

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 44 OF 2019

SADICK JAPHARY @ MASUNZU.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Utamwa J.)

dated the 29th day of October, 2018

in

DC Criminal Appeal No. 30 of 2018

.....

JUDGMENT OF THE COURT

31st October & 07th November 2022

GALEBA, J.A.:

This appeal by Sadick Japhary @ Masunzu, the appellant, has origins from a charge that was brought against him before the District Court of Tabora in Criminal Case No. 49 of 2017. In that matter, he was arraigned on a single count of incest by male, contrary to section 158 (1) (a) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). According to the prosecution, on diverse dates in the month of January 2017, at Shuleni Street in Kiloleli Ward within Tabora Municipality in Tabora Region, while at his home, the appellant had sexual intercourse with his own biological daughter aged sixteen. For

purposes of concealing the appellant's daughter's identity in a quest to protect her dignity, we will refer to her, just as the victim.

As the appellant denied to have committed the offence, the case was tried and he was ultimately found guilty and was accordingly, convicted of committing the offence as charged. Consequent to the conviction, the District Court sentenced him to four (4) years imprisonment, but that decision aggrieved the Director of Public Prosecutions (the DPP), particularly the sentence that was imposed upon the appellant. Thus, the DPP lodged DC Criminal Appeal No. 30 of 2018, in which he raised a single ground of appeal, namely:

"That the trial Magistrate erred in law by illegally sentencing the Respondent to four years in prison."

The appeal was heard and at the end, the High Court allowed the sole ground of appeal. However, as the appeal rested on that ground only, the entire appeal was therefore allowed on that basis. Consequent to allowing the appeal, the High Court enhanced the sentence of four (4) years that had been imposed by the District Court, to thirty (30) years imprisonment, the minimum punishment provided under section 158 (1) (a) of the Penal Code. It is this decision of the High Court allowing the DPP's appeal, that aggrieved the appellant, who, in order to

express his dissatisfaction, lodged this appeal raising three grounds of appeal as follows:

- "1. That, the learned Judge of the High Court totally erred on point of Law to isolate and deal only with the grounds of appeal by the Republic (appellant) without evaluating the whole evidence on record, hence reached to the wrong decision like this.*
- 2. That, the learned Judge of the High Court wrongly convicted and sentenced him without first perusing the charge sheet, preliminary hearing and the evidence tendered before the trial court which did not specify the exact date and month when the offence was committed.*
- 3. That, the learned judge totally misled himself in his judgment for failure to take into consideration that the prosecution failed to discharge their noble duties of proving the charge against the accused person (Respondent) beyond all reasonable doubt because no D.N.A. test was tendered before the trial court to authenticate if that the child or the pregnancy was the appellant's. My Lord, judges it is trite law that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person as provided in provisions of Section*

110 (2) and 112 of the Evidence Act [Cap. 6 R.E. 2002].”

At the hearing of this appeal, the appellant appeared in person without legal representation, whereas the respondent Republic had the services of Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Alice Thomas, learned State Attorney. The appellant prayed that we adopt his grounds of appeal, determine them in his favour, and allow the appeal. He also preferred that the learned State Attorneys, reply to his grounds and if any need arose, he would rejoin.

However, before we could adopt the appellant's grounds of appeal, Ms. Silayo, rose to inform the Court that, the appellant's grounds of appeal cannot be entertained by this Court. She contended that the Court can only entertain and determine matters which have been made a subject of contention and decided upon by the High Court. She submitted that all matters raised in this appeal were supposed to be raised and decided first by the High Court, which is not the case. The learned Senior State Attorney argued that, when the District Court passed the judgment, it was only the DPP that appealed, but the appellant did not lodge any appeal to the High Court, so he cannot raise any appeal before this Court, unless the grounds raised issues of law. To bolster her argument, Ms. Silayo, referred us to this Court's decision in

Godfrey Wilson v. R, Criminal Appeal No. 168 of 2018 (unreported), where this Court observed that, only matters of law may be entertained in this Court without first being discussed in the High Court.

In rejoinder, the appellant insisted that we scrutinize his grounds as presented, and allow the appeal. Alternatively, he prayed that this Court be pleased, at least, to reduce the severity of the punishment that was enhanced by the High Court, in case we cannot set aside the whole sentence of thirty (30) years.

We have thoroughly and carefully reviewed the record of appeal and have paid due attention to submissions of both parties. In the context of the arguments by parties in this appeal, the issue for our determination is whether this Court may entertain grounds of appeal challenging the decision of the High Court on factual matters that did not come before it for determination.

In this matter, it is not disputed, and the appellant conceded that after the decision of the District Court in Criminal Case No. 49 of 2017, it was the DPP only who appealed to the High Court on a single ground of inadequacy of the sentence. We have exhaustively reviewed the decision of the High Court, and we are satisfied that the only point that the High Court had mandate to discuss and did discuss is the magnitude of the sentence, which was presented by the DPP.

It is appropriate at this point, to start our deliberation by revisiting briefly the general powers of this Court on appeal as provided for by law, starting with the Constitution of the United Republic of Tanzania 1977, [Cap 2 R.E. 2002] (the Constitution). Article 117 (3) of the Constitution provides that:

"(3) The functions of the Court of Appeal shall be to hear and determine every appeal brought before it arising from the judgment or other decision of the High Court or of a magistrate with extended jurisdiction."

The above article is mirrored and reflected by the provisions of section 4 (1) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] (the AJA), which is to the effect that:

"4. (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction."

The jurisdiction of this Court, in view of the above quoted provisions of the Constitution and of the AJA is that, this Court, can only entertain an appeal on a complaint which must have been heard and determined by the High Court or by a Resident Magistrate with extended jurisdiction. Of course, when hearing appeals, this Court has revisional jurisdiction under section 4 (2) of the AJA, to hear complaints based on

points of law even if such matters were not presented for determination before the High Court or before a Resident Magistrate with extended jurisdiction.

All in all, the bottom line is that, this Court does not have jurisdiction to entertain grievances of parties, in the form of appeal, following their dissatisfaction of the decisions of the District Court or of the courts of Resident Magistrates without such matters having been presented and determined first by the High Court.

It is not the first time that this Court is confronted with a scenario, where the appellants have brought grievances against the decision of subordinate courts direct to the Court without first presenting them to the High Court for determination. In the case of **Jackson Zebedayo Wambura and Another v. R**, Criminal Appeal No. 419 of 2018 (unreported), the appellants did not appeal to challenge findings of the Court of Resident Magistrate at Kisumu in respect of gang rape and unnatural offence and raised them with this Court, this is what we stated:

"..... basically, the Court entertains appeals from the High Court. If a matter originating from a subordinate court is not appealed against before the High Court, it cannot be brought directly to the Court on appeal unless it is from a subordinate court

with extended jurisdiction. The jurisdiction of the Court is provided under section 4 (1) of the Appellate Jurisdiction Act, Cap 141 in the following terms: 'The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction.' In the light of the above provision and as earlier on intimated, the appellants did not appeal against gang rape and unnatural offence in the High Court. Therefore, their appeal before the Court in respect of those offences is misplaced."

Further in **Godfrey Wilson** (supra), this Court faced with a more or less a similar matter, stated as follows:

"...as was stated in Galus Kitaya and Hassan Bundala's case (supra), we think that those grounds being new grounds for having not been raised and decided by the first appellate court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts, and at any rate, we cannot be in a position to see where the first appellate court went wrong or right. Hence, we refrain ourselves from considering them."

Other cases on the same aspect include; **Galus Kitaya v. R**, Criminal Appeal No. 196 of 2015; **Athumani Rashidi v. R**, Criminal

Appeal No. 26 of 2016 and; **Abeid Mponzi v. R**, Criminal Appeal No. 476 of 2016, (all unreported).

A critical examination of the disputed grounds of appeal in the present matter, reveals that the points raised in the grounds of appeal are pure matters of fact because; **one**, the complaint in the first ground of appeal is that, the High Court erred in law because it only dealt with the respondent's ground of appeal but failed to evaluate the whole evidence on record. **Two**, the second ground of appeal is a complaint that the High Court did not review the record of preliminary hearing and the evidence on record, because had the court done that, it would have discovered that the prosecution did not prove a specific date on which the offence was committed as per the charge sheet. **Three**, the complaint in the third ground of appeal is that the prosecution at the trial did not prove the case against the appellant beyond reasonable doubt. We are satisfied therefore that all the three (3) grounds of appeal, none raises any question of law. Thus, the complaints were supposed to be raised before the High Court under section 359 (1) of the CPA.

In the circumstances, we agree with Ms. Silayo, that this Court has no jurisdiction to entertain the three (3) grounds raised in this appeal. Accordingly, we disregard the grounds and refrain from addressing any

of them. However, as there are no other grounds of appeal properly filed and meriting determination of this Court, this appeal is incompetent, and we accordingly strike it out.

Finally, we wish to observe that if the appellant has any grievances or misgivings with the decision of the District Court, subject to the law on timelines for lodging criminal appeals to the High Court, he can pursue such grievances in the High Court.

DATED at **TABORA**, this 5th day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 07th day of November, 2022 in the presence of Appellant in person and Ms Veronica Mosha, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "E. G. Mrangu", is written over a set of horizontal lines.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL