IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

(CORAM: MKUYE, J. A., SEHEL, J.A, And GALEBA, J. A.)

CRIMINAL APPEAL NO. 237 OF 2020

SOSPETER JOHN..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court at Kigoma)

(Mariki, SRM, Extended Jurisdiction)

dated the 30th day of April, 2020
in
DC. Criminal Appeal No. 7 of 2019

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JUDGMENT OF THE COURT

13th & 28th July, 2021

SEHEL, J.A.:

This second appeal arose out of an incident that took place on 24th June, 2017 at about 04:00 hours at Muyama village within Buhigwe District in Kigoma Region in the house of Moses Yoram (PW1). According to the evidence of Madandi Moses (PW4), the son of PW1, when he woke up at about 04:00 hours on that date, he found the back door of the house opened and the lights were off. The obtaining circumstances, raised eyebrows to him. He decided to check his twin little sisters. For the purposes of concealing their names we

shall refer them as "the girls" or "the victims". They were sleeping in a separate room. As he was nearing the girl's room, he heard some whisper and when he entered, he switched on the lights and found the appellant in the bed naked and the girls were crying. The girls were also naked. They did not put on any underpants. When PW4 asked the girls as to what happened, they told him that the appellant had penetrated them against the order of nature and they were feeling some pains.

Having seen PW4, the appellant quickly got out of bed while covering his face with a sweater. PW4 tried to fight with him and he managed to uncover his face. He then called his friend, one Shukrani Kigaza (PW5) who helped him to apprehend the appellant. They tied him with a rope. PW4 then texted his father, PW1 who was on Safari. Acting on the report, PW1 called the Ward Executive Officer of his area, one Yudas Bakeza (PW9) and requested him to go and check at his house because he was told by PW4 that they have apprehended a thief. PW1 also called the police to report the crime.

Upon receipt of the information, PW9 took a motorbike and quickly rushed to the scene of crime where he found the appellant already under arrest.

It was also the evidence of PW4 that he noticed the 25 kilograms of maize and 2.5 kilograms of groundnuts were missing (Exhibits A, collectively). PW4, PW5 and PW9 interrogated the appellant on the whereabouts of the sacks. He admitted to have stolen them and led them to a banana plantation nearby the house of his grandmother where they found the hidden sacks of maize and groundnuts. On their return to the house, they found that the police officers had arrived.

The victims were taken to Muyama health centre where they were attended by Fortidas Josephat (PW6) a Medical Officer. He examined them and observed that each of the victim's anus had blood and bruises. He thus concluded that the girls were forcefully penetrated by a sharp or blunt object. He recorded his findings in a two separate Police Form No. 3, PF3s (Exhibits C, collectively). He also examined the two underpants which the victims had worn on that night and observed that they had blood stains. The underpants were admitted as Exhibits B, collectively.

There was also the evidence of the mother of the victims, Leonia Paulo (PW7) who testified that the girls were born on 19th January, 2008. She tendered the two birth certificates, one for each girl (Exhibit D, collectively).

A police officer from Muyama police station, E.4320 Detective Corporal Mwaimu (PW8) interrogated the appellant on 2nd July, 2017 but his cautioned statement was not received in evidence by the District Court of Kasulu at Kasulu (the trial court) as it was held that it was recorded beyond the basic period for interviewing a suspect, that is, it was recorded beyond four hours which was contrary to section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) (the CPA).

With that evidence, the appellant was arraigned before the trial court with four counts. In the first and second counts, he was charged with unnatural offence contrary to section 154 (1) (a) and (e) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019) (henceforth "the Penal Code"). In the 3rd count, he was charged with burglary contrary to section 294 (1) (a) and 2 of the Penal Code while in the fourth count, he was charged with theft contrary to section 265 of the Penal Code.

It was alleged by the prosecution that, on 24th June, 2017 at about 04:00 hours at Muyama Village within Buhigwe District in Kigoma Region, the appellant did break into the dwelling house of one Moses Yoram, at night, and stole maize and ground nuts and thereafter did have carnal knowledge of the twin girls aged nine years against the order of nature. The appellant pleaded not guilty to the charge levelled against him.

In his defence, the appellant vehemently denied committing the offences. He claimed that he was not apprehended at the scene of the crime as he was at home on that incident day. He stated that the police officers arrested him at his home and took to Muyama police station where he was initially charged with two offences of breaking and stealing but later on PW1 influenced the police officers to charge him with unnatural offence. Nonetheless, he acknowledged that he did not cross-examine PW1 because he claimed that the evidence of PW1 was hearsay.

After a full trial, the trial court found credence on the prosecution case thus the appellant was found guilty, convicted and sentenced to life imprisonment on the first two counts, twenty years on the third

count and five years on the fourth count. The sentences were ordered to run concurrently.

Aggrieved, he filed his appeal to the High Court which was later on transferred to the Resident Magistrates' Court of Kigoma at Kigoma to be heard and determined by Honourable Mariki, Senior Resident Magistrate with extended jurisdiction (the first appellate court). He raised two grounds of appeal. The grounds were: - first, sections 228 (1) and (3) and 229 (1) of the CPA were not complied with as the charge was not read over to him and secondly, the charge under the fourth count was defective for being preferred under the CPA. The first appellate court after it had gone through the record held that the charge was read and explained to the appellant when he was first arraigned before the trial court, he denied the accusation and a plea of not guilty was entered. It further held that the charge was reminded to him during the pre-liminary hearing and a plea of not guilty was entered. Regarding the complaint on the defective charge, it held that the charge was proper as it was preferred under the Penal Code and not CPA as alleged by the appellant. It thus dismissed the grounds of appeal. Nonetheless, the first appellate court subjected the entire

evidence under scrutiny and agreed with the findings of the trial court that the appellant committed the offences and was arrested at the scene of crime. It thus dismissed the appeal save for the sentences of twenty years in the third count and five years on the fourth count which were reduced to twelve months for each of the said counts.

It is noteworthy to point out here that the testimonies of the victims were expunged by the first appellate court as they were found to have been received in contravention with section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) (the Evidence Act). It also expunged from the record two Exhibits; the PF3's of the victims (C, collectively) and the birth certificates of the victims (D, collectively) because after they were admitted in evidence the trial court omitted to read them over to the appellant.

Still protesting for his innocence, the appellant preferred the present appeal. He advanced a total of six grounds of appeal which are: -

1. *That, both the trial court and the senior resident magistrate with extended jurisdiction erred in law and fact in convicting the Appellant without cogent*

evidence adduced by the prosecution side to prove the offence beyond reasonable doubt.

2. *That, the senior resident magistrate erred in law and fact in upholding the Appellant's conviction without considering that the appellant was deprived the fair trial as the exhibits PF3s and the cautioned statement were admitted and tendered before the court without being read over as required under section 210 (3) of the Criminal Procedure Act, so that, the Appellant could understand the content and give the Appellant the room to agree or object. This irregularly admitted exhibit ought to be expunged.*
3. *That, the trial court erred in law and fact in convicting the Appellant without considering that no identification parade against the accused person in order to leave no doubt that the alleged bandit is the one involved in the commission of the offence. Rather than relying on the dock identification.*
4. *That, the honourable trial court erred in law and fact in convicting the Appellant on the basis of evidence adduced, without considering that the identification was not adequate/accurate so as to remove all chances of mistaken identity taking into account that the offence was committed during the night.*

5. *That, the senior resident magistrate erred in law and fact in upholding the conviction without considering the principle that the Appellant cannot be convicted on the weakness of his/her defence but on the strength of prosecution evidence adduced.*
6. *That, there was no evidence against appellant as the evidence of victims (PW2 and PW3) was recorded against the law and it was useless for offending section 127 (2) of the Evidence Act and make the rest of the evidence to have no prove that it was the appellant who sodomized PW2 and PW3".*

When the appeal was called for hearing on 13th July, 2020 the appellant appeared in person, unrepresented whereas the respondent/Republic has the services of Ms. Edna Makala, learned State Attorney.

When the appellant was called upon to argue his appeal, he opted to hear first, a reply from the learned State Attorney while reserving his right to re-join, if need would arise.

In reply, Ms. Makala outrightly opposed the appeal and contended that the six grounds of appeal are new. She contended that they were not raised and considered by the first appellate court. Thus,

the Court is precluded, in terms of section 6 of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), to determine factual issues which were not raised and considered by the first appellate court. She pointed out that, with the exception to grounds number 1, 2, 3 and 6, the rest of the grounds of appeal raise factual issues. She therefore urged the Court not to consider grounds number 4 and 5. To bolster her position, she referred us to the case of **Godfrey Wilson v. The Republic,** Criminal Appeal No. 168 of 2018 (unreported). The respondent being a layperson did not make any reply to that submission.

We stated herein that this is a second appeal. As rightly submitted by the learned State Attorney, by virtue of section 6 (7) (a) of the AJA, the Court can only consider matters of law (not including severity of sentence). We have compared the grounds of appeal filed by the appellant in the first appellate court which appear at page 95-97 of the record of appeal with the one filed to this Court and we entirely agree with the learned State Attorney that, the fourth and fifth grounds of appeal raise issues of fact and not law and raised for the first time before this Court. The issues concerning identification of the

appellant raised in the fourth ground of appeal and the weaknesses of the appellant's defence raised in the fifth ground of appeal were not raised and considered by the first appellate court. There is a host of authorities of this Court, including the case of **Godfrey Wilson** (supra) that save for the grounds concerning legal issues, the Court will not look into new grounds in the second appeal which were not addressed and determined by the first appellate court (See also **George Maili Kemboge v. The Republic** Criminal Appeal No. 327 of 2013, **Galvs Kitaya v. The Republic,** Criminal Appeal No. 196 of 2015 and **Hassan Bundala @ Swaga v. The Republic,** Criminal Appeal No. 386 of 2015 (all unreported).

Since the fourth and fifth grounds of appeal raise pure factual issues and were not considered and decided by the first appellate court, we refrain from looking at the grounds.

Ms. Makala then counter attacked the sixth ground of appeal concerning the evidence of the victims, who testified before the trial court as prosecution witnesses' number two and three (PW2 and PW3). She submitted that their evidence was rightly expunged by the first appellate court because they were received in contravention of

section 127 (2) of the Evidence Act. She thus urged the Court to uphold the findings of the first appellate court. Again, the appellant had nothing to re-join.

On our part, we have examined the record of appeal and noted that the first appellate court following the appraisal on the entire evidence, it observed that after the trial court had satisfied itself that PW2 and PW3 did not understand the meaning of oath, it proceeded to receive the witnesses' evidence without requiring them to promise to tell the truth to the court and not lies. As such, the reception of the victims' evidence was contrary to section 127 (2) of the Evidence Act which requires the child witness, who does not understand the meaning of oath, to promise to tell the truth and not lies. With that anomaly which is apparent on the record of appeal, we concur with the first appellate court that the evidence of PW2 and PW3 was received contrary to section 127 (2) of the Evidence Act. In that regard, their evidence had no evidential value and was perfectly expunged. We find the ground of appeal was unnecessarily raised because the evidence of PW2 and PW3 was not used by the first appellate court to uphold the convictions of the appellant.

For the second complaint regarding failure to read over the contents of PF3 and cautioned statements after they were admitted in evidence, Ms. Makala contended that the ground has no merit. She reasoned that although PF3s were received in evidence by the trial court but they were expunged by the first appellate court because they were not read out after they were admitted in evidence. On the cautioned statement, she argued that it was not received in evidence by the trial court. She therefore prayed to the Court to uphold the findings of the first appellate court and dismiss the ground of appeal.

Admittedly, our scrutiny of the record of appeal revealed that the first appellate court expunged not only the PF3s of the victims but also the birth certificates since their contents were not read over to the appellant after they were admitted in evidence. In expunging the documentary evidence, the first appellate court relied on the principle we sated in our previous decisions in the cases of **Robinson Mwanjisi and Three Others v. The Republic** [2003] T.L.R. 218 and **Seleman Moses Sostei @ White v. The Republic,** Criminal Appeal No. 385 of 2018 (unreported), that after a document was cleared for admission, the contents of it ought to be read over to an

accused person and its omission entitled such document to be expunged because it is a fatal irregularity. In this appeal, we reiterate the same position. We thus see nothing to fault the findings of the first appellate court.

As for the cautioned statement, it is true that it was not admitted in evidence. This is reflected at page 36 of the record of appeal where the trial court rejected it. In that respect, we find the sixth ground of appeal to be misconceived as the documents were not used by the first appellate court to uphold the appellant's convictions and sentences.

We now turn to the grounds of appeal that touch the merits of the appeal, which are the first and third grounds of appeal. We shall consider them together because they boil down to one issue as to whether the case was proved beyond reasonable doubt by the prosecution against the appellant. In determining these grounds of appeal, we shall be mindful of the position of the law that the Court can interfere with the concurrent findings of fact by the courts below if it finds out that there was a misdirection or non-directions on the evidence, a misapprehension of the evidence, a miscarriage of justice,

or a violation of some principle of law or practice (see: - **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Musa Mwaikunda v. The Republic** [2006] TLR 387).

It was submitted by Ms. Makala that the prosecution discharged its duty by proving the four offences against the appellant. She argued that the unnatural offence was proved by the evidence of PW6 who examined the two victims and found that each victim's anus had bruises and blood and each was complaining to have some pains. In that regard, the doctor concluded that the girls' anuses were forcefully penetrated by a sharp or blunt object. PW6 also examined the victims' underpants and found blood stains (Exhibit B, collectively). Ms. Makala submitted further that there is also evidence of PW4 who told the trial court that he found the appellant in the bed while naked where the girls were sleeping. She pointed out that at page 22 of the record of appeal, PW4 told the trial court that he found the girls naked and crying. When he asked them as to what happened, they replied that the appellant had sexual intercourse with them against the order of nature. The evidence of PW4 was corroborated by PW5 who helped PW4 to apprehend the appellant whom they found in the girls' room.

Ms. Makala further contended that the age of the girls was proved by PW7 who told the trial court that the girls were born on 19th January, 2008 thus on 24th June, 2017 when the offence was committed, the girls were below ten years old. With that evidence on record, Ms. Makala urged the Court to find that the offence of unnatural offence was proved beyond reasonable doubt against the appellant.

As to the offence of burglary, Ms. Makala contended that PW4 proved it because he told the trial court that when he woke up, he found the back door was opened and the lights were off and then found the appellant in the girls' room.

As to the offence of theft, Ms. Makala submitted that PW4, PW5 and PW9 proved this offence. She pointed out that after PW4 realized that the sacks of maize and groundnuts were missing, he together with PW5 and PW9 interrogated the appellant who admitted to have stolen them and led them to a place where he had hidden the stolen sacks. He took them to a banana farm situated near the house of the appellant's grandmother and thereat, they found the stolen sacks of maize and groundnuts which were tendered in evidence (Exhibits A, collectively). She added that since the appellant was apprehended at

the scene of the crime there was no need of the identification parade. At the end, she prayed to the Court to dismiss the appeal.

The appellant re-joined by contending that PW4 and PW5 were not truthful witnesses because they contradict the evidence of PW1, and that the evidence of PW4 was not corroborated by PW5 who helped PW4 to apprehend the appellant while in the two girls' room.

We wish to start with unnatural offence, the appellant was charged with two counts of unnatural offence contrary to section 154 (1) (a) of the Penal Code. For such an offence to stand, there ought to be proof of penetration, however slight into the anus, with or without consent (see the case of **Joel s/o Ngailo v. The Republic**, Criminal Appeal No. 344 of 2017 (unreported)). As shown herein, the first appellate court after it had expunged the evidence of the victims found that the conviction of the appellant on the unnatural offence can still stand from the evidence of other eye witnesses apart from the victims' evidence. On our part, this being a second appeal and after appraising ourselves with the evidence on record, we find nothing to fault the finding of the first appellate court. We say so because it is on record that PW4 found the appellant sleeping in the girls' bed while naked

and the girls had no underpants. The same was corroborated by PW5 who helped PW4 to apprehend the appellant while in the girls' room. Further, it was the evidence of PW4 that the girls told him that they were sodomized by the appellant. PW6 corroborated that evidence because after he had examined the girls' anuses, he found bruises and blood. He thus concluded that there was forceful penetration by sharp or blunt object in the girls' anuses. There is also on record the evidence of PW7 who established the girls' age to be below 10 years. In totality, we are satisfied that the evidence brought before the trial court was enough to prove the essential ingredients of unnatural offence contrary to section 154 (1) (a) of the Penal Code. Accordingly, there is nothing to fault the findings of the two lower courts on the appellant's conviction of unnatural offence.

We now turn to the offence of theft of which we find that the appellant was rightly convicted by the trial court and the first appellate court correctly upheld such conviction. This is because there was asportation, an essential ingredient of theft, of sacks of maize and groundnuts from PW1's house to a banana plantation nearby the house of the appellant's grandmother. According to the evidence of

PW4, PW5 and PW9, it was the appellant who led them to the place where they found the stolen items. They collected them and later on tendered and admitted them as Exhibit A, collectively.

Concerning the offence of burglary, the main ingredients of such an offence are breaking and entering into dwelling house during night with intent to commit an offence or having committed an offence breaks out of it. The two courts below held that the prosecution sufficiently established and proved it. Undisputedly, PW4 established that there was breaking and entering of a dwelling house at night when he told the trial court that at around 04:00 hours he found the back door was opened, lights were off and the appellant was found in the girls' bed. After, the appellant had broken into the house, he committed two offences of theft and unnatural offence as shown herein. Besides, the appellant was apprehended at the scene of the crime. Thus, there was no need of conducting an identification parade as claimed by the appellant. We are therefore, like the two courts below satisfied that the offences were proved to the hilt by the prosecution. In that respect, we are of the settled view that it is not right for this Court to interfere with concurrent findings by the two

courts below. Consequently, the first and third grounds of appeal are devoid of merit.

In the end, we find the appeal is lacking merit. We accordingly dismiss it.

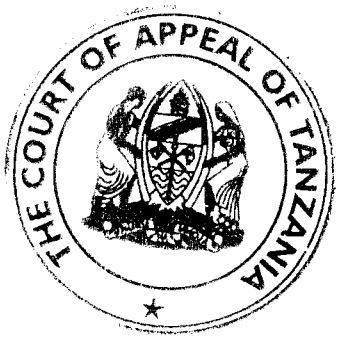
DATED at **DAR ES SALAAM** this 27th day of July, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The judgment delivered this 28th day of July, 2021 in the presence of the Appellant in person via video conferencing facility from Bangwe Prison Kigoma and Ms. Edna Makala, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL