IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MKUYE, J.A., MGEYEKWA, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 265 OF 2021

ELLY MSALILWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kente, J.)

dated the 24th day of December, 2020

in

Criminal Appeal No. 42 of 2020

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JUDGMENT OF THE COURT

06 & 14th December, 2023

MGEYEKWA, J.A.

In the District Court of Mufindi at Mafinga, Elly Msalilwa, the appellant was arraigned, tried and convicted on a charge with one count of an unnatural offence contrary to section 154 (1) of the Penal Code. Upon conviction, he was sentenced to life imprisonment. His appeal to the High Court was dismissed in its entirety, hence the second appeal. The factual setting as unveiled by the prosecution during trial may briefly be recapitulated: The prosecution alleged that on 24th day of August, 2014 at Itona village within Mufindi District in Iringa Region, the appellant had

sex against the order of nature to a boy aged 17 years. To conceal the victim's identity, we shall henceforth refer to the boy as 'EM' or 'PW2' as he so testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. The prosecution sought to prove the case through five witnesses whose account gives rise to the following story.

Nico Ng'umbi (PW1), a teacher at Itona Secondary School stated that he was informed by his students that the appellant had sexual intercourse against the nature of order with PW2. Subsequently, on 10th March, 2014, PW1 asked the victim what had befallen him. PW2 could stand the appellant's acts no more he decided to break the ice and disclosed the ordeal to PW1 and PW5, his teachers. He told them that the appellant had been sodomizing him since the year 2010, when he was in standard six and forbid him not to tell anyone about his vicious behaviour. Subsequently, PW1 and PW5 interrogated the appellant who admitted to have committed the shameful offence. They told him to write a letter and commit himself not to repeat such shameful act. PW1 believed that the appellant's vicious behaviour towards PW2 had ended. Unfortunately, that was not the end of the appellant's fierce behaviour. On 24th August, 2014,

they received a complaint from the victim's grandmother that PW2 was missing. PW1 and PW5 searched the appellant but to no avail. Thereafter, they dashed to the appellant's house. On arrival, they knocked the door, the appellant opened it. They asked him the whereabout of PW2, he denied to have seen him. They tried to enter into his house, but he did not let them in. The appellant's entrance door was forced open, they saw PW2 seated in the appellant's bed.

In 2014, EM who testified as PW2 was living with his grandmother and was studying at Itonga Secondary School where the appellant was working as an assistant manager. According to PW2, the brutal incident occurred in the year 2010 when PW2 was in standard six. On allegedly, unknown date, PW2 left home without notifying his grandmother, when he returned home, her grandmother was angry, thus, she instructed the appellant to punish him because of his bad behaviour. The appellant took advantage of PW2, instead of punishing him, he asked PW2 to choose a punishment to which he will be subjected from two options; canning with salt water or sexual intercourse against the order of nature. PW2 choose to have sexual intercourse with him against the order of nature and he was warned not to tell anyone. To PW2, the experience was deadly painful. From that day it became a habit for the appellant to sodomize

PW2. On 25th August, 2014, the appellant invited him in his house and ordered him to undress his trouser. Then, the appellant had sex with the unwilling PW2 against the order of nature. Suddenly, PW2 heard a knock at the door, it was his teacher, Bakari Kazemma. The appellant warned PW2 to remain silent and hide in his bedroom.

Some more evidence of the encounter came from a police officer Assistant Inspector, Mtulia (PW3) who was assigned to investigate the matter. On 27th August, 2014, he interrogated the appellant and prepared a cautioned statement which was admitted as exhibit P2. Dr. Kivambe testified as PW4, a medical doctor working at Mafinga District Hospital. He performed medical examination on PW2 on 26th August, 2014 and observed that PW2 had no bruises on his anus and that his sphincter muscles were loose. PW4 concluded that he was used to anal sex.

There was further prosecution evidence from Bakari Abeid (PW5). In his testimony, he supported the narration by PW1 that they heard rumors that the appellant was with PW1 in his house. This made them to report the matter to the street chairman. Eventually the matter was reported to the Police.

As hinted above, the appellant, in his affirmed defence disassociated himself from the offence. He stated that he was working at Itona

Secondary School as an assistant hostel manager and chief cook. He said he was informed by civilians that, there were few teachers who had sexual relationships with their students. Thus, he decided to make a close follow-up and confirmed that it was true. In his trap, he managed to catch PW5 with a female student. Few days later, while at his house he was invaded by PW5 and his fellows who started to torture him and forced him to confess that he had sex with PW2 against the order of nature.

In convicting the appellant, the trial court found PW2, the prosecutrix, to be a reliable witness. It also found that PW2's evidence was corroborated by the evidence from PW1, the appellant's written confession (exhibit P1), and the appellant's cautioned statement (exhibit P2). The appellant's defence was rejected for being nothing but full of lies. The trial court therefore found that the case against the appellant was proved to the required standard and proceeded to convict and sentence the appellant to life imprisonment.

Dissatisfied, the appellant appealed to the High Court. The first appellate court was convinced by the version of the prosecution witnesses and, accordingly, the appellant's appeal was rejected. Still protesting his innocence, the appellant has come to this Court on a second appeal. In his memorandum of appeal, he raised six (6) grounds of appeal.

Nonetheless, for reasons which will be apparent shortly, we think it will be unnecessary for us to reproduce the memorandum of appeal herein.

At the hearing of the appeal, on 6th December, 2023, the appellant appeared in person, unrepresented. The respondent, Republic was represented by Ms. Pienzia Nichombe, learned Senior State Attorney assisted by Ms. Radhia Njovu, learned State Attorney. When given the chance to argue his grounds of appeal, the appellant adopted his memorandum of appeal and opted to hear the learned Senior State Attorney's response and would rejoin if the need would arise.

Responding, Ms. Njovu did not support the appeal. She anchored her submission on a legal point which she found to be pertinent. Ms. Njovu was brief and straight to the point. She contended that, during the hearing of the appeal at the High Court, the appellant raised six (6) grounds of appeal, however, the first appellate court failed to consider all grounds of appeal. Expounding, she argued that, the first appellate court considered only the sixth ground of appeal related to prove of the case beyond reasonable doubt, and did not consider the rest grounds of appeal raised in the appellant's petition of appeal. Elaborating further, the learned State Attorney argued that, the Court cannot determine the appellant's grounds of appeal as the first appellate judge did not determine all grounds of

appeal. To reinforce her proposition, she cited the case of **Freeman Mbowe v. The Republic**, Criminal Appeal No.504 of 2020, [2021] TZHC 3705, (25 June 2021, TanzLII).

On the way forward, Ms. Njovu implored us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap.141 (the AJA), to nullify the proceedings and judgment of the first appellate Court and remit the case file to the High Court for rehearing and compose a fresh judgment in accordance with the law.

Having heard the submission of Ms. Njovu, the appellant admittedly conceded that the first appellate court did not consider all grounds of appeal. Consequently, he urged us to nullify the judgment of the first appellate court and remit the case file to the High Court for rehearing.

Having closely perused the record of appeal, and a thorough scrutiny of the impugned judgment of the first appellate court we are in accord with Ms. Njovu's submission that not all the grounds of appeal were considered and determined as required by law. It is apparent in the record that, before the first appellant court, the appellant lodged a petition of appeal that comprised six (6) grounds, most of which contain complaints similar to those in the memorandum of appeal placed before this Court. A thorough scrutiny of the impugned judgment of the first

appellate court, it indicates that the appeal before the first appellate court was duly determined., however, not all the grounds of appeal were considered and determined as required by law.

It is clear that the first appellate judge in his judgment, considered and dealt with the first, third, and sixth grounds of appeal only as he was convinced that they were sufficient to dispose of the appeal. Certainly, there is no indication in the impugned judgment that the substance of the complaints in the appellant's fourth and fifth grounds were fully resolved by the first appellate court. The Court dealt with a similar scenario in **Nyakwama Ondare @ Okware v. Republic**, Criminal Appeal No. 507 of 2019 (unreported), where it echoed that:

> "***In the instant appeal, we unreservedly note that the first appellate court did not address and determine the grounds of appeal separately or generally.*** *On the contrary, as intimated above, it simply framed its own points for the determination of the appeal which did not relate to the appellant's grounds of appeal in the petition of appeal." [Emphasis added].*

In the instant appeal, the first learned appellate judge at page 78 of the record of appeal, acknowledged that the appellant had fronted six grounds of appeal. However, he did not deal with each ground as listed

in the petition of appeal. Instead, he addressed the first, second, third and sixth grounds generally, the substance of which was the case against the appellant was not proved beyond reasonable doubt, the credibility of PW2, eye witness evidence and concluded that the appeal was unmerited.

As intimidated above, the first appellate court is not duty bound to consider all grounds of appeal but it is bound to resolve all complaints raised in the appeal either separately or jointly as it will deem just. There is a plethora of the Court's pronouncements to that effect which include: **Malmo Montage Konsult AB Tanzania Branch v. Magret Gama**, Civil Appeal No. 86 of 2001 (unreported) and **Revocatus Mugisha v. Republic**, Criminal Appeal No. 200 of 2020, [200] TZCA 1753 (28 August 2020, TanzLII). We take cognizance of our holding in the case of **Malmo Montage Konsult AB Tanzania Branch** (supra), where we stated that:

> *"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court.* ***It is however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal.*** *It may, if convenient, address the*

grounds generally or address the decisive ground of appeal only or discuss each ground separately."

[Emphasis added].

See also **Revocatus Mugisha v. Republic** (supra) and **Simon Edson @ Makundi v. Republic**, Criminal Appeal No. 5 of 2017 (unreported). In the latter case, the Court stressed on the importance of the appellate court to consider the grounds of appeal presented before it.

It is our considered view that even if the first appellate court was not obliged to consider all grounds of appeal, it was supposed to indicate if it had any reservations on the two grounds. If it had, it was required to state reasons for not determining them. We thus without hesitation, hold that the first appellate court erred by its failure to consider other grounds of appeal.

In the light of the above cited authorities, we are in accord with Ms. Njovu that since the first appellate court did not address and resolve the complaints of the appellant on all grounds of appeal in accordance with the law, the same cannot be determined in this appeal.

Consequently, in terms of section 4(2) of the AJA, we hereby nullify the proceedings and judgment in Criminal Appeal No. 42 of 2019 and remit the case file to the High Court for rehearing of the appeal in

accordance with the law before a different judge. The appellant shall remain in custody.

It is so ordered.

DATED at **IRINGA** this 13th day of December, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in the presence of the Appellant in person and Mr. Daniel Faustin Lyatuu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL