IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And MAIGE., J.A.)

CRIMINAL APPEAL NO. 401 OF 2019

SIABA S/O MSWAKI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Masabo, J.)

Dated the 25th September, 2019

in

Criminal Appeal No. 194 of 2018

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JUDGMENT OF THE COURT

20th September, & 4th October, 2021

LEVIRA, J.A.:

The appellant, Siaba Mswaki was convicted by the District Court of Kisarawe of unnatural offence contrary to section 154 (1) (a) and (c) of the Penal Code, Cap. 16 R.E. 2002 [now R.E. 2019]. The prosecution alleged at the trial that on 21st November, 2015 at about 07:30 hours at Mafumbi Village within Kisarawe District Coast Region, the appellant had carnal knowledge against the order of nature of the victim who by then was aged 25 years. To prove their case against the appellant, the prosecution called a total of 4 witnesses and tendered one exhibit. In

defence, the appellant was a sole witness and he had no any exhibit to tender.

The substance of the evidence relied upon by the trial court to ground the appellant's conviction was to the effect that; on the material day and time, Hassan Ramadhani (PW1) while at his shamba looked at a distance beyond his shamba and saw the appellant pushing the victim to the bush. He went closer only to see the appellant sodomizing the victim who was allegedly insane. However, when the appellant saw PW1, he tried to dress up his trousers but PW1 grabbed him before he could do so and shouted for help. In response, Sauda Kondo (PW2) arrived at the scene and found both the appellant and the victim naked. PW2 helped PW1 to hold the appellant and together they continued to shout until their voices reached the village chairman who also responded. PW2 and Hamza Ramadhani (PW3) who is the father of the victim corroborated PW1's evidence to the effect that the victim is mentally ill. According to PW3, the appellant admitted to commit the offence when taken to the office of VEO and requested him to resolve the issue amicably but PW3 refused. PW3 reported the incident to Kisarawe Police Station where the victim was issued a PF3. He was later taken to the hospital for examination, after which Dr. Innocent Mkini (PW4) discovered that the

victim had bruises on and inside the anus and he was suffering from epilepsy. Having examined and treated the victim, PW4 filled the victim's PF3 which was tendered and admitted during trial as exhibit P1.

On the strength of prosecution evidence, the appellant was convicted as alluded to above and sentenced to 30 years imprisonment despite his evasive denial to the charge in his defence. His first appeal to the High Court was not successful, hence the current appeal.

In the memorandum of appeal the appellant has raised ten (10) grounds some of which were not raised before the High Court in his first appeal as noted by Ms. Aurelia Makundi, learned State Attorney, who appeared at the hearing for the respondent Republic together with Ms. Rehema Mgimba, also learned State Attorney. On his part, the respondent appeared in person, unrepresented.

Having quickly perused the record of appeal we agree with Ms. Makundi that the appellant has raised new grounds which are not points of law (grounds 1, 2, 4, 5 and 7) which were not raised and determine by the first appellate court, the High Court. It is settled law that grounds of appeal which were not brought into the attention of the first appellate court for determination cannot be raised in the second appeal - see

Bakari Abdallah Masudi v. Republic, Criminal Appeal No. 126 of 2017 (unreported).

In the light of the settled position, we shall therefore deal only with the grounds of appeal which were argued and determined by the High Court, to wit, grounds 3, 6, 8, 9 and 10. For clarity we take liberty to renumber and reproduce them hereunder: -

1. That the High Court judge erred in law and fact when dismissed the appeal of the appellant without taking into account that no one was called at the trial court as a victim and there is no any document tendered at the trial court to prove the illness of the unknown complainant even the chairperson of the hamlet, the VEO or the village chairman were not called to support the evidence of PW3 regarding the condition of unknown victim.
2. That the High Court judge erred in law and fact when dismissed the appeal of the appellant without taking into account that as she mentioned in her judgment on page 41 of the proceedings nowhere in the trial court judgment showed that the victim was called there to testify.
3. That the first appellate court erred in law and fact when dismissed the appellant's appeal without taking into account

that failure to call the police who issued PF3 (exhibit P1) and the police who investigated this case and the victim who complained to be sodomized and the village and hamlet leaders, the prosecution failed to prove the charge against the appellant as per the required standard.

4. That the High Court judge erred in law and fact when dismissed the appellant's appeal without taking into account that failure to call a hamlet chairperson is miscarriage of justice due to the fact that he is a justice of peace in his/her area as he/she vested with powers in Article 146 (2) (b) of the Constitution of the United Republic of Tanzania.
5. That the first appellate court erred in law and fact when dismissed the appellant's appeal without considering the defence of the appellant in its judgment.

When invited to argue his grounds of appeal, the appellant first opted to adopt them as part of his oral submission and stated that justice was not done to him by the lower courts because he does not know the victim. Also, he complained that the prosecution alleged that on the material day he was arrested and taken to the office of village

Executive Officer (VEO) but the said VEO was not called to testify to that effect. Therefore, he prayed for his appeal to be allowed.

In reply, Ms. Makundi stated that the respondent opposes this appeal. Arguing the 1st, 2nd, 3rd and 4th grounds of appeal together, she submitted that according to the charge sheet and the evidence adduced by prosecution witnesses, the victim was mentioned to be Salmin Hamza. She referred us to pages 6, 7, 8 and 10 of the record of appeal where PW1, PW2, PW3 and PW4 testified that the victim is insane. She expounded that apart from PW1, PW2 and PW3 there was also evidence of PW4, a doctor who examined the victim and discovered that he was suffering from epilepsy which is causing him mental problems. According to Ms. Makundi, although the best evidence in sexual offences comes from the victim, the victim could not be called to testify due to his mental illness as commented by trial magistrate in his decision.

As regards the complaint that the Ward Executive Officer (the WEO) and the Village Executive Officer (the VEO) were not called to testify, Ms. Makundi argued that there is no specific number of witnesses who are required to prove a certain fact as per section 143 of the Evidence Act, Cap 6 RE 2019 (the Evidence Act). She highlighted that what is important is the credibility and reliability of witnesses. She

backed up her argument with the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 367. As such, she said, the evidence of PW1 and PW2 was credible and reliable them being eye witnesses. Their evidence, she said was corroborated by that of PW4 who examined the victim and discover that he was penetrated.

Ms. Makundi stated further that the evidence of the above-mentioned prosecution witnesses (PW1, PW2, PW3 and PW4) was not challenged by the appellant in cross-examination and therefore it stood to be an accepted fact. In support of this position, she cited the decision of the Court in **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (unreported).

She summed up by stating that in sexual offences, the best evidence comes from the victim, but in the circumstances of the current case, the victim was not called to testify because of his mental illness. She went on stating that although the WEO and VEO were not called to testify, the evidence of PW1 and PW2 proved that it was the appellant who sodomized the victim. Therefore, she urged us to dismiss the above grounds of appeal for being baseless.

As regards the 5th ground of appeal, Ms. Makundi conceded to it. However, she urged us to step into the shoes of the first appellate court

and examine that defence as it was in **Karim Jamary @ Kesi v. Republic,** Criminal Appeal No. 412 of 2018 (unreported).

In his brief rejoinder, the appellant reiterated his complaint that it was wrong for the High Court to sustain his conviction because the victim was not called to testify and he does not know him.

In determining this appeal, we shall deal with the grounds of appeal as argued by Ms. Makundi. The 1st, 2nd, 3rd and 4th grounds of appeal raise a common complaint that the first appellate judge erred in dismissing the appellant's appeal as the prosecution failed to call material witnesses; namely the victim, the police officer who issued PF3, the WEO and VEO, and therefore failed to prove the case against him to the required standard. We note that the appellant's complaint regarding the victim is twofold. In the first limb, the appellant's complaint is that apart from the fact that the victim was not called to testify, the appellant does not know him and the alleged insanity in the second place.

The main issue for our determination in the above four grounds of appeal is whether failure to call the victim or other witnesses to testify discredited the prosecution case.

We have thoroughly gone through the record of appeal and we agree with the appellant that the victim was not called as a witness to testify before the trial court. However, we wish to state at the very outset the settled position of law that, in criminal cases the burden of proof lies on the prosecution and it never shifts – see **Tafifu Hassan @ Gumbe v. Republic,** Criminal Appeal No. 436 of 2017 (unreported). This means that it is upon the prosecution to call material witnesses to prove a case beyond reasonable doubt and in exercising this noble task they are not limited in terms of number of witnesses whom they should call. Section 143 of the Law of Evidence Act, Cap 6 R.E. 2019 provides in clear terms that there is no particular number of witnesses that is required in proving a case. What is important is the credibility of a witness and weight of evidence. In the case of **Bakari Hamis Ling'ambe v. Republic,** Criminal Appeal No. 161 of 2014 (unreported) the Court held that: -

> *"It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (section 143 of Tanzania Evidence Act, Cap. 6). A Court of law could convict an accused person relying on the evidence of*

a single witness if it believes in his credibility, competence and demeanor."

It is also settled position that conviction can be grounded on account of the evidence of an eye witness without calling a victim to testify – see **Mbaraka Ramadhani @ Katundu v. Republic,** Criminal Appeal No. 185 of 2018 (unreported). In the instant case, it is undisputed fact that the victim was not called to testify as a witness and the reason as stated by Ms. Makundi, which we accept, is that he was prevented by his mental illness. At page 6 of the record of appeal, PW1 testified that he saw the appellant pushing the victim who is insane to the bush. At page 7 of the record of appeal, PW2 stated that the victim is a matured person but mentally ill. The state of mind of the victim was also stated by his father, PW3 at page 7 of the record of appeal that "my neighbor had carnal knowledge with my son who is mentally ill." The medical doctor who examined the victim discovered that the victim was having mental problem. As stated by Ms. Makundi, we have perused the record of appeal and we could not find anywhere the appellant cross-examining prosecution witnesses concerning their testimonies regarding the victim's mental condition. In the cited case of **Damian Ruhele** (supra) it was stated that: -

"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."

Being guided by the above established position, we entertain no doubt that the appellant accepted the fact that the victim is mentally ill and, in that status, he could not be called as a witness to testify before the court. We are also fortified by the fact that the appellant and the victim were neighbours a fact which was stated by PW3 and confirmed by the appellant himself in his defence at page 11 of the record of appeal when he said that, on the material day and time he was at home repairing his bicycle and the victim came and sat at the fallen trees. In cross-examination he said he knew the victim as a neighbor and he thought they were living in peace, but he was surprised to be told that he had carnal knowledge with him (the victim). This part of defence speaks it all that the appellant was familiar with the victim which entails that he was also aware of his state of mind, a fact which defeats his complaint that he does not know the victim.

In the circumstances, we do not find any justifiable reason to fault the direct evidence of PW1 who caught the appellant *inflagrante delicto* sodomizing the victim. His evidence was corroborated by that of PW2

who also happened to arrive at the scene of crime and found both the appellant and victim naked and she assisted PW1 in arresting the appellant. Also, PW4 who medically examined the victim confirmed that he was sodomized. PW3 and all other prosecution witnesses testified that the victim was insane a fact which impaired his ability to testify as stated by the trial magistrate in her judgment at page 22 of the record of appeal.

Therefore, we entertain no doubt that the prosecution witnesses were credible, reliable and they managed to prove to the required standard that indeed, it was the appellant who sodomised the victim. In **Mbaraka Ramadhani @ Katundu v. Republic** (supra), the Court agreed with the conviction and the sentence of the appellant who was charged with rape basing only on the evidence of an eye witness. Likewise in the current appeal, we agree with the first appellate judge that PW1 and PW2 who were eye witness, were reliable and their credible evidence justified the appellant's conviction and sentence.

Much as we agree with the second limb of appellant's complaint that the WEO, VEO and the police officer who issued PF3 were not called to testify, we do not think that there is a need to labour repeating what we have already stated above. Suffices here to state that we are

satisfied that the prosecution witnesses summoned particularly, PW1, PW2 and PW4 were well versed with necessary information connected to the commission of the offence and their evidence was not shaken during trial. As such, we are settled in our mind that failure to call those people as witnesses does not have any negative connotation justifying the Court to draw negative inference on the prosecution - see **Bashiri John v. Republic,** Criminal Appeal No. 486 of 2016 (unreported) and **Tafifu Hassan @ Gumbe v. Republic,** (supra). Besides, even if they were material witnesses as stated by the appellant, their evidence could be nothing but mere hearsay evidence as nothing on record indicates that they were at the scene of crime on the material day and time. Having so stated, the 1st, 2nd, 3rd and 4th grounds of appeal fail and thus they are accordingly dismissed.

In the fifth ground of appeal, the appellant is complaining that his defence was not considered by the trial court and therefore, it was an error for the High Court to dismiss his appeal. In response to this ground of appeal, Ms. Makundi conceded to the appellant's complaint and added that, the High Court as first appellate court ought to have stepped into the shoes of the trial court and consider the appellant's defence but did not do so. However, she said, the defence evidence was too week and

thus even if the same could be considered, the decision could remain the same. She stated the current position to the effect that where the defence is not considered, the Court can step into the shoes of the first appellate court and consider it as was in **Karimu Jamary @ Kesi v. Republic** (supra) and urged us to do so as she was confident that the prosecution proved the case against the appellant beyond reasonable doubt.

In the cited case of **Karim Jamary @ Kesi** (supra), having been conceded that defence case was not considered, the State Attorney invited the Court to step into the shoes of the High Court (the first appellate Court) to consider defence case. The Court accepted the invitation and took the position which we adopt as it stated that:-

> *"The learned Senior State Attorney conceded as much that the trial court wrongly rejected the appellant's defence of alibi. He too conceded the first appellate judge glossed over the issue in his judgment. Under the circumstances, Mr. Maleko invited us to step into the shoes of the High Court and do what it omitted to do. We accept the invitation having regard to our previous decisions particularly;* ***Joseph Leonard Manyota v. Republic,***

Criminal Appeal No. 485 of 2015 (unreported) to which reference was made recently in ***Julius Josephat v. Republic,*** *Criminal Appeal No. 3 of 2017 (unreported)."*

The appellant testified as a sole witness for defence and his evidence is found at page 11 of the record of appeal. Having examined his evidence we find that basically he does not dispute meeting the victim on the material day and time. He only disputes the place of meeting him (scene) and that he did not commit the alleged offence. Instead, he said, he was arrested after a fight which ensured between him and Hassan Ramadhani, the father of the victim (PW3) who invaded him having found his son (the victim) sitting near the place where the appellant was repairing his bicycle.

In the circumstances, we are satisfied that the appellant's defence could not raise any reasonable doubt against the prosecution case as PW1, who was an eye witness lucidly testified that he saw the appellant sodomizing the victim. Similarly, PW2 corroborated PW1's evidence as he saw both the appellant and the victim naked at the scene of crime. They both got hold of the appellant and later sent him to the Village Executive office. The appellant did not cross-examine them on any of

the facts and thus their evidence remained unchallenged and the same was corroborated by that of PW4. We therefore, agree with Ms. Makundi and find that even if the two courts below had considered the defence evidence, they could not have come up with different findings. Therefore, this ground of appeal is lacking in merit. Consequently, we dismiss it.

In the upshot, we find the appeal to be without merit and dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 30th day of September, 2021.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 4th day of October, 2021 in the presence of the Appellant in person linked via video conference at Ukonga and Ms. Dhamiri Masinde linked via video conference at DPP's office Dar es Salaam, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL