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. 577 OF 2017

ABUU KAHAYA RICHAEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkasimongwa, J.)

dated the 12th day of December, 2017
in
Criminal Appeal No. 40 of 2017

.....

JUDGMENT OF THE COURT

16th June & 22nd October, 2020

MWARIJA, J.A.:

On 18/1/2016 the appellant, Abuu Kahaya Richael was arraigned before the District Court of Temeke on the charge of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002] (hereinafter "the Penal Code"). The prosecution alleged that on 9/11/2015 at Mtoni area within Temeke District in Dar es Salaam Region, the appellant did have carnal knowledge of a girl aged sixteen years. For the

purpose of hiding her identity with a view of protecting her dignity we shall hereinafter refer to her as R. W. or PW1, her abbreviated status in the list of witnesses who testified for the prosecution.

The appellant pleaded not guilty and as a result, the case proceeded to a full trial. After hearing the evidence of four prosecution witnesses including the victim who, as stated above, testified as PW1 and the appellant who was the only witness for the defence, the trial court found that the prosecution had proved the case beyond reasonable doubt. It thus convicted and sentenced the appellant to 30 years' imprisonment. Dissatisfied, he unsuccessfully appealed to the High Court hence this second appeal.

The background facts of the case can be briefly stated as follows: On the material date the appellant and two other persons including Amos Anthony, who testified as PW3, were at the house of Dr. Evelyne Minja where the victim was living. PW3 who is a mason, was undertaking construction works for the said Dr. Evelyne Minja at her site, the work to which the appellant had contracted with her to supply bricks.

While she was on duty at her work place at Kizuiani Hospital, Dr. Evelyne Minja, who was also a witness in the case (PW2), received a call

from PW1 who complained of having been raped by the appellant. On that information, PW2 drove back home where she found PW1 crying. When PW2 questioned PW3 on what had befallen PW1, he replied that PW1 had also complained to him that she was raped by the appellant.

As would have been expected, PW2 decided to take PW1 to hospital for medical examination and treatment. While driving to the said destination, she met the appellant who agreed to accompany her to hospital. After he had embarked on the motor vehicle, PW2 seized that opportunity and instead of driving straight to the hospital, she drove to Mbagala Kizuiani/Maturubai Police Station whereupon the appellant was arrested and subsequently charged in court.

The evidence to the effect that the appellant was at the house of PW2 on the material date of the incident, was tendered by PW2 and PW3. In his evidence, PW3 testified that on 9/11/2015 he was there constructing a latrine building for PW2. He was with the appellant who was the supplier of bricks. After some time, he said, he took a break and went to have breakfast leaving the appellant at the site. It was his further evidence that, when he returned, PW1 approached him while crying and told him that the appellant had raped her.

On her part, PW1 stated in her evidence that on the material date, the appellant and other two persons including PW3 were at PW2's site undertaking construction works. She went on to state that, later on in the day, PW3 and that other person left, leaving the appellant there. Shortly thereafter, she went on to state that the appellant followed her and asked to be given some water to drink. As she was going inside the house, she said, the appellant got hold of her, covered her mouth and fell her down. He then undressed her underwear and forcefully had carnal knowledge of her. According to her evidence, she felt severe pains and bled because she has never had sexual intercourse before.

Maleck S. Mwega (PW4), is the Clinical Officer who examined PW1 after the incident. He testified that after having examined the victim's vagina, he found that it had bruises as well as traces of blood and semen. He recorded his findings on the PF3 which was admitted in evidence as exhibit P1. He indicated that, PW1's vagina was penetrated by a blunt object.

On her part, PW2 testified that, as she was driving to hospital, she met the appellant on the way. She asked him about the incident and according to her, in response, the appellant asked to be pardoned. She

ostensibly agreed telling him that she would consider his request but should join her to take the victim to hospital. The appellant agreed and as stated above, she took him to Kizuiani Police Station.

In his defence, the appellant testified that the charge against him was a frame-up resulting from misunderstandings between him and PW2. According to his evidence, he had business relationship with PW2, the nature of which was that he supplied her with building materials including bricks, on credit basis. On the material date, at about 11:00 a.m., he went to PW2's home where he found her reversing her motor vehicle. He added that, in the motor vehicle, there were some other women together with PW1. PW2 asked him to join them in the motor vehicle promising to return with him after a short period. To his surprise, he said, she drove to Kizuiani Police Station where, after having entered therein, she went out in the company of a police officer who proceeded to arrest and lock him up until 3/12/2015 when he was charged as stated above.

Having considered the evidence tendered by the prosecution and the appellant, the learned trial Resident Magistrate was satisfied that the case was proved beyond reasonable doubt and thus convicted and sentenced the appellant as shown above. The trial court was satisfied that the

evidence of PW1, PW2, PW3 and PW4 which was supported by exhibit P1, was credible and thus established first, that PW1 was raped and secondly, that it was the appellant who raped her.

Upholding the trial court's decision, the first appellate court was of the view that the prosecution evidence had sufficiently proved all elements of the offence of rape. The learned first appellant Judge did not, therefore, find any plausible reason to fault the decision of the trial court.

In his memorandum of appeal filed on 5/10/2018, the appellant raised seven grounds which may however, be consolidated into four grounds (the first to fourth grounds) as follows:-

1. That the learned High Court Judge erred in law in upholding the trial court's decision while the same was erroneous as it lacked the points for determination.
2. That the learned High Court Judge erred in law in upholding the decision of the trial court while the same was based on contradictory evidence of PW2 and PW3 as regards the circumstances under which the appellant was arrested.
3. That the learned first appellate Judge erred in law in upholding the appellant's conviction while the prosecution evidence did not prove

all ingredients of the offence of rape which the appellant was charged with.

4. That the learned first appellant Judge erred in law in failing to find that the prosecution did not prove the case against the appellant beyond reasonable doubt.

Apart from the grounds raised in his memorandum of appeal, the appellant filed a supplementary memorandum of appeal consisting of three additional grounds. However, the same boil down to two grounds thus forming the 5th and 6th grounds of appeal as follows:-

5. The first appellate Judge erred in law in sustaining the appellant's conviction based on the judgment which was defective for the trial court's failure to consider the appellant's defence hence denying him the right to be heard.
6. The first appellate Judge erred in law in upholding the decision of the trial court arising from the proceedings which were a nullity for being tainted with irregularities resulting from the trial court's failure to comply with s. 231 (1) of the Criminal Procedure Act [Cap. 20 R.E.2002] (the CPA) in that, **first,** it failed to record the manner in which the appellant chose to give his defence, **secondly**, by not

giving the appellant the opportunity to close his case hence denying him the right to call his witnesses and **thirdly**, by failing to inform the witnesses of their right to require that their recorded evidence be read out to them thus contravening s. 210 (3) of the CPA.

At the hearing of the appeal which was conducted through video conferencing, linked to Ukonga prison, the appellant appeared in person, unrepresented. On its part, the respondent Republic was represented by Ms. Nancy Mushumbusi assisted by Ms. Chesensi Gavyole, learned State Attorneys.

When he was called upon to argue his appeal, the appellant, who had filed written submission in support of the appeal, adopted his submission and opted to let the learned State Attorney submit in reply thereto and thereafter make a rejoinder, if the need to do so would arise.

In support of the first ground of appeal, the appellant argued in his written submission that the trial court did not comply with s. 312 (1) of the CPA in that, its judgment does not contain the points for determination. Citing the case of **Shija Masawe v. The Republic**, Criminal Appeal No. 158 of 2007 (unreported) in which the Court dealt with the situation where

the conditions under s. 312 (1) of the CPA were not complied with, the appellant submitted that the omission rendered the trial court's judgment fatally defective.

On the second ground of appeal, it was the appellant's submission that the evidence of PW2 and PW3 was contradictory as regards the circumstances under which he was apprehended. He argued that, whereas PW2 said that she met the appellant on the way and asked him to join her in the motor vehicle so that they could take PW1 to hospital, PW3 said that the appellant escaped when PW2 arrived at her home after the incident.

On the 3rd ground of appeal, the appellant submitted that one of the ingredients of the offence of rape, that is penetration, was not proved. He argued that the statement by PW1 that the appellant inserted his penis in her private parts should not have been relied upon to find that penetration was proved. He contended further that, the prosecution did not only fail to prove that PW1's clothes were found to have been blood stained but failed also to prove that the alleged bleeding was caused by penetration and not due to menstruation. In any case, he went on to argue, the clothes said to be blood stained were not tendered in court as exhibits.

The appellant argued further that the medical examination report (exhibit P1) was wrongly acted upon by the trial court because the same was not read over before the court after having been admitted in evidence. Relying on the case of **Mashaka Pastory Paulo Mahegi @ Uhuru and 4 others v. Republic**, Criminal Appeal No. 61 of 2016 (unreported), the appellant argued that the omission prejudiced him and thus prayed that the exhibit be expunged from the record.

In ground four of appeal, the appellant contended that in a whole, the prosecution did not prove the case against him beyond reasonable doubt. He relied on *inter alia* what he pointed out above in ground three and argued that the anomalies weakened the prosecution evidence.

As for the fifth ground of appeal, the appellant argued that the trial court failed to consider his defence. He stressed that the omission vitiated the judgment, adding that, the first appellate court strayed into an error because it also failed to address that anomaly. According to his argument, the High Court did not evaluate the evidence but merely remarked that "the adduced defence evidence did not punch hole the prosecution case." He said that, had the first appellate court considered his defence, it would

have found that the same raised reasonable doubt against the prosecution case.

With regard to the sixth ground of appeal, the appellant submitted in essence that he was not afforded the right conferred on an accused person by s. 231 of the CPA. it was his submission that, according to the record, after the trial court had found that he had a case to answer and after addressing him in terms of s. 231 (1) of the CPA, his response on whether he chose to give evidence on oath or not was not recorded. He submitted further that the record does not show that he was informed of his right to call witnesses. This, he said, is evident because the record does not show that he closed his case.

In her reply submission, Ms. Mushumbusi started by contesting the second ground of appeal. She submitted that, the point that the evidence of PW2 and PW3 was contradictory was not raised in the High Court and therefore, should not be considered in this appeal.

The learned State Attorney conceded however, to the fifth ground of appeal. She agreed that the High Court erred in failing to find that the trial court's judgment was defective for the trial magistrate's failure to consider the appellant's defence. According to the learned State Attorney, the

omission vitiated the judgment. It was her submission that the omission is fatal and therefore, suffices to dispose of the appeal. The learned State Attorney did not therefore, argue the rest of the grounds of appeal. She urged us to nullify the trial court's judgment, quash the proceedings and judgment of the High Court and remit the record to the trial court for it to compose a judgment afresh after having considered the appellant's defence.

Having considered the submissions of the appellant and the learned State Attorney, we wish to start by agreeing with Ms. Mushumbusi that the second ground of appeal has been improperly raised because it was not canvassed and determined in the High Court. It is trite law that an issue based on matters of fact, which was not argued and determined by the first appellate court, cannot be entertained in a second appeal. Reiterating that principle in the case of **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 (unreported), the Court had this to say:-

> *"The Court has repeatedly held that matters not raised in the first appellate court cannot be raised in a second appellate court."*

See also the cases of **Abdul Athumani v. Republic** [2004] T.L.R. 151, **Abraham Iddi Alute @ Ngudu v. Republic**, Criminal Appeal No. 347 of 2017 and **Simon Godson Macha v. Mary Kimambo**, Civil Appeal No. 393 of 2019 (both unreported). This being the position therefore, we decline to entertain that ground of appeal.

Having so decided, we now proceed to determine the other grounds of appeal. To begin with the first ground, the contention by the appellant that the judgment of the trial court is defective because it does not contain the points for determination is, in our considered view, without merit. According to the judgment, the trial magistrate started by considering, first, whether the evidence had proved that PW1 was raped. Having answered that issue in the affirmative, he proceeded to make a finding on whether or not it was the appellant who committed the offence. On that point, he stated as follows in his judgment at page 21 of the record of appeal:-

> *"Now the issue before me is determination on who raped PW1."*

Then, on further analysis of the evidence, albeit briefly, the learned trial Resident Magistrate concluded that the prosecution evidence proved

beyond reasonable doubt that it was the appellant who committed the offence against PW1. It is thus not true that the judgment of the trial court does not contain the points for determination as contended by the appellant and therefore, this ground of appeal fails.

The sixth ground of appeal in which the appellant complains that the trial was vitiated by procedural irregularities is also in our view, devoid of merit. First, the contention that the trial magistrate did not comply with s. 231 (1) of the CPA is not correct. Although from the record of appeal, the manner in which the appellant had opted to give his defence was not clearly recorded, the irregularity was due to a typing error. Our perusal of the original record shows that the word "oath" was omitted in the typed proceedings. What transpired after the closure of the prosecution case on 23/3/2016 reads as follows:-

> *"Court: The accused is explained of his right in accordance [with] section 231 of the CPA R.E. 2002.*
>
> *Accused: I will present my defence without oath.*
>
> *Defence witness – Ally s/o*
>
> *Defence exhibits – NIL"*

We note, however, from the record that, at the hearing of the defence case on 28/4/2016, the appellant gave his defence on oath. We do not find anything wrong with that because there has been no complaint from the appellant that he did not do so willingly.

Secondly, we do not also find merit in the appellant's contention that he was not given the opportunity of calling his witnesses. It is true that from the record, it is not shown that the appellant closed his case. As shown above, on 23/3/2016, he indicated that he had one witness to call. However, at the end of his defence evidence on 28/4/2016, he did not say anything about his witness. He did not also complain in his written submission that on that date, he still had the intention of calling his witness or that he was denied adjournment so that the witness could be summoned to appear in court to give evidence. We therefore, find that the sixth ground of appeal is also lacking in merit.

On the appellant's complaint that the trial court failed to comply with s. 210 (3) of the CPA, it is true from the record that the trial magistrate did not comply with that provision, which states that:-

"210 – (1) .... N/A

(2) .... N/A

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

The issue however, is whether the omission occasioned any injustice to the appellant. To answer the issue, it is instructive to state that the provision gives that right to witnesses and therefore, they are the persons who were supposed to complain. The appellant, who was the accused person at the trial, cannot complain on behalf of the prosecution witnesses. In the case of **Athuman Hassan v. Republic**, Criminal Appeal No. 84 of 2013 (unreported) for example, where a similar complaint was raised, the Court observed that:-

"...we do not see substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and make a comment on their evidence."

Obviously, the appellant could only complain in his capacity as a witness in the defence case. However, because the purpose of s. 210 (3) of the CPA is to ensure a witness' evidence is properly recorded, unless the authenticity of the recorded evidence is at issue, non-compliance with the provision in question would not invalidate the tendered evidence. For instance, in the case of **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 (unreported) in which, dealing with a similar situation as in the case at hand, the Court had this to say:-

> *"In **Richard Mebolokini v. Republic** [2000] T.L.R. 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. But in the present case the authenticity of the record is not in issue, at least, the appellant has not complained. In the circumstances of this case, we think that non-compliance with section 210(3) of the CPA is curable under section 388 of the CPA."*

Given the above stated position, we find that in the present case, the irregularity did not occasion any injustice to the appellant. In the circumstances, we do not find merit in the sixth ground of appeal.

With regard to the fifth ground of appeal, although the appellant's contention is that the two courts below did not consider his defence, in his written submission, he admitted that the High Court did so but challenges the extent to which the learned first appellate Judge's considered that defence. He argued that the consideration of his defence by the High Court lacked the requisite analysis. In essence therefore, he faults the learned first appellate Judge for failing to direct himself on the contents and substance of the appellant's evidence. In such a situation it is trite law that this Court has the power of looking into that defence evidence and make its own finding. In the case of **Deemay Daati and 2 Others v. Republic** [2005] T.L.R. 132, the Court had this to say on that principle:-

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and guilty of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."*

Exercising that power, we have duly considered the appellant's defence evidence. Having done so, we find that, the defence that he was not at PW2's home on the material date before the time of the incident, is not

plausible. The evidence of PW3 which the appellant did not challenge proves that he was at that place working with the former before the time of the incident. He did not also challenge the evidence of PW1 who testified that the appellant and PW3 were at PW2's home undertaking construction works before the time of the incident. The appellant's contention that on the material date, he arrived there at 11.00 a.m. after the rape incident is therefore, an afterthought.

That said and done, we now revert to the third and fourth grounds of appeal. To begin with the third ground, we agree with the appellant that from the record, it is clear that after admission in evidence of the medical report (exhibit P1) the contents of that document were not read over in court. It is true also that PW1's clothes, which were alleged to have been found with blood stains were not tendered in evidence as exhibits. With regard to the failure to read out the medical report, the law is clear that the omission rendered that documentary evidence invalid. The relevance of reading over a document after its admission in evidence has been emphasized by the Court in a number of decisions. For instance, in the case of **Joseph Maganga and Dotto Salum Butwa v. Republic,**

Criminal Appeal No. 536 of 2015 (unreported) which involved the cautioned statement of the appellant, the Court observed that:-

> *"The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained [in it] in order to make an informed defence. Failure to read the contents of the cautioned statements after it was admitted in evidence was a fatal irregularity."*

The procedure to be adopted when a documentary evidence is intended to be used in a case was aptly stated in the case of **Robinson Mwanjisi v. Republic** [2003] T.L.R. 218 cited by the appellant in his written submission. The Court stated that:-

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it can be read out."*

Since in this case, the procedure of reading out the document was flouted, there is no gainsaying that exhibit P1 was wrongly acted upon because the same was invalid. In the circumstances, the same deserves to be expunged from the record, as we hereby do.

Notwithstanding the absence of the medical report and the prosecution's failure to tender the victim's clothes, the issue is whether the evidence on record had proved the case against the appellant. It is now settled law that the best evidence as regards proof of a sexual offence has to come from the victim of the offence. In the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379, the Court had this to say:-

> *"The true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in the case of any other woman where consent is irrelevant that there was penetration."*

- See also the cases of **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015, **Imani Charles Chimango v. Republic**, Criminal Appeal No. 382 of 2016 and **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (all unreported).

In this case, PW1 testified that the appellant raped her. She described the circumstances under which the offence was committed. She states as follows at page 7 of the record of appeal:-

> *"...one mason by name of Abuu...came to me and asked for water to drink. I went in the house for water. He*

then followed me in the house, covered my house (sic) with his palm and laid me down. He then hold (sic) my hand back, undressed my clothes by his left hand. He then pulled his penis and ***penetrated into my private parts.*** *I felt great pain. As he finished, he went out while blood following (sic) from my parts and I phoned my mother."*

[Emphasis added].

Admittedly the victim did not state that the appellant inserted his penis into her vagina, instead she used the words "private parts". Despite the use of that phrase by the victim, we do not agree with the appellant that the phrase is ambiguous such that the same cannot be invariably interpreted to mean that he did have carnal knowledge of her. According to **Collins Cobuild Advanced Learner's English Dictionary**, Fifth Ed., "private parts" are defined as genitals which, according to the same dictionary, mean person's "external sexual organs." In essence therefore, PW1's statement proved that the appellant penetrate her vagina even though she did not directly state so.

We had the opportunity of giving interpretation to a similar statement in the case of **Hassan Bakari @ Mamajicho v. Republic,** Criminal Appeal No. 103 of 2012 (unreported). In that case, we observed that:-

> *"...it is common knowledge that when people speak of sexual intercourse they mean the penetration of the penis of a male into the vagina of female. It is now and then read in court record that the trial court's just make reference to such words as sexual intercourse or* ***male/female organ*** *or simply to have sex and the like. Whenever such words are used or a witness in open court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina."*

That being the nature of PW1's evidence and after having pointed out the laid down position that, the true evidence of rape has to come from the victim, we do not find any sound reason to fault the concurrent findings of the two courts below that the evidence of the victim sufficiently proved penetration. The third ground is, for that reason, devoid of merit.

In the circumstances since proof as regards the other ingredient of the offence of rape, that is; consent was not required because the victim was under the age of eighteen years, we similarly agree with the findings of the two courts below that the prosecution proved its case beyond reasonable doubt. The fourth ground of appeal is therefore, equally devoid of merit.

On the basis of the foregoing reasons, we are settled in our mind that the appeal has been brought without sufficient reasons. The same is hereby dismissed in its entirety.

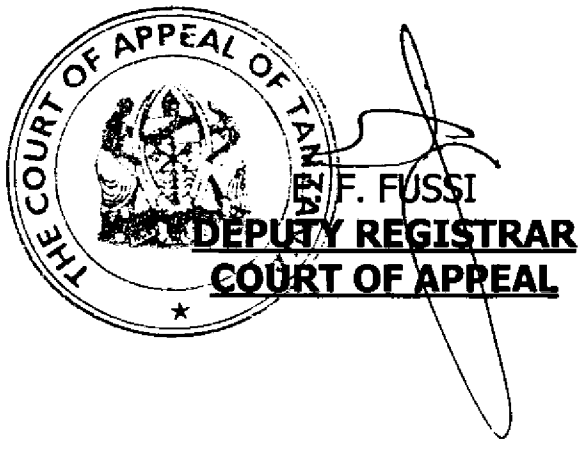
DATED at **DAR ES SALAAM** this 20th day of October, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 22nd day of October, 2020 in the presence of Appellant in person through video conference linked to Ukonga prison and Mr. Benson Mwaitenda, learned State Attorney for the Respondent/ Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL