IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: JUMA, C.J., WAMBALI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 236 OF 2019

PATRICK S/O OMARY @ RICHARD..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)..... RESPONDENT

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

(Mrango, J)

dated the 15th day of May, 2019

in

Criminal Appeal No. 5 of 2019

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JUDGMENT OF THE COURT

22nd & 25th September, 2023

KENTE, J.A.:

This is a second appeal by the appellant Patrick Omary @ Richard. It arises from the judgment of the High Court of Tanzania (Mrango, J as he then was), sitting at Sumbawanga, in DC. Criminal Appeal No. 5 of 2019. Initially, the appellant appeared before the District Court of Sumbawanga where he was charged with and subsequently convicted of the offence of rape contrary to sections 130 (1) and (2) (a) and 131 (1) of the Penal Code, Cap. 16, Revised

Edition, 2002 (now Revised Edition, 2019). He was sentenced to the mandatory thirty years' imprisonment. Dissatisfied, he appealled in vain to the High Court where the appeal was dismissed in its entirety. In addition, the appellant was ordered to undergo a corporal punishment of twelve strokes of the cane. Still aggrieved by the conviction and sentences imposed on him, the appellant has appealed to this Court.

The factual background giving rise to this appeal as accepted by the trial and the first appellate courts was briefly to the following effect: The appellant and the complainant whose identity we shall hereinafter conceal and simply refer to as "the victim" or "PW1", are closely related. The victim is the appellant's great grandmother. On 10th May 2018, the appellant went to visit his grandmother Therezia Choma (PW2) who was living with the victim at Luwa village within the municipality of Sumbawanga in Rukwa Region. On the following day, the appellant's grandmother asked him to accompany her to the farm. The appellant however gave an excuse saying that he could not go to the farm as he was feeling unwell. Accordingly, PW2 left for the farm leaving behind the appellant and the victim.

Sometimes later, the appellant is said to have gone to the victim's room purportedly to assist her to take bath. He allegedly took her from the bed and sat her on the chair. He undressed her and started bathing her. After bathing her, he took her back to the bed and applied oil over her. While on bed, he went on to have sexual intercourse with her, without her consent.

Before the trial court, the victim recounted how she raised the alarm seeking help but no one came to her rescue. After satisfying his seemingly irresistible sexual urge, the appellant went over to one Evance Salanga PW3's (appellant's uncle's) house leaving the victim behind still crying for help. As a result, PW3 heard the victim's alarm whereupon he decided to go and check on her. On reaching there, PW3 saw the victim bleeding. She then told him she was raped by the appellant. Assisted by his brother, they arrested and held him for a while before they whisked him to the Police Station at Sumbawanga where the appellant was held longer to complete investigation into the rape incident.

At the police station, the appellant was interrogated by No. H 5929 Detective Constable Wycliffe (PW4) to whom he allegedly

confessed to have committed the offence. PW1 was then taken to Sumbawanga Regional Hospital for medical examination and treatment. On being examined by Assistant Medical Officer Albert Matebela (PW5), she was found to have blood oozing from her private parts and confirmed as having been sexually penetrated. PW5 tendered a report upon medical examination popularly known as the PF3 which was admitted in evidence as Exhibit P2.

The appellant in his defence, denied all the claims levelled against him but he did not dispute the fact that he was arrested at the home of PW1 on the material day. He also admitted that, before his arrest he had stayed home and could not go to the farm as he was sick. However, he maintained throughout the trial that, he did not know the offence with which he stood charged.

After a full trial, as earlier stated, the trial court found him guilty and convicted him as charged. Aggrieved, the appellant preferred an appeal to the High Court where, apart from sustaining his conviction and sentence by the trial court, the first appellate court imposed on him an additional twelve strokes of the cane.

Dissatisfied by the decision of the High Court, the appellant has preferred this second appeal. In his Memorandum of appeal, the appellant has raised four grounds of complaint which can be conveniently summarised as hereunder:

1. *The learned judge of the first appellate court erred both in law and in fact to dismiss his appeal basing on the prosecution evidence while failing to observe that the same was problematic as to be contradictory and not worth of credit.*
2. *The first appellate court erred in law and in fact to rely on exhibit P2 (PF3) without noting that the same was prepared contrary to law in that it was not signed by the doctor who attended PW1 and duly stamped the omission which rendered the said medical examination report a nullity.*
3. *The learned judge erred both in law and in fact to uphold the appellant's conviction and sentence basing on the prosecution evidence while failing to observe that he was of unsound mind as to not know what was going on.*

4. *The first appellate court erred in law and in fact to dismiss the appeal relying on the prosecution evidence without making a deep examination and evaluation of the same the omission which is fatal, incurable and irregular.*

At the hearing of the appeal, whereas the appellant appeared in person paddling his own canoe, Ms. Safi Kashindi Amani and Mr. Gregory Muhangwa learned State Attorneys resisted the appeal on behalf of the respondent, the Director of Public Prosecutions.

We prefer to begin our discussion by stating that, the second ground of appeal is completely misconceived as the medical examination report complained of (Exhibit P2) was expunged from the record by the first appellate court. This was on account of the omission by the trial court to read or cause it to be read over to the appellant immediately after it was admitted in evidence contrary to our guidance in the famous case of **Robinson Mwanjisi and Three Others vs. R** [2003] T.L.R 218. In the circumstances we have to say that, the appellant should have no cause for complaint against what

was decided by the first appellate court on that aspect as it was all in his favour. On that, we say no more.

Moving forward to the third ground of appeal which challenges the learned Judge of the first appellate court for sustaining the appellant's conviction and sentence without taking into account that he was of unsound mind as not to understand what was going on throughout the trial, we note that, this ground of complaint was neither raised at the trial nor appealed against before the first appellate court.

It is trite law that, except for one reason but which is not the case here, this Court will not entertain any ground of appeal or argument which was not raised and considered at the High Court. This well known principle has been articulated in a myriad of our earlier decisions such as **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 (unreported), **Hassan Bundala @ Swaga v. Republic**, (Criminal Appeal No. 386 of 2015) [2015] TZCA 261 (23 February, 2015, TANZILII); **Hussein Ramadhani v. Republic**, (Criminal Appeal No. 195 of 2015) (unreported), **Abeid Mponzi v. Republic**, (Criminal Appeal No. 476 of 2016) [2019] TZCA 122 (16

May 2019, TANZILII). However we are mindful that, like any other general rule, the above stated principle is not without exception. In this connection, it is to be observed that, in line with the provisions of section 6 (7) of the Appellate Jurisdiction Act (Cap 141 R.E 2019) and as such, a court of law cannot sanction what is illegal, this Court will only entertain a ground raised for the first time on appeal if it involves a point of law. Since the third ground of appeal does not raise any point of law worth of determination by this Court, we entirely agree with Ms. Amani who urged us to disregard it as we hereby do.

Moving on to the first and fourth grounds of appeal, we wish to observe that, in these grounds which are in-extricably linked, essentially the appellant is faulting the first appellate court for sustaining his conviction and sentence by the trial court while the charge against him was not proved to the required standards. That in brief is the bottom line.

It will be recalled that, the charge laid against the appellant alleged rape contrary to sections 130(1) and (2)(a) and 131(1) of the Penal Code. As correctly submitted by Ms. Amani, in terms of the

above-cited provisions of the law, the offence of rape is committed where it is established that the accused person had unlawful sexual intercourse with a woman without her consent and ordinarily by force or through the use of any other device which may cause a woman to engage in sexual activity without consent. Moreover, in any charge for rape, there must be evidence from the prosecution establishing beyond doubt that there was sexual penetration of the accused person's manhood into the complainant's private parts. That is what we are going to determine in the ensuing part of this judgment as we proceed to determine whether or not the first appellate Judge had addressed himself to these vital ingredients of the offence of rape.

It will be recalled that after hearing Ms. Amani's submissions in opposition of the appeal, the appellant who had opted to hear the learned State Attorney first, made a rejoinder denying categorically to have committed the offence of which he was convicted. Asked by the Court why he did not challenge the victim who was quite candid about the rape incident that befell her and the culprit being none other than himself, the appellant contended that, the allegations levelled against him were so grievous as to leave him completely

confounded and lost for words. While admitting to have been left by his grandmother (PW2) at the victim's home where he was eventually arrested, it was the contention of the appellant that, hitherto he cannot fathom out the reason behind his prosecution and conviction. For, according to him, PW1 had sort of fainted and slumped on the ground and as he sought to assist her, he was told that he had raped her. As a matter of fact, the appellant said, he never raped her and for that matter, he implored us to quash his conviction and direct for him to be set free.

We note from the record that, when Ms. Amani was submitting in opposition of the appeal, she maintained firmly that there was sufficient evidence to connect the appellant with the offence with which he was charged and subsequently convicted.

Referring us to our decision in the case of **Denis Joseph @ Saa Moja v. Republic**, (Criminal Appeal No. 121 of 2021) [2023] TZCA 104 (13 March 2023, TANZILII) the learned State Attorney submitted correctly so in our view that, the evidence of the victim which, in the eyes of the law, is the best evidence had established that, apparently, taking advantage of her senility and the fact that

she was then home alone, the appellant went on to have sexual intercourse with her without her consent. Moreover, Ms. Amani relied on the case of **Adamu Angetile v. Republic,** (Criminal Appeal No. 402 of 2020) [2023] TZCA 14 (15 February 2023, TANZILII) to underscore the principle that, unless there are good and cogent reasons for not believing a witness, every witness is entitled to credence and must be believed. In line with the above stated principle, the learned State Attorney submitted that, the reason why PW1 should be considered as a credible witness was borne out by the appellant's failure or omission to cross – examine her. In this connection Ms. Amani cited the cases of **Nyerere Nyague v. Republic**, (Criminal Appeal No. 67 of 2010) [2012] TZCA 103 (21 May 2017, TANZILII), which was referred to by the court in **Kanaku Kidari v. Republic**, (Criminal Appeal No. 326 of 2021) [2023] TZCA 223 (4 May 2023, TANZILII) in support of her submission that, 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.

The learned State Attorney went on submitting that the evidence of PW1 was materially corroborated by the testimony of PW3 who at a long last came to her rescue.

On our part, having gone through the evidence that was tabled before the trial court, like the first appellate court, we have no quarrel with the concurrent finding by the two lower courts that indeed the appellant was the culprit who raped the victim on that day. There was ample evidence to justify that finding of fact and all the guidelines regarding the applicable statutory law and jurisprudence were duly observed by the lower courts.

For the sake of exactitude, it was established through the evidence of PW1 and PW3 that on the material day, the appellant had the carnal knowledge of the victim in a non-consensual sexual encounter. There is also sufficient evidence that the victim was sexually penetrated as orally attested to by Doctor Albert Malebela (PW5) a Medical Officer who examined the victim and confirmed the suspicions of rape as to put all the doubts to rest. It must be emphasized here that, as held earlier on by this Court in a host of cases including the case of **Isaya Msofe v. Republic**, (Criminal

Appeal No. 31 of 2020) [2022] TZCA 147 (17 March 2022, TANZILII), after elimination of the PF3, the oral account of PW5 remained intact.

Upon consideration of the evidence led by the prosecution witnesses before the trial court, as the learned Judge of the first appellate court did, we agree with Ms. Amani that indeed, there was ample evidence to justify the appellant's conviction. His failure or omission to cross-examine PW1 who was the victim and eyewitness to the crime left her evidence, on the strength of our holding in **Nyerere Nyague** (supra), highly credible. On our part therefore, we can see no ground for discrediting the evidence of this witness which could have even by itself supported a conviction. Thus, going by the record of appeal, it is not in doubt that the evidence of the prosecution on the record was properly evaluated against that of the defence contrary to the complaint by the appellant in ground four. Besides, the evidence of the defence had raised no doubt against that of the prosecution.

All in all therefore, on the evidence on record, we are satisfied that the learned Judge of the first appellate court was justified to come to the conclusion that the case against the appellant had been

proved beyond reasonable doubt. We therefore dismiss the first and fourth grounds of the appeal.

In the ultimate event, we find no merit in the appeal which we accordingly dismiss in its entirety.

DATED at **SUMBAWANGA** this 23rd day of September, 2023.

I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 25th day of September, 2023 in the presence of the Appellant in person and Ms. Irene Godwin Mwabeza, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL