IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 149`B' OF 2020

ADAM SHANGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(De-Mello, J.)

dated the 31st day of August, 2020

in

Criminal Appeal No. 122 of 2020

.....

JUDGMENT OF THE COURT

9th February & 22nd December, 2022

MASHAKA, J.A.:

The District Court of Morogoro at Morogoro convicted Adam Shango, the appellant of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code. He was found guilty of having carnal knowledge of a boy (name withheld to conceal his identity) aged one year and six months against the order of nature. The prosecution alleged in the charge that the appellant committed the offence on 09th January, 2019 at Mkundi Bwawani area within the Municipality and District of Morogoro in Morogoro region. The conviction

of the appellant who denied the charge, was based on the evidence tendered by three prosecution witnesses and three documentary exhibits. Following his conviction, he was sentenced to the statutory life imprisonment.

A factual account unveiled by the prosecution during trial is as follows: On that fateful day, Mariana Mtandike (PW2) mother of the victim left the victim in the care of the appellant her brother and went to the shop to buy some food stuff. When she returned home, she found the victim crying uncontrollably. As she tried to calm down the victim, she noticed blood from the bottom part of the victim and on the appellant's shorts. She inquired from the appellant why her son was bleeding from the anus, who replied that he did not know. She informed her neighbours on what happened to the victim who was in the care of the appellant.

As the appellant was apologetic, the angry neighbours surrounded his residence and wanted to harm him. For the safety of the appellant, some good citizens took him to the Morogoro Central police station. PW2 together with the victim reported to the police and a PF3 was issued so as to take the victim for examination at the hospital.

It is E5528 D/CPL Clemence (PW1) who took the shorts worn by the victim, issued a PF3 and interrogated the appellant. He tendered the shorts and the appellant's briefs *'bukta'* which had been sent to the Government Chemist. These were collectively admitted in evidence as exhibit PE3. At the Regional Hospital of Morogoro, where Dr. Emmanuel Mkumbo (PW3) examined the victim who, besides finding blood stains on the victim's shorts, he noted anal bleeding and mucoid secretions from the victim's anus observing that a blunt object was forcefully inserted into his anus causing tear of the anal canal, lacerations and bruises. In these findings, PW3 concluded that the victim was penetrated through the anus and tendered the PF3 which was admitted in evidence as exhibit PE2.

It was recounted by PW1 that the appellant confessed to have penetrated the victim through the anus. The appellant's cautioned statement was admitted in evidence as exhibit PE1 after the trial court had conducted an inquiry and satisfied itself that it was voluntarily made by the appellant.

In his defence, the appellant had nothing much to testify on the accusations levelled against him by the prosecution. He called one witness; Deonus Joseph Tiani (DW2) a local street leader of the street *(kiongozi wa*

mtaa). DW2 had nothing of substance other than saying that the appellant had no criminal record.

The trial court was satisfied with the truthful and credible account of PW2 and PW3 corroborated by PW1 and exhibits PE1 and PE2 that the prosecution proved the charge to the hilt that the appellant had carnal knowledge of the victim against the order of nature. Based on that evidence, the trial court convicted and sentenced the appellant as indicated earlier.

The appellant unsuccessfully appealed to the High Court which upheld the conviction and sentence, hence this appeal. The appeal is based on eleven grounds of appeal contained in the memorandum of appeal and paraphrased as follows: **one,** that the first appellate court failed to assess, analyze and evaluate the evidence of the prosecution and show the points for determination and reason for the decision; **two,** the conviction was based on discredited evidence of PW1, PW2 and PW3 and the victim was not summoned to adduce evidence; **three,** the age of the victim was not proved; **four,** the cautioned statement was recorded out of the time prescribed by the law; **five,** irregular tendering of the PF3 (exhibit PE2) and failure to accord him opportunity to cross examine; **six,** the prosecution failed to

establish the chain of custody of exhibit PE3; **seven,** the trial court conviction grounded on exhibit PE2 while PW3 failed to conduct a medical examination on the appellant; **eight,** the conviction relied on the incredible and untenable evidence of PW1, PW2, PW3 that could not link the appellant to the charged offence; **nine,** the trial court failed to address the rights of the appellant after the ruling on a prima facie case to enable him to prepare his defence; **ten,** failure to read the charge to the appellant when defence case commenced contrary to sections 228 and 229 of the Criminal Procedure Act (CPA); and **eleven,** the appellant was not informed his right to appeal.

When the appeal was called on for hearing, the appellant appeared in person, with no legal representation. The respondent Republic enjoyed the services of Ms. Aziza Mhina and Ms. Rachel Balilemwa, both learned State Attorneys.

When we called upon the appellant to amplify his grounds of appeal, he opted to adopt the grounds and written statement of arguments in support of his appeal, imploring the Court to consider them and set him free.

At the onset, Ms. Mhina addressing the Court, resisted the appeal. She submitted that grounds one, two, three, four, five, six, seven and eight of

the appeal were new as they were not canvassed by the first appellate court. However, it was her contention that, grounds one, two, three, four, five and eight were premised on points of law and therefore properly before the Court. Referring to our decision in **Makene Simon v. Republic,** Criminal Appeal No. 30 of 2018 (unreported), she urged us not to consider grounds six and seven because the Court has no jurisdiction to determine new grounds which never featured before the first appellate court neither were on points of law. In his rejoinder on this particular issue, the appellant had nothing to add.

It is settled law that, a ground of appeal which was not raised and determined by the first appellate court cannot be entertained by the Court in second appeal, unless it involves a point of law. We categorically stated so in **Felix Kichele and Another v. Republic,** Criminal Appeal No. 159 of 2015 (unreported), among other things that:

> *"...Indeed, there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the High Court. That is part of the reason why under section 7 (6) (a) of the Appellate Jurisdiction Act, 1979 it is provided that a party to proceedings under Part X of the CPA, 1985*

may appeal to the Court of Appeal on a matter of law but not on a matter of fact."

We reiterated our stance in **Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017 (unreported) that:

> *"...those three grounds are new. As often stated, where such is the case,* ***unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction."***
> [Emphasis added]

We agree with the learned State Attorney that the two grounds do not qualify to be grounds of appeal based on points of law to be determined by the Court. We refrain from entertaining grounds six and seven.

We propose to dispose grounds one, four, five, nine and ten ahead of the other grounds because they involve procedural issues. In ground one, the appellant is faulting the trial court on the non-compliance with section 312 (1) of the CPA. Basically, the appellant claimed in his written statement of arguments that the non-compliance centers on the appellate judge's failure to assess and evaluate the prosecution evidence. Referring us to pages 54 to 59 of the record of appeal, Ms. Mhina submitted that the first

appellate judge analyzed and evaluated the prosecution evidence based on the five grounds of complaint preferred by the appellant in his petition of appeal and which were considered in the impugned decision.

The appellant is faulting the first appellate court for failing to comply with section 312 (1) of the CPA, which states that:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*
>
> *(2) N/A*
>
> *(3) N/A*
>
> *(4) N/A."*

This complaint need not detain us much. We have scrutinized the judgment of the first appellate court and found it was composed in accordance with the dictates of the law. Furthermore, the judgment contained the points for determination, the decision thereon and the reasons for the decision. As submitted by the learned State Attorney, that the appellate judge was guided by the grounds advanced in the petition of appeal. Upon our reexamination of the decision of the first appellate court, we are satisfied that the judgment complied with the statutory requirement and dismiss the complaint for being baseless.

Moving to ground four, the complaint is that the cautioned statement was recorded out of the time prescribed. The appellant argued that PW1 recorded exhibit PE1 after the expiry of the prescribed four hours and it lacked the stamp of the police post where it was recorded. He argued that this contravened section 50(1) (a) of the CPA as no extension of time was sought and granted as required by the law. This was conceded to by Ms. Mhina who pointed out that since PW2 did not state the time the appellant was taken to the police post by the good citizens, the time of arrest is not established. Further, she submitted that, though PW1 commenced the recording of exhibit PE1 at 14:49 hours, there is doubt on the exact time of

arrest to enable the computation of the prescribed time of four hours from the time he was arrested to the time the recording commenced and finally completed. We agree with Ms. Mhina that; it is settled law that a cautioned statement recorded beyond prescribed time, in the absence of a valid reason for the delay is not admissible in evidence against the accused. In the case at hand, while the appellant was arrested on 9/1/2019 by villagers and sent to the police post at unknown time, his statement was recorded from 14.49 hours to 15.56 hours. Since the time of arrest is unknown, it cannot safely be ascertained if the statement was actually recorded within the prescribed four hours. The appellant is entitled to the benefit of doubt and as such, we are satisfied that the cautioned statement was wrongly acted upon to convict the appellant. We find merit in this ground and expunge exhibit PE1 from the record.

In ground five, the appellant's complaint is against the failure by the first appellate court to find that exhibit PE3; the government chemist report was irregularly tendered and he was not accorded opportunity to cross examine. In reply, Ms. Mhina submitted that though exhibit PE3 was admitted in evidence it was not read out aloud in court after it was cleared for admission. Relying on the Court's decisions, she argued that the failure

to read exhibit PE3 upon admission, denied the appellant the right to know its contents. In bolstering this point, Ms. Mhina referred our decision in **Ndugulile Mandago v. The Republic,** Criminal Appeal No. 58 of 2019 (unreported). She implored us to expunge it from the record exhibit PE3. As evidently shown at page 20 of the record of appeal, the government chemist report was tendered by PW1 and admitted as exhibit PE3. Furthermore, after it was cleared for admission, it was not read out loud in court and explained to the appellant. That was a fatal irregularity. Guided **by Robinson Mwanjisi and 3 Others v. Republic** [2003] T.L.R 218, we expunge exhibit PE3 from the record. We, thus find merit in ground five of appeal.

The appellant's complaint in ground nine is centered on failure to comply with section 231 of the CPA, that the trial court did not address the appellant on his rights after a ruling on a *prima facie* case was made by the trial court. The appellant argued that the record does not show if the trial magistrate informed the appellant on the manner of giving defence evidence as prescribed under section 231 (1) (a) or (b) of the CPA, therefore he was not accorded a fair hearing. Ms. Mhina in reply contended that the appellant was properly addressed by the trial court on the prosecution having

established a *prima facie* case against the appellant and required to give a defence.

The record of appeal shows at page 21 that, after the prosecution closed its case, the trial court ruled that the prosecution case against the appellant had been made sufficiently to require the appellant to give evidence in compliance with section 231 (1) of the CPA. We find worthy to have the record speaks by itself as follows: -

> *"**Court:** This court read ruling and addressed the accused person on the following:*
>
> ***Accused:***
>
> - *I will adduce my defence on oath*
> - *I will call one witness and myself*
> - *I will not tender exhibit."*

It is obvious that the answers given by the appellant certainly disclosed that he was well addressed in terms of section 231 (1) (a) and (b) of the CPA and thereafter the appellant DW1 and his witness DW2 testified in defence. In the circumstances, ground nine lacks merit and is dismissed.

The appellant's complaint in ground ten is that the trial court failed to read over the charge for the appellant before entering a plea of not guilty when the defence case commenced, hence the trial court contravened sections 228 and 229 of the CPA. In response, Ms. Mhina submitted that, the charge was read over to the appellant before the trial and preliminary hearing commenced. She further argued that the cited provisions by the appellant do not require that an accused is to be reminded the charge against him.

The record of appeal is glaring that the substance of the charge was read over to the appellant who pleaded not guilty and the trial court entered a plea of not guilty, a duty which the trial court duly discharged as gleaned at page 3 of the record of appeal. In terms of section 229 of the CPA, the prosecutor paraded witnesses and adduced evidence and tendered exhibits to prove the charge. Besides, the appellant was accorded opportunity to cross examine all the prosecution witnesses as required by the law as gleaned at pages 12 to 21 of the record of appeal. The appellant's complaint that the charge was supposed to be read again before the defence case commenced has no legal basis as rightly submitted by the learned State Attorney. Ground ten is baseless and is dismissed.

The appellant complains in ground eleven of appeal that the trial court did not explain to him the right to appeal. The appellant argued that the first appellate judge after upholding the conviction and sentence, failed to inform him his right to appeal against the decision. Ms. Mhina argued in reply that after upholding the conviction and sentence, the first appellate judge informed the appellant that he had a right to appeal. She concluded that the ground of appeal has no merit and prayed to the Court to dismiss it. There is always a presumption that a court record accurately represents what transpired in court – see **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018 (unreported). As gathered from the record at page 52, it is clearly shown that on 31/8/2020 the judgment was delivered in the presence of the appellant and the learned State Attorney and the right to appeal was explained by the first appellate court. This ground is accordingly dismissed.

We now revert to the substantive complaints in grounds two, three and eight of appeal. The appellant's complaint in ground two of the appeal is against the prosecution's failure to call the victim to testify before the trial court. In his submissions, the appellant argued that the well-established principle is that the burden of proof in criminal cases lies in the prosecution. He referred to our decisions in **Joseph John Makume v. Republic** [1984]

TLR 49 and **Mohamed Said v. The Republic,** Criminal Appeal No. 145 of 2017 (unreported). In response, Ms. Mhina submitted that, the victim was a baby aged one year and six months as stated by PW2, PW3 and exhibit PE2 who could not testify before the trial court. She supported her arguments with our decision in **Issa Ramadhan v. The Republic,** Criminal Appeal No. 409 of 2015 (unreported).

As correctly argued by Ms. Mhina, this is not the first time that a court has convicted an accused person without the testimony of the victim of the crime. In a number of cases, it has been the position of the Court that conviction can be sustained independent of the evidence of the victim – see **Haji Omary v. The Republic,** Criminal Appeal No. 307 of 2009, **Fuku Lusamila v. The Republic,** Criminal Appeal No. 12 of 2014, (both unreported) just mentioning a few. In **Haji Omary v. The Republic** (supra), the child victim did not testify for the sole reason of tender age and the Court had this to say:-

> *"The law recognizes that there are instances where the charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased, senility, tender age or*

.....may prevent a victim from testifying in court (see section 127 of Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victim's testimony. In this case the victim was a four-year-old chiid. He was indeed a child of tender age. Though we agree that ideally the reason for the non – taking of the testimony of the victim should have been entered on record however such failure neither weakened the case for the prosecution nor resulted in the failure of justice."

The victim in this appeal was a baby aged one year and six months who could not have been called to testify. The evidence of PW2 the mother and PW3, the doctor proved that the victim was aged one year and six months and supported by exhibit PE2 showing that he was penetrated by the appellant against the order of nature. We will deliberate more on this in ground eight. We find the complaint to be baseless and dismiss it.

In ground three of appeal, the appellant complains that the age of the victim was not proved by the prosecution. Ms. Mhina submitted that PW2, the mother of the victim and PW3, the doctor proved the age of the victim. She bolstered her arguments with our decision in **Makenji Kamura v. Republic,** Criminal Appeal No. 30 of 2018 (unreported) for the proposition

that, age can be proved by the victim, relatives, parents, medical practitioner or a birth certificate. Guided by our decisions in **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015, **Edson Simon Mwombeki v. Republic,** Criminal Appeal No. 94 of 2016, **Edward Joseph v. the Republic,** Criminal Appeal No. 19 of 2009, **Iddi Amani v. Republic,** Criminal Appeal No. 184 of 2013 (all unreported), we are satisfied that the victim's age was sufficiently proved by the mother of the victim (PW2). Indeed, the appellant did not challenge that evidence in cross examination. This ground lacks merit and we dismiss it.

The complaint raised in ground eight is that the first appellate court relied on incredible and untenable evidence of PW1, PW2, PW3 that could not link the appellant with the charged offence. The appellant argued that the prosecution failed to prove the case beyond reasonable doubt; the standard of proof applicable in criminal cases. He contended that, the first appellate court failed to objectively evaluate the gist and value of the defence and weigh it against the prosecution case because the evidence of PW2 and PW5 was tainted with contradictions and it should be discredited.

In response, Ms. Mhina submitted that, the evidence of PW2, the mother of the victim was corroborated by PW3, the doctor who examined the victim on that same day when blood was oozing from his fresh wound with the anus open while the muscles were loose having lacerations and bruises and the victim was in pain caused by forceful penetration.

We, endorse the concurrent findings of fact by the two courts below being satisfied that, the evidence of PW2 was credible because; she reported the incident immediately to the Police; she had left the victim in the care of the appellant her brother and uncle of the victim and was in good health and upon her return from the shop, she found the victim crying uncontrollably and bleeding from the anus. The appellant did not explain to PW2 what had happened to the victim who was under his care and protection. PW2's evidence was corroborated by PW3 who observed that the anus of the victim was actually penetrated by force causing the said lacerations. The credible and tenable evidence of PW2 points to the guilt of the appellant that he had carnally known the victim against the order of nature and without doubt the perpetrator of the offence. Thus, ground eight fails.

In its totality, the evidence against the appellant which was found to be sufficient to ground conviction, by the trial court and sustained by the first appellate court. We have found no justification to interfere with the concurrent findings of the two lower courts.

For the foregoing reasons, we find the appeal lacking in merit and we dismiss it in its entirety.

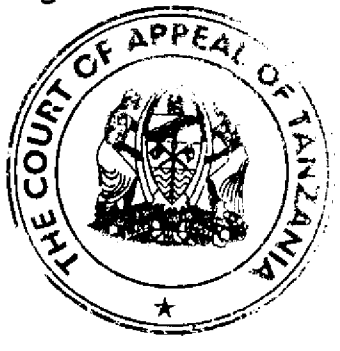
DATED at **DAR ES SALAAM**, this 20th day of December, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of December, 2022 in the presence of the Appellant in person who appeared through Video conference facility linked from Ukonga prison and Mr. Tumaini Maingu Mafuru, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL