IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., MWAMBEGELE, J.A., AND KWARIKO, J.A.)

CRIMINAL APPEAL NO. 370 OF 2017

JAFARI SALUM @ KIKOTI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

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

(Kitusi , J.)

Dated the 12th day of April, 2016
in
(DC) Criminal Appeal No. 236 of 2016

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JUDGMENT OF THE COURT

30th March & 8th May, 2020

MWAMBEGELE, J.A.:

The appellant Jafari Salum @ Kikoti was arraigned before the District Court of Bagamoyo for the offence of rape c/s 130 (3) (d) of the Penal Code, Cap. 16 of Revised Edition, 2002 (now of 2019). We shall elsewhere in this judgment refer to it as the Penal Code. The particulars of the offence in the charge sheet show that on 13.01.2016 at about 13:45 hours at Kiromo area in Bagamoyo District, he raped one woman who we shall simply refer to her as the victim. Having pleaded not guilty to the charge, a full trial ensued during which the prosecution fielded six witnesses in support of the charge levelled against the appellant. The

defence case comprised three witnesses including the appellant himself. At the end of the trial, the appellant was found guilty as charged. He was convicted and handed a sentence of thirty years in jail, the minimum provided by the law. His first appeal to the High Court before Kitusi, J. (as he then was) proved futile, hence this second appeal.

Perhaps before going into the nitty-gritty of the appeal, it may be apt to narrate, albeit briefly, the relevant background facts leading to the appellant's arraignment. It is this: the appellant was, at the material time, a traditional healer. The victim had some ailment; it was said she was possessed with demons, which were attended to by traditional medication from the appellant. The victim used to go to the appellant's residence to collect some traditional medicine from time to time.

On 13.01.2016, the victim together with her mother Asia Ally (PW2) and Juma Abdallah (PW3) went to the appellant's residence for her usual traditional medication. They found the appellant there, together with his assistant Hamidu Ramadhani (PW4), who told the victim to undress and ordered her to put on a red clothing and a black costume locally known as *kaniki*. Having so done, the appellant took the victim outside his residence; to some place in the nearby bush where he told her that he wanted to treat her by inserting some medicine into her vagina using his penis. He administered to her some concoction which

made her unconscious. The appellant then lay her down and started to have sexual intercourse her in her unconscious state. When the victim gained consciousness after a while, the appellant was still performing on her. When he was done, they returned to the appellant's residence prior to which the appellant told the victim not to tell anybody as to what had transpired. However, the victim let the cat out of the bag immediately as she went back; she was crying. Amidst sobs, she disclosed to PW2 and later to her husband Said Salum (PW6) that the appellant had raped her.

Later, the matter was brought to the attention of the police and the charge preferred against the appellant who was, consequently, convicted and sentenced in the manner explained above. As already alluded to above, his first appeal to the High Court was unsuccessful. Undeterred, he has come to this Court on seventeen grounds of grievance comprised in two memoranda of appeal filed on 13.10.2017 and 24.09.2019. However, the seventeen grounds may be compressed into the following grounds:

1. The first appellate court erred in law and fact by upholding appellant's conviction on a defective charge;

2. The first appellate court erred in law and fact in upholding the appellant's conviction in a trial which the prosecution delayed to arraign him without any justifiable reasons assigned for the delay;

3. The first appellate court erred in law and fact in upholding the appellant's conviction that the prosecution proved the case against the appellant beyond reasonable doubt while the tendered PF3 (Exhibit P1) was expunged;

4. The first appellate court erred in law and fact in upholding the appellant's conviction in a trial which was not procedurally conducted as the appellant was not furnished with the complainant's statement and that the offence was not procedurally reported to PW5;

5. The first appellate court erred in law and fact in upholding the appellant's conviction on a rape charge relying on the testimony of the victim who failed to establish penetration of a male organ into the vagina;

6. That, the evidence adduced by ASIA ALLY (PW2), JUMA ABDALAH (PW3) and HAMIDU RAMADHANI (PW4) would be expunged from the record as their names are not listed in the list of the intended prosecution witnesses during the preliminary hearing and there is no notice given to comply with the law;

7. The first appellate court erred in law and fact in upholding the appellant's conviction while the trial Senior Resident Magistrate was

not seized with jurisdiction to hear the case which ought to have been tried by a District Magistrate;

8. The first appellate court erred in law and fact in upholding the appellant's conviction on a trial in which the appellant was not fairly tried as he was arrested without court order when he was present in court on 4th April, 2016 (the day ordered for his defence);

9. The first appellate court erred in law and fact in upholding the appellant's conviction by upholding the conviction against the appellant relied on the discredited testimony of PW1;

10. The first appellate court erred in law and fact in upholding the appellant's conviction as after expunging the PF3 there was no evidence on bruises, laceration, PITC non-reactive, VDRL non-reactive, discharges and blood; the elements which vitiated the charge against the appellant; and

11. The first appellate court erred in law and fact in upholding the appellant's conviction in the absence of a DNA test to prove that the appellant had committed the charged offence.

The appeal was argued before us on 02.04.2020 during which the appellant appeared in person, unrepresented. The respondent Republic appeared through Ms. Mwasiti Hussein Ally, learned Senior State Attorney. Fending for himself, the appellant adopted the seventeen

grounds contained in the two memoranda of appeal and asked the learned Senior State Attorney to respond to them. Need arising, he reserved his right to rejoin.

For her part, Ms. Ally expressed her stance from the very outset that she supported the appellant's conviction as well as the sentence meted out to him. She consolidated in response the first, second and third grounds of appeal in the supplementary memorandum of appeal which challenge the charge sheet as being defective for, **one**, failure to include the definition section, **two**, failure to include the punishment section and, **three**, failure in the particulars of the offence to state the details comprised in section 130 (3) (d) of the Penal Code under which he was charged.

The learned Senior State Attorney submitted that, indeed, the definition section was not cited in the statement of the offence part of the charge sheet; it was supposed to refer to section 130 (1) and (3) (d) of the Penal Code. However, the learned Senior State Attorney was quick to state that the omission was curable; it was not fatal as to make the charge sheet hopeless. She stated that there is a plethora of authorities on the point but had none at the moment. The learned Senior State Attorney promised to supply us with such authorities at a later stage, and she indeed walked the talk. She supplied us with our

unreported decision in **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017, wherein at p. 18 we observed that the ailment was curable under section 388 (1) of the CPA.

The learned Senior State Attorney also submitted that the particulars of the offence part of the charge sheet simply narrates that the appellant raped the victim without disclosing the particulars appearing in para (d) of subsection 3 of section 130 of the Penal Code. She added that the particulars of the offence should have included details that the appellant, being a traditional healer, took advantage of his position and raped the victim who was his client under the pretext that he was healing her. That is a defect offending against section 132 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002; now 2019 (the CPA), she contended. The learned Counsel referred us to our decision in **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007 (unreported) in which at p. 14 we underscored that, in terms of section 132 of the CPA, every charge must contain not only a statement of the specific offence with which the accused is charged but also such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. However, the learned Senior State Attorney, referring to p. 16 of the same case, argued that the defect could be remedied by the testimony of the witnesses who testified that

the appellant was a traditional healer and that the victim was his client. The omission to state the details complained of was therefore remedied and thus no prejudice was occasioned, she submitted.

With regard to the omission to cite the punishment section, the learned Senior State Attorney also submitted that it was not fatal. She, again, relied on the excerpt reproduced above in **Jamali Ally** (supra) to buttress her submission.

On the complaint that the appellant was not taken to court within twenty-four hours after he was taken into custody, Ms. Ally conceded that the appellant was under custody by 13.01.2016 but was taken to court on 22.02.2016. She submitted that the reasons why are not evident on record but it might have been caused by the appellant's endeavours to try to settle the matter out of court, for PW6 testified that the appellant sent his relative to lure him with Tshs. 2,500,000/= to get rid of the matter.

Regarding the complaint on the PF3, the learned Senior State Attorney submitted that it was expunged by the High Court. She added, however, that the appellant's conviction was well founded even without the PF3.

Regarding grounds 6, 7, 8 and 10 of the supplementary memorandum of appeal, Ms. Ally was of the view that they did not

feature in the High Court thus the Court will not have legal justification to entertain them. She made reliance on our decision in **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) to buttress the proposition. The learned counsel urged us to ignore these grounds of appeal.

On the ground with respect to the jurisdiction of the Senior Resident Magistrate to sit in the District Court, Ms. Ally submitted that even though the complaint did not feature in the High Court, it was a legal point which the Court had jurisdiction to entertain. She submitted that the Senior Resident Magistrate had jurisdiction to sit in the District Court. The learned Senior State Attorney did not go further to elaborate why.

On the ground that the DNA test was not conducted, Ms. Ally submitted that the same was not required as there was enough evidence to implicate the appellant to the hilt.

In a brief rejoinder, the appellant challenged the fact that from the confusion of the facts in the charge sheet and evidence, he was prejudiced because it was not clear if he was charged with drugging the appellant or it was a normal rape or that he raped the appellant who was his client as a traditional healer. He thus prayed that he should be set free by allowing the appeal.

Having summarized the background facts of the case, the condensed grounds of appeal as well as the submissions of the parties to this appeal, the ball is now in our court. In determining this appeal, we will confront the grounds of appeal in the manner applied by the learned Senior State Attorney.

First for determination is the complaint the subject of the first ground of appeal to the effect that the first appellate court erred in law and fact in upholding the appellant's conviction which was based on a defective charge. Encapsulated in this ground are the complaints that the charge did not contain the definition and punishment sections and that the particulars of the offence did not contain the details in section 130 (3) (d) that the appellant; a traditional healer, took advantage of that position and raped the victim who was his client.

Starting with the complaint on lack of the definition section in the charge sheet, we agree, indeed, that the definition section is wanting in the charge sheet. The charge sheet simply refers to section 130 (3) (d) of the Penal Code. As rightly observed by the learned Senior State Attorney, the charge should have cited section 130 (1) and (3) (d) of the Penal Code. However, again, as rightly submitted by the learned Senior State Attorney, failure to mention the definition section will not make the charge sheet defective as to vitiate the whole trial. In **Jamali Ally**

(supra); the case supplied by the learned Senior State Attorney, the Court grappled with the point. The Court asked itself whether failure by the prosecution to cite sections 130 (1), (2) (e) and 131 (2) of the Penal Code prevented the appellant from understanding the nature and seriousness of the offence of rape and prevented him from entering his proper defence thereby occasioning him injustice. The Court concluded:

> *"... we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."*

Similarly, in **Joseph Maganga Mlezi and Another v. Republic**, Criminal Appeal No. 536 & 537 of 2015 (unreported), we were called to decide whether failure, in the particulars of the offence part of charge sheet, in a charge of armed robbery, to indicate the name of a person to whom threat was directed was fatal. We relied on **Jamali Ally** (supra) to hold thus:

> *"... the particulars of the offence together with evidence of PW1 enabled the appellants to appreciate the seriousness of the offence facing them as they were aware that the person threatened at the robbery incident was PW1. This eliminated whatever prejudices and as such, the*

omission to mention the threatened person being remedied by the testimonial account of PW1 is thus curable under section 388 (1) of the CPA."

Second for consideration in this ground of appeal is the complaint on lack of the punishment section. Indeed, that section is wanting in the charge sheet. Again, we agree with Ms. Ally that the ailment is curable under the provisions of section 388 of the CPA. We are of this view because the appellant was sentenced to a prison term of thirty years in jail which is the punishment prescribed by section 131(1) of the Penal Code; the punishment section complained of. The appellant was therefore not prejudiced in any way.

We were confronted with an akin situation in **Burton Mwipabilege v. Republic**, Criminal Appeal No. 200 of 2009 (unreported). In that case, like in the case at hand, the penalty section was not mentioned in the charge. We observed at p. 5 of the judgment:

"... this is curable under section 388 of the CPA, because the irregularity has not, in our view, occasioned a failure of justice."

We then proceeded to recite the following excerpt from the decision of the defunct East African Court of Appeal in **R. v. Ngidipe Bin Kapirama and Others** (1939) 6 E.A.CA. 118:

"An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has otherwise been a failure of justice".

On the authority of our decision in **Burton Mwipabilege** (supra) and that of the defunct East African Court of Appeal in **Ngidipe Bin Kapirama** (supra), we are positive that failure to mention the punishment section in the case at hand was not fatal as it is curable under the provisions of section 388 of the CPA.

Next for consideration in the first ground of appeal is the complaint in the third limb that the particulars of the offence part of the charge sheet did no state the details comprised in section 130 (3) (d) of the Penal Code under which the appellant was charged. We agree that the details comprised in section 130 (3) (d) of the Penal Code are wanting in the charge sheet. These are the details that the appellant was a traditional healer who used that advantage to rape the victim. However, as rightly submitted by the learned Senior State Attorney, we do not think this ailment was fatal as to vitiate the charge. We say so because we are of the considered view that the ailment was remedied by the testimony of witnesses who were positive that the appellant was a traditional healer and that the victim was his client for treatment of demons which supposedly haunted her. We are firm therefore that the

appellant was fully informed by the statement of the offence and testimony of witnesses that he; as a traditional healer, raped the victim who was his client. That enabled the appellant to appreciate the charge facing him.

The above discussion on the defective charge may be recapitulated thus: failure in the charge sheet to cite the definition and punishment sections or to clarify the ingredients of the charge under which an accused person is charged, will be curable under section 388 (1) of the CPA if the witnesses remedy the ailment in their evidence. In the case at hand, the ailments complained of were remedied by the testimony of witnesses and therefore the appellant was not prejudiced. No failure of justice was occasioned.

For the reasons we have assigned, we find the complaint on the defective charge without merit.

Next for our determination is the complaint that the first appellate court erred in law and fact in upholding the appellant's conviction in a trial in which the prosecution delayed to arraign him without any justifiable reasons assigned for the delay. The appellant claims this to have offended the mandatory provisions of section 32 (1) of the CPA. Indeed, as Ms. Ally submitted, the evidence is silent as to what made the appellant be arraigned after about 39 days after he was arrested. This is

perhaps why Ms. Ally went into speculation that the delay might have been caused by the appellant's endeavours to have the matter settled out of court. Much as we do not find ourselves safe to go into speculation, as Ms. Ally did, we do not think this procedural mishap was fatal as to vitiate the trial of the appellant.

We now turn to determine the complaint on the PF3; the subject of the third ground of appeal as compressed above. As rightly submitted by the learned Senior State Attorney, the PF3 was expunged by the first appellate court. However, the gist of the complaint in this ground, we think, is on the fact that the remaining evidence was not sufficient to ground a conviction against the appellant. Ms. Ally contended that the appellant's conviction was well founded even without the PF3. We will not burn any fuel to discuss the PF3 which was expunged. We agree with Ms. Ally that an accused person may be convicted of rape even without a PF3 provided that there is other sufficient evidence to prove that the accused raped the victim – see**: Bashiri John v. Republic**, Criminal Appeal No. 486 of 2016 (unreported). The question which pokes our mind is whether the remaining evidence was sufficient to ground a conviction against the appellant. We hasten to answer the issue in the affirmative. The evidence of PW1; the victim, is quite straight-forward that the appellant took her to the nearby bush where he

administered to her some concoction which made her unconscious and when she gained consciousness, she found the appellant raping her. She narrated the ordeal to her mother (PW2) and, later, to her husband (PW6). We are of the considered view that the appellant was rightly convicted even without the PF3. This ground has no merit as well.

We now turn to determine the complaints on grounds 4, 5, 6, 8, 9 and 10 of the compressed ground enumerated above. As rightly submitted by the learned Senior State Attorney, these grounds did not feature in the first appellate court. As such, we will not have jurisdiction to entertain them. The Court has had several occasions to traverse this point in a number of its decisions. These decisions are **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 416 of 2013, **Hussein Ramadhani v. Republic,** Criminal Appeal No. 195 of 2015, **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016, **Charles Juma v. Republic**, Criminal Appeal No. 391 of 2016, **Bonfance Alistedes v. Republic**, Criminal Appeal No. 346 of 2016 and **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (all unreported), to mention but a few. In all these decisions, the Court did not mince words. It consistently held that matters not canvassed and determined in the trial court or the High Court cannot be entertained by the Court. In **Hassan Bundala @ Swaga**, for instance, the Court held:

"It is now settled as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; and not on new matters which were not raised nor decided by either the trial court or the High Court on appeal."

In **Elia Wami v. Republic**, Criminal Appeal No. 30 of 2008 (unreported), we relied on our previous decisions in **Marwa Mahende v. Republic** [1998] T.L.R. 249 and **Elias Kamagi v. Republic**, Criminal Appeal No. 118 of 1992 (unreported) to hold:

"... a point of law (not facts) may be raised at an appellate level even if it was not raised before the court(s) below, provided that the parties are given opportunity to address the court on the point."

From the above authorities, we sieve the principle that, unless it is a point of law, matters not canvassed and determined in the trial court or the High Court cannot be entertained by the Court.

In the case at hand the grounds under discussion are matters of facts; not ones of law, and on the authority of the cases above, we find ourselves loathe to entertain them. We therefore accept the invitation by Ms. Ally to, as we hereby do, disregard them.

We now turn to determine the seventh ground reproduced above; the complaint that the Senior Resident Magistrate had no jurisdiction to sit in the District Court. We do not think this ground will detain us. In

terms of section 6 (1) (b) of the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2019, a District Court is properly constituted if presided over by a District Magistrate or a Resident Magistrate. The appellant's complaint on this ground to the effect that the Senior Resident Magistrate had no jurisdiction to sit in the District Court has no speck of merit.

The last ground is a complaint to the effect that no DNA test was conducted to analyze the spermatozoa. We will not be detained much by this ground as well. Ejaculation has never been an ingredient to prove an offence of rape. It is not a legal requirement. As rightly put by Ms. Ally, the appellant's guilt was proved to the hilt by the prosecution. Confronted with an akin complaint in **Hamis Shabani @ Hamis (Ustadhi) v. Republic**, Criminal Appeal No. 259 of 2010 (unreported), the Court observed:

> *"... there is no legal requirement that in offences of this kind, 'sophisticated scientific evidence' to link the appellant and the offence is required. It is not the requirement, for example, that the assailant's spermatozoa, red and white blood (or even DNA) should be examined to prove that he is the one who committed the offence. If there is other, independent evidence to implicate the accused with the offence and the court is satisfied to the required*

standard (that of proof beyond reasonable doubt), that in our view, is sufficient and conclusive."

In the instant case, the evidence of the victim as corroborated by PW2, PW3, PW4 and PW6 sufficiently proved that the appellant did indeed commit the offence. The appellant himself, in his defence, did only complain why the victim washed his body before going to the hospital for medical examination. Neither did he cross-examine the victim on the fact that he administered to her some concoction which made her unconscious after which he raped her. This Court is therefore entitled to believe that the victim spoke but the truth. In **Ismail Ally v. Republic**, Criminal Appeal No. 212 of 2016 (unreported) we reproduced the following excerpt from our previous unreported decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 which we think is worth recitation here:

> *"As a matter of principle, 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 trial court to disbelieve what the witness said."*
>
> [See also: **Edward Joseph v. Republic**, Criminal Appeal No. 272 of 2009, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, and **George Maili Kemboge v. Republic**, Criminal

Appeal No. 327 of 2013, CAT (all unreported decisions of the Court cited in **Ismail Ally** - supra)].

In the case at hand, we are surprised that the appellant did not cross-examine the victim on relevant aspects of the charge facing him.

For the reasons we have endeavoured to assign in this judgment, we find this appeal without an iota of merit. It stands dismissed entirely.

Order accordingly.

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

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The judgment delivered this 8th day of May, 2020 in the presence of Appellant in person and Mr. Kacandid Nasua learned State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL