IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 70 OF 2016

MUSTAPHA KHAMIS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mambi, J.)

Dated the 12th day of February, 2016
in
Criminal Application No. 60 of 2015

.....

JUDGMENT OF THE COURT

27th November & 6th December, 2018

MWAMBEGELE, J.A.:

Before us is an appeal by the appellant Mustapha Khamis seeking to challenge the decision of the High Court Tanzania at Mbeya (Mambi, J.) pronounced on 12.02.2016 in DC Criminal Appeal No. 60 of 2015. He was arraigned before the court of the Resident Magistrates of Mbeya vide Criminal Appeal No. 60 of 2015 for two counts: rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (henceforth "the Penal Code") and impregnating a schoolgirl contrary to rule 5 of the Education (Imposition of Penalties to Persons who Marry or Impregnate a School Girl) Rules,

2003 - GN No. 265 of 2003. After a full trial, he was convicted on both counts and awarded thirty years' imprisonment in respect of the first count and five years' imprisonment in respect of the second. Dissatisfied, he has come to this Court on three grounds of complaint, that is:

1. That, both first appellate court and the trial court grossly erred both in law and in fact by holding that the prosecution has proved the charges beyond all reasonable doubts against the Appellant, while it was not;

2. That, the first appellate court did not address its mind that the trial court had grossly erred both in law for failure to inform the Appellant his right to call the doctor who examined the victim, and admitting PF.3;

3. That, both first appellate court and the trial court were erroneously influenced by evidence adduced by prosecution side, hence did not adequately consider and ignored the defence evidence by the Appellant which is fatal.

Before we go into the nitty gritty of the matter, we find it imperative to narrate, albeit briefly, the material background facts giving rise to this appeal as they can be gleaned from the record of appeal. They go thus: PW1; the victim in the matter, whose name we shall not disclose, was a secondary schoolgirl aged seventeen. She was living

with her aunt named Gloria Grayson Mjema (PW2). On 22.04.2014, PW2 told the victim to bring from school a receipt she was given when she paid school fees. It appears the victim, for reasons not apparent on the record, had none. She therefore feared going back home without it. She thus resorted to go and stay with her lover; the appellant. She lived there for about a month when she was told by the appellant to go back home as he feared he would be arrested and prosecuted for keeping a schoolgirl. Still fearing to go back home without the school fees receipt, she took refuge in a nearby forest where some forest officers found her at 19:00 hrs and, after she told them what had befallen her, they took her to the nearby police station where she also narrated the episode. She later took policemen to the appellant and was arrested at once and thereafter the charges the subject of this appeal were instituted against him. After the appellant was arrested, PW1 was taken to the Hospital where she was examined and told that she was two weeks' pregnant.

On his part, the appellant dissociates himself with the charges levelled against him claiming, initially, that the victim is a stranger to him and that he saw her for the first time at the police station after he was arrested. However, later, he shifted the goalposts and claimed to have previously met the victim at his shop at the Bus Stand and after

some days, she showed up again claiming that she was looking for a certain person who worked with Nganga Bus. He gave her Tshs. 2,000/= for some meal as she was hungry. That he went home leaving behind the victim who remained there until the time he was about to sleep when he received a text message to the effect that she was still outside his shop. He went thither only to find the victim crying and asking for a place to sleep that night. Then he took her to his residence where the victim slept on the couch in the sitting room. On the following day, the appellant asked the victim's sister if she knew where the victim was but she was not aware of her whereabouts. The appellant returned to his residence and told the victim to return home but that the latter told her that she would not go back home. That the appellant went to look for her mother to no avail. When he returned back home, the victim was not there. He was arrested five days thereafter and later the charges the subject of this appeal were preferred against him. The appellant denies to have ever had sexual intercourse with the victim.

When the appeal was placed before us for hearing on 27.11.2018, the appellant entered appearance and was represented by Mr. Pacience Maumba, learned advocate. Mr. Hebel Kihaka and Ms. Xaveria

Makombe, learned State Attorneys, joined forces to represent the respondent Republic. The learned advocate for the appellant had earlier filed written submissions which he sought to adopt together with the grounds of appeal as part of his oral arguments. Having so done, he had nothing useful to add and asked us to allow the Republic respond after which he would rejoin if need arose.

In the written submissions, in respect of the first ground of appeal, Mr. Maumba submitted that it is the duty of the prosecution to prove a criminal case beyond reasonable doubt. To buttress this rather obvious proposition, the learned counsel cited **Okethi Okale and others v. Republic** [1965] 1 EA 555. The complaint in respect of the first ground of appeal is four-pronged. First, the appellant complains that the testimonies of the victim (PW1) on the one hand and that of PW2 and Exon Mwakalikamo (PW3) on the other, were contradictory in that while PW1 testified that she was a student of Meta Secondary School, PW2 and PW3 testified that she was a student of Vanessa Secondary School. Secondly, he stated that PW1 was allegedly pregnant but the moment she testified she was not pregnant under the pretext that she miscarried but produced no medical evidence to support the miscarriage episode. For this reason, he submitted that both the trial and first appellate court

ought to have found that the testimony of PW1 was concocted to make the truth from lies. Thirdly, that PW1 did not testify in her evidence-in-chief about having sexual intercourse with the appellant. She testified about having sexual intercourse in re-examination which was inordinate procedure, he argued. Fourthly, Mr. Maumba submitted that there was no proof that PW1 was aged seventeen at the material time and that she was a schoolgirl. He argued that as far as the evidence on record was concerned, the appellant was an adult who consented to sexual intercourse if there was any. Relying on **Prince Charles Junior v. Republic**, Criminal Appeal No. 250 of 2014 (unreported), Mr. Maumba submitted that the first appellate court ought to have treated the evidence as a whole and subjected the same to a fresh and exhaustive scrutiny, failure of which constituted an error in law.

On the second ground of appeal, Mr. Maumba submitted that the trial and first appellate courts ought to have adhered to the provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (henceforth "the CPA") which mandatorily require the Court to inform the appellant of his right to require the medical personnel who made the PF3 to be summoned in accordance with the section. He submitted that Dr. Aggrey William (PW4) who tendered the

PF3 is not the one who filled it. Failure to inform the appellant of his rights to summon the person who prepared the PF3 offended section 240 (3) of the CPA and, relying on **Tumaini Mtayomba v. Republic**, Criminal Appeal No. 217 of 2012 (unreported), the PF3 was not supposed to be relied upon to convict the appellant. He thus prayed that the same be expunged.

On the third ground, Mr. Maumba submitted that the trial and first appellate courts did not consider the evidence of the appellant. He submitted that the appellant testified that he sympathized with the victim and took her to her room where she slept on the couch in the sitting room. On the following day, the appellant went to PW1's sister and enquired after her but her sister did not know her whereabouts. He returned home and told her to go back home but she told him that she could not. He left her there and went to look for her mother but his efforts did not bear any fruits. That the appellant brought witnesses to support him. This defence of the appellant, Mr. Maumba submitted, was not considered by both the trial and first appellate courts. He referred us to **Abel Masikiti v. Republic**, Criminal Appeal No. 24 of 2015 (unreported) wherein the Court observed that failure to consider the defence was fatal.

As an extension to the foregoing argument, Mr. Maumba submitted that a statement by the trial court to the effect that it was hard to believe that the appellant; a young man, would have slept with a girl in one room without having sex and that the appellant testified that he slept in one room with PW1, imported extraneous matters in evidence and that the course of action prejudiced the appellant. He referred us to **Okethi Okale** (supra) wherein it was observed that it was dangerous and inadvisable for the court to put forward a theory not canvassed in evidence or counsel's speeches.

Having submitted and argued as above, Mr. Maumba reiterated that the case against the appellant was not proved beyond reasonable doubt and, therefore, urged us to allow the appeal and set him free.

Responding, Mr. Kihaka expressed his stance at the very outset that the respondent Republic supported the appellant's appeal. Elaborating for taking that stance, he submitted that the appellant was charged with and convicted of, *inter alia*, rape contrary to sections 130 (1) and (2) (e) & 131 (1) of the Penal Code. Citing the unreported decision of this Court in **Selemani Makumba v. Republic** [2006] T.L.R. 379, at p. 384, he submitted that in cases of this nature, the best evidence is that of the victim. In the case at hard, he submitted, the

victim did not prove penetration; she just stated that the appellant was her lover since 2013 and that she stayed with him for a month; from 22.04.2014 to 22.05.2014. She brought in the aspect of penetration in re-examination when she testified that there was sexual intercourse between them several times. That was not a correct procedure, he argued. Such aspect ought to have been raised in examination-in-chief so as to accord the defence to cross-examine on the same. By not testifying on penetration, the provisions of section 130 (4) (a) of the Penal Code were offended, he argued.

Responding on the second ground of appeal, he submitted that section 240 (3) of the CPA was offended. The doctor who testified as PW4 is not the one who filled the PF3; Exh. P2. In the circumstances, the court should have informed the appellant of his right to summon the person who examined the victim and filled the PF3, he submitted. The learned State Attorney referred us to our unreported decisions in **Juma Masoud @ Defao v. Republic**, Criminal Appeal No. 52 of 2007 at p. 8 and **Tumaini Mtayomba** (supra) to urge us expunge the PF3.

Regarding the third ground, the learned state attorney submitted that this is a new ground; it did not surface at the first appellate Court. In the premises, he argued, this Court has no jurisdiction to entertain it.

On the discrepancy of evidence between PW1 on the one hand and PW2 and PW3 on the other, he submitted that the question of where the appellant schooled was not at issue. However, on being probed, he conceded that in terms of section 127 (7) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (henceforth "the Evidence Act"), credibility of the witness; the victim, could be easily shaken by this piece of evidence.

Having stated as above, the learned State Attorney concluded that the case against the appellant was not proved beyond reasonable doubt.

In a short rejoinder, Mr. Maumba, first wanted to rejoin on the third ground that the question of failure to consider the defence of the appellant was not being raised before us for the first time but, on being probed, he conceded to what the learned State Attorney submitted on the point; that the Court would not have jurisdiction to entertain a matter which was not decided by the first appellate court.

Having stated the above, the ball is now in our court to confront the three grounds of appeal enumerated above in the quest to determine the fate of this appeal. In our quest, we will start with the third ground of appeal and then deal with the second and the first will be determined last.

On the last ground, the appellant complains that his defence was not considered by both the trial and first appellate courts. This ground will not detain us. As rightly submitted by Mr. Kihaka and seemingly conceded by Mr. Maumba, the complaint was not raised in the first appellate court, and therefore this Court will not have jurisdiction to entertain it in terms of the law we have pronounced ourselves in a number of our decisions. Among them are the cases of **Zakayo Shungwa Mwashilingi and Two Others v. Republic**, Criminal Appeal No. 78 of 2007, **Birahi Nyankongo and Another v. Republic**, Criminal Appeal No. 182 of 2010, **Mashimba Dotto @ Lukubanija v. Republic**, Criminal Appeal No. 317 of 2013 and **Laurent Kisingo v. Republic**, Criminal Appeal No. 123 of 2013 (all unreported), to mention but a few. In **Birahi Nyankongo**, for instance, confronted with an akin situation, we observed:

> *"... the complaint about differing dates of arrest was not raised during the hearing of the first appeal so it is an afterthought not worthy of consideration by this Court."*

We subscribe to the position we took in **Birahi Nyankongo** as well as other cases cited above and therefore refrain from entertaining

the last ground of appeal because the complaint surfaced for the first time before us; it was not decided upon by the first appellate court.

The second ground is pegged on the noncompliance with the provisions of section 240 (3) of the CPA. The learned counsel for both parties are at one that failure to inform the appellant on his right to call the person who made the medical report; the PF3, was in flagrant disregard of the provisions of section 240 (3) of the CPA. We agree with the position taken by counsel for both parties. This Court has time and again insisted on compliance with this mandatory provision of the law to the letter. Failure to do so makes the PF3 (or any medical document) expunged on appeal – see: **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006, **Arabi Abdu Hassan v. Republic**, Criminal Appeal No 187 of 2005, **Burundi s/o Deo v. Republic**, Criminal Appeal No. 33 of 2010, **Parasidi Michael Makulla v. Republic**, Criminal Appeal No. 27 of 2008, **Arabi Abdu Hassan v. Republic**, Criminal Appeal No 187 of 2005, **Shabani Ally v. Republic**, Criminal Appeal No. 50 of 2001, **Prosper Mnjoera Kisa v. Republic**, Criminal Appeal No. 73 of 2003, **Meston Mtulinga v. Republic**, Criminal Appeal No. 426 of 2006 and **Tumaini Mtayomba** (supra), all are unreported

decisions of the Court, to mention but a few. In **Alfeo Valentino**, for instance, the Court observed:

> *"We think that the law on this issue was stated with sufficient lucidity by this Court in the cases of* ***Kashana Buyoka*** *v* ***R,*** *Criminal Appeal No. 176 of 2004,* ***Sultan s/o Mohamed*** *v* ***R,*** *Criminal Appeal No. 176 of 2003,* ***Rahim Mohamed*** *v* ***R,*** *Criminal Appeal No. 234 of 2004, (all unreported) among many others. The Court has consistently held that once the medical report, as the PF3, is received in evidence, it becomes imperative on the trial court to inform the accused of his right of cross-examination. This Court held in these cases that* ***if such a report is received in evidence without complying with the mandatory provisions of section 240 (3), such a report must not be acted upon****."* [Emphasis ours].

We think the above excerpt, to which we fully subscribe, seals the matter. As the trial court did not comply with the mandatory provisions of section 240 (3) of the CPA, and the shortcoming went unnoticed in the first appellate court, that was fatal and the ailment cannot be

salvaged by section 388 of the same Act. In the circumstances, the PF3; Exh. P2, is expunged from the record.

Next for consideration is the complaint the subject of the first ground of appeal. As alluded to hereinabove, the complaint has four limbs. The first limb is about the discrepancy of evidence of PW1 on the one hand and that of PW2 and PW3 on the other. It is true that while the testimonial account of the victim has it that she was a student of Meta Secondary School, that of PW2 and PW3 contradicts it; they testified that she was a student of Vanessa Secondary School. We find the testimony of PW2 and PW3 as plausible. PW3; the Headmaster of Vanessa Secondary School testified that PW1 was a student of Vanessa Secondary School in Form One and Two in the years 2012 and 2013 respectively and that after doing the Form Two Examinations, she never returned on the following year to join Form Three. Much as we agree with Mr. Kihaka that the question where the victim was schooling was not at issue, the fact that she lied renders the credence of her testimony doubtful. We find the credibility of the testimonial account of the victim watered down by this piece of evidence.

The second limb of the appellant's complaint is that the victim did not prove that she was pregnant in that they did not bring any medical

evidence to that effect. With due respect to Mr. Maumba, we do not think this argument is powerful. We say so because even if there was proof that the victim was two weeks' pregnant at the material time, that would not have proved that the appellant was responsible for that pregnancy. Neither would it be proof that the appellant raped her. Bringing evidence to that effect would therefore not have added value to the prosecution case.

Next for determination is the third limb of complaint which is to the effect that the appellant did not prove penetration. Both learned counsel are at one that the victim testifying about penetration re-examination was inordinate which is tantamount to an afterthought. We agree with the submissions and arguments by counsel for both parties and proceed to demonstrate hereunder.

It is not disputed that in the offence under discussion; rape, penetration is one of the essential ingredients. The learned counsel for the parties seem not to dispute that proof of penetration is a mandatory statutory requirement under section 130 (4) (a) of the Penal Code. For easy reference we take the liberty to reproduce the provision:

> *"130 (4) For the purposes of proving the*
> *offence of rape-*

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence ..."

In the light of the provision of the law just reproduced, penetration is an essential ingredient of the offence of rape. It is not in dispute that the victim's account on penetration was not a subject during examination-in-chief but came later in re-examination. We find it pertinent to underline at this juncture that the need to prove one's case in examination-in-chief cannot be overemphasized. In this respect we find it overbearing to somewhat digress and discuss the order and purpose of examination of witnesses. This is the domain of section 147 of the Evidence Act. It reads:

"147. Order and direction of examinations

(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined.

(2) The examination-in-chief must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination and if it does so, the parties have the right of further cross-examination and re-examination respectively.

(5) Notwithstanding the other provisions of this section, the court may, in any case, defer or permit to be deferred any examination or cross-examination of any witness until any other witness or witnesses have been examined-in-chief, cross-examined or, as the case may be, further examined-in-chief or further cross-examined."

In proving the ingredients of rape, we expected the respondent Republic to give such evidence in examination-in-chief, for, the purpose of re-examination, in terms of section 47 (3) of the Evidence Act, is not

bring into evidence new matters but to be confined to matters arising out cross-examination. Elaborating on the object and scope of examination-in-chief in India under section 138 of the Indian Evidence Act, M. C. Sarkar, M. C. Sarkar and Prabhas C. Sarkar, the authors of **Sarkar, Law of Evidence**, 18th Edition has this to say at p. 2768:

> *"It has been seen that the object of this examination is to elicit from the witness all the facts or such of them as he can testify* ***in order to prove the case of the party calling him****. Every question is to be framed with some object in view ..."*
> [Emphasis supplied].

Regarding re-examination, the learned authors state at p. 2807 of the same scholarly work:

> *"The re-examination should be confined to matters arising out of the cross-examination, and ordinarily the counsel will not be allowed to question on matter which could have been asked in examination-in-chief. If it is desired to introduce new matter in re-examination, the counsel should in every instance seek permission of the court ..."*

Citing the Indian case of **Daulatram v. Bharat Ins Co**, 1973 D 180, the learned authors add at p. 2808:

> *"If new matter is introduced in re-examination without objection the court must be deemed to have permitted the question and the adverse party has a right to further cross upon the matter".*

Section 138 of the Indian Evidence Act is *in pari materia* with our section 47 of the Evidence Act.

A somewhat akin situation was the case in **Abdallah Ramadhan v. The D. P. P.**, Criminal Appeal No. 219 Of 2009 (unreported) wherein, a witness made no attempt to describe the conditions of identification or even state in her evidence whether she knew the appellant before the alleged armed robbery or whether there was electricity or some other source of light at the scene of crime. The witness stated in cross-examination that the appellant had been at the bar for about an hour during the day. In dismissing that kind of evidence we observed:

> *"... had the complainant identified the bandits, she would have deposed the same in her examination in chief instead of glossing over the same during cross-examination."*

In the case at hand, a new matter which was very relevant to the case was not raised in examination-in-chief but in re-examination and the appellant was not accorded opportunity to cross-examine upon it. Neither was the witness recalled for cross-examination in terms of section 47 (4) of the Evidence Act. Apparently both courts below were of the view that it was not fatal. We, with respect, do not agree with that reasoning. That very relevant ingredient constituting the offence of rape should have been raised in examination-in-chief. Raising it in re-examination without giving the appellant the right to cross-examine on it prejudiced him. He was, in the circumstances, not fairly tried. The trial Court should not have relied upon that kind of evidence to convict him.

There was another complaint; the subject of the fourth limb to the effect that there was no proof that PW1 was aged seventeen at the material time as no birth certificate was tendered in evidence and that she was a schoolgirl. This complaint will not detain us. Like the complaint above in respect of the appellant's defence not being considered, the complaint respecting the age of the victim was not raised in the first appellate court. Under normal circumstances, as already determined above in respect of failure to consider the appellant's defence, we would have refrained from entertaining the

complaint here. However, upon a second thought, we have decided to give the appellant a benefit of doubt and entertain it given that this complaint might have been encapsulated in the general first ground of appeal before the first appellate court.

The age of the victim was not contested. PW2 testified that the victim was seventeen years of age at the time and the appellant did not cross-examine the witness on that. Thus raising an alarm after his failure to cross-examine the witness on the age of the victim is but an afterthought. In this regard, we find irresistible to reiterate the position of the law we took in **Ismail Ally V. Republic**, Criminal Appeal No. 212 of 2016 (unreported). In that case, the appellant in a statutory rape case, complained on appeal on the age of the victim. We observed:

> *"... the complainant's age was not raised during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2 and PW3 on that point. Therefore, raising it at the level of appeal is an afterthought - See the cases of* ***Edward Joseph v. Republic,*** *Criminal Appeal No. 272 of 2009,* ***Damian Ruhele v. Republic,*** *Criminal Appeal No. 501 of 2007,* ***Nyerere Nyegue v. Republic,*** *Criminal Appeal No. 67 of 2010, and* ***George***

Maili Kemboge v. Republic, *Criminal Appeal No. 327 of 2013, CAT (all unreported)."*

We went on to quote the following excerpt from **Nyerere Nyegue**:

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

We think the foregoing provides an answer to the appellant's complaint in respect of the age of the victim. He did not raise an alarm over it at the trial and did not cross-examine PW1 and PW2 over it. In the premises, raising it at this stage is but an afterthought.

Be that as it may, Proof of age is not necessarily by way of a birth certificate as Mr. Maumba would like us to believe. We were confronted with a similar issue in **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 (unreported) wherein we cited the following observation from our previous unreported decision in **Edward Joseph v. Republic**, Criminal Appeal No. 19 of 2009:

"Evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's age."

We also referred to **Iddi s/o Amani v. Republic**, Criminal Appeal No. 184 of 2013 (unreported) wherein the appellant claimed that no birth certificate was tendered to prove the age of the victim. The Court relied on the evidence of the father as being in a better position to prove the age of the victim who was his daughter. We added that "after all, the contents of the Birth Certificate by and large depend on the information received from the parents".

For completeness, we find it apposite to refer to the position pertaining to the point in neighbouring jurisdictions. In **Byagonza v. Uganda** [2000] 2 EA 351, the decision of the Supreme Court of Uganda, the following paragraph from **Halsbury's Laws of England** (4th Edition) Volume 17, paragraph 42 on determination of age was cited:

"Age may be proved by various means, including the statement by a witness of his own age and the opinion of a witness as to the age of another person, but when age is in issue stricter methods of proofs, may be required. In these cases, age may proved by

the admission of a party; by the evidence of a witness who was present at the birth of the person concerned, by the production of a certificate of adoption or birth, supplemented by evidence of identifying the person whose birth is there certified, by the oral or written declarations of deceased persons, and in civil proceedings, by the statement in writing of a person who could have sworn to the fact. In certain criminal and other cases in which the age of a person is material, the age will be presumed or deemed, to be what appears to the court to be his age at the relevant time after considering any available evidence".

We are persuaded by the **Byagonza** case and hold that it extrapolates the correct position of the law applicable in our jurisdiction as well.

Lastly, we agree with Mr. Maumba that the trial court imported extraneous matters and theories not canvassed in evidence into the case and used to convict the appellant. For instance, the trial court, at p. 35 of the record recorded the appellant as saying:

"I felt sorry for her I took her to my home, she slept in the couch in the sitting room and I slept in my bedroom."

However, in the judgment; at p. 56 of the record of appeal, the trial court observed:

> *"the evidence of the accused that he did not make (sic) sexual intercourse with the victim is baseless and* ***this court has not taken it seriously because how is a young man like the accused who is not married can accept to help out the young girl to sleep in his room leaving people who had opportunity to help*** *the girl with somewhere to sleep including the woman whom he received a message from through his mobile".*

With due respect to the learned trial Resident Magistrate, the foregoing certainly shows that he imported in evidence extraneous matters not the subject of what transpired in court. As shown in the bold expression of the quote above, the appellant never said he slept in one room with the victim. He said PW1 slept on the couch in the sitting room while he slept in his bedroom. Likewise, the bold expression in the excerpt above makes it apparent that the learned trial Resident Magistrate brought forward a theory which was not canvassed in evidence. As rightly put by Mr. Maumba for the appellant, it was held in **Okethi Okale**, I quote from the first headnote that:

"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches".

Relying on **Okethi Okale**; the decision of our predecessor; the Court of Appeal for East Africa, we think it was dangerous and inadvisable for the trial court to put forward a theory of the impossibility of the appellant; an unmarried young man, to accept to help out PW1 to sleep in his room leaving people who had opportunity to do so. That theory by the trial court was not only inconsistent with the evidence adduced during the trial but also prejudicial to the appellant.

The above said, we think, generally, the prosecution's case fell short of proof of the case to the required standard in criminal law; beyond reasonable doubt. This appeal is therefore meritorious and we allow it. We, consequently, quash the judgment and conviction of both courts and set aside the sentences of thirty and five years' imprisonment meted out to the appellant in, respectively, the first and second count. The sentence of compensation of Tshs. 2,000,000/= to the victim is also set aside. We order that the appellant Mustapha Khamis be forthwith

released from prison custody unless held there for some other lawful cause.

Order accordingly.

DATED at **MBEYA** this 5th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL