IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL No. 101 OF 2019

JAMES BEDA.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Mashauri, J.)

dated the 14th day of June, 2019

in

DC Criminal Appeal No. 144 of 2018

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JUDGMENT OF THE COURT

18th & 25th February, 2022

KIHWELO, J.A.:

What precipitated this appeal is the arraignment of James Beda, the appellant herein, before the District Court of Mpanda at Mpanda in Criminal Case No. 40 of 2018 in which he was indicted for trial with two counts; grave sexual assault contrary to the provisions of section 137C (1) (a) of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code) and unnatural offence contrary to the provisions of section 154 (1) (a) of the Penal Code. It was the case for the prosecution that, on 21.03.2018 at Kilimahewa area within the District of Mpanda in Katavi Region, the appellant, for sexual

gratification inserted a ripe peeled banana in the vagina of one Grace Thobias (the victim or PW1). In addition to that, the appellant did have carnal knowledge of the victim against the order of nature. The appellant maintained his innocence when the charge was put to him.

In an attempt to establish its case, the respondent lined up six prosecution's witnesses to testify namely; Grace Thobias (PW1), H.5765 DC Godwin (PW2), Chrispine Andrew (PW3), Magreth Festo Mahembe (PW4), Mohamed Kabina (PW5) and H. 311 DC Emmanuel (PW6). The evidence of the prosecution witnesses was supplemented by four documentary exhibits. On his part in defence, the appellant relied on his sworn testimony and called one witness Ally Iddy (DW2) to beef up his defence.

The brief facts of the case leading to the arraignment of the appellant for the charge he is contesting, can be easily gleaned mainly from the testimony of prosecution's witnesses and goes as follows: The appellant and the victim were husband and wife who got married in 2013 through a traditional ceremony and are blessed with two issues. It was alleged by the prosecution that on 21.03.2018 the appellant came back home at night with a bunch of bananas and at around 01:00am the appellant started harassing and abusing the victim. At first the appellant asked for the victim's voters

registration card which he lit fire on it before going ahead with the abuse. He then pushed the victim on the coach and took a rope from his pocket and tied the victim's hands. While the victim was in a state of shock not knowing what to do, the appellant went to the bedroom and came out with a machete which he then placed on the table and threatened the victim that, if she dared make any attempt to scream, he was going to kill her. The appellant then peeled two bananas and ate them and as the victim was looking at him, the appellant asked whether she wanted to eat the banana as well, and went ahead to peel one banana which he inserted into the victim's private parts. The victim who felt severe pain did not scream fearing for her life but was crying silently. The appellant then decided to undressed himself, beat the victim and finally he inserted his penis into the anal part of the victim. The victim felt severe pain but the appellant could not stop waging his dark desires until when he had quenched his thirsty. He then took out the banana pieces from the victim's private parts and forced her to eat but the victim adamantly refused to those demands following which the appellant threw the banana pieces onto the victim's face. After that he untied the victim and went to the bedroom where he locked himself inside leaving the victim at the sitting room.

In the following morning the appellant locked the victim inside and left away which forced the victim who was peeping from the inside to ask for help from a passerby. The victim later in a day went to the police to report the incidence and she was given a PF3 which she took to the hospital and PW5, upon medically examining the victim dully filled the PF3. The victim reported the incidence to her aunt (PW4) who examined her anal part and witnessed fresh bruises. The appellant was later arrested and his cautioned statement was taken by PW2 while PW6 conducted the search of the victim's house and recovered a machete which was used to threaten the victim and the search of the appellant's house was witnessed by PW1 and PW3. Consequently, the appellant was arraigned in court as hinted above.

The learned trial Resident Magistrate after considering the evidence placed before him, was impressed by the prosecution and found that the case against the appellant in respect of the second count was proved to the hilt. The appellant, was therefore convicted as charged and accordingly he was sentenced to the mandatory term of thirty years imprisonment. His attempt to challenge the finding and sentence of the trial court at first proved futile as the High Court (Mrango, J.) in Criminal Appeal No. 88 of 2018, invoking its revisional powers, nullified the judgment, quashed the conviction and set aside the sentence meted on the appellant but the successor Magistrate

similarly, convicted the appellant and sentenced him to a mandatory term of thirty years which was upheld by the High Court (Mashauri, J.). Disgruntled with the decision of the first appellate court, he has come to this Court on a second appeal.

This appeal was predicated on self-crafted four-point memorandum of appeal lodged on 21st August, 2019. Furthermore, on 18th February, 2022 the appellant lodged in Court a self-crafted supplementary memorandum of appeal containing five points of grievance.

On our part, we have found that the grounds of appeal raise the following six paraphrased points of grievance: **One**, that the medical doctor who examined the victim was not professionally qualified. **Two**, that the exhibits were irregularly admitted in evidence. **Three**, that the prosecution failed to call the justice of peace to testify or tender the extra judicial statement to support the cautioned statement. **Four**, that the first appellate court did not consider the defence case. **Five**, that the evidence of PW1 and PW2 were recorded contrary to the requirement of section 210 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002, now R.E. 2019] (CPA) and **six**, that the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal before us on 18th February, 2022, the appellant appeared in person, and had no legal representation. Upon being invited to address us on the grounds of appeal, he implored us to adopt the grounds of appeal as well as the supplementary memorandum of appeal and urged us to consider them in determining the appeal. He also opted to let the respondent reply to his grounds of appeal, while reserving his right of rejoinder, if need would arise.

On the adversary side, the respondent was represented by Ms. Irene Mwabeza, learned State Attorney who gallantly resisted the appeal.

On her part, before responding to the grounds of appeal raised by the appellant, Ms. Mwabeza, contended that from the nine grounds of appeal which have been raised by the appellant, some grounds did not feature in the appeal before the first appellate court, that is the second ground and partly the third ground in the substantive memorandum of appeal. Similarly, ground two and three of the supplementary memorandum of appeal were not raised at the first appellate court. Ms. Mwabeza, however, was quick to argue that ground two in the substantive memorandum of appeal and ground four in the supplementary memorandum of appeal can be entertained by this Court because they raise points of law. As for the rest of the grounds which

were not raised and determined by the first appellate court, Mr. Mwabeza, argued that this Court has no jurisdiction to determine them. For this proposition, she referred us to page 7 of the typed decision in **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported. She implored us to disregard these grounds of appeal and proceed to consider the merits of the rest of the grounds.

Ms. Mwabeza, prefaced her reply by starting with ground two in the substantive memorandum together with ground four in the supplementary memorandum which were argued conjointly. In these two grounds, essentially, the appellant is complaining that the first appellate court erred in dismissing the appellant's appeal while exhibits were irregularly admitted by the trial court. Ms. Mwabeza, admittedly conceded that all exhibits were not properly received and admitted in evidence. Illustrating, she referred us to page 13 of the record of appeal where exhibit P.1, the cautioned statement of the appellant which was produced in evidence by PW2 was not read in court upon admission contrary to the requirement of the law. In further elaboration, she referred us to page 22 of the record of appeal where the PF3 was not admitted in evidence despite the fact that PW5 prayed to tender it as an exhibit. Similarly, Ms. Mwabeza, referred us to page 24 of the record of appeal where PW6 prayed to tender the certificate of seizure and the

appellant had no objection but the court instead admitted a machete and marked it exhibit P2 and at the same page the certificate of seizure was admitted and marked exhibit P3 without it being introduced and the appellant was not given an opportunity to object to it. Furthermore, Ms. Mwabeza, referred us to page 25 where PW6 prayed to tender the chain of custody but in the contrary the court admitted the certificate of seizure and marked it as exhibit P4 and the same was not read in court. She rounded up her submission by arguing that all exhibits were not read in court and failure to read exhibits is contrary to the rules of fair trial. To bolster her submission, she cited page 9 of the typed decision in **Edgar Kayumba v. Director of Public Prosecutions**, Criminal Appeal No. 498 of 2017 (unreported) and prayed that we expunge all exhibits from the record.

In relation to the first ground of the substantive memorandum, Ms. Mwabeza, was fairly brief and argued that, this complaint is not meritorious in that as argued before the PF3 which was filled by PW5 was not admitted in evidence. However, she argued that, a clinical officer is a qualified medical practitioner authorized to conduct medical examination. To facilitate an appreciation to her proposition she referred us to our earlier decision in **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016 (unreported).

In that regard, the learned State Attorney, urged us to dismiss this ground of appeal for want of merit.

Responding to ground four of the substantive memorandum Ms. Mwabeza, was very brief and contended that the admissibility of the cautioned statement does not depend upon the production of the extra judicial statement or testimony of the justice of peace as the appellant seeks this Court to believe. She submitted further that, in any case there is no particular number of witnesses required to prove a particular fact. Ms. Mwabeza, further argued in response to the complaint that the defence case was not considered, that the trial court sufficiently and adequately addressed the defence case. Illustrating further, she referred us to page 11 of the typed judgment which was not included in the record of appeal. Similarly, Ms. Mabweza, referred us to page 90 of the record of appeal and argued that the first appellate court sufficiently considered the appellant's defence and found that there was no merit in it. In that regard, the learned State Attorney, urged us to dismiss this ground of appeal for want of merit.

The learned State Attorney in respect of ground five of the supplementary memorandum, in which the appellant complained that the evidence of the victim (PW1) and PW2 was taken contrary to the requirement

of section 210 (1) of the CPA argued that, this ground has no merit. Illustrating, she contended that the evidence of PW1 and PW2 is obtained from page 9 to 15 of the record of appeal. In her considered opinion the learned State Attorney submitted that the trial court complied to the requirement of section 210 (1) of the CPA. Specifically, she referred us to page 12 where upon finishing taking the evidence of PW1 the trial court indicated that section 210 (1) of the CPA was complied with and then the trial magistrate signed and dated 09.04.2018. She further referred us to page 15 of the record of appeal where the trial magistrate upon finishing taking the evidence of PW2 indicated that section 210 (1) of the CPA was complied with. She urged us to dismiss this ground of appeal.

The learned State Attorney in reply to ground four of the substantive memorandum and ground one of the supplementary memorandum which faulted the first appellate court for not dismissing the appeal while the prosecution did not prove the case beyond reasonable doubt. She argued that, the appellant was charged with two counts and in order to prove the charge, the prosecution produced six witnesses and a number of documentary and physical exhibits which though they were improperly admitted in evidence.

Upon being prompted by the Court on whether it was proper for the first appellate court to act *Suo Motto* by convicting the appellant and sentencing him for the first count for which he was acquitted by the trial court, Ms. Mwabeza, contended that the first appellate court was right in terms of section 373 (4) of the CPA but admittedly argued that, that provision is not explicit as to the procedure upon which the appellate court has to adopt and implored us to give directions on that aspect.

In further elaborating the argument that the prosecution discharged its burden, she contended that the prosecution proved all the ingredients of the two offences. Illustrating, she referred us to page 10 of the record of appeal where PW1 expressed in minute detail how the appellant is alleged to have committed the heinous crime, and according to her the evidence of PW1 proved the prosecution's case beyond reasonable doubt in terms of section 127 (6) of the Tanzania Evidence Act, [Cap 6 R.E. 2019] (EA). Ms. Mwabeza, further argued that the testimony of PW1, PW4 and PW5 was consistent as to what the appellant did to PW1. She rounded up by arguing that the prosecution proved the case beyond reasonable doubt and therefore the appeal is devoid of merit and it should be dismissed.

In rejoinder, the appellant being a layperson and unrepresented did not have much to say. However, he spiritedly denied the accusations and argued that the entire case against him was fabricated and that PW1 framed him so that she could be with her new lover after the matrimonial relationship between the appellant and PW1 was in turmoil and they could not stay together any longer as PW1 wanted to separate. He went on to contend that PW1 was not a truthful witness and that is why in her testimony she did not disclose at all the matrimonial problems the two had. In illustrating further that PW1 framed him, the appellant argued that PW1 did not report the matter to PW3 who was the justice of peace and instead went straight to the police and even then, the matter was reported to the police in the afternoon while the incidence occurred at night. The appellant finally prayed that his appeal should succeed and he should be left free.

It is now our precious duty to determine the appeal by considering the grounds of complaints raised by the appellant as against the submission by the respondent. We shall start by addressing the argument by the learned State Attorney that ground two and three of the substantive grounds and ground four of the supplementary grounds are new grounds not raised or determined by the first appellate court. Admittedly, going through the record of appeal, the said grounds were neither raised nor determined by the first

appellate court as rightly argued by the learned State Attorney. This Court has time and again discussed at considerable length this issue which is now settled and clear. See, for example, **Emmanuel Josephat v. Republic**, Criminal Appeal No. 323 of 2016 (unreported) in which this Court stated that where grounds of appeal are raised in the Court for the first time, it will not entertain and determine them for lack of jurisdiction. In **Hassan Bundala Swaga v. Republic,** Criminal Appeal No. 386 of 2015 (unreported) it was held:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

The above restated principle of law is grounded on the provisions of section 4(1) and 6 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) read together with rule 72 (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) where this Court derives its mandate to determine criminal appeals.

Corresponding observations were made in **Abdul Athuman v. Republic** [2004] TLR 151, as well as **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 and **Nurdin Mussa Wailu v. Republic**, Criminal

Appeal No. 164 of 2004 and **Richard Mgaya @ Sikubali Mgaya v. Republic**, Criminal Appeal No. 335 of 2008 (all unreported). Since we have determined that, the above grounds did not feature at the first appellate court and since the first appellate court did not make any finding on them, this Court ordinarily lacks the requisite jurisdiction to entertain them and therefore, they qualify to be disregarded. Hence, ground three in the substantive memorandum is disregarded. However, as rightly argued by the learned State Attorney ground two in the substantive memorandum and ground four in the supplementary memorandum raise point of law and therefore this Court is duty bound to resolve them.

In resolving ground two in the substantive memorandum and ground four in the supplementary memorandum which were argued conjointly, we wish to state that there is no dispute that the exhibits at the trial court were irregularly admitted in evidence and even those which were properly admitted were not read and the omission to read documentary exhibits after admission is an irregularity which may not be cured. There is a considerable body of case law on this area and the most celebrated is the case of **Robinson Mwanjisi v. Republic** [2003] TLR 218 in which the Court faced with documentary exhibits which were not read it decidedly declared that the omission was incurable and expunged them from the record. We therefore,

hereby expunge all the exhibits namely PF3, cautioned statement of the appellant, certificate of seizure and the chain of custody from the record.

We will now turn to determine the first ground of the substantive memorandum on the complaint that the clinical officer was not a competent person to examine PW1. We think this ground should not detain us, for, as rightly submitted by the learned State Attorney, this is not the first time the Court is faced with the question on whether a clinical officer is a competent person to conduct medical examination. The Court has pronounced itself on numerous occasions that a clinical officer is a qualified medical practitioner authorized to conduct medical examinations-see for example, **Charles Bode** (supra), **Julius Kandonga v. Republic**, Criminal Appeal No. 77 of 2017 and **Filbert Gadson @ Pasco v. Republic**, Criminal Appeal No. 267 of 2019 (all unreported). In **Charles Bode** (supra) where the Court defined the term "clinical officer" to mean:

> *"A gazetted officer who is qualified and authorised to practice medicine. A clinical officer observes, interviews and examines sick and health individuals in all specialties to document their healthy status and applies pathological, radiological, psychiatric and community heath techniques...."*

Based upon the above time-honored principle of the law, PW5 in the instant case as a clinical officer was competent to examine PW1, the victim. In the circumstances, we find that the first ground of the substantive memorandum is devoid of merit.

We shall now consider the fourth ground of the substantive memorandum in which the complaint is on the failure to produce extra judicial statement or call the justice of peace in order to support the cautioned statement. We think, we should remark, as rightly argued by the learned State Attorney that there is no requirement of law or even practice that a cautioned statement cannot be based upon to convict the offender in the absence of the extra judicial statement or the evidence of the justice of peace. In any case there is no particular number of witnesses required to prove a particular fact and this is clearly stated under section 143 of the EA which was echoed in the case of **Bakari Hamis Lingámbe v. Republic**, Criminal Appeal No. 161 of 2014 (unreported). Moreover, it is the prosecution that enjoys the discretion to choose which witness to call. In **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015 (unreported), the Court stated that:

"..it is the prosecution which have the right to choose which witness to call so as to give evidence in support of the charge..."

The second limb of the complaint in this ground is about the defence case not being considered. We begin by noting that, both the trial court and the first appellate court considered the defence case. We wish to emphasize the peremptory principle of law that, the defence case however weak, trivial, foolish or irrelevant may seem it has to be accorded the requisite consideration by the trial court and if the trial court did not do so, then the first appellate court is duty bound to consider it. If both courts below do not do so then this Court has discretion to step into the shoes of the first appellate court and re-evaluate the evidence in order to come up with its own finding. There is a chain of authority on this matter by this Court. See, for example the case of **Hassan Mzee Mfinanga v. Republic** [1981] TLR 167. However, in the instant appeal the trial court at page 11 of the typed judgment which was not part of the record of appeal adequately considered the defence case and also the first appellate court at page 90 of the record of appeal considered once again the defence case. We therefore find this ground has no merit and it must fail.

Ground five of the supplementary memorandum is definitely without substance and should not detain us. We have painstakingly examined the record of appeal and we have noted that the trial magistrate complied with section 210 (1) of the CPA. In the circumstances this complaint fails.

We are left with one issue which was raised in ground four of the substantive memorandum and ground one of the supplementary grounds on whether the prosecution proved its case to the hilt. We have examined critically the evidence on record and painstakingly considered the submissions of the learned State Attorney in reply to the grounds of complaint. The main question that remains to be answered is whether PW1 was a credible witness given the circumstances of the instant appeal. It is a peremptory principle of law that every person, who is a competent witness in terms of the provisions of section 127 (1) of the EA is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not be believed. See, for example **Goodluck Kyando v. Republic** [2006] TLR 363.

There are no rules of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour of the witness, has been assessed by the presiding Judge/Magistrate, and the assessment

is the sole prosecution star witness and the only eye witness. However, her testimony have exercised our mind quite considerably in particular as to her credibility. The testimony of PW1 raises a number of questions as to her credibility bearing in mind that, the appellant and PW1 had matrimonial dispute for quite sometimes such that DW2 and the two families tried to reconcile them without success and that PW1 was the one who was insisting that the they part ways. The prosecution did not challenge this during cross examination of DW2 and PW1 during her testimony did not at all disclose that the duo was going through matrimonial hardship and that raises red flag on her credibility and truthfulness and worse more, the prosecution did not show that the two were not in matrimonial dispute as the defence through DW1 and DW2 testified. Our doubt is further coupled by the fact that PW1 in her testimony did not at all explain why she did not escape after enduring the worst that night and in particular when the appellant went inside the bedroom and locked himself leaving her at the sitting room. Furthermore, when the police were searching for the machete at the appellant's house it was PW1 who recovered it from underneath the coach where she hid it.

More glaring weaknesses in the prosecution evidence is the fact that the incidence occurred at night but PW1 appears to have reported late to the police and there is no plausible explanation to that and surprisingly PW1 did

not report to PW3 the justice of peace contrary to the situation obtained in areas like where PW1 is coming from. PW3 only received a call from the police when they were going to conduct search at the appellant's house.

It is now elementary law that, the best evidence of sexual offence comes from the victim. See, for example **Omari Kijuu v. Republic**, Criminal Appeal No. 39 of 2005 (unreported). We are also aware that under section 127 (6) of EA which was cited by Ms. Mwabeza, a conviction for sexual offence may be grounded on the basis of the uncorroborated evidence of the victim.

However, as we have already said in our previous decisions, we think that, the evidence of such victims has to be subjected to thorough scrutiny in order for courts to be satisfied that what they state contain nothing but the truth. The reason is not far-fetched, sexual offences are very serious offences that attract public interest and public scrutiny but also having dire consequences for the accused once found guilty given the severity of the sentence imposed. In the case of **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 (unreported) while discussing section 127 (6) this Court held:

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel*

truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general...and that such compliance will lead to punishing the offenders only in deserving cases."

In view of what we have endeavoured to demonstrate, it is our conclusion that the conviction of the appellant rested on weak and unreliable evidence. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant's immediate release from prison unless held for another lawful cause.

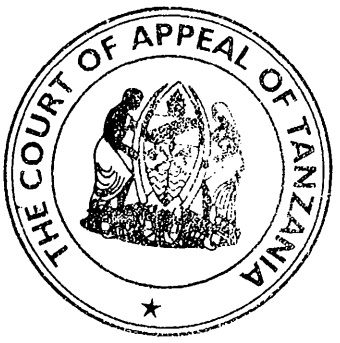
DATED at **MBEYA** this 25th day of February, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 25h day of February, 2022 in presence of the appellant in person, and Ms. Nancy Mushumbusi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL