IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 292 OF 2019

SHADRACK WILLIAM .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Shinyanga at Shinyanga)

(Mwaiseje, SRM – Ext. Jur.)

Dated the 13th day of May, 2019
in
Criminal Appeal No. 6 of 2019

JUDGMENT OF THE COURT

28th October & 11th November, 2022

MWARIJA, J.A.:

The appellant, Shedrack William was charged in the District Court of Kahama with unnatural offence contrary to section 154 (1) (a) of the Penal Code. It was alleged that on 14/12/2014 at about 02:00 hrs within Kahama District in Shinyanga Region, the appellant did have carnal knowledge of one "LSN" (the victim) against the order of nature. The appellant denied the charge and as a result, the case proceeded to a full trial at which, each side (the prosecution and the defence) relied on the evidence of four witnesses.

Until the material date, the appellant and the victim were inmates at Kahama District Prison in cell No. 8 (the cell). According to the evidence of the victim, who testified as PW1, on the fateful night at about 2:00 a.m. he was asleep in the cell. Before he had gone to sleep however, he noticed that one of the persons who used to sleep close to him had been shifted and another inmate had replaced that person. He said that, the arrangement was made by one Anthony Paulo the prisoners inmates in-charge.

PW1 went on to state that, his sleep was interrupted after having felt that an object had been inserted in his anus, the act which caused him to suffer pain. He realized that a person was sodomizing him. He pushed away that person who according to him, turned out to be the appellant and a quarrel ensured between them. When he inspected his private parts by use of a hand, PW1 found that he was smeared of some liquid substance which, upon smelling it, found that it was body oil.

Following the quarrel between him and the appellant, the remandees cell leader, one Daudi Malenya (PW2) woke up and went to inquire about the incident. After PW1 had narrated the incident, PW2 took the appellant and PW1 to the toilet to inspect them. The inspection was done in the presence of DW4. According to PW1's further evidence,

upon inspection, whereas his buttocks were found to have been smeared with oil, the appellant's penis had oil and the trace of feaces. The matter was then reported to the prison warden and later, in the morning, the Officer In-Charge of the prison dealt with the matter. According to PW1, the appellant pleaded to be forgiven and promised to give PW1 TZS 20,000.00 and a trouser, the offer which he refused. PW1 went on to state that, he was, as a result, taken to hospital for medical examination. He was examined by Daniel David Nyango, a Clinical Officer who testified as PW3. It was his evidence that, after having carried out medical examination on the victim, he found that PW1's anus had bruises and his sphincter muscles were lacerated, the evidence that the same was entered by an abnormal thing.

PW2 supported the evidence of PW1 that, when he inspected the appellant and PW1, whereas the appellant was found with trace of feaces and body oil on his penis which he was at the time trying to clean it by using a towel, PW1 was found with oil on his buttocks. The witness added that, on the material night, the appellant was shifted to sleep at the space near PW1 after having refused to sleep at his usual space or any other part of the cell.

Evidence for the prosecution was also given by D. 4236 D/Sgt Lwanganga (PW4) who was the investigator of the case. He said that, in the course of his investigation, he recorded the statements of *inter alia,* PW1 and PW2.

In his defence, the appellant, who testified as DW1, disputed the prosecution evidence. He testified that, on the material night, he was awaken and told that he was required by the *"Nyaparas"* (cell leaders) who were with PW1 and PW2. When asked about the allegation that he had shifted from his sleeping space and went to sleep near PW1 whereupon he sodomized him, the appellant denied that allegation. He said further that, the inmates who slept close to PW1 also denied having seen the appellant shifting near PW1. He went on to state that, in the morning, the matter was reported to the Officer In-Charge of the prison who directed that both the appellant and PW1 be taken to hospital for medical examination.

It was the appellant's further testimony that, at the hospital, it was only PW1 who was examined by a doctor but no medical examination was conducted on him. He went on to state that, since the allegation by PW1 were found to be unforunded, PW1 and PW2 promised to set out a trap on him. He reported that threat to the wardens' superintendent, one

Shiguma who summoned and warned PW1 and PW2 about their intention. He was however, later charged in court.

The appellant challenged the evidence tendered by the prosecution witnesses. He contended that, the evidence of PW1 was unreliable because he testified on what the prosecution had told him to say. He contended further that, the evidence of PW1 and PW2 is contradictory as regards the cell leader who directed that the appellant be shifted to the sleeping space near PW1 and on the place in the cell where PW1 and the appellant were inspected after the incident. He also challenged the evidence of PW2 contending that, the same is unreliable because first, the body oil container which was alleged to have been found at the place where PW1 was sleeping and secondly, the towel which the appellant allegedly used to clean his private parts, were not tendered in court. He went on to challenge the evidence of PW3 questioning the finding of the witness that PW1's anus had bruises while the instruments used to diagnose those conditions were not disclosed.

As stated above, the appellant called three witnesses to support his evidence. The three witnesses; Emmanuel Nzalia Makungu (DW2), Amolo Oaga (DW3) and DW4 (Anthony Kagulunyembe) were until the material date, the appellant's inmates in Kahama District Prison. They supported

the appellant's evidence, first, that he was not shifted from his sleeping space to the place near PW1, secondly, that upon being inspected neither was the appellant found to have any body oil smell or a towel nor was PW1 found with any signs of having been carnally known against the order of nature. DW4 added that, on the material night, he slept at a third space from that of the appellant, meaning that the appellant did not shift and went to sleep near PW1.

In its decision, the trial court found the evidence of the prosecution witnesses credible, particularly that of PW1 and PW2 which was to the effect that, on the material night, the appellant had shifted and slept close to PW1. It found further that, the evidence established that, upon suspicion that it was the appellant who committed the offence, both PW1 and the appellant were inspected and whereas PW1 was found with body oil on his buttocks, the appellant was found with body oil and trace of feaces on his penis. As to the appellant's defence, the trial court was of the view that the same did not raise any reasonable doubt in the prosecution evidence.

On appeal, the decision of the trial court was upheld. The first appellate court agreed with the trial court that the evidence of PW1 and PW2, which was supported by that of PW3, sufficiently established that

the appellant committed the offence. She found further that the conduct of the appellant of offering to pay PW1 TZS 20,000.00 and a trouser so as to settle the matter, amounted to admission of the offence.

As shown above, the appellant was further aggrieved and thus preferred this appeal raising five grounds which may be paraphrased as follows:

1. That the first appellate court erred in law and fact in upholding the appellant's conviction while his conviction on the sexual offence was based on evidence of a single witness which was not supported by any independent evidence.
2. That, the first appellate court erred in law and fact in failing to find that the trial court's judgment was erroneous on account of having been based on (i) the exhibits which were improperly admitted and (ii) the evidence which did not establish the time at which the offence was committed against the appellant and the object used to penetrate PW1's private parts.
3. That, the first appellate court erred in law and fact in upholding the appellant's conviction which was based on contradictory evidence of

PW2 and PW3 on the circumstances under which the offence was committed.

4. That, the first appellant court erred in law and fact in upholding the decision of the trial court while in his evidence, PW1 did not establish (i) that he slept close to the appellant on the material night and (ii) that he was carnally known against the order of nature by the appellant.
5. That, the first appellate court erred in law and fact in upholding the appellant's conviction while the evidence of PW3 was unreliable.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Caroline Mushi assisted by Ms. Immaculata Mapunda, both learned State Attorneys. When he was called upon to argue his grounds of appeal, the appellant opted to let the learned State Attorney submit in response to the grounds of appeal and thereafter make his rejoinder, should the need to do so arise.

In her submission, Ms. Mapunda stated by contending that grounds 2 (ii) and 4 (i) of appeal raise new matters which were not canvased at either the trial or in the first appeal. Relying on the case of **Jacob Mayani**

v. Republic, Criminal Appeal No 558 of 2016 (unreported), the learned State Attorney urged us not to consider those grounds of complaint.

On ground 2 (i) of the appeal Ms. Mapunda argued that, although exhibit P1 (the PF3) was improperly acted upon because, after its admission in evidence, the same was not read out hence deserving to be expunged, the oral evidence of PW3 sufficiently proved that PW1 was carnally known against the order of nature.

With regard to grounds 1, 3, 4(ii) and 5, the learned State Attorney supported the finding of the trial court that the evidence tendered by the prosecution witnesses, particularly, PW1, PW2 and PW3, though circumstantial in nature, sufficiently proved the prosecution case to the hilt. She argued further that, from the evidence of PW1, which was not challenged, the appellant offered to give PW1 TZS 20,000.00 and a trouser so that the latter could drop his complaint.

According to the learned State Attorney, by so doing, the appellant admitted the offence because, in terms of s. 3 (1) (a) of the Evidence Act, that amounted to confession. She stressed that, since the appellant did not cross-examine PW1 on that fact, the evidence remained unchallenged thus rendering credence to PW1's evidence. The learned State Attorney

cited the case of **Goodluck Kyando v. Republic** [2006] T.L.R 363 to bolster her argument.

In rejoinder, the appellant maintained the argument which he had made in the first appellate court; first, that being a Clinical Officer, PW3 did not qualify to conduct medical examination on PW1 and fill PF3. Secondly, that the evidence of the prosecution witnesses was contradictory and unreliable. Thirdly, that his defence evidence and that of his witnesses raised reasonable doubt in the prosecution evidence.

We have considered the submissions made by the learned State Attorney and the appellant. To start with the contention made by Ms. Mapunda on grounds 2 (ii) and 4 (i) raised by the appellant. We agree with her that the two complaints concern new matters which were not raised and dealt with both at the trial and in the first appeal. The appellant is therefore, precluded from raising them in this appeal. It is only when such a new matter raises a point of law that the same may be considered at any stage of the proceedings. In the case at hand, the said complaints by the appellant are based on matters of fact and therefore, the same have been improperly raised.

It is trite law that matters which were not raised in the first appellate court cannot be entered in a second appeal. – See for instance the cases

of **Justine Bruno @ Mkandamambwe v. [Republic],** Criminal Appeal No. 323 of 2018 and **Sadick Marwa Kisase v. Republic,** Criminal Appeal No. 83 of 2017 (both unreported). In the latter case, the Court observed as follows:

> *"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appeal."*

On ground 2 (i), Ms. Mapunda admitted that Exh. P1 was wrongly acted upon because the same was not read out in court after its admission in evidence. That is a correct position and we thus hereby expunge it from the record as prayed by the learned State Attorney. The issue however is whether the absence of that exhibit resulted into the prosecution's failure to prove the allegation that PW1 was carnally known against the order of nature. We respectfully agree with the learned State Attorney that, despite the expungement of exhibit P1, the oral evidence of PW3 sufficiently proved that PW1 had his anus penetrated. In his evidence, PW3 stated that when he physically examined PW1, he found that his anal mucosa had bruises and the anal sphincter was lacerated. The witness concluded thus that such private part of PW1 was entered by an abnormal thing. The appellant has argued that PW3 was not a competent person to conduct medical examination on PW1. That

argument is misconceived. As held by this Court in the case of **Charles Bode v. Republic,** Criminal Appeal No. 46 of 2016 cited by the learned first appellate Judge, a clinical officer is competent to give expert evidence on medical matters.

In grounds 1, 3, 4 (ii) and 5 in which the appellant is in essence, challenging the finding by both the trial count and the first appellate court that the evidence of the prosecution witnesses, is credible, we wish to start by reiterating the principle governing the exercise by this Court, of the powers of interfering with concurrent finding of two courts below. The Court may interfere with such finding only when, among other things, it is shown that the decision was a result of misapprehension, non-direction or misdirection on the evidence – See for example the cases of the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R 149 and **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported). In the latter case, the Court had this to say on that principle:

> *"The law is well settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the*

substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

In the present case, both the trial and the first appellate court found that PW1, PW2 and PW3 were credible witnesses. Having considered their evidence, we could not find any justifiable reason to fault that finding. According to their evidence, after PW1 had complained to PW2, both the appellant and PW1 were inspected. Whereas PW1 was found to have been smeared with oil on his buttocks, the appellant's penis was found with oil and trace of feaces. Furthermore, as submitted by Ms. Mapunda, according to the evidence of PW1 which was not challenged by way of cross-examination, the appellant pleaded with PW1, offering to give him TZS 20,000.00 and a trouser so as to settle the matter, but PW1 refused the offer.

Since that evidence was not challenged, the appellant is deemed to have accepted it to be true – See for instance, the case of **Damian Ruhende v. Republic,** Criminal Appeal No. 501 of 2007 (unreported). In effect therefore, that evidence fortified the circumstantial evidence that it was the appellant who committed the offence against PW1. The appellant's defence which centered on countering the facts relating to

what took place in the prison after PW1's complaint as testified by the prosecution witnesses, particularly PW1, PW2 and PW3 did not, for the reasons stated above, raise any reasonable doubt in the credible evidence of the said witnesses. In the circumstances, we agree with the learned State Attorney that grounds 1,3, 4 (ii) and 5 are also devoid of merit.

On the basis of the foregoing reasons, this appeal lacks merit. As a result, the same is hereby dismissed.

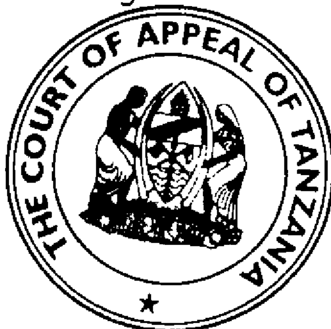
DATED at **SHINYANGA** this 11th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 11th day of November, 2022 in the presence of the Appellant in person and Ms. Gloria Ndondi, learned State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL