IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 6 OF 2018

CHARLES ATHUMANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 30th day of November, 2017
in
DC Criminal Appeal No. 34 of 2017

JUDGMENT OF THE COURT

26th & 30th November, 2021

KEREFU, J.A.:

In the District Court of Moshi, the appellant, Charles Athumani was charged with two counts. The first count was on the offence of rape and the second count on attempted rape contrary to sections 130 (1) (2) (e), 131 (1) and 132 (1) and (2) (a) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition 2019) (the Penal Code), respectively. On the first count it was alleged that on diverse dates of the year 2015 at Makoroboi Kilototoni area within the Rural District of Moshi in Kilimanjaro Region, the appellant had carnal knowledge of a girl aged ten (10) years old. On the second count, it was alleged that on 14th March, 2016 at the

same place, the appellant attempted to have carnal knowledge of the same girl. To conceal her identity, we shall refer to her as 'GA' or simply 'PW2' as she so testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled five (5) witnesses and one documentary exhibit (PF3). On his side, the appellant testified alone, as he did not summon any witnesses.

In a nutshell, the prosecution case as obtained from the record of appeal indicates that, the appellant and Agnes John (PW1) were living as husband and wife together with PW1's children, to wit, PW2, Salehe and Mary. PW1 testified that on 14th March, 2016 she got up early at around 06:00 hours and informed the appellant that she was going to the market. She left PW2 with the appellant in the house and went with Mary as she was still very young. On her way to the market, PW1 passed at the house of her neighbour so that they could go together. She found her neighbour awake but still preparing, thus she had to wait for her. While there waiting, PW1 heard screaming from her house and she went back. She entered inside her bedroom and called the appellant but there was no response. She checked at the sitting room where PW2 used to sleep and she found

the appellant on top of PW2 and both were naked. PW1 asked the appellant what was he doing and why he wanted to kill PW2 but the appellant did not respond. It was the testimony of PW1 that she raised an alarm and neighbours came to her house. She said that when the appellant saw neighbours coming, he pushed her and ran away naked. PW1 informed her neighbours about the incident and she called *bodaboda* which came and took them to Himo Police Station.

PW1 went on to state that she interrogated PW2 who told her that the appellant used to rape her and threatened to kill her if she reveals the same to PW1. PW2 also told her that the appellant started to rape her when she was hospitalized for two weeks. That, he raped her several times. PW1 stated further that when she went for the said treatment, she left PW2 to sleep to her neighbour's house but the appellant went and took her back while claiming that PW2 should not sleep in neighbour's house.

Upon obtaining the PF3, PW1 took PW2 to Mawenzi Regional Hospital where she was examined and treated by Dr. Boniphace Massau (PW3) who found that PW2 was raped as her hymen was not intact and there were bruises in her vagina. PW3 recorded his findings in Police Form No. 3 (PF3) which was admitted in evidence as exhibit P1.

In her own testimony, PW2 testified that, in January, 2015 when PW1 was hospitalized, the appellant used to go to her room, undressed her, applied oil on her vagina and insert his penis into her vagina and carnally known her. She said that the appellant warned her not to reveal the ordeal to PW1 lest he would kill her. PW2 testified further that, the appellant did that wrongful act several times from 2015, though the same was only discovered on 14th March, 2016 as narrated by PW1 above. WP. 3788 D/CPL Zari (PW5) the investigation officer testified that, she was involved in the investigation of the incident, interviewed the appellant and recorded his statement.

In his defence, although the appellant admitted that he lived together with PW1 from July, 2015 when he separated from his first wife, he denied any involvement in the commission of the offence. He challenged the evidence of PW1 and PW2 that they gave untrue story before the trial court. He complained that, the case was framed up against him due to misunderstandings between him and PW1 arising out of a debt. The appellant testified further that on the material date PW1 told him that she was going to the market but a moment later, he heard her shouting outside asking for help. That, he went outside and asked her what was the matter but PW1 kept on shouting and some neighbours showed up. The

appellant said that he heard PW1 telling those neighbours that he raped PW2. The appellant testified further that he informed his manager on the debt and the existing misunderstanding between him and PW1. The said manager gave him the money to clear the debt but he used it to rent another room at Njia Panda and started to live there. He said that he was arrested on 9th April, 2016 at Njia Panda on accusation that he raped PW2.

After a full trial, the trial court accepted the version of the prosecution's case on the first count and specifically relied on the testimony of PW2 whose evidence was found to have been corroborated by the evidence of PW1 and PW3. It was however the finding of the trial court that the second count was not proved to the required standard. Thus, the appellant was acquitted on that count but he was found guilty on the first count, convicted and sentenced to thirty (30) years imprisonment.

The appellant unsuccessfully appealed to the High Court where his sentence was enhanced to life imprisonment and was ordered to pay fine of TZS 200,000.00 and compensation to the victim at the tune of TZS 500,000.00. Still protesting his innocence, he lodged this appeal. In the memorandum of appeal the appellant has raised eleven (11) grounds of appeal which can be conveniently paraphrased herein below: -

(1) That, the first appellate court erred in law in upholding the conviction and enhanced the appellant's sentence despite the charge being not proved to the standard required by the law;

(2) That, the first appellate court erred in enhancing the appellant's sentence but failed to note that the trial court failed to comply with the mandatory provisions of section 210 (3) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA);

(3) That, the first appellate court erred in law and fact by failure to re-hear and re-evaluate the entire evidence on record and arrive at its own decision but ended up to enhance the sentence which was based on weak, inconsistent, incredible, uncorroborated and unreliable evidence from the prosecution witnesses;

(4) That, the first appellate court erred in law and fact when it sustained the conviction but failed to note that the trial court misapprehended the nature and quality of PW2's unsworn testimony;

(5) That, both lower courts erred in law and fact when they held that PW1 and PW2 were credible and reliable witnesses despite the fact that they hide the existence of Salehe the son of PW1 who was said to live in another room and thus make the children in that house to be three instead of two as alleged by PW1 and PW2;

(6) That, both lower courts erred in law and fact in relying on the evidence of PW3 who alleged to have found bruises in the PW2's vagina while the offence alleged on that material date

was attempted rape hence raising doubt to the medical examination;

(7) *That, the first appellate court erred in law for failure to observe that exhibit P1 was wrongly admitted in evidence as there was no explanation as how it found its way to the court after the same was alleged to have be given back to the police officer;*

(8) *That, both lower courts erred in law and fact for failure to note that the prosecution intended exhibit, the 'sketch map' was not tendered in court;*

(9) *That, both lower courts erred in fact for failure to note that although PW1 alleged that she heard screaming from her bedroom but she later alleged that she found the appellant and PW2 in the sitting room;*

(10) *The first appellate court misdirected itself when it failed to draw adverse inference to the prosecution as PW1 alleged that neighbours came to the scene of crime but none of them was summoned to testify before the court; and*

(11) *That, both lower courts erred in law for failure to consider the defence evidence.*

In addition, on 22nd November, 2021 the appellant lodged a supplementary memorandum of appeal consisting of two grounds to the effect that: -

(1) *The first appellate court erroneously enhanced the thirty (30) years imprisonment meted out by the trial court to life*

imprisonment despite the age of the victim of the alleged offence PW2 being ten (10) years old; and

(2) *The first appellate court erred in law in offering the respondent a second opportunity to re-join on the submission made by the appellant which is unprocedural and contrary to the law.*

At the hearing of the appeal, the appellant appeared in person without legal representation whereas the respondent Republic was represented by Mses. Agatha Pima and Grace Lwila, both learned State Attorneys.

When invited to argue his appeal, the appellant adopted his grounds of appeal in both memoranda and started right away to submit on the two grounds in the supplementary memorandum of appeal. On the first ground, he faulted the first appellant court for having enhanced the sentence to life imprisonment. He argued that, according to the particulars of the offence indicated in the charge, PW2 was aged 10 years. He further argued that even in her own testimony, PW2 testified that she was born in 2005, thus by 2015 when the offence was alleged to have been committed, she was aged 10 years. It was the appellant's argument that the sentence of life imprisonment enhanced by the first appellant court was illegal and should not be allowed to stand.

On the second ground, the appellant faulted the procedure adopted by the first appellate court of offering the respondent a second opportunity to re-join the submission made by the appellant. He argued that he was prejudiced by such act, as he was not afforded the same opportunity to respond to the said second submission made by the respondent.

As regards the grounds of appeal contained in the substantive memorandum of appeal, the appellant indicated that he would argue only the first, third, fourth, fifth, seventh and eleventh grounds.

Starting with the first and eleventh grounds, the appellant contended that the prosecution case was not proved beyond reasonable doubt as PW2 gave unsworn testimony which was not corroborated by other witnesses. He clarified that, in her evidence, PW2 testified that she was raped several times from January, 2015 when PW1 was hospitalized but there was no evidence on record which supported that fact. He added that even the claim by PW1 that neighbours came to the scene of crime was not corroborated as none of those neighbours came to testify before the court.

On the third, fourth and fifth grounds, the appellant faulted the first appellate court for failure to subject the evidence on record to scrutiny and proper re-evaluation and thus failed to observe that PW1 and PW2 were

incredible and unreliable witnesses. He clarified that, both, PW1 and PW2 testified that the offence was committed at Njia Panda Kilototoni, while the charge indicated that, it was committed at Makoroboi Kilototoni area. He further challenged the claim by PW2 that she was raped on several times since 2015, but failed to tell anyone. It was his argument that the act of PW1 to remain silent for all those days, is a clear proof that, the entire incident was framed.

On the seventh ground, the appellant argued that exhibit P1 (PF3) was not properly admitted in evidence as in her evidence, PW1 testified that after medical examination, they gave the PF3 to PW5 who investigated on the case, but the said PF3 was tendered in court by PW3 and there was no explanation as how the same landed into his hands. The appellant contended further that even his defence was not considered by both courts below hence they arrived into erroneous decisions. Based on his submission, the appellant urged us to allow the appeal and set him free.

In her response, Ms. Kabu, at first supported the appellant's conviction and sentence. She however, started her submission by referring us to the fifth, sixth, eighth, ninth and tenth grounds and contended that the same are new as they were not part of the grounds canvassed and

determined by the High Court on the first appeal. On that account, she implored us to disregard them.

She then right away conceded to the two grounds contained in the supplementary memorandum of appeal by arguing that the sentence enhanced by the first appellate court was not supported by the record of appeal as PW1 and PW2 clearly testified that in 2015, when the offence was alleged to have been committed, PW2 was 10 years old. She thus urged us to set aside the sentence of life imprisonment imposed by the first appellate court and uphold the sentence of thirty (30) years imprisonment meted by the trial court.

While conceding to the complaint on non-compliance with the provision of section 210 (3) of the CPA, the subject of second ground in the substantive memorandum of appeal, Ms. Kabu argued that such irregularity did not prejudice the appellant. To bolster her submission, she referred us to **Amani Bwire Kilunga v. Republic,** Criminal Appeal No. 372 of 2019 (unreported).

In addressing the Court on the fourth ground, Ms. Kabu also conceded that there was non-compliance with the provisions of section 127(2) of the Evidence Act, [Cap. 6 R. E. 2002] (now 2019) (the Act) as

amended in 2016 as PW2's evidence was received without her promise to tell the truth and not lies. For that reason, she invited the Court to expunge PW2's evidence from the record. Changing her earlier stance, she argued that after expunging the evidence of PW2, there is no other evidence on record sufficient to prove the offence of rape against the appellant, because PW1 testified on the offence of attempted rape and PW3's evidence was only to establish that PW2 was carnally known but not the evidence to implicate the appellant to have committed the offence charged. Surprisingly, even after conceding that there is no sufficient evidence on record to prove the case against the appellant, Ms. Kabu urged us to order for retrial.

In a brief rejoinder submission, the appellant did not have much to say other than reiterating what he submitted earlier and insisted his prayer that the appeal be allowed and he be set at liberty.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we wish to start by reiterating a settled principle that, this being a second appeal, the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless there has been a misapprehension of

evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. See **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149 and **Mussa Mwaikunda v. The Republic**, [2006] TLR 387. We shall be guided by the above principle in disposing this appeal.

At first, we are enjoined to determine Ms. Kabu's submission that the fifth, sixth, eighth, ninth and tenth grounds of appeal as enumerated above are new complaints and should not be considered by this Court as they were not raised in the first appeal or determined by the High Court. She contended that the Court is precluded to entertain such new grounds unless they were pure points of law. The said issue being on a legal point, the appellant offered no counter argument. Indeed, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal. This position has been reaffirmed by the Court in numerous decisions - see, for instance, in the cases of **Abdul Athuman v. Republic** [2004] TLR 151, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 and **Yusuph Masalu @ Jiduvi v. Republic,** Criminal Appeal No. 163 of 2017 (both unreported). In **Sadick Marwa Kisase** (supra) the Court emphasized that: -

"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate court."

In this regard, this Court will not entertain the said grounds of appeal for lack of jurisdiction as per the dictates of the provisions of sections 4 (1) and 6 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] which specifically empowers this Court to deal with appeals from the High Court and subordinate courts with extended jurisdiction. As such, we will only consider the remaining grounds of appeal.

On the remaining grounds however, we wish to begin our consideration of the appeal by addressing the point of law raised in the fourth ground of appeal concerning the evidence of PW2 as raised by the appellant and supported by Ms. Kabu. It is undisputable fact that at the time of giving her evidence, PW2 was a child of ten (10) years old, thus a tender age. Section 127 (4) of the Evidence Act defines who is a child of tender age. It states as follows: -

"For the purpose of sub-section (2) and (3), the expression 'child of tender age' means a child whose apparent age is not more than fourteen years."

It is also undisputable fact that the evidence of PW2 was received on 14th September, 2016 when the provisions of section 127 (2) of the Act had already been amended vide the Written Laws (Miscellaneous Amendment) (No.2 of 2016) Act No. 4 of 2016 which came into force on 8th July, 2016. The said section provides for a procedure of taking the evidence of a child of a tender age and it provides that: -

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

In the case of **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) we lucidly expressed the import of the above section and we stated that: -

> *"To our understanding, the ...provision as amended provides for two conditions.* ***One,*** *it allows the child of tender age to give evidence without oath or affirmation.* ***Two,*** *before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies."*

In that case we went ahead and observed that the plain meaning of the provisions of sub-section (2) of section 127 of the Evidence Act is that,

a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In a situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.

In addition, in our recent decision in **Masoud Mgosi v. Republic,** Criminal Appeal No. 195 of 2018 (unreported), among other things, we considered the effect of failure by a child of tender age to promise to tell the truth and not lies before testifying in court, we stated that: -

> *"We agree with the learned State Attorney that **PW1's evidence was invalid because she did not promise to teli the truth and not lies as required by section 127 (2) of the Act.** Like we did in **Ibrahim Haule's** case (supra) we hereby expunge that evidence from the record." [Emphasis added].*

Similarly, in the case at hand, as correctly argued by Ms. Kabu, PW2's evidence was received in contravention of section 127 (2) of the Act, as prior to the recording of her evidence, she did not promise the court to tell the truth and not lies. We thus agree with Ms. Kabu that PW2's evidence has no evidential value and we hereby discount it from the record.

Having revisited the evidence on record, we as well agree with Ms. Kabu that after discounting the evidence of PW2, the best evidence in sexual offences, the remaining evidence of PW1 is insufficient to prove that the appellant committed the offence of rape, as she testified on the attempted rape alleged to have been committed on 14th March, 2016. The other evidence of PW4 and PW5 was wholly hearsay thus incapable of incriminating the appellant with the offence charged. Furthermore, the evidence of PW3 was only to establish that PW2's vagina was penetrated and not to the effect that it was the appellant who had unlawful carnal knowledge of her - see the case of **Parasidi Michael Makulla v. Republic,** Criminal Appeal No. 27 of 2008 (unreported).

In the circumstances, we are satisfied that there is no evidence on record which could have been safely relied upon by the trial court and the first appellate court to convict the appellant. It is our further view that had the first appellate court considered the issues discussed above, it would have come to the inevitable finding that it was not safe to sustain the appellant's conviction. In the event, we are constrained to uphold the fourth ground which is sufficient to dispose of the appeal in the appellant's favour, hence the need for considering the other remaining grounds of appeal does not arise.

In view of what we have demonstrated above, we find merit in the appeal and allow it. Accordingly, we quash the appellant's conviction and substitute it with an acquittal resulting in setting aside the sentences imposed on the appellant. We order that the appellant be released from custody forthwith unless he is otherwise lawfully held.

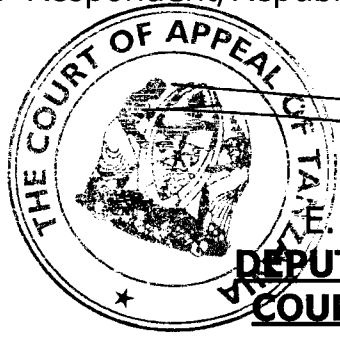
DATED at **ARUSHA** this 29th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 30th day of November, 2021 in the presence of the appellant in person and Ms. Eunice Makala, learned State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL