

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., WAMBALI, J.A., And KOROSSO, J.A.)**

**CRIMINAL APPEAL NO. 354 OF 2017**

**ABDALLAH SAID@ KUNDUM ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Muruke, J.)**

**Dated the 24<sup>th</sup> day of July, 2017**

**in**

**Criminal Appeal No. 178 of 2016**

**.....**

**JUDGMENT OF THE COURT**

26<sup>th</sup> February & 26<sup>th</sup> May, 2020

**KOROSSO, J.A.:**

The Appellant was arraigned in the Resident Magistrate's Court of Kibaha charged with two counts of Incest by Male, contrary to section 158(1)(a) of the Penal Code, Cap 16 Revised Edition 2002 (The Penal Code). The particulars of the offence in the first count stated that, the appellant on diverse dates from 2013 to 2015 at Miembe Saba area within Kibaha District in Coast Region did have unlawful sexual intercourse with his daughter aged fifteen (15) years, whom we shall henceforth refer to

with a prefix "MAB" to disguise her identity. In the second count, it was alleged that the appellant did have unlawful sexual intercourse with his daughter aged eleven (11) years, who will be referred to as "FCD" to conceal her identity.

A brief background of the case which led to the arraignment of the appellant is expounded by the prosecution witnesses especially Rahima Mshana Ally (PW1), "FCD" (PW2) and "MAB" (PW3), "ATF" (PW4) a child of 14 years a friend of PW3 and Bupe A. Mwanjwango (PW5). PW1 the wife of the appellant and mother of four children, was engaged in business which she attended to daily at Kariakoo and lived with her husband (the appellant) and their children at Kibaha. Her business led her to leave her four children at home with their father most of the time.

On 20<sup>th</sup> March, 2015, "MAB" informed her mother, PW1 that the appellant (her father) had sexual intercourse with her regularly. Another child, "FCD" upon being asked also alleged the same thing. It was then that PW1 reported the matter to the community police in the village popularly known as "*polisi jami*". The appellant was then put under restraint and taken to the police station at Kongowe. At the police station, a PF3 was issued and PW2 and PW3 were taken to the hospital at Tumbi

for examination. According to PW2 and PW3, their father started having carnal knowledge of them in 2013 during the time their mother was absent. That their father during the night, used to call them to go and sleep with him in the room, and when they went to the said room he told them to undress and then sexually molested them one after the other, and thereafter sent them back to their room. PW3 stated further that the sexual intercourse with their father continued until in the year 2015 when "MAB" reported to PW1.

The appellant, who gave an affirmed testimony and called one witness to support his defence denied the charges stating they were concocted. After a full trial, the appellant was found guilty, convicted and sentenced to three years' imprisonment.

The Director of Public Prosecutions (the DPP) was aggrieved with the conviction and sentence imposed against the appellant and appealed to the High Court of Tanzania at Dar es Salaam claiming the sentence was omnibus and in contravention of the law. Specifically, the petition of appeal filed by the DPP on the 28<sup>th</sup> June, 2016 had three grounds of appeal which read as follows:

1. *That, the trial Magistrate erred in law and facts by convicting the accused person only on one count, while he was charged with two counts.*
2. *That, the trial Magistrate erred in law and fact by imposing omnibus sentence to accused person.*
3. *That, the trial Magistrate erred in law and facts by passing sentence to accused person which is contrary to the Minimum Sentence Act, Cap 90 Revised Edition 2002.*

Based on the above grounds, the first appellate Court allowed the appeal and substituted the sentence of three years' imprisonment to one of thirty years' imprisonment, guided by the provisions of section 158(1) (a) of the Penal Code.

The appellant was dissatisfied with the decision of the High Court and hence the appeal to this Court, fronting nine grounds as found in the substantive memorandum of appeal filed on the 21<sup>st</sup> March, 2019. Further, on 9<sup>th</sup> November, 2019 the appellant lodged in Court the supplementary memorandum of appeal comprising four grounds of appeal. It is further noted that with the leave of the Court the appellant submitted four other

supplementary grounds of appeal on the date at the hearing of the appeal.

The nine grounds of appeal are paraphrased as follows:

1. That the first appellate judge erred in upholding the conviction and enhancing the sentence despite an invalid DPP's petition of appeal.
2. That the first appellate judge erred in upholding the conviction and enhancing the sentence without re-evaluating the evidence in the record.
3. That the first appellate judge erred in upholding the conviction and enhancing sentence without addressing all issues in the DPP's appeal.
4. That the petition of appeal filed by the DPP was invalid having failed to state the offence the appellant was convicted of and that it contained incorrect date, month and year of the decision appealed against.
5. That the first appellate court erred in upholding the conviction and enhancing the sentence while the prosecution witnesses were unreliable, uncredible and their evidence lacked corroboration.
6. That the first appellate court erred in upholding conviction and enhancing sentence against the appellant while the arresting officer never gave testimony at the trial.

7. That the first appellate court erred in upholding conviction and enhancing sentence while the demeanor of witnesses relied upon was apparently not noted in the record of proceedings.
8. That the first appellate judge erred by upholding the conviction and enhancing the appellant's sentence based on the repudiated cautioned statement which was recorded contrary to the law.
9. That, the first appellate court erred by upholding the conviction and enhancing the sentence based on a fictitious case which was not proved to the required standard.

The respective compressed supplementary grounds of appeal are essentially as follows:

1. That the first appellate court failed to re-evaluate the evidence in the trial court and thus failed to fulfill its duty.
2. That the first appellate judge erred in not according the appellant the right to submit on raised points of preliminary objection.
3. That the trial judge failed to consider the appellant's dissatisfaction when his application for bail was denied by the trial court despite the fact that there was no objection from the prosecution side.

4. That, despite the appellant's objection to admissibility of his cautioned statement, the trial judge failed to consider irregularities and resolve illegalities in his favour.

At the hearing, the appellant fended for himself, unrepresented, whereas the respondent Republic enjoyed the services of Ms. Janet Magoho assisted by Ms. Esther Challe, both learned State Attorneys.

The appellant adopted his respective grounds of appeal and then informed the Court his preference for the respondent Republic to start submitting first and he be accorded an opportunity to respond thereafter.

Ms. Janet Magoho commenced her submissions by advancing the respondent Republic's objection to the appeal. She also prayed for the leave of the Court to be allowed to group all the grounds of appeal into three areas and respond to the appeal within that framework. She submitted that the first area will address the first and fourth grounds of the substantive memorandum of appeal which purported that there was no notice of appeal to the High Court by the DPP and also that the petition of appeal was defective.

The learned State Attorney argued that the relevant notice of appeal was filed in due time although it was not included in the record of appeal, and

maintained that in filing the notice and petition of appeal the DPP complied with sections 371(1) and (2) and 379 of the Criminal Procedure Act, Cap 20 Revised Edition, 2002 (the CPA). Ms. Magoho at the same time conceded that the petition of appeal (as found at page 83 of the record of appeal) does not contain the offence which the appellant was charged and convicted against and also that the date of the judgment stated therein is incorrect, since it states the judgment was delivered on the September 2015 instead of 26<sup>th</sup> January 2016.

The learned State Attorney was however of the view that the discerned defects do not invalidate the petition of appeal since the name of the trial magistrate, the names of the appellant (who was the respondent then) and the DPP (who was the appellant then) are shown. She argued that from this it should be found that there was no injustice occasioned and that the defects were not substantive and are curable under section 388 of the CPA.

The learned State Attorney beseeched the Court to disregard consideration of the second group of grounds of appeal that is, the second, third, fifth, sixth, seventh, eighth and ninth grounds of appeal and all the compressed supplementary grounds of appeal, because they are



new grounds of appeal which were not dealt with in the first appellate court. That these grounds relate to the evidence at the trial, while the first appeal only dealt with a challenge on the conviction of the appellant on one count only instead of the two counts for which he was charged with and also expressed dissatisfaction with the sentence meted to the appellant. Thus she implored the Court not to consider the new grounds of appeal and to find the appeal devoid of merit and dismiss it.

With respect to the third group of grievances, there is a specific complaint which is apparent in all his grounds of appeal. This concerns enhancement of sentence by the first appellate court. The learned State Attorney firstly conceded that although there is no specific ground challenging enhancement of sentence, but in all the nine grounds in the substantive memorandum of appeal, the appellant complains indirectly on the enhancement of sentence. She thus submitted on it as it arguing that this formed the basis of the first appellate court's judgment. To this end, she argued that in enhancing the sentence, the first appellate judge properly directed himself and was in line with the holding in **Tumaini Mtayomba vs Republic**, Criminal Appeal No. 217 of 2012 (unreported). That the offence charged against the appellant was a scheduled offence

and the sentence meted by the trial court that of three years' imprisonment was improper, since the minimum sentence is thirty years'. In the circumstances, she thus prayed for the Court to find the appeal devoid of merit and deserving dismissal.

The appellant's rejoinder was a restatement of his earlier prayers imploring the Court to consider all his grounds of appeal. He also reiterated being disgruntled by failure of the first appellate court to hear submissions from parties on the raised preliminary objection.

We have carefully considered the rival submissions of the parties before us, and from the outset it is important to note that, this is a second appeal. The first appeal that was considered and determined at the High Court of Tanzania at Dar es Salaam was one filed by the DPP, and the grounds of appeal have already been reproduced hereinabove. A scrutiny of the record of proceedings before us, divulges that the appellant did not file an appeal or cross appeal to challenge the trial courts findings, conviction and sentence. He claimed however at the hearing that he had filed a notice of appeal whose whereabouts could not be traced. Thus,

what is evident is that what was considered and determined by the first appellate court related to the appeal by the DPP only.

Our analysis of the grounds of appeal before us has discerned that they are three main areas of contention. The first area involves the second, fifth, sixth, seventh and eighth grounds as found in the memorandum of appeal and the first, second, third and fourth supplementary grounds of appeal. The second area of contention relates to alleged anomalies in the proceedings of the first appellate court, found in the first and fourth grounds found in the substantive memorandum of appeal. The third group relates to enhancement of sentence.

With regard to the first area of contention, as rightly stated by the learned State Attorney, in general, these grounds display dissatisfaction with matters related to the witnesses' evidence and admissibility of documentary evidence. These are matters which were not addressed or determined in the first appellate court. The appellant when invited to expound on this ground, he had nothing substantive to submit. These grounds were also matters not appealed against by the appellant's in the High Court.

It is a well settled principle that this Court, in the second appeal, shall not consider grounds not dealt with in the first appellate court. This position has been restated time and again by this Court as rightly pointed out by the learned State Attorney. In **Emmanuel Josephat vs Republic**, Criminal Appeal No. 323 of 2016 (unreported), it was stated that where grounds of appeal are raised in the Court for the first time, it will not entertain and determine them for lack of jurisdiction. Also see **George Maili Kemboge vs Republic**, Criminal Appeal No. 327 of 2013; **Sadick Marwa Kisase vs. Republic**, Criminal Appeal No. 168 of 2012; **Hassan Bundala Swaga vs Republic**, Criminal Appeal No. 385 of 2015; and **Ramadhani Mohamed vs. Republic** Criminal Appeal No. 112 of 2006 (all unreported). In the later case it was specifically held that:

*"We take it to be settled law, which we are not inclined to depart from, that this Court will only look into matters which came up in the lower court and were decided, not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

The position stated in the above cited decisions of the Court is entrenched in section 6(1) of the Appellate Jurisdiction Act, Cap 141

Revised Edition 2002 (the AJA), where this Court derives the mandate to entertain and determine appeals from the High Court or a subordinate court when exercising extended powers. Henceforth, we proceed to disregard in our determination of this appeal the second, fifth, sixth, seventh and eighth grounds as found in the substantive memorandum of appeal and all the grounds found in the supplementary memoranda of appeal, for reasons stated above.

The second area of complaint as found in the first and fifth grounds in the memorandum of appeal relate to the alleged anomalies and irregularities in the record of appeal. These are matters which we are of the view can be categorized as points of law. The main contention being that the petition of appeal filed by the DPP was invalid for reasons of lack of a notice of appeal and the petition of appeal being defective for failure to state the offence for which the appellant was charged and convicted with and stating an incorrect date when the trial court's judgment was delivered.

We are alive to the submissions of the learned State Attorney in response to this contention and her prayer that we should find that despite the said anomalies, no apparent injustice was occasioned because the said

defects are curable under section 388 of the CPA and thus rendering the petition of appeal to be proper. She also implored the Court to find the ground devoid of merit.

It is a fact as rightly stated by the appellant and conceded by the learned State Attorney that the notice of appeal to the High Court by the DPP was not included in the record of appeal. Suffice to say we managed to retrieve it from the original case file and concluded that the said notice of appeal is part of the record of this appeal. Our scrutiny of the relevant notice of appeal to the High Court shows that it was filed within the prescribed period within the confines of section 379(1)(a) of the CPA, as required for an appeal lodged by the DPP. Therefore, the argument that there was no notice of appeal to the High Court fails.

With regard to the assertion that the petition of appeal to the High Court (found at page 83 of the record of appeal) was defective, our examination of its contents reveals that, it is an appeal from the judgment of Kibaha Resident Magistrate's Court at Kibaha in Criminal Case No. 17 of 2015. The date of the judgment is recorded as "... *day of September 2015*", instead of the 25<sup>th</sup> of January 2016 (see page 81 of the record of

appeal) which was the date the trial court's judgment was delivered. Accordingly, it is indisputable that the petition of appeal to the High Court cited an incorrect date of judgment. At the same time the petition of appeal does not disclose the offence of which the appellant was convicted with. These anomalies in the petition of appeal being evident, the question is whether they are fatal or not and if so, the consequences thereto.

The next issue for our consideration relates to complaints by the appellant that the first appellate court did not address the preliminary objection raised by the appellant on the competency of the notice of appeal. Admittedly, as can be discerned from the record of appeal. In its judgment, the first appellate court did not consider nor determine any matter concerning the alleged preliminary objection. However, in the record of appeal at page 88, we note that the appellant intimated to the court that he had filed a Notice of preliminary objection that the appeal is out of time, and the court responded by acknowledging being aware of the same and making a finding that it was not a notice of preliminary objection in terms of the law, to which the appellant is recorded to have agreed and prayed for hearing to proceed. For ease of reference, we import the relevant portion of the proceedings as follows:

**"03/07/2017**

*Coram: Hon. Muruke, J.*

*For the Appellant - Debora Mushi*

*For the Respondents - Present in person*

**Debora Mushi:** *The matter is for hearing. We are ready.*

**Abdallah Said Kundumi:** *I have filed a Notice of preliminary objection that appeal is out of time.*

**Court:** *We have received the same. It is not notice of preliminary objection in terms of the law.*

**Abdallah Said Kundumi.** *I agree let proceed with hearing."*

Therefore, from the above excerpt it is evident that the issue related to the notice of preliminary objection was determined by the first appellate court to the satisfaction of the appellant and thus the complaint has no legs to stand on. In any case, our perusal of the record of appeal has failed to retrieve the respective notice of preliminary objection for this court to consider and determine whether the finding of the first appellate court on this matter was prejudicial to the rights of the appellant. Thus for reasons stated, we find no cogent reason to continue to deliberate on this issue which was already dealt with by the first appellate court to the satisfaction of the appellant.



Regarding the grievance that the petition of appeal cited an incorrect date of judgment and failed to disclose the offence for which the appellant was charged with, the fact that it contained the names of the appellant and the DPP, which are the names of the concerned parties; the relevant case number, that is, Criminal Case No. 17 of 2015 which was decided by Hon. A.H. Mbadjo, Resident Magistrate and also included in the challenged notice of appeal has not been challenged. We find this to illustrate that there was no opportunity for any of the parties to confuse the said appeal. Thus taking all the stated factors in consideration, we are fortified that the presented anomalies on the petition of appeal to the High Court cannot be said to touch the substance of the appeal. Thus, as rightly observed by the learned State Attorney, we find there was no injustice occasioned to either party and that the said anomalies are curable under section 388 of the CPA. This being the case, this complaint is found to lack merit.

Lastly, with regard to the complaint on the enhancement of sentence, we think this should not detain us. As rightly pointed out by the learned State Attorney, the sentence substituted by the first appellate court was a statutory minimum provided punishment for the offence for which the

appellant was charged with upon conviction. Thus we equally dismiss this complaint.

In the premises, for reasons expounded above, we find the appeal lacks merit and it is hereby dismissed.

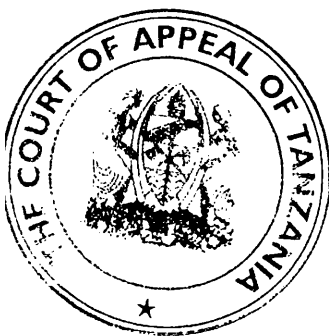
**DATED** at **DAR ES SALAAM** this 21<sup>st</sup> day of May, 2020.

S.A. LILA  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

Judgment delivered this 26<sup>th</sup> day of May, 2020 in the presence of the Appellant in person – linked via video conference, and Ms. Anunciatha Leopold, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
B.A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**