IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 40 OF 2019

SABAS KUZIRIWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mambi, J.)

dated the 12th day of September, 2017
in
Criminal Appeal No. 45 of 2016

.....

JUDGMENT OF THE COURT

23rd & 30th November, 2021

MWAMBEGELE, J.A.:

In the Court of the Resident Magistrate of Sumbawanga sitting at Sumbawanga, the appellant Sabas Kuziriwa, was charged with and convicted of the offence of rape contrary to section 130 (1), (2) (e) and 131(1) of the Penal Code, Cap 16 of the Revised Edition, 2002 (the Penal Code). It was alleged that on 10.09.2015 at Mkusi Village within Sumbawanga District in Rukwa Region, he had sexual intercourse with one DL (true identity withheld) aged 17 years. He pleaded not guilty to the

charge after which a full trial ensued. He was at the end of the trial found guilty, convicted and sentenced to serve a prison term of thirty years. His first appeal to the High Court was barren of fruit, hence this second appeal.

The facts giving rise to the appeal, as brought by the prosecution at the trial, are fairly simple. They may be stated in brief as follows: the appellant was employed by the victim's husband, a certain Gunesa Ugali, as a houseboy. The victim, a girl aged seventeen, was Gunesa Ugali's wife. The victim and appellant lived in the same house. Also living there was Elias Francisco (PW4) who was also employed by the said Gunesa Ugali as a cowhand. The appellant and PW4 slept in the same room.

On the night of the said 10.09.2015, the appellant sold an idea to PW4 that they should go and have sexual intercourse with women in the house who were sleeping alone. PW4 declined the invitation. After a short while, the appellant left the room presumably to accomplish his evil intention to have sexual intercourse with the women in the house. He went to the victim's room where she was fast asleep, alone. Amidst her sleep, she felt like someone having sexual intercourse with her. She flashed a torch only to realise that it was the appellant raping her. He was

armed with a *panga* and threatened to hack her with it if she raised any alarm. After he was done, he left. It was at that point in time when the victim raised an alarm. It was her brother in law, Lugwasha Ugali (PW2) who showed up first. On arrival there in response to the alarm raised by the victim, he met the appellant at the door. He was still armed with the *panga*. He also raised an alarm and members of the people's militia defence group commonly known as *sungusungu*; a Kiswahili term for them, responded and arrested the appellant who was hiding in the vicinity of the scene of crime. The *sungusungu* kept the appellant under their custody until the following morning when they took him to the police where No. G. 1487 DC Msendo (PW5) recorded his cautioned statement (Exh. P2).

At the trial, the appellant denied in his defence the accusations levelled against him. He testified that his boss owed him Tshs. 100,000/= as his wage for laying bricks. He did not unveil the connection of the Tshs. 100,000/= his boss owed him and the offence.

In the meantime, the victim was taken to Mkusi Dispensary where Peter Bilauri (PW3) medically examined her and found her private parts

with bruises and sperms. He filled a PF3 (Exh. P1) with the relevant details.

As already alluded to above, the two courts below found that the case against the appellant was proved to the hilt. His second appeal to this Court is premised on seven grounds of appeal. The seven grounds boil down to the complaints on; **first**, insufficient evidence of visual identification; **secondly**, improper admission of Exh. P1 and P2, **thirdly**, the evidence of PW1 PW2 and PW4 who were family members was not corroborated; and, **fourthly**, that the defence of the appellant was not considered.

At the hearing of the appeal before us, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Safi Kashindi Amani, learned State Attorney.

When we called upon the appellant to argue his appeal, he simply adopted the seven-ground memorandum of appeal and asked the Court to invite the respondent to reply to his grounds of appeal. He reserved his right to make a rejoinder after the respondent's rebuttal submissions.

Ms. Amani expressed her stance at the very outset that the respondent Republic did not support the appellant's appeal. It was her contention that the case by the respondent against the appellant was proved to the standard required by the law; beyond reasonable doubt. She started her onslaught by submitting that some of the grounds of appeal surfaced in this second appeal for the first time; they were not addressed by the first appellate court. Thus, relying on sections 4 (1) and 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (the AJA) and our unreported decision in **George Claud Kasanda v. Republic**, Criminal Appeal No. 37 of 2018, she invited us to disregard them. The learned State Attorney thus addressed us on only two grounds; the second; a complaint on insufficient visual identification, and the seventh; a two-pronged complaint that his defence was not considered and that the case against the appellant was not proved beyond reasonable doubt.

Submitting on the second ground of appeal, Ms. Amani argued that the visual identification of the appellant was watertight. She submitted that the victim testified at p. 45 of the record that she identified the

appellant with the help of light illuminated from a torch she had. She described that the appellant was wearing a yellow T-shirt and a pair jeans. She added that the testimony of the victim was corroborated by PW2 who also identified the appellant wielding a *panga* at the door. The learned State Attorney argued that the appellant was well-known to the identifying witnesses and that he was arrested immediately after the commission of the offence. She referred us to p. 13 of our decision in **Charles Nanati v. Republic**, Criminal Appeal No. 286 if 2017 to buttress the proposition that the appellant was properly recognised at the scene of crime.

With regard to the complaint that the appellant's defence was not considered at the trial, the learned State Attorney took us to p. 66 of the record of appeal where that defence was supposedly considered. Upon being prompted by the Court on the allegation in defence by the appellant that the victim's husband owed him Tshs. 100,000/= and that he might have been framed on that basis, she first stated that the defence was an afterthought. However, upon mature reflection, she admitted that the trial court and the first appellate court did not address that aspect. She thus implored us to step into the shoes of the first appellate court to consider

the appellant's defence at the trial and make a finding. The learned State Attorney relied on section 4 (2) of the AJA to implore us to do so. Even if the courts below would have considered the appellant's defence, he would still have been convicted as the prosecution evidence was so strong, she argued.

The learned State Attorney conceded, however, that the PF3 (Exh. P1) was not procedurally adduced in evidence as it was not read out in court after admission. For this ailment, she submitted, the PF3 could be expunged from the record. She contended that there was oral evidence of PW3 to replace what was contained in the expunged PF3. She thus concluded that on the evidence of PW1, PW2, PW3 and PW4 as well as the appellant's cautioned statement (Exh. P2) which was properly adduced in evidence, the prosecution marshalled sufficient evidence to mount a conviction against the appellant and the trial court rightly so held and the first appellate court correctly so upheld the decision on first appeal.

Having stated as above, the learned State Attorney implored us to dismiss the appeal in its entirety.

The appellant had very little in rejoinder. He simply urged us to consider his grounds of appeal and release him from prison.

We start our determination by addressing first the respondent's complaint that some of the grounds raised in this appeal were not addressed by the first appellate court and, because they are not based on legal issues and so we should not consider them in this second appeal. We agree with Ms. Amani that some of the grounds of appeal are new. It is fairly settled law in this jurisdiction that, save for issues of law, this Court will only entertain grounds of appeal which were first placed before the first appellate court for determination. That this is the law has been stated in a plethora of our decisions – see, for instance, **Alex Ndendya v. Republic,** Criminal Appeal No. 340 of 2017, **Rutoyo Richard v. Republic**, Criminal Appeal No. 114 of 2017, **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 and **Nasibu Ramadhani v. Republic**, Criminal Appeal No. 310 of 2017 (all unreported), to mention but a few. In these decisions of the Court, we took the view that, on a second appeal, except for the grounds which raise legal issues, an appellant should not be allowed to sneak in new grounds which were not

raised and considered by a first appellate court. We have invariably been discarding those grounds and Ms. Amani beseeched us to do so in this appeal.

We agree with Ms. Amani on the foregoing standpoint of the law in this jurisdiction. Flowing from there, if it were not for the general ground raised in the first appellate court that the case against the appellant was not proved beyond reasonable doubt, we would have outrightly agreed to discard those new grounds which are not based on legal issues as proposed by Ms. Amani. As evident at pp. 12 and 13 of the record of appeal, the appellant advanced eight grounds of appeal before the first appellate court and the gist of the first and eighth grounds was that he was convicted on evidence which did not establish his guilt beyond reasonable doubt. In that state of affairs, we think, the grounds of appeal that are said to have been raised in the Court for the first time, were encapsulated in that general ground. As good luck would have it, it is not the first time the Court is grappling with this issue. The issue has been traversed before. In **Rutoyo Richard** (supra), for instance, there arose a similar argument and, relying on our previous unreported decision in

Robert Andondile v. Republic, Criminal Appeal No. 465 of 2017, we stated at p. 12 of the typed judgment:

> *"As the above recited grounds of appeal before the High Court vividly show, the appellant had raised as a ground of appeal that, the prosecution case was not proved beyond reasonable doubt. General as it is, such a ground calls for an appellate court to consider all the evidence, oral, documentary and physical evidence to ascertain whether in their totality establish the appellant's guilt to the hilt .... several grounds or points of grievance may be drawn from that general ground. Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance."*

In so holding, we relied on the following excerpt from **Robert Andondile** which we reproduced at p. 13 of the written judgment:

> *"While we agree with Ms. Makombe that **this Court may not deal with grounds which were not***

raised and determined by the High Court or Resident Magistrate with extended jurisdiction, we asked the learned State Attorney to address all grounds for two reasons. First o fall, at the High Court the appellant had raised a general ground that the prosecution had failed to prove the case against him beyond reasonable doubt, which is a general ground. *Secondly, the grounds of appeal are so overlapping that some elements in the so-called new grounds touch on those which had been earlier raised..."*

The scenario in the appeal before us, fall in all fours with the one that obtained in **Robert Andondile** above. We thus find guidance in that decision and take the same position in the appeal before us. Accordingly, we decline the invitation by Ms. Amani to discard the so-called new grounds of appeal as they are contained in the general ground fronted in the second appeal that the case against the appellant was not proved beyond reasonable doubt. Apparently, the learned State Attorney addressed the same when submitting on the first limb of ground 7; a

complaint that the case against the appellant was not proved beyond reasonable doubt as required by the law.

We now turn to consider the complaint by the appellant that he was not properly identified at the scene of crime. We really find difficulties in agreeing with the appellant on this complaint. We say so because, as put by the learned State Attorney, and to our mind rightly so, the victim and appellant slept in the same house. While fast asleep, the victim felt like someone carnally knowing her. She flashed a torch and identified the appellant. She even described the attire of the culprit as a yellow T-shirt and a pair of jeans. She could not immediately call for help as the appellant was armed with a *panga* and threatened to hack her with it if she screamed. After the appellant was done with the heinous act, he left. That was at the point in time when the victim yelled for help. It was her brother-in-law who testified as PW2 who responded to the call. Upon arrival, he met the appellant by the door armed with the *panga* and ran away. PW2 also raised an alarm and the *sungusungu* appeared and arrested the appellant. As the appellant was well known to both the victim and PW2, we are satisfied that this evidence of identification by recognition

was quite appropriately relied upon by the trial court and rightly upheld by the first appellate court. The complaint on visual identification by the appellant is therefore dismissed.

Next for consideration is the complaint by the appellant that his defence was not considered. The learned State Attorney conceded when prompted by the Court that the episode by the appellant that the husband of the victim owed him Tshs. 100,000/= as his wage for laying bricks and that the case might have been framed against him for that reason, was not considered by both the trial and first appellate court. The learned State Attorney was however quick to state that even if the trial court would have considered that defence, it would have arrived at the same conclusion as that defence was an afterthought. That aspect escaped the mind of the first appellate court as well. The learned State Attorney thus implored us to invoke the provisions of section 4 (2) of the AJA and step into the shoes of the first appellate court and do what it ought to have done. That is, to consider the appellant's defence and dismiss it as an afterthought.

It is true that the appellant spoke of the victim's husband owing him Tshs. 100,000/=. Even though he did not state any nexus between the

debt and the charge, we give him a benefit of doubt that he meant to say that he was framed so that he should not be paid the money the victim's husband owed him. The trial court and the first appellate court did not consider this defence. We are aware that the trial court summarized the appellant's defence at p. 63 of the record of appeal but never considered it after the summary. It is elementary that summary of evidence is not consideration of it. To buttress this standpoint of the law, we find it irresistible to restate what we held on the point in **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014 (unreported):

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."* (at p. 5 of the typed judgment).

In the judgment of the trial court, after the trial court summarized the appellant's evidence, it went on to analyze the prosecution evidence. No mention of the appellant's defence was made in the analysis. Much as

we are aware that judgment writing is a matter of style, each and every magistrate or judge has his own. What is relevant is the critical analysis of both the prosecution and defence evidence. As we held in **Amiri Mohamed v. Republic** [1994] T.L.R. 138:

> *"Every magistrate or judge has got his or her own style of composing a judgment, and what vitally matters is that the essential ingredients shall be there, and* ***these include critical analysis of both the prosecution and the defence."***
> [Emphasis supplied].

This, we are afraid, was not the case in the judgment of the trial court. As already stated above, after summarizing the appellant's defence, the trial court never adverted to it in its analysis. This omission was to the detriment of the appellant. It occasioned miscarriage of justice and prejudiced the appellant.

With regard to the way forward, we agree with the learned State Attorney that we should step into the shoes of the first appellate court to do what it did not do. This will not be the first time for the Court to take that course. The Court did so in **Dinkerrai Ramkrishan Pandya v. Rex**

[1957] 1 EA 336, **Iddi Kondo v. Republic** [2004J T.L.R. 362, **Cosmas Kumburu v. Republic**, Criminal Appeal No. 426 of 2016 (unreported) **Julius Josephat v. Republic**, Criminal Appeal No. 03 of 2017 (unreported), **Mzee Ally Mwinyimkuu @ Babu Seya v. Republic**, Criminal Appeal No. 499 of 2017 (unreported) and **Karimu Jamary @ Kesi v. Republic**, Criminal Appeal No. 412 of 2018 (also unreported).

Adverting to the case at hand, the appellant's defence at the trial, as already stated above, was that the victim's husband owed him and seemed to state that that was the reason why he was framed. We agree with the learned State Attorney that the appellant's defence was but an afterthought. We say so for the reasons we have already considered when determining the issue of visual identification by recognition above. And, as if to clinch the matter, the appellant did not state so in his cautioned statement (Exh. P2). In Exh. P2, the appellant is recorded as saying:

> *"... tarehe 08/09/2015, majira ya saa tisa mchana, nilimaliza kufyatua matofali hayo elfu mbili. Kwa kuwa baba mwenye nyumba ambaye ni MWANAUGALI alikuwa amesafiri hivyo sikuweza kupata malipo yangu. Niliendelea kukaa pale*

kwenye mji wake ili nimsubiri aje anilipe hela zangu Tsh. 100,000/= - laki moja tu. Nyumbani kwake alikuwa amebaki mke wake pamoja na wadogo zake. Tarehe 10/09/2015 nilipata tamaa ya kufanya mapenzi na mke wa MWANAUGALI. Usiku majira ya saa tisa niliamka toka chumba ambacho nilikuwa nimelala na kuelekea chumbani kwa MWANAUGALI ambako alikuwa amelala ... mke wa MWANAUGALI. Baada ya kuingia ndani nilipanda kitandani na kuanza kumbaka. Ghafla akaanza kupiga kelele za kuomba msaada na alikuwa akiwaita mashemeji zake ...."

Our literal translation of the above expert would be:

"... on 08/09/2015, at about 15:00 hours, I finished laying those two thousand bricks. As MWANAUGALI had travelled, I had to remain there for my wage of Tshs. 100,000/= - one hundred thousand only. At home, there remained his wife and her younger siblings. On 10/09/2015 I felt a sexual urge to sleep with the wife of MWANAUGALI. At about 03:00 hours, I woke up and went to the room of MWANAUGALI where his wife was sleeping. After entering the room, I climbed on her bed and started

raping her. She then started raising an alarm calling for help from her in-laws."

The above excerpt is a narrative of the appellant himself on what transpired. The question of being framed because the victim's husband owed him does not come up. If anything, according to Exh. P2, the appellant was not paid his Tshs. 100,000/= because the victim's husband who hired him to lay the two thousand bricks, had travelled.

Given the above, we are in agreement with the learned State Attorney that even if the trial court had considered his defence, it would have dismissed it as an afterthought. In the same token, had the first appellate court reappraised the evidence and considered the appellant's defence, it would also have found, as it did, that the appeal before it was without merit.

We now turn to consider the general ground of complaint that the case against the appellant was not proved beyond reasonable doubt. In view of the discussion above, this ground of complaint will not detain us. We have already discussed above that the appellant was positively identified by the victim and PW2 and was arrested in the vicinity

immediately after the commission of the offence. And to clinch it all, the appellant's cautioned statement which was properly introduced in evidence, corroborates the testimony of the victim and PW2.

We agree with the learned State Attorney that the guilt of the appellant was established by the prosecution beyond reasonable doubt. His conviction by the trial court was therefore apposite. So was the decision of the first appellate court to uphold the conviction. For the avoidance of doubt, we agree with Ms. Amani that Exh. P1 was not procedurally adduced as it was not read out loud in court after admission. We expunge it from the record as prayed from the record. However, even after expunging it, the oral testimony by PW3 is enough to prove that the victim was raped.

For the avoidance, we find the complaint by the appellant that the evidence of PW1, PW2 and PW4 who were family members was not corroborated as wanting in substance. We say so because there is no law which require that evidence of family members should be corroborated. What is of importance is the competence, credibility and reliability of the witnesses – see: **Mustafa Ramadhani Kihiyo v. Republic** [2006] T.L.R

323, **Deogratius Beno v. Republic**, Criminal Appeal No. 166 of 2005 (unreported) and **James Sharifu v. Republic**, Criminal Appeal No. 160 of 2013 (also unreported). In **Mustafa Ramadhani Kihiyo** (supra), for instance, we held:

> *"The evidence of ... related witnesses is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited, unless of course, there is ground for doing so."*

Likewise, in **Deogratius Beno** (supra) we reproduced the following excerpt from our previous decision in **Paul Tarayi v. Republic**, Criminal Appeal No. 216 of 1994 (unreported) wherein we considered the issue of evidence of relatives and observed:

> *"... we wish to say at the outset that it is, of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be born in mind, the evidence of each of them must be considered on*

merit, as should also the totality of the story told by them."

The Court further observed in **Paul Tarayi** that:

> *"The veracity of their story must be considered and engaged judiciously, just like the evidence of non-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction base on such evidence cannot hold unless there is supporting evidence by a non-relative."*

In the case at hand, the appellant just alleged that PW1, PW2 and PW4 were family members and, for that reason, surmised that their testimonies needed corroboration. As already alluded to, that is not the correct position of the law in our jurisdiction. We find this complaint wanting in merit and dismiss it.

The sentence of thirty years in prison imposed on the appellant by the trial court and upheld by the first appellate court was the minimum

prescribed by the Penal Code under which he was charged. We thus find no legal reason to meddle with it.

In the final analysis, we find and hold that this appeal was lodged without a justifiable complaint and dismiss it entirely.

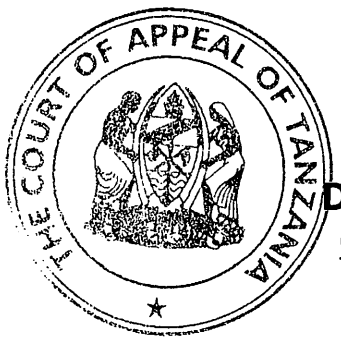
DATED at **MBEYA** this 29th day of November, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of November, 2021 in the presence of the appellant in person and Ms. Sara Anesius, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL