IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 80 OF 2020

ERICK s/o MICHAEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the decision of the Resident Magistrate's Court at Kibaha]

(Magesa, SRM - EXT. JUR.)

dated the 30th day of December, 2019

in

Criminal Appeal No. 47 of 2018

JUDGMENT OF THE COURT

15th July, 2022 & 1st March, 2024

MASHAKA, J.A.:

The appellant, Erick Michael was convicted by the District Court of Kibaha of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E 2002]. He was sentenced to thirty years imprisonment. His appeal to the High Court was transferred to the Resident Magistrates' Court at Kibaha and heard before learned Senior Resident Magistrate exercising Extended Jurisdiction (Ext. Juris.) under section 45(2) of the Magistrate's Courts Act [Cap 11 R.E. 2019]. The

appeal was unsuccessful and the sentence was enhanced to life imprisonment. Still dissatisfied, the appellant is assailing the conviction and sentence in this final appeal.

It was alleged that on 2nd day of March, 2019 at '*Kwa Mathias*'– Umwelani area within Kibaha District, Coast Region the appellant had carnal knowledge of a girl (name withheld) aged 15 years against the order of nature. To conceal her identity, she will be referred to as the victim who testified as PW3. In proving its case, the prosecution paraded five prosecution witnesses and tendered two documentary exhibits admitted in evidence as exhibit P1 the certificate of birth and exhibit P2 the PF3. In his defence, the appellant was the sole witness against the allegation levelled by the prosecution and denied to partaking in the unnatural offence.

Essentially, the facts of the case culminating to the conviction and sentence of the appellant are as follows: the victim (PW3) had visited her aunt at Mlandizi on 2nd March, 2019 staying there until late hours. She left around 6:00pm to return home to her parents residing at *Mita Hamsini* area Kibaha. She reached '*Kwa Mathias*' bus stop around 7:45pm and hired one Ramadhan Adam a '*bodaboda*' driver to take her home. On her way home, Ramadhani gave the appellant a lift on same

motor cycle. When they were about to reach PW3's place, Ramadhani requested her permission to stop at an unknown place to collect his pullover which she agreed. Ramadhani stopped and went to fetch the pullover; but he could not get it and the appellant told him to go to his house he will get the pullover there. They both left and continued until they reached at an unfinished house. Ramadhani and the appellant entered the house and Aisha Ally (PW2) wife of Ramadhani got out and invited PW3 who was reluctant to enter the said house but later agreed to do so.

Upon entering the house, according to PW3's evidence, the appellant spent some time seducing her to engage in sexual intercourse but she declined and informed him that she was in her menses. The appellant was adamant and started undressing himself and PW3, despite the fact that PW2 and Ramadhani were present watching the appellant. The appellant took a *panga* threatening PW2 and Ramadhani who went outside and he and PW3 remained inside the house. The appellant forcefully ravished PW3 against the order of nature. PW2 heard PW3 complaining of being in pain and yet the appellant had carnal knowledge of her against the order of nature.

After the appellant accomplished sodomising PW3, at about 1:00hrs, PW2 escorted PW3 to the '*Kwa Mathias*' bus stand where she hired another '*bodaboda*' to take her home. PW3 arrived home in the morning and met Serafin Christian Andrew (PW1), her step-father. She narrated what had befallen her. PW1 accompanied with PW3 reported the incident to the police post. The police issued a PF3 to PW3 to go for medical examination at a hospital. At Mkoani Health Centre of Coast Region, Jamali Khamis Namkazava (PW5) a medical doctor examined PW3 and observed that her anal part was penetrated by a blunt object causing bruises. When PW1 and PW3 brought back the PF3 to the police post, they met the appellant who had been arrested on other allegations. PW3 identified the appellant who was interrogated and later charged. WP2999 D/CPL Mwanakombo (PW4) conducted the investigation.

In his defence, the appellant (DW1) admitted to have been identified by PW3 at the police post as alluded above and also admitted that he was a '*bodaboda*' rider at '*Kwa Mathias*' bus stand at Kibaha. He denied the accusation to have sodomised PW3.

The trial court convicted the appellant based on the evidence of PW2 and PW3 that the appellant was properly identified. It further held

that the evidence of PW3 was corroborated with the evidence of PW5 that a blunt object had penetrated the anus of PW3. Consequently, the appellant was sentenced in the manner indicated above. His appeal to the High Court but heard by SRM (Ext. Juris.) was unsuccessful and the documentary evidence; exhibits P1 and P2 were expunged from the record because they were not read out after admission in evidence. The first appellate court relied on the oral evidence of PW1, PW3 and PW5 which was found credible and reliable to ground the conviction. His sentence was enhanced to life imprisonment by the first appellate court, hence the appeal.

The appellant lodged two sets of memoranda dated 10/08/2020 and 01/06/2021 containing a total of fourteen grounds of appeal. We noted that the grounds of appeal raise three pertinent issues; **one**, whether the trial was vitiated by procedural irregularities; **two**, whether the charge was proved to the hilt addressing the appellant's complaint that he was not properly identified, and; **three**, whether the prosecution proved the charge to the required standard. The procedural irregularities were raised in grounds one, two, five, eight, nine, thirteen and fourteen. The remaining grounds three, seven, ten, eleven and twelve raise the complaints that the appellant was not properly identified by PW2 and

PW3 and lastly, the prosecution case did not prove the offence beyond reasonable doubt.

At the hearing, the appellant was present in person, unrepresented. He prayed to adopt his memoranda of appeal and written submissions in support of his appeal to form part of his oral submission. Mr. Adolf Kisima assisted by Ms. Nura Manja, both learned State Attorneys, represented the respondent Republic who resisted the appeal.

At the onset, Mr. Kisima brought to our attention that grounds four and six were new grounds. Mr. Kisima argued that the position of the law is that this Court is not vested with jurisdiction to determine new grounds which were not raised before the first appellate court. He contended that such grounds cannot be raised in the second appeal unless they are based on points of law reinforcing his argument with the case of **Ngaru Joseph and Another v. Republic**, Criminal Appeal No. 172 of 2019 (unreported). He contended further that though ground four could be a point of law, the presence of the social welfare officer did not prejudice the appellant or cause any miscarriage of justice. It was his submission that it was necessary for the presence of the said officer when an accused is a child and not as a witness. On ground six,

Mr, Kisima argued that it is based on facts and not on a point of law. He therefore implored the Court to refrain from determining grounds four and six of appeal.

Before going to the substantive grounds of the appeal, we will determine the procedural irregularities raised by the appellant. As rightly stated by Mr. Kisima, ground four and six are factual and new grounds which were not raised, argued and determined by the first appellate court. In terms of section 4(1) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] the Court lacks jurisdiction to determine. See: **Hassan Bundala @ Swaga v. Republic** Criminal Appeal No. 416 of 2013, **Jafari Mohamed v. Republic** Criminal Appeal No. 112 of 2006 and **Hussein Ramadhani v. Republic** Criminal Appeal No. 195 of 2015 (all unreported). We find that ground four was not raised and canvassed in the first appellate court. However, we find that the presence of the social welfare officer did not prejudice the appellant and did not occasion any miscarriage of justice. Ground six is founded on the identification of the appellant that PW3 was incredible. We will determine together with the complaint on identification.

Moving to grounds nine, thirteen and fourteen of appeal which concern non-compliance with sections 312, 231(1), (a) and (b), 228 and

229 of the Criminal Procedure Act [Cap 20 R.E 2019] (the CPA), it was the appellant's contention that the first appellate court failed to determine that the defence evidence was not considered by the trial court and its judgment lacked the points of facts and critical analysis of the prosecution evidence which is contrary to section 312 of the CPA. Further, he submitted that the first appellate court failed to observe the irregularity that the trial magistrate failed to explain to the appellant the option available in giving his defence which was contrary to section 231 (1), (a) and (b) of the CPA. Arguing further, he contended that there was a failure of the first appellate court to determine that the charge was not read over to the appellant for him to enter his plea of not guilty before the defence case commenced contrary to sections 228 and 229 of the CPA.

In reply, Ms. Manja submitted that at page 45 of the record of appeal, the trial court considered the defence case of the appellant. Further she argued that section 312 of the CPA was only applicable of the trial court and not the first appellate court. On non-compliance to section 231 (1), (a) and (b) of the CPA, she submitted that it was duly complied with as reflected at page 32 of the record of appeal and prayed the ground be dismissed for lack of merit. Regarding compliance with sections 228 and 229 of the CPA, it was her contention that pages 32

and 33 of the record of appeal exhibits compliance. She concluded that this renders the grounds of appeal unmerited and beseeched the Court to dismiss the respective complaints.

We are convinced as rightly argued by Ms. Manja, the grounds are unmerited. Regarding ground nine, it is undeniable that, neither the trial court nor the first appellate court considered the defence case. The Court can in such an omission remedy the shortfall by stepping into the shoes of the first appellate court to consider the defence evidence and determine whether it casts any doubt on the prosecution evidence. See: **Peter Said Ramadhani v. Republic**, Criminal Appeal No. 490 of 2020 and **Julius Josephat v. Republic**, Criminal. Appeal. No. 03 of 2017 (both unreported).

In the circumstances, we shall consider and re-evaluate the defence evidence together with that of the prosecution. In his defence case at page 34 of the record of appeal, the appellant denied committing the offence though he did not deny his presence at PW2's house with PW3 on the fateful night of 2/3/2019. He had testified that he was arrested on 3/3/2019, beaten at the police post and forced to admit to have sodomised PW3. It was the appellant's evidence that he had no grudge with PW2 and did not state any reason or create a doubt

why PW3 would testify against him. His defence did not shake the prosecution case given that he was positively identified by PW3 and PW2 who was present at the scene of crime and his evidence was direct. We find the defence of the appellant was an afterthought, and his evidence did not assail the prosecution case.

On the propriety of the judgment, section 312 of the CPA provides for the contents of a judgment to be written or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court containing the point or points for determination, the decision thereon, the reasons for the decision and be dated and signed by the presiding officer as of the date on which it is pronounced in open court. With due respect, we disagree with Ms. Manja's contention, that section 312 of the CPA provides that the necessary contents of a judgment is applicable only to the trial court. A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision and it is applicable to the first appellate court which has to incorporate the contents, provide a re-evaluation of the evidence and reach a decision thereon. That said, we have perused the record of appeal; the judgment found at pages 57 to 62 of the record, and we find that the

learned SRM (Ext. Juris.) commenced with a statement of the case, described the grounds of appeal for determination, re-evaluated the evidence adduced before the trial court and delivered his decision. We find the first appellate court complied with the requirements of section 312 of the CPA.

There was a complaint that the charge was not read over before taking defence evidence. Section 231(1), (a) and (b) of the CPA provides:

> *"(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right -*
>
> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
>
> *(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the*

court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.

Having gone through the record as discerned at page 32 of the record of appeal, after the close of the prosecution case the trial court duly explained to the appellant his right to defend himself and call witnesses under the above stated provision. It is on record that the appellant had stated that he will testify on oath and call no witness. In addition, at page 33 of the record, the trial court read the charge and explained the substance of the charge to the appellant before he adduced his defence evidence. In the premises, ground fourteen of appeal is misconceived. The provision requires the trial court to explain the substance of the charge facing the appellant before he proceeds with the defence case; to defend himself and call witnesses. As garnered at page 5 of the record, a plea of not guilty was entered after the charge was read to the appellant and asked to plead. Further when the appellant denied the truth of the charge, the trial court proceeded to hear the prosecution case. At page 33 of the record, the trial court read and explained the substance of the charge to the appellant before he

adduced evidence in his defence case. We find the first appellate court duly complied with section 228 of the CPA.

Regarding compliance with section 229 of the CPA, it requires the prosecutor to commence its case against the accused after a plea of not guilty has been entered, call witnesses and adduce evidence in support of the charge. As gathered from pages 12 to 32 of the record, we find that section 229 of the CPA was duly complied by the first appellate court allowing the prosecutor to proceed with the hearing of prosecution case, the appellant cross examined each prosecution witness and the answers were recorded. We thus, dismiss grounds nine, thirteen and fourteen of appeal for lack of merit.

Now we proceed to determine the substantive grounds of appeal. Grounds three, ten, eleven and twelve of appeal are based on the identification of the appellant by PW3 because the offence was committed at night. It was the appellant's contention that it was upon the trial court to satisfy itself that an identification parade was conducted to confirm PW3's memory taking into account that she did not know him prior to the date of incident, given that his arrest was not prompted by the case at hand. He further contended in ground six that the first appellate court erred in law to rely on the evidence of PW3

which was incredible. He argued that it failed to note that PW3 alleged to have seen the appellant and the person she had hired to take her home for the first time on the date of the alleged incident but, surprisingly when testifying in court she was referring to them by their names without saying as to when she came to know their names, hence his conviction was wrongly upheld.

Mr. Kisima argued in reply that the appellant was properly identified in spite of the incident having occurred at night. Ramadhani was accompanied with his friend the appellant and PW3 when they entered the unfinished house of PW2 using the appellant's torch as there was no electricity. He cemented his argument that PW3 was escorted by her father and while at the police post she recognized the appellant who was there. Ms. Manja argued further that PW2 knew the appellant and corroborated the evidence of PW3 who recognized the appellant at the police post before giving any description of the appellant. PW3 had visited her house the previous night in the company of the appellant and Ramadhani. It was Ms. Manja's contention that there was no need of conducting an identification parade because PW2 knew the appellant and she corroborated the evidence of PW3 who had seen the appellant the previous night because he took time to seduce

PW3 and had carnal knowledge against the order of nature until 1:00am when she left. Thus, the length of time was enough for PW3 to recognize him on 03/03/2019 at the police post.

The first appellate court was satisfied with the findings of the trial court in respect of the proof of identification and PW3 being a credible witness. Though there was torch light at the house of PW2, the appellant was positively recognized by PW3 the next day when she reported the incident at the police post. Although the appellant had been arrested for another offence and PW3 was able to positively recognized him as she had travelled with him on the motorcycle to PW2's house, stayed with him for some time seducing her to have sex which she refused and eventually having carnal knowledge of her against the order of nature. The evidence of PW3 was corroborated by PW2 who knew the appellant before the incident.

The issue for our determination is whether the appellant was positively identified by PW2 and PW3. The circumstances for a proper identification have been stated in various cases to mention a few; **Waziri Amani v. Republic** [1980] T.L.R 250, **Marwa Wangiti Mwita and Another v. Republic,** Criminal Appeal No.6 of 1995, **Ally**

Manono v. Republic, Criminal Appeal No. 242 of 2007 (both unreported). In **Waziri Amani** *(supra)* the Court emphasized: -

> *"The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so, was there moonlight or hurricane lamp etc.) whether the witness knew or has seen the accused before or not."*

In the light of the above excerpt, the trial court was expected to apply the guidelines to satisfy itself that there was proper identification of the accused person. There is no doubt that, PW3 hired Ramadhani at 7:45pm who later picked up the appellant and went to the house of PW2. Since it was at night, the source of light and intensity of light was of paramount importance if the appellant was not known to Ramadhani and PW2. Upon revisiting the evidence of PW2 and PW3 none of them had stated the source and the intensity of light. More so, PW2 did not state the distance from where she was standing to where the appellant was with PW3. All the same, PW2's evidence illustrates that she knew the appellant; he was a friend of his husband Ramadhani and both were

'*bodaboda*' drivers parking at *Kwa Mathias* bus stand at Kibaha. PW2 knew the appellant and firmly stated in her evidence at pages 14 and 15 of the record of appeal: -

> *"I recall on 2.3.2019 at night hours I was on (sic) bed, I heard someone knocking at the door. I got out and found the accused and his friend namely Ramadhani. The accused is a friend of my husband and Ramadhani is the accused's friend. The accused asked me to get in with a girl who stood outside. I saw her and I welcomed her but she hesitated to get in but later on she agreed. When they got in the accused asked me to get out so that they talk to their guest (PW3). .... While I was there, I saw the accused while undressing himself and he asked the girl to do the same. I asked him as to why he decided to do so at my place but he shouted to me that I had to keep quiet. Thereafter the accused asked PW3 to play (sic) sex with him but PW3 denied saying that she was on menstruation period. The accused decided to sleep with her no matter what. I stopped them but the accused took a panga and threatened us. The accused ordered me and Ramadhani to get out and he remained with the victim. We sat nearby the room hence we heard PW3 saying "Eric niache unaniumiza".*

We wished to help her but the accused closed the door hence we couldn't help her. Later on, I heard him saying that "sikuachi mpaka nitoe shida zangu." Thereafter he opened the door and he told us to get out with the girl".

It was PW2's evidence that she knew the appellant well and even witnessed him have carnal knowledge of PW3 against the order of nature. Also, PW2 showed in her evidence that PW3 knew the appellant because she called his name saying "*Eric niache unaniumiza*". Further, in her evidence, PW2 stated at page 15 of the record that: -

"Actually, I did not know PW3 but while the accused came with her at my place, he introduced her to me as his friend."

Further, PW3 managed to recognise the appellant the next morning at the police post in the absence of PW2 when she went to report the incident accompanied with PW1. Additionally, we may add, it is a cardinal principle that the ability to recognise an assailant at the earliest opportune time is of utmost importance as it proves reliability of the witness Similar position was taken by this Court in **Peter Said Ramadhani v. Republic**, Criminal Appeal No. 490 of 2020 and **Edson Simon Mwombeki v. Republic**, Criminal Appeal No.94 of 2016 (both unreported) where the victim of sexual offence was able to identify a

stranger few minutes after the event. In this appeal, after the appellant was recognised by PW3, PW2 corroborated the evidence as an eye witness who hosted the appellant at her house but could not provide assistance to PW3 after she was threatened by the appellant. PW2's evidence showed that the appellant was a friend of her husband Ramadhani the '*bodaboda*' driver hired by PW3 on that fateful date. We, totally agree with Ms. Manja that PW3 was a credible witness whose evidence as corroborated by PW2, leaves no doubt that the appellant was the one who committed the offence at her house. We find grounds three, ten, eleven and twelve not merited and are dismissed.

In ground five of appeal, the appellant is faulting the failure of the prosecution to call the arresting officer as a witness. The appellant argued that the arresting officer ought to have been called to clarify who arrested the appellant taking into account that PW2 during cross-examination alleged that he was arrested by her husband a fact that was not stated in her evidence in chief hence an afterthought. Ms. Manja's short response was that the prosecution did not see the need to call the arresting officer because there is no number of witnesses required to prove an offence, relying on section 143 of the Evidence Act (Cap 6 R.E.2019).

It is trite law that there is no specific number of witnesses required for the prosecution to prove any fact under section 143 of the Evidence Act. See: **Yohanes Msigwa v. Republic** (1990) TLR 148, **Katona Rashid @ Mitano v. The Republic,** Criminal Appeal No. 487 of 2016; **Amiri Hassan Kudura v. Republic,** Criminal Appeal No. 271 of 2013 (both unreported). However, the burden of proof is always on the prosecution to prove the offence beyond reasonable doubt based on the quality of evidence rather than the number of witnesses. The appellant contends that during cross examination PW2 testified that her husband Ramadhani arrested the appellant but he was not called as a witness. It is worthy to note that during preliminary hearing under section 192 of the CPA gleaned at page 9 of the record of appeal, the appellant agreed that he was arrested on 03/03/2019 and did not require any proof as the appellant and prosecutor agreed and signed the memorandum of agreed facts. We find that there was no need to call husband of PW2 because it was not disputed that the appellant was arrested on 03/03/2019. In the circumstances, ground five fails for lack of merit.

Ground seven of appeal is based on the third issue, whether the evidence adduced by the prosecution proved the offence beyond reasonable doubt. There is no gainsaying that the charge was proved

beyond reasonable doubt. Founding on the evidence of PW3 which was corroborated by PW2 who invited PW3 to her house accompanied by Ramadhani and the appellant who introduced PW3 to her that she was a friend, witnessed the appellant undressing himself and asked PW3 to undress. The appellant had a torch light on. PW2 knew the appellant as a friend of her husband Ramadhani and could not confuse him. PW2 also heard PW3 refusing to have carnal knowledge with the appellant because she was in her menses and while being sodomised by the appellant complained of pain. Though the intensity of light was not explained by PW2 and PW3, we are of the considered view the circumstances we have explained provided favourable conditions for positive recognition of the appellant. Also, PW5 corroborated the evidence of PW3 that she was penetrated by a blunt object in her anus and the solid identification of the appellant by PW3 at the police post, leaves no doubt that the appellant committed the offence.

Concluding with grounds one, two and eight of appeal conjointly, the appellant is challenging the propriety of the sentence imposed by the first appellate court. Basically, it was his contention that being a first offender and PW3 was above ten years, the proper sentence was thirty

years. In addition, he argued that the first appellate court did not call him to mitigate before enhancing the sentence.

We find it pertinent to reproduce section 154 (1) (a) and (2) of the Penal Code:

> *"Section 154 (1) provides that any person who –*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b) N/A, or*
>
> *(c) N/A.*
>
> *commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(2) Where the* ***offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."***
> [Emphasis made]

It is undisputed that PW3 was born on 23/08/2004, hence aged 15 years. Additionally, Mr. Kisima argued that the appellant was charged under section 154(1) (a) and (2) of the Penal Code which also provides the life sentence if it is proved the victim is under eighteen years. It is

not disputed that the victim of carnal knowledge against the order of nature was a girl under 18 years, which attracted a mandatory sentence imposition of a mandatory life sentence to the appellant upon his conviction. In our consideration, the first appellate court correctly enhanced the sentence. The next issue is whether the enhancement of the sentence was prejudicial to the appellant. In **Joshua Mgaya v. Republic**, Criminal Appeal No. 205 of 2018 (unreported), the Court was confronted with a similar scenario and held:

> *"In our view, although it would be desirable by the first appellate court to invite the parties to express their views in relation to enhancement of sentence in deserving cases, we do not think the substitution of the sentence by the first appellate court by imposing the appropriate and mandatory sentence after dismissing the appeal was fatal and prejudicial to the appellant."*

In light of the above excerpt, the record of appeal reveals that the appellant was before the first appellate court during hearing of the appeal and the issue of enhancing the sentence was raised by the respondent Republic and the appellant had nothing to add. We find that it is neither fatal nor prejudicial to the appellant as the first appellate

court was imposing the mandatory sentence. Thus, grounds one, two and eight are baseless and are dismissed.

All said and done, we are satisfied that the appellant was properly convicted and the sentence meted out to him was the mandatory provided by law. The appeal has no merit and it is dismissed in its entirety.

DATED at **DAR ES SALAAM** this 29th day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered on this 1st day of March, 2024 in the presence of present in person and Mr. Cathbert Mbilingi, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL