IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CORAM: WAMBALI, J.A., LEVIRA, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 504 OF 2020

FIRMON MLOWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kente, J.)

Dated the 3rd day of July, 2020

in

DC Criminal Appeal No. 74 of 2018

JUDGMENT OF THE COURT

31st October & 9th November, 2022

WAMBALI, J.A.:

The Court of Resident Magistrate of Njombe at Njombe (the trial court) convicted the appellant, Firmon Mlowe of the offence of rape contrary to the provisions of section 130 (1) (2) (b) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2022] (the Penal Code), and subsequently sentenced him to thirty years imprisonment in terms of section 131 (1) of the same Act. It also imposed a fine of TZS. 100,000.00; payment of TZS. 300,000.00 as compensation to the victim; and ordered that he had to suffer three strokes of the cane. The conviction and sentence

followed the allegation in the charge to the effect that, the appellant had carnal knowledge of one Ferdinanda Mwajombe without her consent on 15th January, 2018 along Kambarage Street in the District and Region of Njombe.

It is on record that five prosecution witnesses testified at the trial and one of them tendered the medical examination report of the victim contained in the PF3 to support the case against the appellant. The witnesses included, Bosco Mlowe (PW1), Mary Mwajombe (PW2), Ferdinanda Mwajombe (PW3), Kilian Mligo (PW4) and Barnabas Baraka Mgonja (PW5).

The basic evidence which allegedly connected the appellant to the commission of the offence is to the effect that, on 15th January, 2018 in the morning, while cooking, PW3 was invaded by the appellant who squeezed her neck and drugged her to the utensil's store. While in the said store, he undressed his trouser and did the same to PW3's skirt and penetrated his penis into her vagina without her consent. PW3 raised an alarm and as a result, the appellant fled after he had accomplished his unlawful act. It was further the prosecution evidence that PW3 reported the incident to her brother-in-law (PW1) who subsequently proceeded to trace the appellant and managed to arrest him at Zengelendeti. PW1

sent the appellant to the scene of crime and later, accompanied by PW4 they surrendered him to the police station. PW3 was given a PF3 at the Police Station and went to Kibena Hospital for medical examination. She was examined by PW4 who noted discharge from her vagina which looked like sperms. PW5 filled the PF3 which was tendered and admitted during the trial as exhibit P1.

In his defence, the appellant denied the accusation levelled against him by the prosecution. He claimed that on the date of the incident, that is, 15th January, 2018, he was at Nzengelendeti resting where he was suddenly approached by PW1 who requested to be accompanied to his house for conversation. He thus accompanied PW1 to his house together with two other women and when they reached there, he heard him telling the two women to inspect PW3 to ascertain if she was raped. He claimed further that, to his surprise, he was taken to the Police Station on instruction of PW4 on allegation that he had raped PW3. He maintained that he could not have raped PW3 as he was suffering from hernia which necessitated him being operated, and thus his health condition exonerated him from the allegation.

As it were, at the end of the trial, the trial court made a finding that the prosecution side had proved the case against the appellant

beyond reasonable doubt. Hence, it convicted and sentenced him as intimated above. His effort to convince the High Court (the first appellate court) to upset the trial court's finding failed, hence this second appeal.

He has therefore, approached the Court through the instant appeal to challenge the decision of the first appellate court which upheld the finding of the trial court. The memorandum of appeal lodged by the appellant before the Court earlier on contains seven grounds of appeal, which we take the liberty to paraphrase as follows:

1. *That, the High Court wrongly relied on the testimony of PW3 to ground his conviction while it was not corroborated by other independent evidence.*
2. *That, the trial and first appellate courts erred to rely on the doctor's unreliable and unconclusive recommendation in respect of his finding that upon examining PW3, he saw some discharge which looked like sperms.*
3. *That, there was gross violation on the procedure of receiving the expert evidence of the witness who examined the victim because he was not called to testify at the trial to defend his findings.*
4. *That, the first appellate judge misdirected himself for upholding the trial court's decision because he failed to draw adverse inference on the credibility of the victim who, being an adult,*

failed to explain why she did not raise an alarm after the appellant allegedly had unconsented carnal knowledge of her.

5. *That, the first appellate judge wrongly disregarded the appellant's defence that all the prosecution witnesses were not credible because they were members of the same family.*
6. *That, the first appellate judge erred in law for his failure to draw adverse inference for the lack of proof by PW1 on the alleged stolen phone since his statement on whether he bought it or was given was contradictory.*
7. *That, the prosecution failed to prove the case beyond reasonable doubt.*

Before we commenced the determination of the appellant's grounds of appeal, having closely perused the record of appeal, we had a concern on whether the appeal before the High Court was duly determined. It is apparent in the record that, before the first appellant court, the appellant lodged a petition of appeal that comprised of twelve (12) grounds, most of which contain complaints similar to those in the memorandum of appeal placed before this Court. We further noted that during the hearing of the appeal before the first appellate court, the appellant adopted all the grounds of appeal and after expounding some of them, he left it for the determination by the first appellate court. On the other side, the learned State Attorney who represented the respondent Republic substantially submitted on all the grounds of appeal

by combining some of them and others were argued separately. In short, the appellant's appeal was strongly contested by the respondent Republic. The appellant also made a considerable rejoinder submission.

More importantly, a thorough scrutiny of the brief judgment of the first appellate court indicates that not all the grounds of appeal were considered and determined as required by law. It is plain that only the first, tenth and eleventh grounds of appeal were considered by the first appellate judge who in the end concluded that the appeal had no merit. Indeed, there is no indication in the impugned judgment that the said grounds of appeal were compressed into some few grounds or separately as submitted by the respondent's counsel during the hearing of the appeal. Essentially, consideration and determination by the first appellate court was mainly made on the credibility and reliability of the evidence of the victim and the defence of the appellant with regard to his inability to commit the offence because of his ill health.

In the circumstances, we requested parties to comment on whether considering the impugned judgment, this Court would be in a better position to determine the complaints in this appeal which were not determined by the first appellate court.

Responding, the appellant, who appeared in person, without legal representation, submitted that it was due to the failure of the first

appellate court to determine his complaints in the petition of appeal which prompted him to bring the same before this Court.

He argued that, despite being a lay person in law, he was concerned that the first appellate court did not resolve most of his complaints placed before it through the petition of appeal. He thus, urged this Court to determine the appeal by considering those circumstances. However, upon prompting, he left the determination of the consequences of the omission by the first appellate court to the Court.

For his part, Mr. Mwakalinga supported the appellant's submission. He submitted that according to the record of appeal, it is apparent in the judgment of the first appellate court that, most of the factual and legal issues that were raised in the petition of appeal by the appellant were not determined as required by law. In the circumstances, he argued that the impugned judgment is not sustainable in the eyes of the law and deserves to be quashed and set aside by the Court with direction for the appeal to be reheard on merit by considering the grounds in the petition of appeal in relation to the evidence on record. The appellant had no rejoinder submission after the response by Mr. Mwakalinga.

We are aware of the settled position that the first appellate court is not bound and expected to answer the points for determination or

issues as framed by the trial court in Criminal and Civil cases respectively. Indeed, it is not expected to deal with the grounds seriatim as listed in the petition of appeal. It may also if convenient, address the grounds of appeal generally or address the decisive ones only or discuss each ground separately.

Nonetheless, the trial court has the duty and is bound to resolve the complaints contained in the raised grounds of appeal. For this stance, see for instance, the decisions of the Court in **Malmo Montage Konsult AB Tanzania Branch v. Magreth Gama**, Civil Appeal No. 86 of 2001, **Nyakwama s/o Ondare @ Okware v. The Republic**, Criminal Appeal No. 507 of 2019 and **Mwajuma Bakari (Administratix of the Estate of the late Bakari Mohamed) v. Julita Semgeni and Another**, Civil Appeal No. 71 of 2022 (all unreported), among others.

We must however emphasize that, even where the first appellate court decides to address the grounds separately or generally or the decisive one only, it must specifically indicate so in the judgment.

Unfortunately, this is not the position in the case at hand. It is noteworthy that, though the grounds in the petition of appeal raised several factual and legal issues which were substantially canvassed by the parties during the hearing of the appeal as intimated above, there is

no indication in the record that the substance of the complaints of the appellant on those grounds were fully resolved by the first appellate court. On the contrary, as stated above, the first appellate court dealt with three grounds and concluded the matter without stating anything in respect of the parties' submissions on other grounds of appeal.

It is always presumed that complaints of findings of facts by the trial court are supposed to be resolved by the first appellate court before it records the concurrent findings of facts or otherwise with the trial court as the case may be. It is for this reason that this Court, being the second appellate court, intervenes to resolve the complaints on the concurrent findings of facts by the two courts below where there is misapprehension of the evidence and the law.

In this regard, in **Michael Elias v. The Republic,** Criminal Appeal No. 243 of 2009 (unreported), the Court stated as follows:

> *"On a second appeal, we are supposed to deal with questions of law. But this approach rests on the premise that the findings of facts are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction, this court must, in the interests of justice interfere."*

Therefore, the second appellate court is not entitled to interfere with the findings of the first appellate court merely because its judgment is not elaborate as that of the trial court or because some reasons given by the trial court had not been expressly reversed by the first appellate court.

We are equally alive to the settled position that where the first appellate court fails to re-appraise the evidence, since the first appeal is in effect a re-hearing of the case, this Court may step into its shoes and evaluate the evidence on record or remit the case back to the first appellate court for rehearing. Particularly, in **Hassan Mzee Mfaume v. The Republic** [1981] T.L.R. 167 the Court held as follows among others:

> *"(ii) A judge on first appeal should re-appraise the evidence because an appeal is in effect a rehearing of the case;*
>
> *(iii) Where the first appellate court fails to re-evaluate the evidence and consider material issues involved in a subsequent appeal, the court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*

In the case at hand, having closely examined the grounds of appeal in the petition, the submissions of the parties and the judgment

of the first appellate court, we are settled that the issue is not only on the failure to re-evaluate the evidence on record. On the contrary, it is also on the issue of the first appellate court's failure to resolve the questions of facts and law which were raised by the appellant in the petition of appeal and contested by the respondent Republic. It is apparent in the record of appeal that the first appellate court failed to consider adequately the submissions of the parties for and against the grounds of appeal placed before it for determination. In this regard, we are of the view that as the first appellate court had allowed parties to submit on all the grounds of appeal, it was duty bound to consider and determine them as required by law. This is more so because there is no indication in its judgment that it combined those grounds into the decisive ones conclusively as required by law.

We must emphasize that ordinarily, save where there are misapprehension of the evidence on record, the first appellate court is the final court of facts. Therefore, a party pursuing an appeal before it is entitled to a full, fair and independent consideration of the evidence at the appellate stage against the findings of the trial court. Anything less than this is unjust to the respective party.

We have carefully perused the materials in the record of appeal in relation to the grounds of appeal in the petition placed before the first

appellate court, the impugned judgment, and heard the parties. Indeed, considering the failure by the first appellate judge to set out the reasons for not conclusively determining the substantial part of the grounds of appeal in the petition in relation to the submissions of the parties, we are settled that the impugned judgment is not sustainable, we find force in the parties concurrent submissions on the complaint that the first appellate court failed to resolve the substance of the appellant's complaints as required by law. It is no wonder that the said failure compelled the appellant to submit the memorandum of appeal containing some similar complaints for determination by the Court.

At this juncture, we find it pertinent and indeed persuaded by the following observation of the Indian Supreme Court in the case of **Santosh Hazari v. Puru-Sholtom Tiwari** (Deceased) by L. Rs. (2001) 3 SCC 179, at pages 188 – 189 on the scope and duties of first appellate court in determining the first appeal:

> *"... the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties unless restricted by law, the whole case is therein open for rehearing both on questions of facts and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind*

and record supported by reasons, on all issues arising along with the contention's put forth; and pressed by the parties for decision of the appellate court ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court ... and then assign its own reason's for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it ..."

The above observation was also followed in **Madhukar and Others v. Sangram and Others** (2001) 4 SCC 756 by the Supreme Court of India where it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all issues and the evidence led by the parties before recording the findings. (See also **H. K. N. Swami v. Irshad Basith** (2005) 10 SCC 243 at page 244 in which similar view was expressed).

Moreover, in **Union of India v. K. V. Lakshman and Others,** AIR 2016 SC 3139, the Supreme Court of India held that:

"... The jurisdiction of the first appellate court while hearing the first appeal is very wide like that of the trial court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first

appellate court to appreciate the entire evidence and may come to conclusion different from that of the trial court."

From the foregoing position and on careful going through the impugned judgment, with profound respect; we are of the considered view that the High Court failed to discharge the obligation placed on it as the first appellate court. In our view, the judgment which briefly disposed of the whole appeal without considering the substantial part of the appellant's complaints is, with respect, unsatisfactory and falls short of considerations which are expected from the first appellate court. It is plain that the first appellate court did not deal with all the complaints contained in the petition of appeal in relation to the evidence led by the parties, the applicable law and the contending submissions before it came to the concurrent findings with the trial court.

We are, therefore, of the settled view that the failure by the first appellate court is fatal and cannot mandate us to step into its shoes to determine the appeal at hand. Basically, this Court deals with appeals whose decisions have been conclusively made by the High Court or subordinate courts with extended jurisdiction in accordance with the law.

In essence, the impugned judgment cannot be countenanced and sustained, and therefore, without going into the merits of the appeal at hand, the Court has no option, but to quash the first appellate court's proceedings and set aside the judgment.

Consequently, we order that the record in respect of Criminal Appeal No. 74 of 2018 be placed before the High Court for its fresh expedited disposal before another judge.

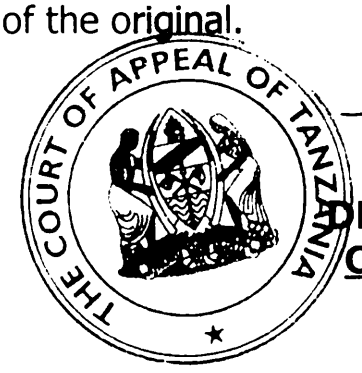
DATED at **IRINGA** this 8th day of November, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 9th day of November, 2022 in the presence of the appellant in person and Ms. Veneranda Masai, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL