

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

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

CRIMINAL APPEAL NO. 550 OF 2016

JUMA KASEMA @ NHUMBU APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Shinyanga)**

(Makani, J)

dated the 25th day of November, 2016

in

DC Criminal Appeal No. 36 of 2016

JUDGMENT OF THE COURT

29th April & 5th May, 2020

KEREFU, J.A.:

This is a second appeal by Juma Kasema @ Nhumbu, the appellant, who was before the District Court of Shinyanga at Shinyanga together with one Busatu Tagambaga @ Awilo (the second accused), charged with five counts. The first, second and third counts of obtaining goods by false pretense, rape and illegal practice contrary to sections 302, 130 (1)(2)(e), 131(1) of the Penal Code, Cap. 16 R.E. 2019 (the Penal Code) and section 45 of the Traditional and Alternative Medicine Act, No. 23 R.E. 2019 respectively were laid against the appellant alone. The second accused, who is not a party to this appeal was charged jointly with the appellant

on the fifth count of obtaining goods by false pretence and was also charged alone for the fourth count of personation contrary to section 269 of the Penal Code.

It was alleged that, between September and October 2011 at Lyabukande village within Shinyanga District in Shinyanga Region, by false pretence and with intent to defraud, the appellant without being registered or enrolled by the Traditional and Alternative Health Practice Council, practiced as traditional healer and obtained from Nkwimba Chalya (PW1) seven cows and one hen pretending to protect PW1 and her family from being demised by witchcraft. It was further alleged that the appellant had sexual intercourse with PW2 a daughter of PW1 aged 13 years. It was also alleged that the second accused with intent to defraud the family of PW1, falsely represented himself to be one Yemba Jumla the son of PW1 who died since 2007 to have been resurrected by magic power of the appellant.

Both, the appellant and the second accused denied the charge laid against them and a full trial was conducted. To establish its case, the prosecution marshalled a total of six (6) witnesses and four (4) documentary evidence.

Briefly, the prosecution case as obtained from the record of appeal indicate that, the appellant was a popular traditional healer purportedly having the power of resurrecting dead people. Sometimes in 2007 PW1 lost her son Yemba Jumla and she went to seek the services of the appellant. The appellant was ready to render his service and told PW1 that her son was not dead but bewitched and taken to a notorious village known as 'Gamboshi.' The appellant promised to bring Yemba Jumla back. The appellant went on to tell PW1 that even her youngest daughter PW2 was about to be taken by witches to Gamboshi. The appellant advised PW1 to bring one white hen and a red cow with white mark on its head and pay TZS 1,000.00 for the service. PW1 was also advised to bring PW2 to stay in the appellant's house for treatment and to be protected from being taken to Gamboshi. PW1 complied with all the conditions given by the appellant.

Several days later, the appellant told PW1 that his son was located and was at the appellant's house. PW1 went to the appellant's house and was shown a room where the resurrected son was kept but could not recognize him as the room was dark and she was not allowed to put on light on the reason that Yemba will ran away as has been in the dark for

a long time and has to get used to the light slowly. The next day PW1 was told to give six cows to the appellant to take her son home which she did. She then went with her two sons and son in-law to the appellant's house to take the said Yemba. One of her son's Malimi Jumla (PW3) was told to wash the alleged Yemba and while washing him, he became suspicious because he had a deformed toe which was bent and had beads on his waist which was not the case with his late brother Yemba. However, on that day the appellant did not allow them to take the resurrected son and he instead told them to return after one week. PW3 disclosed his suspicion to PW1 and his brothers who reported the matter to the militiamen and to the police where upon the appellant and the second accused were arrested. At the time of arrest, the appellant had already sold the cows.

While all those incidences were taking place and when PW1 went to the appellant's house, the appellant's wife complained that the appellant has turned PW2 to be his wife and PW2 also complained to her mother that the appellant was sexually assaulting her. PW2 further complained that the appellant used to intoxicate her with the local brew known as

Balimi (Gongo) and force her to have sex with him and had sex with him four times.

Dr. Kulwijira ES (PW5) examined PW2 and tendered medical examination report (PF3) admitted as exhibit 'PM' which indicated that PW2 was sexually assaulted and infected with venereal diseases. On his part, Dr. Asseli Lema (PW4) examined the appellant and tendered the investigation forms and urine analysis report which were admitted as exhibit 'P1' collectively indicating that the appellant was suffering from venereal diseases which were transmitted to PW2. After the arrest of the appellant and the second accused, F. 875 D/SGT Alfred (PW6) recorded their statements where the appellant confessed to have committed all other offences except rape. The said statements were admitted as exhibit 'PS' collectively.

At the closure of the prosecution case, the trial court informed the appellant his right to make his defence but he opted to remain silent and did not summon any witness. The second accused defended himself. After a full trial, the trial court accepted the version of the prosecution's case and the appellant was convicted on the first and second counts. For the first count he was sentenced to 3 years' imprisonment term and

second count to 30 years' imprisonment with twelve (12) strokes of the cane. In addition, the appellant was ordered to pay TZS 250,000.00 as compensation to PW2. The second accused was convicted on the fourth count and sentenced to 2 years' imprisonment and was also ordered to pay fine at the tune of TZS 150,000.00. They were also jointly convicted of the fifth count and sentenced to 3 years' imprisonment each. Sentences for the imprisonment terms were ordered to run concurrently.

The appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentences were confirmed. Still aggrieved, the appellant has come to this Court, hence the present appeal. The Memorandum of Appeal raises four (4) grounds of appeal, namely:-

- 1. That, the trial court erred in law and in fact to convict and sentenced the appellant with 5 counts which differ to the charge sheet. That his conviction was done contrary to the fairness of the law;*
- 2. That, the trial court erred in law and fact to charge and convict the appellant with the 2nd count of rape which contents contradicted with testimonies adduced by prosecution witnesses and all prosecution exhibits;*
- 3. That, the trial court erred in law and in fact after failure to summon material witness from both of primly areas of the*

scene e.g Hamlet leaders and Village Chairman to testify and exonerate the appellant; and

4. That, the trial court's conviction and sentence imposed against the appellant was not a result of objective in balance of probabilistic (sic).

At the hearing of the appeal before us, the respondent was represented by Mr. Tumaini Pius Ocharo, learned State Attorney. The appellant did not enter appearance as he had earlier on communicated to the Court vide his letter dated 18th April, 2020 that he prefers the hearing of the appeal to proceed in his absence. Mr. Ocharo conceded with the prayer made by the appellant and urged the matter to proceed under Rule 80 (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Court granted the prayer and the hearing proceeded in terms of Rule 80 (3) and (4) of the Rules.

Responding to the appeal, Mr. Ocharo expressed his stance at the very outset that he is not supporting the appeal as he said, all grounds of appeal lodged by the appellants are new grounds which have not been canvassed by the first appellate court and have been raised before this Court for the first time. In the premises, he beckoned upon us to disregard the appeal as the Court would not have jurisdiction to entertain

grounds of appeal which were not decided upon by the first appellate court.

Upon being probed by the Court on the first and second grounds which seems to raise issues of point of law, Mr. Ocharo argument on the first ground was that, the same is misconceived. He contended that, the appellant is alleging that he was convicted on all five counts which is not the case. To verify his point, he referred us to page 110 – 111 of the record of appeal where it was clearly indicated that the appellant was only convicted and sentenced on the first, second and fifth counts.

As for the second ground on the contradictions between the second count and testimonies tendered by prosecution witnesses, Mr. Ocharo argued that there is no any contradiction. He said, the prosecution side summoned six witnesses who proved the case beyond reasonable doubt. He clarified on what was testified by each of the witnesses as found in the record and argued that, the testimony of PW2 was corroborated by PW1, PW3, PW4 PW5 and PW6. He then concluded that the second ground has no merit. In the end, the learned State Attorney concluded that the charge against the appellant was proved beyond reasonable

doubt. Accordingly, he urged us to dismiss the entire appeal for lack of merit.

On our part, having carefully considered the grounds of complaint, the submissions made by the learned State Attorney and examined the record before us, we wish to reiterate the settled principle which state that, in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. The rationale behind is that the trial court having seen the witnesses is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record. Therefore, the Court is entitled to interfere with the concurrent findings of facts made by the courts below if there has been misapprehension of the nature and quality of evidence and other recognized factors occasioning miscarriage of justice. This position was well stated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa**, [1981] TLR 149; **Mussa Mwaikunda v. Republic**, [2006] TLR 387; **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 and **Omary Lugiko Ndaki v. The Republic**, Criminal Appeal No. 544 of 2015 (both unreported). Specifically in **Wankuru Mwita** (supra) the Court said:-

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

Therefore, in determining this appeal, we shall be guided by the above principle.

We wish to begin with the point raised by the learned State Attorney urging the Court not to consider the grounds of appeal which surfaced in this Court because they were not raised and canvassed by the first appellate court. On our part, having examined the said grounds, we have observed that the new grounds are only two i.e the third and fourth as they were not handled by the first appellate court and cannot be raised at this stage. There is a long list of authorities on this point, some of them include, **Abdul Athuman v. Republic**, [2004] TLR 151, **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004, **Sadick Marwa Kisase v.**

Republic, Criminal Appeal No. 83 of 2012, and **Yusuph Masalu @ Jiduvi v. Republic**, Criminal Appeal No. 163 of 2017 (all unreported) just to mention, but a few. In **Sadick Marwa Kisase** (supra) the Court emphasized that:-

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

In this regard, this Court will not entertain the third and fourth grounds of appeal for lack of jurisdiction as per the dictates of the provisions of section 6 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 which specifically empowers this Court to deal with appeals from the High Court. See also **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 and **Abedi Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 (both unreported). Therefore, we will only consider the first and the second grounds of appeal.

Starting with the first ground, we find the same to be straight forward and should not detain us. In this ground the appellant's complaint is that he was convicted of and sentenced on all five counts. Mr. Ocharo had since submitted that, the appellant was only convicted

and sentenced on the first, second and fifth counts and not on all five counts. We have perused the trial court's judgement and the sentence entered against the appellant and we are in agreement with Mr. Ocharo that, though the appellant was charged on four counts, he was only convicted of the first, second and fifth counts. The trial court after considering the evidence adduced, it exonerated the appellant from the third count on account of failure by the prosecution to prove the said count to the required standard i.e beyond reasonable doubt. We thus find the first ground of appeal to be misconceived and devoid of merit.

As for the second ground, the appellant's complaint is that there were contradictions in testimonies of the prosecution witnesses on the second count. To ascertain this complaint, we have revisited the contents of the second count and the testimonies adduced by the prosecution witnesses before the trial court. It is on record that PW2 the victim of rape at the appellant's house narrated that she was taken to that house by PW1 for treatment after PW1 was told by the appellant that PW2 was about to be taken by witches to Gamboshi and she need to be protected by charm. PW2 testified to have been raped at least four times by the appellant after being intoxicated with the local beer known as balimi. For

the sake of clarity at page 29 to 31 of the record of appeal PW2 testified that:-

"...the appellant said that Yemba was hidden at Gamboshi and I was also about to be taken to Gamboshi...he said had to take me for traditional medicines. The aim was to protect me not to be taken 'kichawi.' I spent two weeks at the house of the 1st accused. At the house of the 1st accused there was his wife...what he did he used to give me some local brew called Moshi/Gongo and beer. When I become intoxicated he raped me...the accused was taking his penis and placed it in my vagina...before the 1st accused made sexual intercourse with me, I had never made any sexual intercourse with anyone. When the 1st accused raped me I got transmitted with venereal deceases, Kaswende and Gono...the 1st accused known me carnally four (4) times in different days/dates. I informed my mother (PW1) that when the 1st accused took me to his home, he was knowing me carnally without my consent."

The testimony of PW2 was corroborated by PW1, PW4 and PW5. PW1 testified that when she visited the appellant's house the appellant's wife complained that the appellant has turned PW2 to be his wife and

also PW2 told her that the appellant was sexually assaulting her as he used to intoxicate her with the local brew and that he had sex with her four times. PW5 testified to have medically examined PW2 and observed that she was raped and infected with venereal diseases (Kaswende and Gonorrhoea). PW4 on the other hand, testified to have medically examined the appellant and confirmed that he was suffering from venereal diseases (syphilis and Gonorrhoea) found in PW2's vagina. Therefore, after considering the testimonies of these witnesses and examined all exhibits tendered thereto, we are in agreement with the learned State Attorney that there are no contradictory evidence as regards the testimonies adduced by PW1, PW2, PW4 and PW5 on the second count. It is therefore our considered view that there is no justification to fault the trial Judge for the evaluation and analysis made on that evidence. In actual fact the testimony of PW2 was corroborated by PW1, PW4 and PW5.

It is also on record that the appellant did not cross-examine PW2 or other witnesses on this aspect. It is trite law that, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what

the witness said, as the silence is tantamount to accepting its truth. We find support from our previous decisions in **Cyprian Athanas Kibogoyo v. The Republic**, Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. The Republic**, Criminal Appeal No. 134 of 2012 (both unreported). We have therefore no reason to differ with the lower courts' concurrent findings in respect of the evidence of PW1, PW2, PW4 and PW5 which were so descriptive and coherent. It is therefore our settled view that there is no fault in the factual findings of the two courts below on this ground for this Court to interfere. In the circumstances, the second ground has no merit.

In totality and given the status of the evidence of PW2 which was corroborated by PW1, PW4 and PW5, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair and impartial decision hence there is no justification to interfere with their findings.

For the foregoing reasons, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the case against the

appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

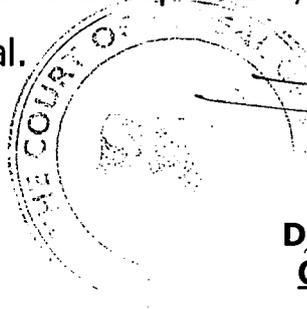
DATED at TABORA this 4th day of May, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 5th day of May, 2020 in the Absence of Appellant with leave to proceed and Mr. Miraji Kajiru, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL