IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A And WAMBALI, J.A.,)

CRIMINAL APPEAL NO. 90 OF 2017

WILLIAM KASANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Korosso,J.)

dated the 07th day of November, 2016
in
Criminal Appeal No. 58 of 2016

JUDGMENT OF THE COURT

8th & 28th May, 2020

MKUYE, J.A.:

At the District Court of Morogoro at Morogoro, the appellant William Kasanga was charged with and convicted of unnatural offence contrary to section 154 (a) and (2) of the Laws Vol. I R.E 2002 (sic) and was sentenced to thirty (30) years imprisonment with 12 strokes of a cane and compensation of Tzs. 200,000/= to be paid to the victim. It was alleged that the appellant, on 23rd day of December 2010 at about 19:30 hrs at Difinga Village within the District of Mvomero and the

Region of Morogoro did have unlawful carnal knowledge against the order of nature to one MEG (name withheld) a boy aged 4 years.

The appellant unsuccessfully appealed to the High Court of Tanzania at Dar es Salaam where the conviction was upheld and the sentence was enhanced to life imprisonment on account that the victim was below the age of ten years.

The brief facts of the case are that on 23/12/2010, the material date, the appellant paid a visit at the home of Emmanuel George (PW1) where he went to see PW1's mother in law. On reaching there, he was welcomed and given a chair to sit on in order to talk with the said in law. Meanwhile, PW1 entered inside the house but after a short time he heard his son MEG (PW3) crying. Incidentally, Said Jackson (PW5) who was also inside the house heard when PW3 was crying. PW1 and PW5 rushed to the scene of crime and found PW3 who told PW1 that "amenivua nguo akawa ananifanya nyuma". The appellant attempted to escape but was apprehended and taken to the village executive officer one, Anselim John (PW2) who issued them with a letter to report at Mtibwa Police Station. At the police station E6803 D/C Mahende (PW6) issued a PF3 to the victim with instructions to be medically examined at the Hospital. On 24/12/2010, PW3 was taken to Bwagala Hospital where

he was examined by Dr. Assey Sixtus (PW4) and observed that PW3 who was 4 years old had been sodomized. He also noted that the boy's anus was injured and that he frequented to the washroom to ease himself and would cry in pain. He also tendered the PF3 which was admitted as Exh P1.

PW3, who gave unsworn evidence following a *Voire Dire* test which was incomplete, testified to the effect that the appellant went at their home on the material day and asked him to accompany him to the mango tree area and on arriving there, he stripped him off his clothes of which he took his erected manhood and inserted it into his (PW3)'s anus. He said, he felt much pain which led him to shout and his father (PW1) and Said Jackson (PW5) came to his rescue whereupon the appellant was arrested when he attempted to take to his heels.

In his defence, the appellant denied involvement with the alleged offence. He however admitted to have been arrested on 23/12/2010 but while on his way to his home from his labour works. In the end, he was convicted with the offence and sentenced accordingly as we have alluded to earlier on.

The appellant, still protesting his innocence has appealed to this Court. He has raised eight (8) grounds of appeal in his substantive

memorandum of appeal which may conveniently be extracted as follows: **First,** the 1st appellate court misdirected itself in substituting the charge leading to enhancement of sentence from 30 years imprisonment to life imprisonment. **Second,** the facts in the preliminary hearing did not correlate with the prosecution evidence on the date of the appellant's arrest and that there are discrepancies between PW4 and PW5's evidence. **Third,** that the prosecution evidence was not exhaustively assessed before conviction. **Forth,** that the case involving a four year old boy was heard in open court instead of in chamber. **Fifth,** that the PF3 (Exh PI) was tendered by the prosecutor instead of PW5. **Sixth,** that the medical examination to the victim was conducted on 24th Dec. 2011 instead of 23rd Dec. 2010 when the event occurred. **Seventh,** the offence against appellant was concocted/ frame up; and **eighthy,** the prosecution case was weak to ground a conviction against the appellant.

The appellant also filed a supplementary memorandum of appeal comprising six (6) grounds which may conveniently be extracted as follows: **one,** the trial court did not furnish the appellant with the complainant's statement and those of other witnesses together with the documentary exhibits to enable him understand the nature of offence and prepare his defence. **Two,** PW4 (the Doctor) was summoned to

testify in court without the appellant being advised to call him. **Three,** the PF3 (Exh. P1) was tendered irregularly as it was tendered by the public prosecutor. **Four,** the witnesses' evidence was not read over to him much as the trial court marked that s. 210 (3) of the CPA was complied with. **Five,** the charge sheet was not reminded to him prior to his defence and the options available for defence were not explained to him as per section 231 of the CPA; and **six,** the case was not assessed properly.

The appellant also on 29th of May 2019 filed written submission in support of the appeal.

When the appeal was called on for hearing vide video conference linked between the Court premises and Ukonga Central Prison the appellant appeared in person, unrepresented; whereas the respondent Republic was represented by Ms. Faraja George and Mr. Adolf Lema both learned State Attorneys.

When the appellant was invited to amplify his grounds of appeal he sought to adopt his memorandum of appeal and the written submission thereof and let the State Attorney respond first and reserved his right to make a reply latter, if need would arise.

In response, Ms George opposed the appeal. She, in the first place submitted that there are new grounds of appeal which were not canvassed at the High Court. She said, those grounds are 3, 6 and 7 in the substantive memorandum of appeal and grounds 2, 5 and 6 in the supplementary memorandum of appeal. She thus, while relying on the case of **Kipara Hamis Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016 (unreported), urged the Court to refrain from entertaining them.

As regards ground No. 1 of the substantive memorandum of appeal that the charge was defective, the learned State Attorney conceded that Vol. I R.E 2002 which was cited in the charge sheet is not known in our Laws. She said, initially, the defect of this nature was not curable under section 388 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA). She, however, added that in the wake of various decisions of this Court, the same is curable. Nevertheless, she said, the appellant was not prejudiced because **one**, the particulars of offence explained the offence he committed, the place where it was committed and the age of the victim. **Two,** item 2 of the facts read over during the preliminary hearing explained that the offence committed was under the Penal Code. **Three,** the witnesses, PW1, PW3 and PW5 testified on how

the offence was committed. **Four,** the appellant was given an opportunity to cross examine the witnesses; and **five,** the appellant testified in defence. To fortify her argument she referred us to the case of **Jamal Ally @ Salum v. Republic,** Criminal Appeal No.52 of 2017.

As to the complaint relating to the enhancement of sentenced by the High Court, the learned State Attorney contended that, it was done without the parties being heard as per section 366 (a) (ii) of the CPA. She urged the Court to step in the shoes of the first appellate court.

As regards ground No. 2 that there was a variation of a date when the appellant was arrested in the preliminary hearing and the evidence, Ms George admitted to it. She, however, argued that though the preliminary hearing indicated that he was arrested on 24/12/2010 and PW5 said he was arrested on 23/12/2010, the variation was minor as it did not go to the root of the matter. After all, she said, the appellant admitted to have been arrested on 23/12/2010.

As regards ground No. 5 of the substantive memorandum of appeal and ground No. 2 of the supplementary memorandum of appeal that the PF3 was tendered by the public prosecutor, the learned State Attorney conceded that it was tendered by the public prosecutor. She submitted further that the said PF3 was not read over in court after

being admitted. She said, since its admission contravened the law, the Court should disregard it.

Nevertheless, despite being disregarded, she was quick to submit that there was sufficient evidence from PW4 who testified to the effect that after he had conducted examination to PW3, he detected bruises in his anus; and observed him frequenting the washroom and easing himself with much pains and that the victim was sodomized. With regard to proof of sexual offences, she referred us to the case of **Seleman Moses Sotel @ White v. Republic**, Criminal Appeal No. 385 of 2018 (unreported) where the Court stated:

> *"Similary, as regards PW3's medical report, apart from expunging the PF3, there is still the oral evidence of PW2 to the effect that, upon her examination, she found that PW3 was not virgin and that the muscles of her anus had become loose, showing that she had been penetrated by blunt object in both her vagina and anus. As observed by the learned first appellate Judge therefore, the evidence of PW1 and PW2 rendered corroboration to PW3's evidence."*

Regarding ground No. 1 of the supplementary memorandum of appeal that the appellant was not furnished with the witnesses' statements, Ms. George argued that there was no law requiring the appellant to be given such witnesses' statements. She said, section 9(3) of the CPA requires the appellant to be given the complainant's statement which they believe he was given. In any case, she said, there is nowhere in the record where the appellant requested to be furnished with such statement and was refused. Even when PW1 who was the complainant testified in court, the appellant did not cross examine him.

Relating to the complaint in ground No. 4 of the supplementary memorandum of appeal that the witnesses evidence was not read over as per section 210(3) of the CPA, the learned State Attorney contended that the ground is baseless as the record of appeal shows that when each witness from PW1 to DW1 testified in court the trial magistrate indicated that section 210(3) of the CPA was complied with.

With regard to grounds No. 7 and 8 of the memorandum of appeal that the case was not proved beyond reasonable doubt, the learned State Attorney countered it in that the prosecution witnesses proved it. In elaboration Ms George submitted that PW1 testified to the effect that the appellant came to his home and asked for his mother in law.

Thereafter he heard the child crying. PW1 and PW5 followed up where the crying was coming up and found the appellant with PW3 crying and that PW3 told them that he was sodomized by the appellant and when PW1 inspected PW3 saw sperms in his anus.

The learned State Attorney submitted further that PW3 also gave his evidence on how the appellant asked him to accompany him to the mango tree and that is where he inserted his male organ in PW3's anus. PW5 saw appellant with PW3 after having heard PW3 crying and he saw sperms in PW3's anus.

The learned State Attorney argued further that this evidence was corroborated by PW4 who examined PW3 and saw him to be sodomized. Regarding the appellant's complaint that PW5 said he saw sperms in the PW3's arm, she clarified that it was a typographical error which was ascertained by the Court upon looking at the original file that it was, indeed, on PW3's anus and not arm. In this regard, Ms. George argued that the case against appellant was proved beyond reasonable doubt.

In rejoinder, the appellant invited the Court to consider his appeal and allow it, quash the conviction, set aside the life sentence and release him.

We have anxiously examined and considered the grounds of appeal and the rival arguments. We wish to begin with the issue of new grounds of appeal. It is trite law that the Court will not have jurisdiction to deal with grounds of appeal not canvassed by the first appellate court. This position has been taken in a numerous decisions of this Court some of them being **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018; **Hassan Bundaia @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015 (all unreported); and **Kipara Hamis Misagaa @ Bigi** (supra). In the latter case it was stated that:

> *"... it is now settled that matters not raised in the first appellate court cannot be raised at the second appellate court."*

In this case, we have examined grounds 3, 6 and 7 of the substantive memorandum of appeal and grounds 2, 5 and 6 of the supplementary memorandum of appeal and we agree with the learned State Attorney that they are new as they were not canvassed in the 1st appellate court. Hence, based on the above cited authorities we find that this court has no jurisdiction to entertain them. We will thus, deal with the remaining grounds of appeal.

With regard to ground No. 1 on the defective charge, the appellant's complaint as was readily conceded by Ms. George is that the citation of the law was incomplete which deprived him to understand the nature of the offence. In the said charge sheet the appellant was charged with *unnatural offence contrary to section 154 (1)(a) (2) of the Laws Vol. 1 RE 2002.* Admittedly, the law that was cited is unknown in the laws of the Land. As was rightly submitted by Ms George there is no law which is cited as Laws Vol 1 R.E 2002.

Equally, we agree with the learned State Attorney that previously, the defect in the charge sheet could not be cured under section 388(1) of the CPA. (See **Alex Medard v. Republic**, Criminal Appeal No. 571 of 2017; and **Mussa Mwaikunda v. Republic,** Criminal Appeal No. 174 of 2006 (both unreported). However, in the wake of various decisions of **Jamali Ally @ Salum** (supra) other factors have been used to gauge if the appellant was prejudiced by such defectiveness. In the said **Jamali Ally @ Salum's** case (supra) the Court held that:

> *"... the particulars of the offence were very clear and in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the*

offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age"

The court also relied on the evidence of PW1 who gave a detailed account on how the appellant raped her (the victim).

In this case, relying on the above cited case, we agree with the learned State Attorney that, though the charge was predicated on Vol.1 R.E.2002 without mentioning a particular law, the particulars of the offence efficiently explained the nature of the offence. The facts read over during the Preliminary Hearing at page 3 of the record of appeal also mentioned the law to which the charged offence was premised to be the Penal Code, Cap. 16. It also explained the particulars of the offence. Moreover, the evidence of PW1, PW2, PW3, PW4 and PW5 also explained in details how the offence was committed and were duly cross examined by the appellant. On top of that, the appellant entered his defence in relation to the offence he was charged with. Since the nature of the offence was clarified in those situations we are satisfied that the appellant was made to understand the nature of the offence he was facing and thus he was able to defend himself. Therefore, it is our finding that he was not prejudiced in any way.

As regards the complaint on variance of dates when the appellant was arrested as shown in the facts read over during the preliminary hearing and the evidence of PW5, it is true. While in the facts read over during preliminary hearing it is shown that the appellant was arrested on 24/12/2010, PW5 testified that he was arrested on 23/12/2010. Incidentally, the record shows that it was among the facts which were not disputed by the appellant. That notwithstanding, there remains two versions of dates when the appellant was alleged to be arrested. But, we think, this need not detain us much. We agree with the learned State Attorney that such variance is minor as it does not go to the root of the matter and that no prejudice was occasioned to the appellant given that the arresting period was reasonable. Thus, we find that ground No. 2 lacks merit. We dismiss it.

As regards the complaint that the PF3 was tendered by the public prosecutor; and that it was not read over to the Court, Ms. George conceded to it. However, we do not agree with her on the first limb of complaint that the PF3 was tendered by the public prosecutor. This is so, because what the public prosecutor said was that, *"I pray your honour that PF3 be tendered as an exhibits."* Looking at the phrase by the public prosecutor, we are satisfied that, it does not show that the

prosecutor was asking to tender it himself but he was praying to the trial court for the PF3 to be tendered as exhibit by someone else or rather a person other than himself.

Be it as it may, as to the second limb regarding failure to read over the PF3 in court, we agree with both parties that the trial court omitted to read over and explain the contents of the PF3 in court. When faced with akin situation in the case of **John Mghandi @ Ndunde v. Republic**, Criminal Appeal No. 352 of 2018 (unreported), the Court expressed its sentiments as follows:

> *"We think, we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record of the evidence."*

Even in this matter, given that the trial court omitted to read over the contents of the PF3 in court to enable the appellant understand its

nature of evidence and prepare a focused defence, it is obvious that it prejudiced him. Hence, we disregard it.

As regards the complaint that the appellant was not furnished with the witnesses' statements, we agree with the learned State Attorney that there is no specific provision of the law requiring the appellant to be furnished with the witnesses' statements. In relation to witnesses' statement to be furnished to the accused, section 9(3) of the CPA provides:

> *"Where in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information of any statement made by him under subsection (3) of section 10, to be furnished to the accused forthwith."*

According to the above cited provision it is only the statement of the complainant which is to be furnished to the accused. It does not provide for furnishing the accused with other witnesses' statements. And, in relation to the said complainants' statement, we think, was supplied to him as there is nowhere in the record of appeal where it is shown that he requested for it and was denied. In this regard, we find

ground No 1 of the supplementary memorandum of appeal to have no merit and we hereby dismiss it.

In relation to ground 4 of the supplementary memorandum of appeal, the appellant's complaint is the trial court's failure to read over the witnesses' evidence to him. Section 210 (3) of the CPA provides:

> *"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."*
>
> [Emphasis added]

This provision as it is, requires the magistrate to read over the evidence to the respective witness if he/she so demands and not to the accused person. And, according to this provision, we think, the accused/appellant being a witness when testifying for his defence could have done so. That he did not do. In any case, we agree with the learned State Attorney that the requirement was complied with as revealed at the end of the testimony of each witness where the magistrate recorded that *"S.210 (3) of Criminal Procedure Act complied*

with". Hence, we find that the appellant's complaint is baseless. We dismiss it.

As regards grounds 7 and 8 of the substantive memorandum of appeal whether the case was concocted and was proved beyond reasonable doubt, we wish to deal with it together with effect of disregarding of PF3. In the first place, we do not see how the case was concocted as there was no evidence led by the appellant to that effect. We also agree with the learned State Attorney that the case was proved beyond reasonable doubt. As was rightly contended by Ms. George, despite the fact that the PF3 is disregarded, the evidence of PW1, PW3, PW4 and PW5 was strong enough to mount a conviction against the appellant. PW1 and PW5 testified on how the appellant visited their home to pay courtesy to PW1's mother in law. The appellant was given a chair so that he can chart with PW1's mother in law and PW1 and PW5 entered inside the house. However, they heard PW3 crying outside the house. When they rushed to his rescue they found the victim with the appellant and he told them that he was sodomized by the appellant. When they inspected him they saw sperms in his anus. PW1 and PW5 arrested the appellant and took him to the VEO (PW2) and latter to the police. PW3 though his evidence was taken after incomplete *voire dire*

test, testified in details how appellant requested him to go to the mangoe tree and when they reached there he stripped off his clothes, undressed himself and inserted his erected manhood into his anus. PW3 explained that he shouted due to pains whereby PW1 and PW5 come to rescue him. PW3's evidence that he was sodomized was corroborated by PW1 and PW5 who saw him with sperms in his anus and PW4 who testified to have examined PW3 aged 4 years and found him with bruises in his anus. He observed that PW3 was sodomized and saw him frequenting to the washroom to ease him with much pains. As to the appellant's involvement in the offence, PW3's evidence was corroborated by PW1 and PW5 who found him with PW3 and put him under arrest. All in all, despite the fact that the PF3 was disregarded, still the prosecution witnesses' evidence was cogent enough to sustain the conviction.

We are aware that the appellant challenged the prosecution for having not called PW1's mother in law who could have explained at what time he (appellant) left with the victim. This issue, we think, cannot detain us much. Section 143 of the Evidence Act, Cap. 6, R.E. 2002 clearly provides that there is no specific number of witnesses to prove a fact in issue. (See also **Yohanis Msigwa v. Republic,** [1990] TLR 148; and **Hassan Juma Kanenyera v. Republic** [1992] TLR 100). In our

view it is not the number of witnesses that is required. What is required is the credibility of their evidence. At any rate, we think that the appellant himself was not precluded from calling such witness if he so wished, to clarify what he wanted her to testify. As such, grounds No. 7 and 8 are devoid of merit and they are dismissed.

We now turn on the complaint that the 1st appellate judge amended the charge and enhanced the sentence from 30 years imprisonment to life imprisonment. We do not agree with the appellant's argument that the first appellate judge amended the charge. However, as was conceded by the learned State Attorney it is true that the sentence was enhanced without requiring the parties to address the court on the legality or otherwise of sentence.

Admittedly, the High Court is under Section 366 (a)(ii) of the CPA empowered to enhance sentence if need be. However, the appellate court would not alter the findings or reduce or enhance the sentence unless the parties to be heard. The said section provides:

> *(1) At the hearing of the appeal, the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the public prosecutor, if he appears, may then address the court and thereafter,* ***the court***

may invite the appellant or his advocate to reply upon any matters of law or of fact raised by the public prosecutor in his address and the court may then, *if it considers there is no sufficient ground for interfering, dismiss the appeal or may–*

(a) in an appeal from a conviction–

(i).....

(ii) ***alter the finding, maintaining the sentence or, with or without altering the finding, reduce or increase the sentence; or***

(iii) .....;" [Emphasis added]

In the instant case, as was submitted by the learned State Attorney, the 1st appellate court enhanced sentence without according an opportunity to the parties and particularly the appellant to be heard. There is no doubt that, failure to accord the opportunity to do so prejudiced the appellant as per section 366 (a)(ii) of CPA. This was an error on the part of the 1st appellate court.

At this juncture, we wish to remind the presiding officers when exercising their powers under section 366 (a) (ii) of the CPA with a

view to altering the finding or reducing or enhancing the sentence to accord the parties an opportunity to be heard. This is in tandem with the basic right to be heard enshrined under Article 13 (6)(a)(ii) the Constitution of the United Republic of Tanzania, Cap 2 RE 2002 as was held by the Court in **Mbeya – Rukwa Autoparts and Transport Ltd V. Jestine George Mwakyoma** [2003] TLR 251, as hereunder:

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part:*
>
> *To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely: when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing."*

In Criminal Appeal No. 317 of 2016 between **Damiano Qadwe** and **Republic,** (unreported), the Court nullified and revised the sentence which was enhanced by the first appellate court without affording the parties opportunity to be heard. It stated as follows:

"Based on the foregoing analysis, we hold that the learned Judge wrongly revised the original sentence and enhanced it without

hearing the appellant contrary to section 373 (2) of the CPA. In the circumstances, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 by which we nullify the revisional proceedings of the High Court in Criminal Revision No. 2 of 2015 and proceed to quash and set aside the revisional order imposing on the appellant the enhanced sentence.

The Court went on to state that:

"... in view of the manifest error in the sentence imposed by the trial court, we must intervene and correct the error by stepping into the shoes of the High Court. Accordingly, pursuant to our revisional powers, we enhance the two years' sentence to the minimum thirty years' imprisonment."

Applying the above principle, we think, this being a second appellate court, we are entitled to step into the shoes of the first appellate court so as to rectify the error.

Given the circumstances, we invoke our revisional powers bestowed on us under section 4(2) of the Appellate Jurisdiction Act and enhance the 30 years imprisonment to the mandatory sentence of life in accordance with the provisions of section 154(2) of the Penal Code.

In the event, with an exception to ground No. 2 of the supplementary memorandum of appeal relating to the PF3, we find the appeal devoid of merit and we hereby dismiss it.

DATED at **DAR ES SALAAM** this 26th day of May, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 28th day of May, 2020 in the presence of Mr. William Kasanga, learned counsel for the appellant and Ms. Saraja George, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL