IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 406 OF 2020

MAPINDUZI MGALLA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mongella, J.)

dated the 12th day of May, 2020

in

Criminal Appeal No. 93 of 2019

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JUDGMENT OF THE COURT

13th February, 2023 & 6th February, 2024

MASHAKA, J.A.:

The appellant, Mapinduzi Mgalla was charged and convicted by the District Court of Mbarali at Rujewa with rape contrary to sections 130 (2) (b) and 131(1) of the Penal Code, Cap. 6, R.E. 2019 and was sentenced to thirty (30) years' imprisonment.

The particulars of the offence indicate that on 24th May, 2016 at about 01:00hrs at Urunda village within Mbarali District in Mbeya Region, the

appellant did unlawfully have sexual intercourse with a girl aged 19 years without her consent. To conceal her identity, she will be referred to as D.K, the victim who testified as PW1. To prove its case, the prosecution summoned five witnesses and tendered two exhibits; the PF3 and the cautioned statement of the appellant which were admitted as exhibits PE1 and PE2 respectively. In his defence, the appellant was the sole witness against the allegation levelled by the prosecution.

At the trial, the prosecution evidence relied on for the appellant's conviction was that; PW1 was travelling from Dar es Salaam to Mbeya by bus on 22/05/2016 to visit her aunt at Uyole though she did not know her residence. Throughout the journey, she was in constant communication with her aunt. Upon reaching Iringa, PW1 could not communicate any further as the battery of her phone was down. She met the appellant who was occupying the next seat and requested to use the appellant's phone to call her aunt. The appellant gave it to her and called her aunt but was unreachable. Initiating further conversation, the appellant asked PW1 where she was heading to and she told him that she intends to drop at Uyole, Mbeya. The appellant informed her that there are murderers at Uyole and for her safety she better drop at his residence where he can assist her

accommodation and on the next day, he would send her to the bus stop to continue with her safari. During their conversation, PW1 enquired from the appellant whether he had a family in which he replied positively and PW1 decided to alight at Igawa area with the appellant. The appellant hired a motorcycle which took them to his house.

Upon arrival at the appellant's house PW1 could not see any member of his family and slept in a separate room from the appellant. On 24/05/2016 at night, the appellant moved from his room to the room where PW1 slept and requested for sex, which she refused. The appellant raped her. The next day he left her in the house, locked the door and PW1 could not to go out. Again, at night he forcefully had sex with her. At noon the next day the appellant forgot to lock the door when he went out and PW1 managed to escape and approached the house of Tatu Johnson (PW5). Around 20:00hrs, PW5 directed PW1 to Lautely Mrisho, the Chairman of the neighbourhood *'kitongoji'* (PW4).

PW1 narrated to PW4 what had happened to her at the appellant's house. PW1 reported the matter at police post the following day and a PF3 was issued to go to the hospital for examination. PW1 was attended by Doctor Tresford Sambi (PW3) who found her vagina had bruises which were

reddish in colour. PW3 filled the PF3 which was admitted in evidence as exhibit PE2. Thereafter, the appellant was arrested and PW2 recorded the appellant's cautioned statement which was admitted as exhibit PE1.

In his defence, the appellant disassociated himself with the commission of the crime, contending that he was arrested on 28/05/2016 around 08:00hrs by the militiamen on allegations of raping a woman. He denied to know PW1.

Impressed with the prosecution evidence, the trial court convicted the appellant based on the evidence of PW1 and PW3 corroborated by exhibits PE1 and PE2. Thus, it sentenced the appellant to thirty years' imprisonment. Dissatisfied, the appellant lodged his first appeal to the High Court which disregarded the evidence of PW4 and PW5 as hearsay with no evidential value. It expunged the cautioned statement, exhibit PE1 from the record. In the end, the learned first appellate Judge dismissed the appeal in its entirety. The appellant was dissatisfied by the decision of the High Court hence the appeal.

The complaints raised by the appellant are predicated on the eight grounds of appeal which can be paraphrased as follows; **one**, the evidence

of PW3 does not show the medical test for deoxyribonucleic acid (DNA) and sexually transmitted disease (STDs) taken to corroborate the victim's medical test; **two**, the evidence of PW1 and PW3 was uncorroborated; **three**, the evidence of PW1 (victim) was full of contradictions thus not reliable; **four**, exhibit PE2 (PF3) was not read after admission in evidence, **five,** the task of the appellant is not to prove the case therefore he was wrongly convicted on his innocence for not calling a witness to prove his alibi; **six**, the trial court did not prepare a memorandum of facts; **seven**, no witness testified to see the appellant with PW1 travelling together or at home or even the motor cycle driver (*bodaboda)* was not summoned by the court; and **eight**, the charge was not proved beyond reasonable doubt by the prosecution side.

At the hearing, the appellant appeared in person, unrepresented. The respondent Republic was represented by Messrs. Edgar Luoga, learned Principal State Attorney assisted by Davice Msanga, learned State Attorney. When the appellant was called to amplify on his grounds of appeal, he adopted the eight grounds of appeal submitting that the Court may consider them and allow Mr. Msanga to respond first reserving his right to respond later, if need arises.

At the outset, Mr. Msanga prefaced his submission declaring that they were strongly resisting the appeal as the prosecution proved the charge against the appellant beyond reasonable doubt. He brought to our attention that grounds one, two and four were new as they were not canvassed and determined by the first appellate court. He prayed that the Court should refrain from entertaining them. Further he argued that though grounds three, five, six, seven and eight were also new, it was his contention that they involved points of law and were properly before the Court. Relying on the case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), he urged us under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) not to determine grounds one, two and four because the Court is not vested with jurisdiction to entertain a new factual ground of complaint.

It is a settled principle that, a ground of appeal which was not raised and determined by the first appellate court cannot be entertained by the Court in a second appeal, unless it involves a point of law. See: **Godfrey Wilson v. Republic** (supra) which quoted **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015, **Athumani Rashidi v.**

Republic, Criminal Appeal No. 26 of 2016 and **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (all unreported).

Our scrutiny of the appellant's complaint raised in ground one, we find this is a matter of fact and not law which we lack jurisdiction to entertain. Also, we cannot gauge as to where the first appellate court went wrong. Thus, we respectfully decline to consider these new grounds of complaint.

In the same vein, grounds two and four of appeal are on points of law which this Court is vested with jurisdiction to entertain and we will consider them. The complaints raised that the evidence of PW1 and PW3 was uncorroborated and the prosecution failed to read over exhibit PE2 to the appellant after its admission in evidence.

We propose to determine grounds four and six ahead of the remaining grounds for the reason that the complaints are based on procedural irregularities. In ground four the appellant is faulting the prosecution for its failure to read exhibit PE2 (PF3) before the trial court after its admission in evidence to enable him to comprehend its contents. During his submissions, Mr. Msanga refrained to argue this complaint contending that it was a new ground.

As gleaned at page 15 of the record of appeal after admission in evidence of exhibit PE2 by the learned trial Magistrate, its contents were not read out in court. It is trite principle that when a document is sought to be introduced in evidence three crucial steps must be performed by the trial court; first, clearing the document for admission; second, actual admission and finally, to ensure that the same is read out in court. This principle was underscored in **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R 218 where the Court held: -

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same."*

We have expounded this stance in a number of our decisions the significance of reading out a document which has been admitted in evidence. In **John Mghandi @ Ndovo v. Republic,** Criminal Appeal No. 352 of 2018 (unreported) we stated the reason behind the requirement to read over the admitted documentary exhibits to an accused person. In particular, we had this to say: -

"We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so

that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record of the evidence."

In **Joseph Maganga and Dotto Salum Butwa v. Republic,** Criminal Appeal No. 536 of 2015 (unreported) the contents of the cautioned statement were not read out to the accused person and the effect of the omission was: -

"The essence of reading out the document is to enable the accused person to understand the facts contained [therein] in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity."

Similarly, in **Robert P. Mayunga and Another v. Republic,** Criminal Appeal No. 514 of 2016 (unreported), the Court held: -

"Failure to read out to the appellant a document admitted as exhibit denies [him] the right to know the information contained in the document and therefore puts him in the dark not only on what to cross-examine but also how to effectively align or arrange his defence."

According to the excerpts above, it is not disputed that exhibit PE2 was admitted in evidence contrary to the procedure and the effect of the omission is to expunge it from the record. In the circumstance, we agree with the appellant that exhibit PE2 deserves to be expunged from the record and thus we accordingly do so. Ground four is merited.

In ground six, the appellant complains that the first appellate court confirmed the decision of the trial court without taking into account that the trial court failed to prepare a memorandum of undisputed facts. Mr. Msanga submitted that the trial court prepared the memorandum of facts in accordance with the requirements of section 192 of the CPA, however there was non-compliance with section 192 (3) of the CPA. He argued that after the prosecutor had read the facts to the appellant and he admitted his name, the public prosecutor and the appellant did not sign the memorandum of agreed facts. He urged us to consider that it did not prejudice the appellant

because all prosecution witnesses were called to testify and he had the opportunity to cross examine them and gave his defence, thus not fatal. This need not detain us. Besides agreeing with the respondent's counsel, the irregular conduct of the Preliminary Hearing does not vitiate the trial. In this regard, the trial was not vitiated.

It is settled that such an omission is an irregularity which is curable under section 388 of the CPA, as decided by the Court in **Yuda John v. The Republic**, Criminal Appeal No. 238 of 2017 (unreported) where the Court quoting **Paul Dioniz v. Republic**, Criminal Appeal No. 171 of 2018 while quoting with approval the case of **Flano Alfonce Masalu @ Singu v. Republic**, Criminal Appeal No. 366 of 2018 (both unreported). Thus, ground six is unmerited.

Moving to ground five, the complaint was that his task is not to prove the case and therefore his conviction should not be based on his failure to call a witness to prove a defence of *alibi*. Mr. Msanga in reply conceded that the first appellate court did not re-evaluate the defence evidence. It was Mr. Msanga's contention that the appellant did not raise any defence of alibi to require the first appellate court to re-evaluate his evidence. He further argued that, in his defence he testified on how he was arrested.

As we gleaned at pages 57 to 58 of the record of appeal, the first appellate court had this to say: -

> *"I have read the trial court's judgment and found from page 5 to 6 the appellant's evidence being considered. The trial magistrate gave reasons for not being convinced by the appellant's evidence. The trial magistrate took in consideration that the appellant never brought any of its family members whom he claimed to live with to testify in court. He also took into consideration the fact that the appellant never cross examined PW1 on her testimony that he was alone with the appellant, with no family member of his for three days at his house. The law is settled to the effect that failure to cross examine on an important matter ordinarily implies the acceptance of the truth of witness's evidence on that aspect."*

From the excerpt above, we find that the first appellate court reconsidered the defence evidence and concluded that notwithstanding the stance of the trial court, it was upon the appellant to cross examine PW1 and show inconsistences and disjointedness in her testimony. We dismiss this ground of appeal for lack of merit.

Going to ground seven that there was no witness who testified to have seen the appellant and PW1 travelling together in the bus or the alleged '*bodaboda*'(motor cycle) driver was not called to testify for the prosecution, hence an adverse inference should be drawn by the Court. In reply, Mr. Msanga submitted that in terms of section 143 of the Evidence Act, there is no specific number of witnesses required to prove a fact. He argued that the prosecution called the relevant and credible witnesses to prove the offence of rape by the appellant. Further Mr. Msanga brought to our attention that the first appellate judge was wrong to confirm the conviction of the appellant that exhibit PE2 corroborated the evidence of PW1 as it was wrongly admitted. All the same, he submitted that the oral evidence of PW3 in record is the correct evidence to corroborate the evidence of PW1.

Grounds two, three and eight of appeal, is whether the appellant's conviction was based on strong prosecution evidence which proved the rape beyond reasonable doubt. The appellant was charged with the offence of rape contrary to section 130(1)(2)(b) of Cap 16 which provides that;

> *"With her consent where the consent has been obtained by the use of force, threats or intimidation*

by putting her in fear of death or of hurt or while she is in unlawful detention."

The prosecution ought to prove, that there was consent which was obtained by use of force, or threats or she was under unlawful detention. The only witness who could prove that is PW1 and PW3. PW1 being the victim and the best witness in sexual offences and PW3 gives corroborative evidence as a doctor. (See: **Selemani Makumba v. Republic**, (2006) TLR 376).

In her evidence, PW1 stated that he met with the appellant in the bus, and he took her to his house and raped her without her consent. From her evidence, there is no point she contended that she consented to be raped as she was threatened or she was under unlawful detention rather in her testimony she contended that she never consented for sex, and the appellant used to force her. PW1 stayed at the appellant's house for several days before she ran away. In **Kassim Mohamed** (*supra*) the Court held:

"It is equally undeniable that the evidence of the prosecution witnesses did not establish an offence under section 130 (1) (2) (b) of the PC. As already pointed out, PW4 (the victim), said that on arrival at her home the appellant forced her into her bedroom

in which he forcefully raped her. She did not at any time say that there were reasons which compelled her to consent, though of course, force was used... Thus, the prosecution evidence did not establish the commission of the offence under section 130 (2) (b) of the PC."

In the light of the above holding, it is clear that for the offence under section 130(1)(2)(b) of the Penal Code to stand the victim must establish that she consented to sexual intercourse due to fear or threat or she was under unlawful detention, lack of which renders the charge unproved. In the instant appeal, such ingredient under section 130(1)(2)(b) is missing. Thus, renders the offence not proved beyond reasonable doubt.

In addition to that, even if for the sake of argument, PW1 claims was raped by the appellant still her testimony is wanting. In her testimony she stated that she went to the appellant house on 22/05/2016 and the appellant promised her that on the following day he will take her to the bus stop. However, the prosecution failed to lead PW1 to explain why she did not leave on the second day, why she decided to stay until 24/05/2016 when alleged was raped. Also, the prosecution evidence did not state if she tried to raise alarm or that there were no houses nearby even if she could raise alarm no

one could hear her and come to her rescue. More so, there was no sketch map to show the distance of the appellant's house and PW5 house or other neighbours. All these facts cast doubts on the evidence of PW1 and ought to have been held in favor of the appellant. Having said so, the charge was not proved beyond reasonable doubt. This ground has merit.

In the event, this appeal has merit and it is allowed.

We quash the judgment of the High Court and set aside the sentence imposed on the appellant. We order the appellant's immediate release if he is not being held in custody for some other lawful cause.

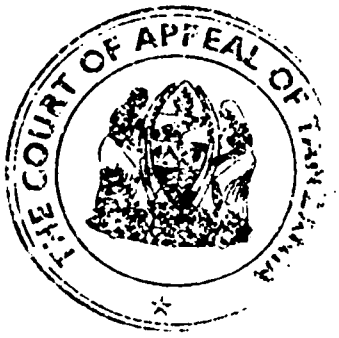
DATED at **DAR ES SALAAM** this 31st day of January, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of February, 2024 in the presence of the Appellant in person and Mr. George Ngwembe, learned State Attorney for the Respondent/Republic vide video link from High Court of Tanzania at Mbeya is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL