IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KENTE, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 463 OF 2019

MUSSA ERNEST .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu)

(Magesa, SRM Ext -Jur.)

Dated the 30th day of September, 2019

in

Criminal Appeal No. 42 of 2019

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JUDGMENT OF THE COURT

19th Sept & 27th October,2022

KENTE, J.A.:

The appellant Mussa Ernest was sentenced to thirty years imprisonment after his conviction by the Kinondoni District Court on one count of rape contrary to section 130 (1), 2(e) and 131(1) of the Penal Code, Chapter 16 of the Laws. His appeal to the High Court, to challenge both the conviction and sentence proved very dull and unrewarding, hence this appeal.

The particulars of the charged offence alleged that, on 3rd July, 2017 at Salasala area in the Kinondoni District of Dar es salaam Region, the appellant had the carnal knowledge of a girl aged seventeen years whose identity we shall hereinafter not disclose but simply refer to as either the complainant, the prosecutrix or the victim. Needless, to say, the appellant had denied the offence.

In support of its case, the prosecution called five witnesses whose evidence was to the following effect. On 1st July, 2017 at about 10:00 am, one Mashaka Ahmed Msumi (PW1) who is the complainant's father, sent her to Salasala Kunduchi area to buy vegetables. Contrary to PW1's expectation, it took the complainant an extraordinary long time of six hours to return home. When he asked her where she had spent all that time, she told him she was with her friend one Angel. Apparently, not content with what his daughter had told him, and suspecting that most probably it was a lie, PW1 wanted to verify it first. Therefore, he ordered the complainant to take him to the home of her friend Angel whose father one Henry Bambo, as it turned out, was PW1's close friend. Seeing that her father was about to prove her wrong, when he went inside to change clothes, she took flight immediately and went to hide at the home of his friend. After sometime, PW1 received

a phone call from his friend who informed him that his daughter had fled to his home and he asked him to go there to settle the matter. Unfortunately, however, PW1 could not do so immediately as he had to go to Mwananyamala to attend his sick father who was admitted to hospital.

On 3rd July, 2017 at about 6:00 pm, PW1 went to the home of his friend but he could not find him nor his (PW1's) daughter. At about 8:00 p.m, he left for home. On the following day at about 7:00 a.m, his friend called and informed him that his daughter had come back at about midnight and that in the circumstances, he could not let her in; further that he had ordered her to return to her parents. PW1 recounted how he was dismayed by his daughter's unexplained disappearance to an unknown place after she was chased away by his friend who seemed to have been equally thunder struck by her grave acts of delinquency.

According to PW1, on 5th July, 2017 the complainant made a call and informed her mother that she was living with her friend and she asked her mother to plead with him to allow her to go back to school. Moreover, PW1 told the trial court that, he told his wife to tell their daughter to go back home and when she (complainant) wanted to know if he would be there, knowing that she was certainly scared of him, he returned a negative

answer. Assured and cosied of her father's absence, the complainant went back home. After she arrived there, her sister is said to have called and informed PW1 who hurriedly went home, picked and told the complainant to take him to wherever she had been staying for all those days.

As luck would have it, this time the complainant did not refuse to cooperate and the truth then came out. As the crow flies, she led PW1 and his friend straight to an unfinished house where the appellant lived. When asked if he knew the complainant, the appellant is said not only to have nodded but he also agreed to have given her his mobile phone which she then had and to have been the custodian of her bag. According to PW1, the appellant readily went inside and took out the said bag. From there the appellant who could hardly explain under what circumstances and what had led him to live with the complainant was taken to the ten-cell leader and sometimes later, he was whisked to the Police Station at Mtongani where he was booked for rape and subsequently arraigned before the Kinondoni District Court.

Regarding the complainant, she gave evidence to the effect that, having escaped from home, she went to the home of her father's friend the said Henry Bambo. Further that, while she was still there and as Henry

Bambo was still in the process of convincing her father to allow her to go back home and later to school, on 3rd July, 2017 the appellant who was living in the neighbourhood called her. She went on narrating that, the appellant asked her why she was then alone. On being told that other children had gone to school, the appellant allegedly lured her to go to his residence. While there, they got into a long conversation about the complainant's problems as the appellant allegedly promised to assist her to solve them. Slowly the conversation metamorphosed into a caressing and fondling exercise resulting in an unconsented sexual intercourse. Throughout this time, the complainant said, the appellant had locked the door and was playing music at a high-pitched voice apparently to reduce detection risk. After sexual intercourse, he gave her food and told her to go back to Bambo's residence where she arrived at about midnight but only to be chased away as alluded to earlier. It was then, she said, when she decided to go back to the appellant's residence where she remained until the 5th July, 2017.

In the morning of that day, the appellant gave her the phone which she used to talk to her mother who pleaded with her father to allow her to go back home as stated before.

The appellant denied the charges in his solitary defence evidence.

He described the events from the 3rd July, 2017 when the complainant allegedly went to his residence requesting for a mobile phone charger. He added that, as he had no charger, he gave her his own phone which she used to communicate with her mother. That, thereafter he went to the market and on the way back home, he met the complainant who was accompanied by her father (PW1) and Mr. Bambo. Without mentioning the place where he met them, he told the trial court that, they asked him if he knew the complainant and when he returned a negative answer, they went straight into his bedroom from where they retrieved her bag. According to the appellant, at first PW1 and Bambo took him to Mtongani Police Station and on the following day, he was transferred to Kawe Police Station. While under cross-examination, he denied to know the complainant saying that he only met her on 3rd July, 2017 when she went to request for the charger. He also denied responsibility for the complainant's alleged pregnancy at that time. However, he could not offer any plausible explanation as to how the complainants' bag had found its way into his bedroom and how the complainant came into possession of his phone.

After considering the evidence from both sides, the learned trial Magistrate found the appellant guilty of the offence of rape for which he

stood charged and convicted him as stated earlier. The appellant's appeal to the High court which was subsequently transferred to the Court of the Resident Magistrate (with Extended Jurisdiction), was found to have no merit and the decision of the trial court was upheld in consequence. Following the judgment of the first appellate court, the appellant lodged a memorandum of appeal containing seven grounds of complaint which was subsequently augmented by a supplementary memorandum of appeal consisting five grounds. Merged together, the appellant's complaints boil down into the following clusters:

1. That the whole trial was marred with some procedural irregularities as to render it a nullity.
2. That the variance of the complainant's name rendered the charge defective.
3. That the evidence of the complainant who testified as PW2 to which the two courts below gave credence, was materially discordant and very unreliable.
4. That the evidence of PW1, PW3 and PW4 was equally unreliable.
5. That, whereas the prosecution's weak evidence was accorded undue weight, the appellant's evidence which was weighty

enough as to introduce some reasonable doubts in the prosecution case, was undeservedly rejected; and

6. That all in all, the appellant's guilt was not proved as to warrant his conviction.

Miss Upendo Paulo Mono who appeared along with Miss Neema Moshi both learned State Attorneys advocating for the respondent Republic was of the different view. She supported the appellant's conviction and sentence by the trial court and the subsequent dismissal of his appeal by the first appellate court.

As can be gleaned from the grounds of appeal raised by the appellant, the written submissions expounding on them and the counter oral submissions made by Miss. Mono, the main issues arising from this appeal are only two. **One,** whether it was proved beyond reasonable doubt that the victim PW2 was raped and **two,** if the answer to the first issue is in the affirmative, whether the appellant was proved to be the culprit.

By way of written submissions, the appellant contended in the first place that, the trial magistrate did not append her signature immediately after his plea of not guilty and at the end of the evidence of each witness contrary to

the mandatory provisions of section 210(1) of the Criminal Procedure Act (the CPA). He cited the decision of this Court in **Yohana Mussa Makubi and Another v. Republic,** Criminal Appeal No. 556 of 2015 (unreported) in support of the position that, the omission or failure by the trial judge or magistrate to append his signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. He submitted that, the omission vitiated the trial as to render it a nullity. The appellant faulted the first appellate court for allegedly not according the commensurate weight to this procedural irregularity and subsequently consigning his complaints into oblivion.

With regard to the victim's name, the appellant submitted that, whereas the particulars of the offence in the charge referred to her father (PW1) as Mashaka Msungi, when the victim appeared to testify before the trial court, she referred to PW1 as Mashaka Msumi and yet PW1 himself told the trial court that his name was Mashaka Ahmed Msumi. Relying on two decisions of this Court in **Masasi Mathias v. Republic** Criminal Appeal No. 274 of 2009 and **Filbert Alphonce Machalo v. Republic** Criminal appeal No. 528 of 2016 (both unreported), the appellant submitted forcefully that, the variance of the victim's name rendered the charge defective as the two

names of the victim portrayed two different persons who ought to have been treated so.

Going forward to the next ground of complaint which seeks to discredit the evidence of the victim, the appellant submitted that she was not a reliable witness. In an endeavor to demonstrate that the two courts below were wrong to rely on her evidence, the appellant contended that, prior to and during the trial, she had shown a capricious behavior. He contended that, the following factors which had the effects of shaking the credibility of PW2 existed in her evidence. **One,** that she lied to her father (PW1) with regard to the place where she had spent almost four hours when he sent her to buy vegetables. **Two,** that there were some material contradictions with regard to her evidence on the age of her pregnancy. **Three,** that whereas she claimed that the appellant was her lover, she did not know his name. Lastly, the appellant went on to discredit the complainant in an idiosyncratic style contenting that, she gave highly improbable and implausible evidence when she told the trial court that, she stayed at his residence for three consecutive days but they had sex only once a thing which, according to him, was just unbelievable. The appellant contended that, given the above- stated shortcomings in the complainant's evidence,

the testimony by PW1, PW3 and PW4 which was equally not without flaws, could not provide any corroborative evidence which he said was necessary in the circumstances of this case. Elaborating on the alleged flaws in the evidence of PW1, PW3 and PW4, the appellant sort of equated it with hearsay evidence which he said did not place him at the scene of the crime nor circumstantially connect him with the complainant's rape.

Arguing the fifth ground of complaint, the appellant contended that, in the face of his defence evidence which had introduced some doubts in the prosecution case, he was entitled to the benefit of the said doubts. However, he expressed grave misgivings at what he called "the lower court's disregard of his evidence". Relying on **Goodluck Kyando v. R.** [2006] T.L.R 362 he reminded us of our own made principle that, every witness is entitled to credence and belief of his testimony unless there are good and cogent reasons for not believing him. On the authority of **Hussein Idd and Another v R.** [1986] T.L.R. 166, the appellant also faulted the two lower courts for allegedly dealing with the prosecution evidence and giving it credit in isolation of his defence evidence. He lamented that, invariably, every aspect of his defence evidence was simply rejected by the two lower courts without assigning reasons. Commenting on the prosecution case as a whole,

the appellant maintained that his guilt was not proved to the required threshold as to warrant his conviction and sentence.

On behalf of the respondent Republic, Miss Moshi supported the judgments of the two lower courts. Submitting in respect of the first limb of the first ground of complaint, the learned State Attorney submitted, correctly so in our considered view that, failure by the trial Magistrate to append her signature and date immediately after recording the appellant's plea was not a violation of any legal requirement in terms of section 228(1) of the CPA. As to the omission to append her signature immediately after recording the evidence of every witness, Ms. Moshi submitted, once again correctly so that, so long as the learned trial magistrate had appended her signature at the end of the proceedings of each particular day, it cannot be said that the evidence of all witnesses was without authenticity.

If we may jumpstart, what the trial magistrate did, in our respectful view, was sufficient authentication and certification of the court proceedings of each day, the accuracy and correctness or which cannot be easily impeached or assailed. We must quickly observe in respect of this complaint that, by so holding we are not sailing in unchartered waters as the position we have taken is in perfect alignment with our perspicuous decision in the case of

Hando Dawido v. Republic, Criminal Appeal No. 107 of 2018 (unreported).

Regarding the third fourth and fifth grounds of appeal, Ms. Moshi did not delve into them in greater depth. She only remarked that they were purely factual grounds which were preferred in contravention of section 6 (7) of the Appellate Jurisdiction Act Chapter 141 of the Laws.

With regard to the contention by the appellant that there were some material contradictions in the evidence of PW1 and PW2, the learned State Attorney submitted in a flat rebuttal that, there were no such contradictions. She added that, even if for the sake of argument, it is accepted that such contradictions existed, going by what was held by this Court in **Selemani Makumba v. R.** [2006] T.L.R. 379, the evidence of the victim was self-sufficient to prove the offence with which the appellant stood charged.

As one would expect, on her submissions, Ms. Moshi got a leg up from Ms. Mono. While admitting the variance of the victim's name as appearing in the charge and on page 18 of the record of appeal, the learned State Attorney maintained that, indeed there was a slight error in the citation of the victim's name as appearing in the charge which however, according to

Ms. Mono, was a curable defect pursuant to section 338 (1) of the CPA. Regarding the alleged contradictions and unreliability of the evidence of PW1 and PW3, Ms. Mono invited us to also have regard to section 127 (6) of the Evidence Act which empowers a court to base a conviction on the sole evidence of a victim of a sexual offence if the court is satisfied that the said victim is telling nothing but the truth. Commenting on the complaint by the appellant that the evidence was not analyzed and that his defence evidence was not considered at all, the learned State Attorney referred us to pages 63 and 64 of the record of appeal where she said, the trial court had considered the appellant's defence but found its utterly baseless. In so far as the entire appeal by the appellant is concerned, we were not surprised that, like her learned sister, Ms. Mono followed suit and strongly urged us to dismiss it for want of merit.

In view of the fact that any criminal trial is initiated by lodging a formal charge or information in a court of law containing, among other particulars, the accused person's name, we shall first consider the complaint regarding the variance of the complainant's name as cited in the charge and as appearing on page 18 of the record. As hinted before, on the authority of the case of **Masasi Mathias and Filbert Machalo** (supra), the appellant

persuaded us to find that the difference in the citation of the complainant's name represented two different persons and that it rendered the charge defective.

We have no doubt that indeed there is a difference in the complaint's name as cited in the particulars of the charge and what she stated to be her name when she appeared before the trial court to testify as witness. We must however quickly observe that, the jurisdiction of this Court as provided under section 4(1) of the Appellate Jurisdiction Act chapter 141, is to hear and determine appeals from the High Court and subordinate courts clothed with extended jurisdiction as is now the case. We must as well be categorical, by way of a restatement that, the Court cannot entertain the grounds of appeal that were not convassed in the first appellate court. (See **Bakari Abdalla Masudi v. Republic,** Criminal Appeal No. 126 of 2017 (unreported). It is for this reasons that, but for one thing, we could have disregarded the appellant's complaint.

It is very elementary that, any material variance between the charge and the evidence is a matter of law which, if established, it renders the charge substantially defective unless the charge is amended and it occasions no injustice to the accused. (See **Zombo Rashid v. Republic,** Criminal Appeal

No. 7 of 2012 and **Anania Turiani v. Republic,** Criminal Appeal No. 195 of 2009 (both unreported), However, upon a careful examination of the record, we are satisfied like the learned State Attorney that, the wrong citation of the complainant's name in the charge had nothing to bear on the evidence led by the prosecution and therefore, it is a curable defect falling under section 388 (1) of the CPA. As can be seen from the record of appeal, the wrong citation which essentially contained not more than a misspelling of the complainant's father's name seems to have been written with a slip of a pen on the part of the draftsman of the charge. Of much importance, contrary to what was contended by the appellant, there is no iota of evidence and we can hardly glean anything from the record suggesting, albeit remotely, that in this case, the complainant could have been any other person other than PW2.

Viewed from that angle, we see nothing which could have confused the appellant from understanding that he was faced with the offence of rape of PW2 and thereby prevented him from mounting a proper defence as to cause him injustice. In the circumstances, we find this ground of complaint to have no merit and consequently dismiss it.

With regard to the testimony of PW1, PW3 and PW4 which the appellant urged us to disregard for the reasons that it was hearsay and redolent with some material contradictions, for our part, we do not find anything materially hearsay or contradictory in the testimony of the three witnesses. As it were, none of the said witnesses claimed to be an eye witness to the complainant's rape. Their respective evidence was basically circumstantial and for that reason, they cannot be faulted or discredited.

As for PW4, being an expert witness, her evidence was specifically intended to provide the trial court with the information which was outside the experience and knowledge of the trial magistrate. In other words, an expert witness is required to provide the court with a statement of his or her opinion on any matter in dispute calling for the expertise by the witness provided that they have the necessary qualification to give such an opinion. It is instructive to observe that, in view of the above stated role, it would be a serious violation and indeed a disregard of the cognitive organs which are available to the grasp of any ordinary human-kind if the court were to press an expert witness in a criminal trial to give a first-hand description or narrative of occurrence of a criminal incident, to which he was not eyewitness. In view of the conceded facts and circumstances of the present

case, we find in the end result that, there was nothing contradictory nor hearsay in the testimony of PW1, PW3 and PW4. Save for PW4's medical examination report (Exh. P) which, upon concession by the learned State Attorney, we have to expunge from the record for having been admitted in evidence in total violation of the mandatory requirements of the law, we hold that the appellant has no good cause to complain against the evidence of PW4.

What is more, it should be common sense if not a fundamental rule of law that, it is not necessary for a witness other than the complainant to prove the direct fact of rape. For if it were otherwise necessary, in many cases if not all, that proof would be unattainable. The above observation is based on the generally accepted fact that, it is very rare indeed for the accused person to be surprised or caught **infra grante delicto** in the direct act of rape. That said, the fourth cluster of the appellant's grounds of appeal crumbles and is hereby dismissed.

Turning to the third and fifth clusters of the appellant's grounds of complaint which, on the one hand they challenge the credibility of the evidence of the complainant and fault the two lower courts for allegedly according undue weight to the prosecution evidence, while, on the other

hand, taking no notice of the appellant's evidence, we wish to say the following as a foundation of our ultimate decision.

One, that given the evidence on the record, which we have subjected to a serious scrutiny, we accept without hesitation that indeed on the fateful day, the complainant who was then aged seventeen years was raped as alleged by her and subsequently confirmed by PW4; and **two,** it appears to us that, in the course of analysis of the evidence, the two courts below had inadvertently glossed over the appellant's defence.

Nevertheless, as stated before, the two courts below were satisfied that indeed, it is the appellant who had sexual intercourse with the complainant on the material day. They relied mainly on the evidence of the said prosecutrix (PW2) whom they believed to be a truthful and reliable witness. On the strength of our decision in **Selemani Makumba** (supra), the learned Senior Resident Magistrate of the first appellate court accepted the evidence of PW2 saying that, being the victim, she was the only witness from whom the direct evidence of rape could come. The learned Senior Resident Magistrate also addressed the ingredients of the offence of statutory rape of which the appellant was convicted. He noted that, at the material time the

complainant was below the age of eighteen years and therefore the question of consent was irrelevant.

As for the appellant's complaint that PW1,PW2,PW3 were not credible witnesses and that their evidence was contradictory, the learned Senior Resident Magistrate took the renown position that, it is the trial and not the appellate court which is in a better position to assess the credibility of a witness and that, an appellate court will not easily interfere with the trial court's finding on the credibility of a witness unless the evidence reveals some fundamental factors of a lowering nature to which a trial court either did not address itself or addressed itself but improperly so. (See **Pia Joseph v. R.** [1983] T.L.R. 161.

Now, assuming that the evidence of PW1, PW2, PW3 and PW4, was problematic as to have no corroborative value as alleged by the appellant, in view of the position of the law as it stands today, we are disposed to share the learned Senior Resident Magistrate's view that having satisfied himself that the complainant was a truthful witness, the appellant's conviction cannot be said to have been illegal or otherwise unfounded merely because it proceeded upon PW2's incorroborated evidence. Section 127(6) of the Evidence Act provides that:-

"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexuai offence the only independent evidence is that of a child of tender years or of a victim of the sexuai offence, the court shall, receive the evidence, and may after assessing the credibility of the evidence of the child of tender year or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victims of the sexual offence is telling nothing but the truth."

When applied to the context of the instant case, the effect of the above quoted provisions of the law is that, both the trial and the first appellate court which accepted the testimony of PW2 as true and credible were justified under section 127(6) of the Evidence Act to respectively convict the appellant and dismiss his appeal even if there was no corroborative evidence to support her testimony. It follows in our judgment that, for purposes of conviction in the circumstances of this case, at most, the evidence of PW1, PW3 and PW4 would be a surplus to the actual evidential requirements.

As for the appellant's defence version evidence which was not considered by the two lower courts, in view of the strong evidence led by the prosecution in support of its case, we have come to the firm conclusion that the prosecution had proved beyond reasonable doubt that the complainant was raped by none other than the appellant. Notably, the appellant had admitted to have met the complainant when she allegedly went to his residence to request for a phone charger. However, he denied to have been involved in sexual intercourse with her. When the fact of the meeting of the two is carefully considered together with the fact that during cross examination, the appellant did not venture to controvert the complainant in her extremely damning evidence relating to what she saw and directly experienced when he lured her to go to his residence, the inevitable conclusion is that it is himself who raped PW2.

Having expressed our satisfaction with the credibility of PW2's evidence, we are left with not even an iota of doubt that the offence charged was proved to the hilt. We also take into account the fact that no reason has been advanced to support the appellant's ill-founded claim that the case against him was fabricated. All in all, we are satisfied that the first appellate

court after considering the evidence on the record, together with the relevant law, had arrived at the correct decision.

All we would say is that, it is upon the above reasons that, we find no merit in the appeal and dismiss it in its entirety.

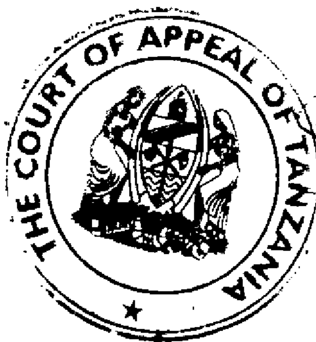
DATED at **DAR ES SALAAM** this 19th day of October, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P.M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of October, 2022 in the presence of Appellant in person, and in the presence of Ms. Kija Elias, State Attorney for the Respondent is hereby certified as a true copy of the original.



S. J. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL