellate court, there were only four grounds of appeal which related to identification of the appellant and the evidential value of the PF3 reports tendered in court. We have also considered the judgment of the High Court and there is no doubt that the three grounds, as expounded by the learned Senior State Attorney were neither raised nor considered or determined by the first appellate court.

We have repeatedly discussed this issue which is now settled. In **Emmanuel Josephat vs Republic**, Criminal Appeal No. 323 of 2016 (unreported) it was stated that where grounds of appeal are raised in the Court for the first time, it will not entertain and determine them for lack of jurisdiction. In **Hassan Bundala Swaga vs Republic, Criminal Appeal No. 385 of 2015** (Unreported) it was held:-

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; not on matters which were not*

raised nor decided by neither the trial court nor the High Court on appeal."

Thus the above cited cases restate the position that as a second appellate court, the Court cannot adjudicate on a matter which was neither raised as a ground of appeal nor deliberated and determined in the High Court. This position is grounded on the provision of section 6(1) of the Appellate Jurisdiction Act, Cap 141 Revised Edition 2002 (the AJA), where this Court derives mandate to address appeals from the High Court or a subordinate court exercising extended powers and thus presupposing that an issue has to emanate from the said courts or those below. Thus, since we have already found that the 2nd, 5th and 6th ground of appeal were neither raised nor determined in the first appellate court, we shall not address them as grounds of appeal in the current appeal and we hereby strike them out.

The 1st, 3rd, 4th and 7th grounds address assertions by the appellant that the prosecution evidence was not sufficient to prove the offence charged against the appellant and also that the visual identification of the appellant is doubtful and thus renders the conviction flawed. With respect to the ground that the evidence was inadequate to sustain conviction, the

respondent Republic invited us to find that the evidence of PW1, PW2, PW3 and PW4 together with Exhibits P1 and P2 proves the case against the appellant beyond reasonable doubt. On the other hand, the defence invited us to find otherwise, contending that there are a lot of gaps in the said evidence and that the identified doubts should benefit the appellant.

The appellant's defence notwithstanding, the trial court found that PW1 and PW2 evidence gave a detailed account of what transpired on the fateful date, and that their identification of the appellant as the assailant who had broken into their room and raped PW1 and PW2 was corroborated by the evidence of PW3 and PW4. The first appellate court agreed with the said finding of fact. We have scrutinized the evidence on identification of the appellant, warning ourselves that it was under unfavourable conditions, and that visual identification is the weakest evidence and therefore unreliable. We have considered the conditions for which a court is expected to take account of as narrated in **Waziri Amani vs Republic** [1980] TLR 250, when deliberating on such evidence. That is, the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor light at the scene; and

rently where a person has been convicted in two or more offences charged and thus the legality of such orders is not in doubt. In a decision by the Court of Appeal in Kenya, that is, **Peter Mbugua Kabui vs Republic**, Criminal Appeal No 66 of 2015, addressing this issue held that:-

> *"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act or transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."*

Another case that also delved on the issue decided by the defunct Court of Appeal for Eastern Africa is **Sawedi Mukasa s/o Abdulla Aligwasa** [1946] 13 EACA 97, which stated that the practice is that where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, it is proper to impose concurrent sentences.

We also scrutinized various judgments of this Court, where appellants were convicted in one or more counts and sentenced, similar to the case at

hand, we have discerned that the practice has been for this Court not to disturb orders that the sentences run concurrently. In **Hassan Kamunyu vs Republic**, Criminal Appeal No. 277 of 2017 (unreported), the appellant a *Madrasa* teacher, was arraigned for ten counts of unnatural offence under section 154 (1) and (2) and two counts of sexual assault on a person under section 135 (2) of the Penal Code. It was alleged that he had sex against the order of nature with ten pupils and sexually assaulted two pupils of the *madrasa.* He was convicted on the first, second, third, fourth and sixth counts and sentenced to thirty years in jail in respect of the first, second, third and fourth counts and five years in respect of the sixth count. The sentences were ordered to run concurrently. His appeal to the High Court was dismissed in its entirety, the High Court not interfering on the sentence. When appeal came to this Court, the appeal was dismissed in entirety with respect to the 1st, 2nd and 3rd counts. (See also **Nguza Vikings @ Babu Seya & 4 Others vs Republic,** Criminal Appeal No. 56 of 2005; **Abdilahi Mshamu Mnali vs Republic,** Criminal Appeal No. 98 of 2010).

This being the position, for the foregoing reasons, having found that the appellant was properly convicted, we also find no need to disturb the sentences imposed. We therefore hold that the appeal lacks merit and is consequently dismissed.

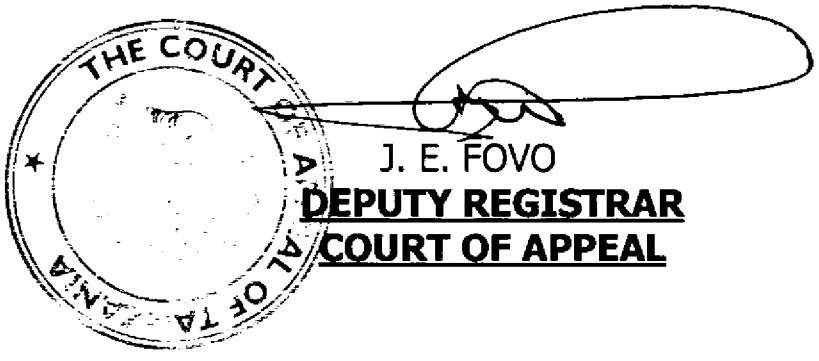
DATED at **MWANZA** this 7th day of November, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 8th day of November, 2019 in the presence of Appellant appeared in person and Hemedi Halidi Halfan, learned Senior State Attorney for the Respondent Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL