IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 499 OF 2017

MZEE ALLY MWINYIMKUU @ BABU SEYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)

(Mwandambo, J.)

dated the 6th day of November , 2017
in
Criminal Appeal No. 3 of 2017

.....

JUDGMENT OF THE COURT

15th June & 17th September, 2020

MWAMBEGELE, J.A.:

The appellant, Mzee Ally Mwinyimkuu @ Babu Seya, was arraigned before the District Court of Temeke for three counts of unnatural offence and one count of rape contrary to, respectively, section 154 (1) (a) & (2) and sections 130 (1) & (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). It was alleged in the particulars of the offence in respect of the first three counts that he had carnal knowledge of three schoolgirls aged nine years against the order of

nature. It was also alleged in the fourth count that he had carnal knowledge of a girl aged nine years. The appellant pleaded not guilty to the four counts and a full trial ensued after which he was found guilty as charged but was convicted on only the first three counts of unnatural offence and sentenced to thirty years in jail in respect of each count. The sentences were ordered to run concurrently. On appeal by the appellant, the High Court (Mwandambo, J. – as he then was) found and held that the appellant's conviction was apposite but that the sentence of thirty years was wrong in both rape and unnatural offence under sections 130 (1) & (2) (e) and 154 (1) & (2), respectively, of the Penal Code as the same should have been life in prison. The High Court thus quashed the sentences imposed by the trial court and substituted them with a sentence of life imprisonment in respect of each count.

The appellant was aggrieved by the decision of the first appellate court. He has thus come to this Court on second appeal on the following six grounds of grievance:

1. That the lower courts erred in law and fact in convicting the appellant on three courts whereas there was no evidence led by the prosecution to establish any of those counts;

2. That the lower courts erred in law and fact in convicting the appellant for the charge which the prosecution failed to prove the age of the victims;

3. That the lower courts erred in law and fact for failure to observe that the prosecution witnesses PW1, PW2, PW3, PW4, PW5 and PW6 were contradictory, unreliable, incredible and had material inconsistencies which rendered their story highly improbable against the appellant;

4. That the learned magistrate erred in law, and the 1st appellate judge erred for failure to observe that the *voire dire* examination was not conducted according to law;

5. That the lower courts erred in law and fact in convicting the appellant for the case which was poorly investigated and prosecuted; and

6. That the learned trial magistrate and the 1st appellate judge grossly erred in law and fact by disregarding the defense of the appellant.

To give flavour to this judgment, we think it will be apposite to narrate, albeit briefly, the material background facts to the appeal before us. These facts, as led by the prosecution's eight witnesses, go thus: the appellant was a shoeshine at Tandika area in Temeke District within the city of Dar es Salaam. The victims were Standard Four pupils at Yusuph Makamba Primary School; a school which was in the vicinity of the appellant's residence and place of work. In a bid to prove its case, the prosecution fielded eight witnesses in its support. Mwasi Paulo (PW1) told the trial court that one day in the month of October, 2014 her daughter who we shall call "SJ" to protect her privacy, came home late under the pretext that she had gone to the Mosque for prayers. Dissatisfied with her answer, and perhaps suspecting that something fishy might have happened, PW1 took her to Tandika Police Post at Mwembeyanga where she was interrogated and confessed to have gone to the appellant who carnally knew her against the order of nature and raped her as well. SJ

was taken to the Hospital where she was examined and found that a blunt object had penetrated her vagina and anus. The relevant PF3 was tendered and admitted in evidence as Exh. P1. Later, a social welfare officer who was procured at PW1's instance, interrogated SJ who told her that she was taken to the appellant by a friend we shall call SS. An interrogation with SS revealed further that she also was carnally known by the appellant against the order of nature. Further interrogation with SS revealed yet another girl in the same class with SJ and SS, who we shall call NI, had also been taken to the appellant where she was also carnally known against the order of nature.

Zainab Hussein (PW2) testified that one day in November, 2014, her daughter, who we shall call NI, arrived home late complaining that she had some pains in her anus because the appellant lubricated her anus with some oil and penetrated his penis therein. She took her daughter to the Hospital where she was examined and found to have been sexually abused with some bruises in the anus. The relevant PF3 was admitted in evidence as Exh. P2.

After the three girls had narrated what had befallen them at the helm of the appellant, the Head Teacher of the school subpoenaed Zulea Waziri (PW3), mother of SS. PW3 went there and was told that her daughter used to go to the appellant's residence together with her friends where they were sexually abused. PW3 took her daughter to Chang'ombe Police Station where she was given a PF3 and later taken to Temeke Hospital for examination.

The victims; NI, SJ and SS testified as PW4, PW5 and PW6, respectively. They all recounted how, on diverse dates, they went to the appellant's place of work at the area known as Transformer where they were given Tshs. 2,000/= to buy chips and later directed to go to the appellant's residence where they were ravished in the manner stated hereinabove. It was PW6 who used to take them at different times. First, PW4 went with PW6. Some days later, PW5 went with PW6. On those occasions the trio were carnally known by the appellant against the order of nature. PW5 was, in addition, raped.

The three victims showed their parents where the appellant worked as well as his residence where he used to ravish them which information led to his arrest.

On his part, the appellant dissociated himself with the charges levelled against him. He told the trial court that he did not know the victims. He stated that he was in bad blood with a certain Mwamvita who previously accused him of raping her daughter. That the said Mwamvita went to his sister to borrow money but she did not succeed and thus promised vengeance against the appellant. Cross-examined, the appellant testified that the previous rape case was a result of his misunderstandings with his sister Rehema. The present charges, he added, were a result of the previous case.

As already stated, the appellant was found guilty, convicted and sentenced by the trial court and first appellate court in the manner shown hereinabove.

The appeal was heard vide a video conference; a virtual court facility of the Judiciary of Tanzania. Whereas the appellant appeared for the hearing in person, unrepresented at Ukonga Prison, Mses. Neema Moshi

and Ashura Mnzava, learned State Attorneys, appeared in Court joining forces to represent the respondent Republic.

The appellant had earlier on filed written submissions in support of his appeal which he sought to adopt at the oral hearing. Relying on the general ground that the case against him was not proved beyond reasonable doubt, the appellant submitted; **first**, that the two lower courts failed to resolve the variance regarding the month in which the offence was allegedly committed; while the charge refers to October, 2014, PW2 and PW3 refer to the month of November, 2014. This variance, he argued, makes the charge incurably defective. **Secondly**, that the *voire dire* test on the victims was not conducted according to law in that the victims were affirmed first and later the test followed. He argued that the trial court ought to have examined the victims with a view to finding out whether they understood the nature of oath and whether they had sufficient intelligence to understand the duty of speaking the truth. The appellant cited **Arap Kalil v. Reginam** [1959] EA 92 to buttress this argument. **Thirdly**, that the age of the victims was not proved. On this point the appellant submitted that while the charge shows that the age of the victims

was nine years, the evidence shows that they were ten. This discrepancy, he argued, created doubts as to the correct age of the victims and therefore making the case being proved below the standard put by the law; beyond reasonable doubt. On this proposition, the appellant cited to us **Mashalla Njile v. Republic**, Criminal Appeal No. 179 of 2014 (unreported). **Four**, that the evidence by the prosecution witnesses was marred with contradictions and lacked coherence. Under this arm, the appellant challenged the evidence of the victim on their episode as to what exactly transpired on the material dates; the dates they were allegedly sexually abused. The appellant branded the victims as not witnesses of truth and therefore not credible and thus unreliable. **Five**, that the case was poorly investigated and prosecuted. **Sixth**, that the trial court did not consider his defence. Unfortunately, there is not much in the written submissions in respect of the sixth ground but the appellant simply contends that the defence he raised was quite sufficient to earn him an acquittal. He contends that failure to consider his defence coupled with the five grounds above, it could not be said that the prosecution case was proved beyond reasonable doubt. He thus prayed that his appeal be allowed and that he should be set free by allowing his appeal.

On her part, Ms. Moshi, expressed her stance at the outset that the conviction and sentence meted out to the appellant were quite appropriate. Supporting this stance, she combined the first and third grounds of appeal for the reason that they were intertwined. The rest of the grounds were argued separately.

With regard to the first and third grounds of appeal whose gist is that there was no evidence to prove the three counts on which the appellant was convicted and that there were inconsistencies in the testimony of witnesses, she submitted that the prosecution led credible evidence on what befell the victims. That story, she submitted, was told by the victims themselves (PW4, PW5 and PW6) as well as their parents (PW1, PW2 and PW3) and the rest of the prosecution witnesses. She argued that there was no discrepancy in their testimonies and that if there were any, they were minor ones which did not go to the root of the matter; they can be overlooked as was the case in **William Kasanga v. Republic**, Criminal Appeal No. 90 of 2014 (unreported), she argued. She submitted that these two grounds were devoid of merit and implored us to dismiss them.

On the second ground which is a complaint that the age of the victims was not proved, Ms. Moshi argued that PW1 and PW3 were parents of two victims and each one of them testified that her child victim was nine years old at the time of the commission of the offence. The learned State Attorney referred us to pages 17 of the record of appeal where PW1 testified that her child was nine years old at the time of commission of the offence. So did PW3 at page 20 of the record where she testified that her child was also nine years old at the commission of the offence.

With regard to the age of PW2's daughter, the learned State Attorney admitted that she did not testify about the age of her but was quick to put up a rider that at page 23, the victim herself (PW4) testified that she was ten years at the moment she testified. That was one year after the commission of the offence, she argued. She cited to us **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 (unreported) in which we said at page 5 that the evidence relating to the age of the victim is expected to come from, among others, the victim, both of her parents or at least one of them, a guardian or a birth certificate. In the case at hand, she submitted, the age of the victims was proved by the parents and the

victims. The second ground, she argued, was without merit and therefore, should be dismissed.

With respect to the fourth ground; that the *voire dire* was improperly conducted on the three victims, Ms. Moshi submitted that the same was conducted quite properly in respect of all of them. She contended that the provisions of section 127 (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 which were applicable then, were not offended against. When we prompted the learned State Attorney that the victims were affirmed before the *voire dire* test, the learned State Attorney quickly responded that the shortcoming was not fatal in that the contents of their testimonies showed that they indeed understood the meaning of oath. After all, she submitted, the appellant was not prejudiced by the ailment, if any. For this proposition, the learned State Attorney referred us to our decision in **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) – [2019] TZCA 109 at www.tanzlii.org.

On the fifth ground of appeal; that the case was poorly investigated and prosecuted, Mr. Moshi submitted that the same was not a ground of

appeal and that even if it were one, it was being raised in the Court for the first time and thus could not be entertained.

Regarding the sixth ground of appeal, the learned State Attorney, conceded that the appellant's defence was summarized in the judgment of the trial court but was not considered. Given this ailment, Ms. Moshi implored us to quash both judgments and order that the matter be remitted to the trial court for composition of a fresh judgment which will consider the appellant's defence.

In a short rejoinder, the appellant strenuously objected to the respondent's prayer for remission of the matter to the trial court for composition of a fresh judgment. He argued that he was not to blame for such infraction and therefore he should not be punished for the mistakes of the trial court. He was insistent that his appeal should be allowed and he be set free.

We shall confront the grounds of appeal in the manner employed by the learned State Attorney. That is, by determining the first and third grounds conjointly and determining the rest of the grounds separately.

The gist of complaint in the first and third grounds of appeal is that the three counts on which the appellant was found guilty, convicted and sentenced were not proved beyond reasonable doubt in that the testimony of witnesses were not consistent. At the centre of this grievance is the complaint that the witnesses referred to different months during which the offences were allegedly committed. We do not think we will be detained much by this complaint. We have, times and again, dealt with complaints of this nature and its effect on the prosecution's case. In all those cases, the Court has been firm that minor contradictions, inconsistencies or discrepancies in evidence from the prosecution will not dismantle its case. The reason for this stance is not hard to seek; minor contradictions, inconsistencies or discrepancies in evidence for the prosecution do not corrode the strength of its case as do material contradictions, inconsistencies and discrepancies.

In **Said Ally Ismail v. Republic,** Criminal Appeal No. 249 of 2008 (unreported), 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".

In another case; **Marmo Slaa Hofu & 3 Others v. Republic,** Criminal Appeal No. 246 of 2011 (unreported), we succinctly added:

"... 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 issue which pops up for our determination at this juncture is whether the contradictions complained of by the appellant are material as to go to the root of the prosecution's case. We, like the learned State Attorney, do not think that they are material. We shall demonstrate.

Admittedly, the charge bears out that the offences were committed in the month of October, 2014. All the witnesses who testified in respect of the month of commission of the offences referred to October, 2014 as the

month on which the offences were committed, save for PW2 who testified that it was in the month of November, 2014. We have considered the rival arguments in respect of these grounds. Having so done, we do not think the discrepancy is of such a nature that it would go to the root of the matter. We agree with the learned State Attorney, that the discrepancy in evidence for the prosecution caused by PW2, was on details which did not affect the prosecution's case. Above all, it did not occasion any failure of justice – see: **Dickson Elia Nsamba Shapwata & Another v. Republic,** Criminal Appeal No. 92 of 2007, **Ismail Ally v. Republic**, Criminal Appeal No. 212 of 2016 and **Slahi Maulid Jumanne v. Republic**, Criminal Appeal No. 292 of 2016 (all unreported). For this reason, we find and hold that the complaint the subject of the first and third grounds of appeal is not well founded. We accordingly dismiss it.

Next for consideration is the second ground of appeal which is a complaint that the respective age of the victims was not proved. This complaint will also not detain us, for the appellant's complaint is not backed by record. If anything, the record of appeal shows that the age of the appellants was proved to the hilt. We will start with the age of PW5

and PW6. PW1, mother of PW5, testified at p. 17 that her daughter was aged ten at the time she was testifying. PW5 herself testified that she was ten at the time she was testifying. That was about a year after the commission of the offence. Likewise, PW3, mother of PW6, testified that her daughter was ten years old at the time she testified. PW6 also testified in cross-examination that she was ten years old. Again, a year had elapsed after the offence was committed. In this regard, we are satisfied that the prosecution proved that the two victims (PW5 and PW6) were aged nine at the time they were ravished. As we held in **Andrea Francis** (supra), the case referred to us by the learned State Attorney:

> *"... in a case such as this one where the victim's age is the determining factor in establishing the offence evidence must be positively laid out to disclose the age of the victim. Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following:- the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc."*

Corresponding remarks were made by the Court in **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 (unreported) in which, confronted with an akin situation, it cited the following excerpt from our previous unreported decision in **Edward Joseph v. Republic**, Criminal Appeal No. 19 of 2009:

> *"Evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's age."*

In view of the above, we are satisfied that the prosecution proved the age of PW5 and PW6 through their own testimonies and through the testimonies of their parents; PW1 and PW3.

With regard to the age of PW4, we agree that her mother (PW2) did not come out clearly on what was the age of her daughter. However, the record of appeal is loud and clear that the victim herself testified at p. 23 that she was aged ten years at the time she was testifying. She was consistent in cross-examination where she reiterated that she was ten years old. That was also about a year after the commission of the offence. We are satisfied therefore that the prosecution proved the age of PW4 as

well. The complaint the subject of the second ground of appeal is therefore with no iota of merit and dismissed.

We now turn to consider the fourth ground of appeal; that the *voire dire* test of the three victims was improperly conducted. We have examined the *voire dire* tests conducted by the trial court. The law applicable then was section 127 of the Evidence Act, Cap. 6 of the Revised Edition, 2002. That law required the trial court to conduct a *voire dire* test to ascertain whether the child of a tender age understands the nature of oath and the duty of telling the truth as well as if he is possessed of sufficient intelligence to justify the reception of his evidence – see: **Hassan Hatibu v. Republic,** Criminal Appeal No. 71 of 2002 and **Mohamed Sainyeye v. Republic,** Criminal Appeal No. 57 of 2010 (both unreported).

Having closely examined the *voire dire* tests conducted in respect of the three victims, we are satisfied that the same tested victims well on the nature of oath, the duty of speaking the truth and whether they possessed sufficient intelligence to justify the reception of their evidence. The only snag, which we prompted Ms. Moshi for the respondent Republic, is that the three victims were affirmed before the *voire dire* tests were conducted.

The learned State Attorney responded that the course of action was not fatal in that the contents of their *voire dire* showed that they indeed understood the meaning of oath. We agree. Indeed, the fact that the victims were affirmed before the *voire dire* tests, was an ailment. However, as the learned State Attorney submitted, the fact that the tests unveiled the fact that they indeed understood the meaning of oath, did not make it a fatal ailment. It did not even prejudice the appellant. We thus find the fourth ground of appeal as unmerited and dismiss it.

The fifth ground of appeal is a complaint that the case was poorly investigated and prosecuted. Ms. Moshi urged us to ignore this ground before it was being raised in the Court for the first time. The appellant, a lay person, did not have any useful argument to respond to this legal question. We agree with Ms. Moshi that this ground was being raised in the Court for the first time and thus, it being not a point of law, this Court lacks jurisdiction to entertain it. That this is the law has been stated by the Court times without number – see: **Abdul Athuman v. Republic** [2004] T.L.R. 151 and **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004, **Ramadhani Mohamed v. Republic**, Criminal Appeal No. 112 of

2006, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012, **Richard Mgaya @ Sikubali Mgaya Republic**, Criminal Appeal No. 335 of 2008 (all unreported), to mention but a few.

In view of the above settled legal position, the fifth ground, having been raised for the first time in this second appeal, and it being not one on law, we do not think this ground is sustainable. We thus dismiss the fifth ground as well.

Regarding the sixth ground of appeal, a complaint that the appellant's defence was not considered, having read the judgment of the trial court, we have no hesitation at all to agree that the appellant's defence was not considered. The judgment of the trial court is found at p. 43 through to p. 51 of the record of appeal. The learned trial magistrate, in an eight-page judgment spent a good six pages summarizing the case and the evidence of both parties. The analysis of the case starts at the second half of p. 49 of the record. The analysis does not contain any scintilla of the appellant's defence; not even a reference to it. In the last two pages in which the trial court made an analysis of the evidence, there is no mention of the appellant's defence at all. We, like Ms. Moshi, are of

the settled mind that the appellant's defence was not considered. The court has held in a string of its decisions that failure to consider an accused person's defence vitiates his conviction. In **Amiri Mohamed v. Republic** [1994] T.L.R. 138, the Court had this to say:

> *"Every magistrate or judge has got his or her own style of composing a judgment, and what vitally matters is that the essential ingredients shall be there, and* ***these include critical analysis of both the prosecution and the defence."***
> [Emphasis ours].

Likewise, in **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014 (unreported), the Court articulated that considering the defence was not all about summarizing it. The Court stated:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

[See also: **Hussein Idd & Another v. Republic** [1986] T.L.R. 166 and **Abel Masikiti v. Republic**, Criminal Appeal No. 24 of 2012, **Ally Juma v. Republic**, Criminal Appeal Case No. 219 of 2014, **Elias Mwaitambila & 3 Others v. Republic**, Criminal Appeal No. 414 of 2013, **Jeremiah John & 4 Others v. Republic**, Criminal Appeal No. 416 of 2013 and **Juma Bundala v. Republic**, Criminal Appeal No. 151 "B" of 2011 (all unreported)].

As already alluded to above, after the appellant's evidence was ımmarized, the trial court never adverted to it in its analysis. We agree with the appellant that such failure to consider his evidence occasioned miscarriage of justice and, certainly, prejudiced him. It was a serious error which vitiated the subsequent conviction.

The question that pokes our mind at this juncture is: what should be the way forward? While Ms. Moshi for the respondent Republic prayed that the matter be remitted to the trial court for composition of a fresh judgment that would consider the appellant's defence, the appellant's stance was diametrically opposed to that contention. It was his contention that, in view of the fact that he is not to blame for the mishap, he should

not be punished for the mistakes of the trial court. He beseeched us to allow his appeal and set him free.

We do not find it hard to confess that the way forward has really exercised our mind. We have found and held that the appellant's defence was not considered by the trial court. The first appellate court fell into the same error. It upheld the decision of the trial court without considering the defence. In addition, the first appellate court purported to enhance the sentence in respect of the fourth count on which the trial court did not impose any sentence. Can these ailments be rectified by this Court on this second appeal? Having revisited a good number of cases, we have no hesitation to answer the issue in the affirmative. In **Dinkerrai Ramkrishan Pandya v. Rex** [1957] 1 EA 336, the erstwhile Court of Appeal for East Africa, confronted with an akin situation in an appeal from this jurisdiction, dealt with the duty of the second appellate court to consider evidence and draw its own inferences. One of the complaints by the appellant was that the trial magistrate did not give proper consideration to the evidence for the defence by balancing it against that for the Crown. His first appeal to the High Court was dismissed without

considering the defence evidence. The Court of Appeal for East Africa held:

> *"... the first appellate court erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect, and, as a result of its error, affirmed a conviction resting on evidence which, had it been duly reviewed, must have been seen to be so defective as to render the conviction manifestly unsafe."*

That court thus considered the appellant's defence and found that the conviction was unsafe. The appeal was allowed.

In **Iddi Kondo v. Republic** [2004J T.L.R. 362, the first appellate court summarily dismissed an appeal by the appellant who was convicted by the District Court. The appellant came to this Court on second appeal. The Court held:

> *"The general rule is that where the High Court wrongly dismisses an appeal summarily the Court of Appeal sends it back to the High Court to be admitted for hearing;* ***but in some deserving cases the Court of Appeal may step into the***

shoes of the Lower Court and determine the appeal itself."

[Emphasis added].

In another case; **Cosmas Kumburu v. Republic**, Criminal Appeal No. 426 of 2016 (unreported) - [2019] TZCA 90 at www.tanzlii.org, following **Iddi Kondo** (supra), the Court entertained an appeal on a point which the first appellate court did not determine, for it summarily dismissed the appeal from the District Court. The Court determined the appeal and released the appellant.

In yet another case; **Julius Josephat v. Republic**, Criminal Appeal No. 03 of 2017 (unreported) - [2020] TZCA 1729 at www.tanzlii.org; the decision we rendered as recent as the 18th ultimo, we were confronted with an akin situation in which the appellant's defence was not considered. We observed:

"Perhaps we should now revert to the question we earlier on posed on what this Court is supposed to do given that the appellant's defence was not considered. We think we should consider first the supposed duty of the second appellate court. As may be recalled, it is the practice that in a second

appeal, the Court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate court. In exceptional circumstances, it may nevertheless interfere as such only when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law or procedure by the courts below. This has been expressed in several cases, including those of ***Pascal Christopher & 6 Others v. The DPP, Joseph Safari Massay v. Republic****, Criminal Appeal No. 125 of 2012, and* ***Felix s/o Kichele & Another v. Republic****, Criminal Appeal No 159 of 2005 (all unreported). In the case of* ***Felix s/o Kichele & Another v. Republic*** *the Court said:-*

"this Court may, however, interfere with such finding if it is evident that the two courts below misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been misdirections or non-directions on the evidence." As already pointed out, the fact that both courts below in the present case did not consider the defence case is in our view a misapprehension of evidence and entitles us to intervene in an endeavour to put

matters in their proper perspective. We have sought guidance from our earlier decision on the point in ***Joseph Leonard Manyota v. Republic,*** *Criminal Appeal No. 485 of 2015 (unreported) in which, encountered with a situation like the present, we appraised the appellant's defence and weighed it against that of the prosecution witnesses in relation to the matter at hand. In the end, we reached at our own conclusion. This is indeed the approach we desired to follow in the present case."*

The Court then proceeded to consider the appellant's defence and, consequently, found that it did not shake the prosecution's case and, ultimately, dismissed the appeal.

The sum total of the foregoing discussion is that, in deserving cases, the Court may step into the shoes of the High Court and do what it should have done on first appeal. In the case at hand, the first appellate court, we respectfully think, should have re-appraised the evidence on the record and drawn its own inferences and findings. In that process, the first appellate court would have considered the appellant's defence. That the first appellate court did not do. Given the nature of this case in which three schoolgirls aged nine years each at the time of commission of the

offence, were carnally known against the order of nature and one of them also raped and for fear of taking them back to the same trauma and given the authorities cited above, we think that this is one of the rare deserving cases in which to step into the shoes of the first appellate court and do what it did not do. This is the task to which we now turn.

The appellant's defence at the trial was as stated at the beginning of this judgment. In short, he complained of being framed because of being in bad blood with one Mwamvita who accused him of raping her child and previous misunderstandings with his sister named Rehema. Weighed against the prosecution evidence, we are satisfied that the defence evidence did not shake the prosecution case. We are of the considered view that even if the trial magistrate could have considered the defence, he would still have found the appellant guilty as charged. Likewise, had the first appellate court reappraised the evidence and considered the appellant's defence, it would also have found, as it did, that the appeal before it was without merit.

Regarding the trial court's failure to make a finding on the fourth count in which the appellant was charged with rape, we think, on the same

parity of reasoning, this Court can rectify the anomaly. The trial court, in its analysis of evidence, was quite clear that the appellant was charged with three counts of unnatural offence and one of rape and found that the appellant was guilty as charged. However, at the end, the trial court made a finding on the three counts only and sentenced the appellant in respect of the three counts only. That was an error. The trial court should have found that the appellant was guilty in respect of the fourth count and should have convicted and sentenced him to life in prison; a sentence which was properly imposed by the first appellate court. The omission to convict the appellant of that count did not, however, prejudice him. The irregularity is therefore curable under section 388 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2019 – see: **Musa Mohamed v. Republic**, Criminal Appeal No. 216 of 2005 (unreported), **Ally Rajabu & 4 Others v. Republic**, Criminal Appeal No. 43 of 2012 (unreported), **Amitabachan Machaga @ Gorong'ondo v. Republic**, Criminal Appeal No. 271 of 2017 (unreported) - [2020] TZCA 43 at www.tanzlii.org and **Mabula Makoye v. Republic**, Criminal Appeal No. 227 of 2017 (unreported) – [2020] TZCA 1762 at www.tanzlii.org.

The above said and done, save for the foregoing discussion on the fourth count, we are of the view that the appellant could be convicted even if the trial court would have considered his defence. The sentences enhanced by the first appellate court were quite appropriate. We order that the appellant should continue serving the sentences enhanced by the first appellate court. The same be served concurrently. In the event, this appeal is dismissed.

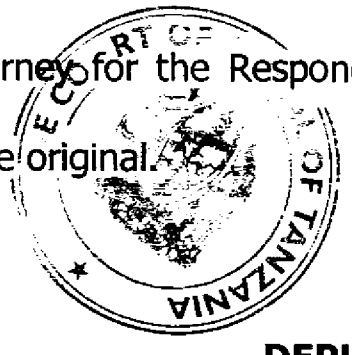
DATED at **DAR ES SALAAM** this 16th day of September, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 17th day of September, 2020 in the presence of Appellant - linked via video conference and Ms. Faraja George, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
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