IN THE COURT OF APPEAL OF TANZANIA
AT SUMBAWANGA

(CORAM: JUMA, C.J., WAMBALI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO 9 OF 2019

BILOZA S/O ROBERT.....APPELLANT

VERSUS

DPP.....RESPONDENT

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

(Mambi, J.)

dated the 12th day of December, 2018

in

Criminal Appeal No. 4 of 2018

JUDGMENT OF THE COURT

18th & 21st September, 2023

JUMA, C.J.:

This appeal originates from the Resident Magistrate's Court of Katavi at Mpanda in Katavi Region where the prosecution charged the appellant with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap—16 R.E. 2002 [now R.E. 2019]. The particulars of the charge appearing in the judgment of the Resident Magistrate's Court Criminal Case No. 294/2016 were that on 7/9/2012, at Mazwe village at Mishamo Refugee Settlement within Mpanda District, he had sexual intercourse with a then 21-year-old woman without her consent. We shall

protect the victim's modesty and privacy under the pseudonym "SDP" or PW1.

The victim (PW1), testified that earlier on the day of the event, she was at home grinding cassava flour around 15:00 hrs when the appellant showed up and asked the whereabouts of her parents. Her parents were at the farms, she replied. PW1 said that the appellant grabbed and pulled her to a chicken hut. After undressing her, he proceeded to rape her. After completing the rape, the appellant gave her Shs. 2,000/=, which he took back on seeing PW1's sister Mariam approaching. PW1 testified that she did not consent to sexual intercourse when the appellant dragged her to the chicken hut.

PW1's sister, Mariam d/o Pascal (PW2), described how she heard the victim making noises and crying that she was dying. Her sister (PW1) was half-naked at the chicken hut, and the man assaulting her was naked, and on top of PW1, raping her. PW2 shouted for help. The man hurriedly dressed up and took off. But he did not run more than ten paces before villagers, who included Odas s/o Mnyandwi (PW3), arrested him. PW2 explained that although PW1 occasionally during lunar moons, suffered epileptic bouts, she did not have epilepsy when the appellant raped her.

The appellant objected when prosecution introduced Pascal s/o Makelilo (PW5), the victim's father as its fifth witness. He objected

because PW5's name was not in the list of prosecution witnesses. The trial court overruled the appellant after public prosecutor explained that prosecution had indicated six witnesses who included PW5, without disclosing their names. PW5 testified how while at his farm one of his daughters rushed to tell him there was an emergency at home. The appellant had already been apprehended when PW5 reached home. PW5 described his daughter, PW1, as an imbecile, with cycles of madness and normalcy. PW5 also recalled the appellant's pleas for resolution of the dispute at home without invoking the criminal justice system.

Buchumi Nicodema (PW4), a clinical officer, was at his place of work at Mishamo on 08/09/2012 when a patient he described as an imbecile arrived with an interpreter who informed him the patient was a victim of rape. PW4 examined the patient's private parts and saw fresh bruises; she was not a virgin. Because bruises on the patient's private parts were not lacerated, PW4 determined that the patient was a victim of penile penetration. PW4 stated that after treating the patient with painkillers and HIV suppressant drugs, he filled a Tanzania Police Medical Examination Form (PF3), which the trial court admitted as exhibit P1.

In his defence, the appellant denied having had sexual intercourse with PW1. He also denied that PW3 gave chase and arrested him ten paces from scene of PW1's rape. He maintained that he was all that time

at Mishamo market selling palm oil (mawese). He was at Mishamo market when two men, who introduced themselves as militiamen, asked to see his permit to enter a refugee camp, which he did not have. Despite assuring the militiamen that he left his permit at home, they took him to the village office, where they accused him of trading in the refugee camp without a license or permit. The appellant accused the village leaders of demanding bribes, or they would fabricate against him serious offences, including the accusation of chopping off human parts. The village leaders transferred him to Mishamo Police Station, where the police locked him up for three days before they took him to Mpanda Police Station.

The appellant in his defence also faulted the prosecution's evidence. He wondered why the prosecution did not bring a ten-cell leader named Ndamitinje s/o Ngalama, who had testified (as PW4) in his earlier trial in the District Court of Mpanda in Criminal Case NO. 250/2012. The appellant also questioned the credibility of the main prosecution witnesses. He raised issue with what the prosecution witnesses said in his first trial in the District Court of Mpanda that differed from what the same witnesses said during his retrial in the Resident Magistrate's Court of Katavi at Mpanda. To show this discrepancy that raises credibility issues, the appellant tendered the judgment that convicted him at the District Court of Mpanda in Criminal Case No. 250/2012 (exhibit D1).

In his decision, after hearing the prosecution and defence evidence, the learned trial magistrate (O.H. Kingwele-SRM) believed the evidence of the victim's sister (PW2), PW3, and the victim's father (PW5) that they arrested the appellant a few paces from the crime scene where he had earlier raped PW1. The trial magistrate also concluded that the evidence of the clinical officer (PW4), who examined the victim and tendered exhibit P1, corroborated the victim's evidence. After convicting the appellant, the trial magistrate sentenced him to serve thirty years in prison.

Dissatisfied with the trial court's decision, the appellant filed his first appeal to the High Court at Sumbawanga. However, the first appellate court (Mambi, J.) dismissed his appeal. Still aggrieved, the appellant has preferred this second appeal, which revolves around five complaints.

In his first complaint, the appellant faults the first appellate judge for dismissing his appeal without considering that the clinical officer (PW4) who examined the victim found no spermatozoa in her vagina to prove the offence of rape.

His second complaint is against the evidence of PW2, who, though not an eyewitness, why, after finding him naked, she failed to lock the chicken hut doors to facilitate an arrest at the crime scene. In his third complaint, the appellant questions why the prosecution could not lift his

fingerprints and also for failing to carry out DNA sample tests on PW1's clothes to link the appellant with rape.

In his fourth complaint, the appellant insists that the militiamen arrested him at Mishamo market which is far away from the crime scene. He added that it was a mistake to arrest him because he was running away. After all, no law prevents citizens from running or walking. The fifth complaint questions why the first appellate court relied on the evidence of PW1 and PW2, members of the same family. He wondered why other non-family members did not testify to support the prosecution case. The sixth complaint had two limbs. The appellant wants us to declare that the prosecution did not prove the offence of rape beyond reasonable doubt. The appellant also faults the first appellate court for failing to consider his defence.

At the date of hearing of this second appeal on 18/09/2023, Mr. Paschal Marungu, learned Principal State Attorney, assisted by Mr. Gregory Muhangwa, learned Senior State Attorney, represented the respondent Republic. The appellant appeared in person. He stated that he would rather first hear the learned State Attorneys' submissions on his grounds of appeal, and he will make a reply.

Mr. Marungu, the learned Principal State Attorney, opposed the appeal.

Before responding to the six grounds of appeal, Mr. Marungu invited us to consider two preliminary legal issues that the appellant did not include in the memorandum of appeal. First, he referred us to the wrong citation of the provisions of law that the prosecution employed to charge the appellant with rape of a 21-year-old woman (the victim). He added that paragraph (e) of section 130 (1) (2) applies where the victim is a girl under the age of eighteen, and the proper charging provision is section 130 (1) (2) (c) and 131 of the Penal Code. Despite this shortcoming, the learned Principal State Attorney quickly sought the support of the case of **GEORGE CLAUD @ KASANDA V. DPP** [2020] TZCA 76 TANZLII to argue that the wrong charging and convicting provisions did not after all prejudice the appellant.

We should not spend much time on the issue of wrong citation of the charging provision. At his first trial before the District Court of Mpanda, the prosecution charged the appellant with rape contrary to section 130(1)(2)(c) and 131 (1) of the Penal Code Cap 16 R.E. 2002. Paragraph (c) of sub-section (2), applies where the victim like PW1, is a woman above eighteen years of age. But for unknown reason, at his retrial in the Resident Magistrate's Court of Katavi, prosecution cited Paragraph (e) of sub-section (2), which applies to victims of under the age of eighteen.] We agree with the learned Principal State Attorney in line with our decision

in **GEORGE CLAUD @ KASANDA V. DPP** (supra), the wrong citation did not prejudice the appellant because the particulars of the offence which the prosecution read to the appellant identified a 21-year old woman.

In his second preliminary issue of law, Mr. Marungu urged us to strike out the first, third, and fifth grounds of the appellant's memorandum of appeal because they are new grounds that the High Court did not in the first place consider. In support of this prayer, he cited the decisions of this Court in **ADAM SHANGO V. R** [2022] TZCA 821 TANZLII and **KARIM SEIF @ SALIM V. R** [2019] TZCA 399 TANZLII. He expounded that these decisions emphasize the position of the law that this Court lacks jurisdiction to consider new grounds that the appellant did not present before the first appellate High Court unless they are on a point of law.

As we said in response to the first issue of law which Mr. Marungu raised, the issue of new grounds of appeal that first appellate court did not consider should not detain us. Mr. Marungu is correct to restate that the jurisdiction of this Court under section 4 (1) of the Appellate Jurisdiction Act, Cap. 141, is restricted to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction. We shall go along our decisions in **ADAM SHANGO VS. R** (supra) and **KARIM SEIF @ SALIM** (supra) both restating the settled

position that the Court cannot deal with grounds that were not discussed in the first appellate court. As a result, we agreed with Mr. Marungu to disregard these grounds one, three and five in the appellant's memorandum of appeal.

Mr. Marungu submitted grounds number two and four together because they both challenge the evidence of PW2 and PW3 identifying the appellant at the crime scene. He referred to the evidence of PW2 recalling how the appellant tried to escape but was arrested ten paces away from the scene. The learned Principal State Attorney pointed out that after hearing shouts for help, PW3 rushed to the source of the commotion and joined those arresting the runaway appellant. According to Mr. Marungu, PW5 arrived just after the appellant's arrest. He insisted that the evidences of PW2, PW3, and PW5 all place the appellant at the scene of rape.

Mr. Marungu rounded up his submissions on grounds two and four by reiterating the settled position of the law to the effect that when a suspect is arrested at a crime scene, the question of his identification does not arise. For support, he cited the case of **DAFFA MBWANA @ KEDI V. R** [2019] TZCA 5 TANZLII, where the appellant was arrested after a short chase, and we stated that the issue of the appellant's identification did not arise. He urged us to dismiss grounds number two and four.

The learned Principal State Attorney spent much more time urging us to dismiss ground number six, where the appellant contends that the evidence on record did not prove the offence of rape beyond reasonable doubt. As far as he is concerned, he identified four types of evidence, each sufficient to prove the charge of rape against the appellant. First, he referred to the evidence of the victim (PW1), which cross-examination did not shake, so much so that both the trial magistrate and the first appellate High Court judge found PW1 a credible witness. He argued that PW1's evidence not only proved sexual penetration but also penetration by the appellant, and without her consent. Mr. Marungu cited the case of **MAWAZO ANYANDWILE @ MWAIKAJA V. DPP** [2020] TZCA 268 TANZLII, to underscore the settled position of this Court that in sexual offences, the best evidence comes from the victim.

The second type of evidence, which according to Mr. Marungu, is sufficient to convict the appellant, is how the appellant was caught red-handed by PW2 in the act of rape. The third type is the medical evidence of PW4, which confirmed the ingredient of sexual penetration of the victim. For the fifth type of evidence against the appellant, Mr. Marungu referred to the appellant's oral confession before PW2, PW3, and PW5, where he asked for pardon and out of court settlement. From the totality of the five types of evidence the learned Principal State Attorney

submitted, the prosecution proved the charge of rape beyond reasonable doubt.

Mr. Marungu next urged us to dismiss the second limb of the appellant's sixth ground of appeal, complaining that the trial and the first appellate High Court disregarded his defence. The learned Principal State Attorney had nothing much to say when we prodded him with questions specifically to show us where, in the appeal record, the trial and first appellate courts considered the appellant's defence in their judgments.

We next invited the appellant to respond to the submissions of Mr. Paschal Marungu, Principal State Attorney. He briefly reminded us that the criminal case against him has taken much too long. He has faced a criminal trial over rape twice. He insisted that the trial and the first appellate courts ignored his defence. He ended by expressing his hope that we would allow his appeal and free him at last.

We are a second appellate court, and our jurisdiction is restricted to matters of law only. The practice of the Court on the second appeal is to avoid interfering with the concurrent finding of facts arrived at by the trial and first appellate courts unless there are good reasons for, for example, where there is misdirection or misapprehension of evidence.

In our minds, apart from questioning why the two courts below failed to consider his defence, the appellant has also raised the wider issue of misapprehension of evidence. That is, failure by the retrial and first appellate courts to consider the evidence of the witnesses who testified in the first trial. We bear in mind here that when Nyangarika, J. allowed the appellant's appeal and ordered a retrial, he did not nullify the proceedings containing testimonies of witnesses. This made available all the testimonies of all the witnesses intact, and available for evaluation and consideration in the retrial.

From the submissions of the learned Principal State Attorney on the appellant's grounds of appeal, failure to consider the appellant's defence is a serious and consequential issue of law that deserves our first attention.

Before we look at the nature of the defence the appellant raised during his retrial, which he blames the trial and first appellate courts for disregarding, it is appropriate we first appreciate briefly the background that precipitated the High Court at Sumbawanga (Nyangarika, J.) to order his retrial in respect of the same offence of rape.

The appellant, is right to complain that his search for justice has taken much too long. He has been in different levels of courts for eleven years since his arrest on 7/9/2012 for rape. He was first charged, tried,

and convicted on 11/04/2013 by the District Court of Mpanda in Criminal Case Number 250 of 2012 and sentenced to serve thirty years in prison. His first appeal to the High Court at Sumbawanga in Criminal Appeal No. 4 of 2016 was anything but a pyrrhic success because, although Nyangarika, J., allowed his appeal, quashed the conviction, and set aside the sentence of thirty years, the first appellate Judge ordered a fresh trial before a different trial magistrate.

It took eight months after the first appellate court's order for a retrial for the appellant to appear before the Resident Magistrate's Court of Katavi at Mpanda on 06/12/2016 in Criminal Case No 294 of 2016.

At his retrial before the Resident Magistrate's Court of Katavi and later the first appellate High Court at Sumbawanga, the appellant presented his defence. In his testimony as DW1, the appellant disputed the prosecution's claim that PW3 and PW5 arrested him ten paces from the scene of rape he was running away from. The appellant insisted that the militiamen apprehended him at the Mishamo market, where he sold palm oil. The militia members accused him of entering the refugee camp without a permit. His arrest, he defended himself, was not related to the rape of PW1. Also, in his defence, the appellant questioned how PW1, PW2, PW3, and PW5 contradicted themselves. He complained that prosecution witnesses' evidence during his first trial in Criminal Case

Number 250 of 2012 differed from what the same witnesses said during his retrial in Criminal Case Number 294 of 2016. The appellant tendered a copy of the judgment (Exhibit D1) in his first trial to enable the trial magistrate in his retrial to evaluate the credibility of prosecution witnesses whose evidence convicted him. Failure to consider these strands of defence amount to misapprehension of defence evidence.

We have taken judicial notice of the decision of the High Court at Sumbawanga where Nyangarika, J. ordered a retrial. The retrial order bears out the appellant's complaints over the way prosecution witnesses so much contradicted themselves that Nyangarika, J. had to order a retrial.

We do not think the following excerpts from the decision of the retrial court amount to any evaluation of the appellant's defence:

> *"On his side the accused person disputed such prosecution evidence by giving two main reasons. One is that the evidence produced in this case is contrary to the evidence produced in CC 250/2012. His second main reason was that the prosecution witnesses failed to produce any evidence to the effect that he was*

arrested at the crime scene. There was another reason from such accused person which I shall state later.

As for the first ground that the evidence produced in this case is contrary to the one adduced in CC No. 250/2012, I find such ground to be of no merit in this case. This is simply because the purported Judgment of CC No 250/2012 which the accused person had tendered as exhibit "D1" had already been nullified by the High Court of Tanzania at Sumbawanga on technical grounds and the said appellate court ordered such accused's case to be tried de novo..."

It is evident from the excerpts above; the trial court did not evaluate the appellant's defence by weighing and valuing such strands of the defence like the militiamen arrested the appellant at the Mishamo market; or how the testimonies of PW1, PW2, PW3, and PW5 on during his first trial contradicted with what these witnesses said during his retrial. Summary of the testimonies of PW1, PW2, PW3, and PW5 are found in trial court's Judgment which the appellant tendered as exhibit D1.

Although the appellant tendered a copy of the Judgment resulting from his first trial (CC No 250/2012), hoping that the trial magistrate will

evaluate his claim that what prosecution witnesses said in his earlier trial is different from what they were saying in his retrial, the trial magistrate brushed off this opportunity to evaluate the defence evidence by claiming that the High Court of Tanzania had nullified the Judgment in his first trial at Sumbawanga. The retrial Resident Magistrate's Court of Katavi and later the first appellate High Court at Sumbawanga failed their duty to evaluate the defence evidence.

On his part, the first appellate High Court Judge did not consider the defence evidence. Instead, he brushed it off, stating, "*The complaint by the appellant that he was not identified has no merit since the offence was committed in the afternoon, and he was arrested near the scene by some people who testified at the trial court.*"

It is hard to understand how Nyangarika, J. found the testimonies of PW1 and PW2 in the first trial to be full of contradictions and inconsistencies, making them unreliable, yet following the appellant's retrial court findings, the first appellate High Court (Mambi, J.) described the same PW1, PW2, and PW3 as "*...not only reliable witnesses but also witnesses of truth.*"

In retrospect, we do not think an order for retrial was appropriate after the first appellate Judge (Nyangarika, J.) found contradictions and inconsistencies in the testimonies of the two main witnesses (PW1 and

PW2). Nyangarika, J. should have set free the appellant. In his decision, Nyangarika, J. highlighted contradictions and inconsistencies in the testimonies of Audex Nyandwi (who testified as PW3) and Ndamitinje s/o Ngalama (the ten-cell leader who testified as PW4). According to Nyangarika, J., PW3, and PW4 were at or near the crime scene but, in their testimonies, came out with a different version on whether they saw the appellant running dressed or undressed. While PW3 saw and caught the appellant running while undressed, PW4 told the trial court that he saw the appellant running while dressed.

After Nyangarika, J. had found that contradictions and inconsistencies of testimonies of PW1 and PW2, the main prosecution witnesses, went to the root of the case and described them to be unreliable, it begs the question of how these same witnesses would become reliable and credible at the appellant's retrial at the Resident Magistrate's Court of Katavi in Criminal Case 294 of 2016.

We think, major contradictions and inconsistencies among its main witnesses during the first trial constituted a gap in prosecution witnesses creating doubt in the appellant's guilt. From the decision of the former Court of Appeal for Eastern Africa in **FATEHALI MANJI V. R** (1966) E.A. 343, we can deduce helpful guidance to the effect that appellate courts should not order a retrial where retrial will allow the prosecution to cure

major contradictions and inconsistencies among prosecution witnesses for purposes of filling up gaps in prosecution case. The former Court of Appeal for Eastern Africa said the following in **FATEHALI MANJI V. R** (supra):

> "*In general* ***a retrial*** *may be ordered only where the original trial was illegal or defective; It* ***will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in the prosecution in its evidence at the first trial;*** *even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires.*" [Emphasis added].

Having found contradictions and inconsistencies of testimonies of PW1, PW2, PW3, and PW4 in Criminal Case No. 294 of 2016 (Resident Magistrate's Court of Katavi), the first appellate High Court Judge (Nyangarika, J.) should not have ordered a retrial that would allow the prosecution to learn from its evidential gaps, by removing contradictions and inconsistencies in order to convict. In our opinion, that order for retrial was, in the circumstances of this appeal, not in the best interests of justice because it prejudiced the appellant.

We conclude our decision by considering the legal consequences of failing to consider an accused person's defence. This ground alone is sufficient to dispose of this second appeal without considering submissions on other grounds.

In **GODFREY RICHARD V. R.**, CRIMINAL APPEAL NO. 365 OF 2008 (unreported), the appellant complained that both the trial court and the High Court (on the first appeal), did not consider his defence. On the second appeal, this Court noted that the trial magistrate referred to the defence case but only by way of summarizing, which does not amount to consideration. We ruled that failure to consider the defence case is as good as not hearing the accused and is fatal.

Having found that the trial Resident Magistrate's Court of Katavi and the High Court at Sumbawanga (on the first appeal) did not consider the

appellant's defence which as we have observed above raised doubt in the prosecution case, we allow his appeal, quash the conviction, and set aside the sentence. We order the appellant to be set free immediately unless he is held for other lawful causes.

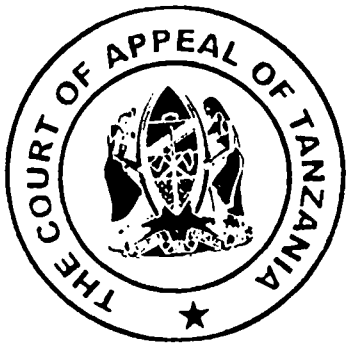
DATED at **SUMBAWANGA** this 21st day of September, 2023.

I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 21st day of September, 2023 via video conference from Sumbawanga Remand Prison in the presence of appellant in person and Mr. Gregory Muhangwa, learned State Attorney for the respondent is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL