IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A. MKUYE, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 341 OF 2017

ALLY PATRICK SANGA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Feleshi, J.)

Dated the 11th day of August, 2017
in
DC. Criminal Appeal NO. 35 OF 2017

JUDGMENT OF THE COURT

16th & 21st August, 2019

MZIRAY, J.A.:

In the District Court of Iringa, the appellant was arraigned of unnatural offence in breach of section 154 (1) and (2) of the Penal Code, Chapter 16 of the 2002 Revised Edition. He was sentenced to 30 years imprisonment with twelve strokes of corporal punishment. In addition, he was condemned to pay a compensation of Tshs. 300,000/= to PW2 **DM** (Name withheld to hide his identity) who was the victim of the offence. On appeal to the High Court the first appellate Judge (Feleshi, J. as he then

was) dismissed his appeal in its entirety. Still aggrieved, the appellant has preferred this second appeal.

It was alleged before the trial court that on the 25th day of February, 2014 at Isoka, Mwangata area within the Municipality and Region of Iringa, the appellant had carnal knowledge of one **DM** a boy of seven years of age against the order of nature. The appellant pleaded not guilty.

For a better understanding of the salient issues in this appeal, we deem it necessary to highlight briefly the factual setting giving rise to the prosecution and the ultimate conviction of the appellant. **DM** (PW2) and **EK** name withheld, (PW4) who are minors were close friends and at the material time were in class II at Mlangali Primary School within the Municipality of Iringa. On their way to school they always used to pass via the place where the appellant was conducting his charcoal business. For that matter, they knew the appellant prior to the incident. It is in the evidence of **DM** that one day the appellant invited them to his home. The real intention of the appellant was not known to the boys. Innocently, the two accepted the invitation and went inside his house. While in the house, the appellant took **DM** by force to his room. According to **DM** the appellant

undressed him and sexually abused him by inserting his penis in his anus. He then released and threatened to kill him if he revealed the shameful act to anybody. **DM** felt pain but he did not reveal the ordeal to **EK** until in the evening when they were coming back from school, there is when he related what happened to him in the morning.

When the boys parted company on that day, **DM** went straight to the home of PW1 Anna Chombe who is his grandmother. According to PW1 this was on 1-3-2004. The latter noticed that **DM** was not walking properly when she took him to have a bath. On inquiring from him, the poor boy just told him that someone had injured him. This answer did not satisfy PW1. She immediately communicated with PW3 Anna Msumange who is the mother of **DM** that she should inquire further from him when he arrives home about the abnormal walk of **DM**. When PW3 interrogated him thoroughly he at last named the appellant as the culprit to the alleged sexual assault. The appellant was nabbed on 4/4/2014 and subsequently brought to the trial court on 16/6/2014 upon which a charge of unnatural offence was pointed to him.

In his defence on oath the appellant denied to have committed the offence. He highly disputed the evidence of PW1 and PW3 to be hearsay. He challenged also the evidence of **DM** to be fabricated. Lastly he said that **DM** was not medically examined to prove that he was sexually assaulted.

It is on record that before **DM** (PW2) gave his evidence on 19/11/2014, a *voire dire* test was conducted by the trial court in compliance with section 127(2) of the Tanzania Evidence Act (TEA). For the purposes of this decision, we think that it is important to reproduce the record in respect of the *voire dire* test:-

It reads thus:-

> *"**Court**; The witness is a child voire dire test*
>
> - ***Voire dire test***
> - ***DM** (name withheld)*
> - *Yes I am a student*
> - *Mlangali Primary School*
> - *I am a standard two (II)*
> - *There are many teachers at the school.*
> - *I do know all by names but some of them I know, such as Mwalimu Kivamba and Mwalimu Msola.*
> - *Yes I am going to church on Sunday.*

- *I am going to pray*
- *Yes, you are telling false you committed they*
- *Yes, I know the meaning of telling taking oath is to state/speak the truth*
- ***Court**:*

  After asking the witness such question, I have satisfied that has able to give evidence and answer the question which may be asked.

The trial court in its decision at page 43 of the record relied heavily on the evidence of **DM** and placed much reliance on the *voire dire* test conducted and upon assessing his demeanour it found that he was a witness of truth. The trial court found that the evidence of **DM** had sufficiently proved the charge beyond reasonable doubt and the missing medical evidence was not necessary in the circumstances of the case to ground a conviction. When the matter went for appeal, the decision of the trial court was confirmed by the first appellate court and the appeal of the appellant was found to be devoid of merit.

In the present appeal, the appellant seeks to impugn the findings of the lower courts. In order to assail the conviction and sentence, the appellant has filed a memorandum of appeal comprising of eight grounds

of complaint. We reproduce them hereunder as framed for ease of reference:-

1. *That, the High Court wrongly to considering totally on the hearsay evidence of PW1, PW3 and PW4 which were not accepted by the law.*

2. *That, the honourable Judge of the High Court erred in law for considering the evidence of PW2 (victim) only which was not corroborate thereto by direct evidence or other strongly evidence*

3. *That, the honourable Judge of the High Court erred in law to rely mostly on PW2 evidence without the voire dire test conducted to PW2 who was a witness at tender age as required by the law in such year (2014) his testimony adduced*

4. *That, the High Court wrongly, to rely on the prosecution side evidence while they failed to tender PF3 in order to establish the charge but also the doctor who examined the PW2 was not called to testify in order to establish the charge.*

5. *That, the honourable Judge of the High Court erred in law to rely only on prosecution side*

evidence without considering that the defence evidence was not well evaluating.

6. *That, the honourable Judge of the High Court erred in law to dismiss the appellant's appeal without take account that the appellant's illness raised in mitigation stage was in question but the court failed to prove such illness to whether DW1 mind was sane or not in order to reach the fairness judgment but also to met the requirement of law.*

7. *That, the honourable Judge of the High Court erred in law to dismiss the appellant's appeal when the High Court proved that the procedure not followed (pg. 80-81 in the record) hence the whole judgment defined itself that was not fair and the justice is not seen done at all.*

8. *That, the honourable Judge of the High Court erred in law for failure to address his mind properly that the prosecution side failed totally to prove this case beyond reasonable doubt.*

At the hearing, the appellant being a lay person had nothing to submit, he just adopted his grounds of appeal and opted to allow the

learned State Attorney to respond first and if need arises he would give his rejoinder submission later.

On the other side, the respondent/Republic was represented by Mr. Alex Mwita, learned State Attorney. From the outset, Mr. Mwita indicated to support the appeal. He also declined to submit on grounds one, six and seven simply on reason that these are new grounds which were not raised and canvassed when the appeal was before the first appellate court.

In his submission, the learned State Attorney combined grounds two and three which are criticizing the procedure adopted by the trial magistrate and the findings made therein in respect of the *voire dire* test conducted to **DM** who is the victim of the alleged offence. He submitted on these grounds that the *voire dire* test was not in conformity with the requirements of section 127 (2) of the Tanzania Evidence Act. On this point he submitted that in the *voire dire* test conducted, the trial magistrate failed to express and record his opinion in the proceedings that **DM** who was a child of tender age was possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. To underscore the point, the learned State Attorney referred us to

our decision in **Mwilali Mussa v. Republic**, Criminal Appeal No. 18 of 2017 (unreported). He concluded that the *voire dire* test was wrongly conducted hence it was an error in law to convict the appellant based on the evidence of the victim emanating from a *voire dire* test which was conducted contrary to the law.

In response to the fourth ground, the learned State Attorney conceded that the doctor who examined the victim was not called to testify and tender the PF3. On this, he submitted that it is not necessary to have medical evidence in a case of the nature particularly where the oral evidence is straight forward and has proved the offence but there are certain circumstances on which such evidence might be necessary, like what happened in this case. It is the view of the learned State Attorney that in the instant case the doctor who examined the victim was a material witness to corroborate the testimony of the victim taking into consideration that it took a period of one week from the period the alleged offence was committed to the period when the victim was conveyed to hospital. It is his contention that due to the nature of the case, the doctor was to be called as a witness short of that the trial court was entitled to draw an adverse inference against the prosecution case. He supported his position by citing

to us our own decision of **Azizi Abdallah v. Republic** [1991] TLR 71. He with respect, differed with the position taken by the first appellate court which actually saw this deficiency in the prosecution case but failed to draw an adverse inference. Having said that, he prayed for the fourth ground be allowed.

Lastly, in response to the firth ground of complaint, the learned State Attorney joined hands with the appellant that his defence was not considered by the trial court something which was a serious misdirection on the part of the trial court. He referred us to page 42 to 43 of the record which according to him it clearly shows that the trial magistrate did not evaluate the defence case and make a finding whether he accepted or rejected it. The same mistake was done by the first appellate court which also failed to re-evaluate the defence of the appellant to the effect that he was not identified at the scene. He invited us to consider this ground in favour of the appellant as we did in the case of **Sadick Kitime v. Republic**, Criminal Appeal No. 483 of 2016 (unreported). He finally prayed for the appeal to be allowed.

In his rejoinder submission, the appellant had nothing useful to submit and left to the Court to use its wisdom and reach to a just decision.

After a careful consideration of the submission of the learned counsel and the record of appeal, we should now be in a position to confront the grounds for determination as appearing in the grounds of appeal raised. We start our determination with an observation made by the learned State Attorney to the effect that grounds one, six and seven in the memorandum of appeal should not be considered in this appeal for a single reason that these grounds were not raised and decided by the first appellate court, so raising them in a second appeal is an afterthought.

We think that this issue should not detain us. We fully subscribe with the submission of the learned State Attorney that as far as these grounds were not raised in the High Court, they cannot be raised and entertained at this stage. In the case of **Bundala @ Swaga V.R**, Criminal Appeal No. 416 of 2013 (unreported) we held thus:-

> *"It is now settled law that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided, and not*

on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

See also **Yusuph Masalu @ Jiduvi V.R**, Criminal Appeal No. 163 of 2017, **Juma Manjano V.R**, Criminal Appeal No. 211 of 2009 and **Samwel V.R**, Criminal Appeal No. 135 of 2004 (all unreported).

We therefore find that grounds one, six and seven are devoid of merit as we have no jurisdiction to entertain them.

Our second issue to discuss is whether section 127(2) of the Tanzania Evidence Act was faulted. This issue covers complaints in the second and third grounds of appeal. Like what the learned State Attorney adopted, we will also combine the two grounds and discuss them jointly as both are complaints in respect of the *voire dire* test. In arguing the two grounds, the learned State Attorney lamented that in the *voire dire* test conducted, the trial magistrate failed to express and record his opinion in the proceedings that the victim who was a child of tender age was possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. That exactly is the essence of section 127(2) of TEA. In the *voire dire* proceedings at page

13-14 of the record of appeal which we reproduced earlier the trial court made its findings as follows:-

> *"**Court:***
>
> *After asking the witness such question, I have satisfied that has able to given evidence and answer the question which may be asked."*

The above recorded finding of the trial court did not show that the purpose of section 127(2) (TEA) was achieved. In our view, the above finding does not suggest that the victim understood the nature of an oath and the duty of speaking the truth.

In the case of **Mwilali Mussa** (supra) we insisted that;

> *"The purpose of a voire dire test under section 127(2) of the Evidence Act is to ascertain whether or not a child of tender age is competent to testify.*
>
> > *It is also intended to ascertain whether a child understands the nature of oath or if he does not, whether or not he knows the duty of telling the truth."*

In the instant case, it is clearly seen that the purpose of *voire dire* test was not achieved as the conducted test was not in conformity with the requirements of section 127(2) of TEA. It was therefore an error for the first appellate judge to state at page 80 of the record that the testimony of PW2 passed the *voire dire* test and grounded a conviction on his evidence. We find that section 127(2) was not adequately complied with and for that reason we allow the second and third ground of appeal.

The fifth ground of appeal pertains on failure on the part of the prosecution to call medical evidence in this case. It is the contention of the appellant that in the absence of medical evidence the charge against him was not proved beyond reasonable doubt. His position is supported by the learned State Attorney for the respondent but with different reasons altogether. He informed us that generally medical evidence is not necessary in the case of this nature particularly where the evidence of the victim is to be believed but in his view the circumstances surrounding this case require medical evidence before a conviction is grounded. He explained that it took long for the victim to be conveyed to hospital from the time when the alleged offence was committed.

It is his contention that since there was a delay to convey the victim to hospital, the doctor who examined him was a material witness to corroborate his evidence. In his view failure to call the doctor who was a material witness was fatal and for that matter the trial court was entitled to draw an adverse inference.

On our part we note from the charge sheet that the alleged offence was committed on 25/2/2014 and according to PW1 she discovered that the victim was not properly walking on 1/3/2014, which was almost one week after the alleged incident. He was not immediately taken to hospital until on 3/3/2014. We tend to agree with the learned State Attorney that as there was an unexplained delay to convey the victim to hospital, it was necessary for the trial court to get the evidence of the doctor who examined the victim to corroborate his story. We tend also to agree with him that failure to call the doctor who was a material witness was fatal, as such omission tainted the prosecution case. The trial court, under such circumstances was entitled to draw an adverse inference. (See the case of **Aziz Abdallah** (supra). The first appellate judge at page 80 of the record of appeal saw that the doctor was not a material witness and he came to

the conclusion that in the circumstances of this case an adverse inference was uncalled for.

With respect, we differ with the findings of the first appellate judge for the reasons which we have stated herein above. We insist that the doctor's evidence was necessary taking into account the date of the alleged incident and the period the victim was taken to hospital. We find merit in the fourth ground of appeal.

The fifth, which is the last ground of appeal, alleges that the High Court relied on the prosecution side evidence without considering that the defence evidence was not properly evaluated. In the record of appeal, the appellant's evidence appears at page 35-37. As rightly pointed by the appellant and supported by the learned State Attorney, the creditworthiness or probative value of the defence evidence is not evaluated anywhere. What the appellant averred and raised in his defence was not considered by the trial magistrate in his judgment. The first appellate Judge did not also evaluate the evidence of the appellant to the effect that he was not identified at the scene of the alleged crime. Taking into consideration that the appellant was arrested on 4/4/2014, almost one

month after the alleged incident, raised doubt why he was not arrested immediately, while it was known that he was a charcoal seller residing within the locality.

We think that in a first appeal, the first appellate court was supposed to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case (see **Leonard Mwanashoka V.R**, Criminal Appeal No. 226 of 2014 (unreported).

It is therefore our conviction that the first appellate court's failure to re-evaluate the evidence of the defence constituted an error of law and by affirming a conviction based on evidence which had not been duly reviewed was also another error which renders the conviction unsafe. In **Hussein Idd and Another V.R** [1986] TLR 283, it was held that failure to consider the defence case was a serious misdirection that, a conviction would be unsafe.

In fine, we hold that the appellant was wrongly convicted of the charged offence. We therefore allow the appeal. We quash the conviction and set aside the sentence and the order for compensation. We order the

...immediate release of the appellant from custody, unless he is lawfully held for some other lawful cause.

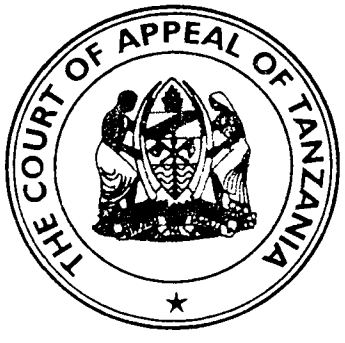
DATED at **IRINGA** this 20th day of August, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on this 21st day of August, 2019 in the presence of Appellant in person and Mr. Alex Mwita, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL