IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MMILLA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 330 OF 2016

JOSEPH NJASII ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Maghimbi J.)

dated the 29th day of May, 2015
in
Criminal Appeal No. 3 of 2015

JUGDMENT OF THE COURT

1st & 10th October, 2018

MMILLA, J.A.:

Joseph Njasii (the appellant), is currently behind bars serving a life sentence following his conviction by the Resident Magistrate's Court of Arusha at Arusha of the charge of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap. 16 of the Revised Edition, 2002. The offence was alleged to have been committed on 24.3.2014 against a child who was then 4 years old, at Kijenge area within the District and

Region of Arusha. After that conviction he unsuccessfully appealed to the High Court of Tanzania, Arusha Registry, hence this second appeal to the Court.

The prosecution case depended on three witnesses namely; Francisca Francis (PW1), the victim child (P.E.) who testified as PW2, and PW3 Dr. Hussein Omary Mohamed.

According to PW1, on 24.3.2014 around 6:00 noon, her victim child asked her to examine him because he was feeling pain on his anus. She led him to her bed room where she examined him and found that his anus was reddish, an indication that it was tempered with. On asking him to explain what happened to him, the child informed her that "*Mdudu wa Mmasai ameniingia*". The child explained that it was like a penis, and named that Masai to be Joseph "Masai". Since PW1 had no idea who that Joseph "Masai" was among the Masai around that area, she sought the help of her house maid who informed her that it had reference to the Masai who was regularly coming at that residence to plait her hair (the house maid's hair). She nevertheless did not tell PW1 the second name of the said Joseph "Masai". On hearing that, PW1 sent her watchman to call

the said Joseph "Masai". That was done, the watchman sent to her a person who happened to be the appellant, whose name was Joseph Njasii. After that person was brought to her, she sent him to Kijenge Police Station. She was given a PF3 and proceeded to Mount Meru Hospital for medical examination and treatment.

As already pointed out, the victim child testified as PW2. On the day he appeared before the trial court to testify, this child said that one day he told his mother that Joseph entered his "Dudu" into his "buttocks" on the day he met him on his way to Hope's home. He said he experienced pain.

The other evidence came from PW3 Dr. Hussein Omary Mohamed. He testified that on 25.3.2018, PW2 was sent to him for medical examination and treatment on account that he was a victim of sexual assault against the order of nature. PW3 recounted that he detected no bruises at the victim's anus, but on inserting a finger thereat, he noticed that PW2's anus was not normal because muscles were loose; a fact which suggested that it was tempered with by a blunt object.

The appellant's defence was very brief. He was emphatic that he was innocent, and that PW1 invented the present case against him in an

endeavour to swindle him a sum of TZS 50,000/= she owed him. He urged the Court to allow the appeal and release him from prison.

As already pointed out, the trial court rejected his defence and was satisfied that the prosecution proved their case against him beyond reasonable doubt and convicted him. Given that PW2 was then 4 years old, a sentence of life imprisonment was passed against him. His first appeal to the High Court was unsuccessful, hence the present one.

Before this Court, the appellant filed a four point memorandum of appeal as follows; **one** that, the prosecution did not prove the case against him beyond reasonable doubt, therefore that the first appellate court improperly upheld the trial court's decision; **two** that, both lower courts did not properly evaluate the evidence before them; **three** that, the evidence of PW2 was wrongly relied upon because it was received in contrarvetion of the provisions of section 127 (2) of the Evidence Act Cap. 6 of the Revised Edition, 2002; and **four** that, he was not correctly identified as the persons who sexually assaulted PW2.

At the hearing of the appeal on 01.10.2018, the appellant appeared in person and fended for himself. After asking the Court to adopt his

memorandum of appeal, he elected for the Republic to begin, but reserved the right for a rejoinder if need would arise.

On the other hand, the respondent/Republic enjoyed the services of Ms Lilian Aloyce Mmassy, learned State Attorney. She made her stand clear that she was opposing the appeal.

Ms Mmassy tackled first the fourth ground of appeal in which as aforesaid, the appellant claims that he was not correctly identified as the person who sexually assaulted PW2. She contended that this is a new ground because it was not raised before first appellate court. She urged the Court to ignore it.

We have carefully gone through the grounds of appeal which were filed in the High Court. We have satisfied ourselves that the aspect whether or not the appellant was correctly identified was not raised before that court, therefore that it has been raised here for the first time. As such, we hurry to agree with Ms Mmassy that where a ground of appeal may be raised in this Court for the first time, it will decline to determine it on account of lack of jurisdiction – See the cases of **Abdul Athuman v. Republic** [2004] T.L.R. 151, **Samwel Sawe v. Republic,** Criminal Appeal

No. 135 of 2004 and **Juma Manjano v. The DPP,** Criminal Appeal No. 211 of 2009, CAT (both unreported). In the case of **Samwel Sawe v. Republic** (supra), the Court said:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v. R*** *(2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

On the basis of the above, we have no jurisdiction to determine and decide the fourth ground of appeal. Thus, it is accordingly struck out.

Next for discussion is the third ground of appeal under which the appellant asserts that the evidence of PW2 was wrongly relied upon because it was received in contrarvesion of the provisions of section 127 (2) of the Evidence Act. Ms Mmassy's response is that this ground is baseless because the learned trial Resident Magistrate fully complied with the provisions of section 127 (2) of the Evidence Act. We rush to say that we agree with the learned State Attorney.

Section 127 (2) of the Evidence Act mandatorily directs the taking of the evidence of a witness of tender age to be preceded by a *voire dire* test in order to test such witness on two aspects; **firstly** whether the witness knows the nature of oath; **secondly** whether she/he is possessed of sufficient intelligence to justify the reception of his/her evidence, and understands the duty of speaking the truth. Before the amendment to that section in 2016 vide "The Written Laws (Miscellaneous Amendment) Act No. 2 of 2016" that section provided that:-

> *"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence*

may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."

A careful examination of the Record of Appeal reveals at pages 10 and 11 that a *voire dire* test was conducted, after which the learned trial Resident Magistrate dutifully recorded her findings on both limbs. It was found that the complainant did not know the nature of oath, a finding which was put on record. It also shows that she received his evidence after she was satisfied that the child possessed sufficient intelligence to justify the reception of his evidence, and understood the duty of speaking the truth. For reasons we have assigned, we find that this ground is devoid of merit. We accordingly dismiss it.

Ms Mmassy discussed together the second and first grounds of appeal. The second ground alleges that both lower courts did not properly evaluate the evidence before them, while the first ground asserts that the prosecution did not prove the case against him beyond reasonable doubt,

therefore that the first appellate court improperly upheld the trial court's decision.

Ms Mmassy's response in respect of the second ground of appeal was that both lower courts properly scuritized and evaluated the evidence before them. Admitting though that the evidence of PW1 depended on what she was told by her victim child that he was sexually assaulted by the appellant, she stressed that the evidence of PW2 was unambiguously clear that it was the appellant who did that awful act to him. She contended therefore that, the prosecution side had proved the case against the appellant beyond reasonable doubt. She pressed the Court to as well dismiss the first and second grounds of appeal.

We wish to preface our discussion by a general statement regarding the duty of the Court in a second appeal.

We are aware that in a second appeal, the Court rarely interferes with the concurrent findings of facts by the two courts below. As a wise rule of practice, the Court may interfere as such only when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law or procedure by

the courts below. In the case of **Felix s/o Kichele & Another v. Republic,** Criminal Appeal No 159 of 2005, CAT (unreported) the Court stated that:-

> *"This Court may, however, interfere with such finding if it is evident that the two courts below misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been misdirections or non-directions on the evidence."*

Thus, where it is apparent that the evidence on the record of proceedings had not been subjected to adequate scrutiny by the trial court or the first appellate court, the second appellate court has an obligation to do so. This principle will guide us in the circumstances of this case.

As already pointed out, the prosecution side had three witnesses who testified in the case. It is certain that PW1 was not an eye witness, and that her evidence was based on what was related to her by PW2. Upon being told by the latter that Joseph "Masai" sexually assaulted him, PW1 inquired from her house maid who told her who Joseph Masai was. The house maid told PW1 that it was the "Masai" who was regularly plaiting her

hair (the house maid's). It was then that PW1 sent her watchman to call that person, which explains how the appellant found himself in this grim. Although PW2 said the appellant was the one who assaulted him, the house maid was not called as a witness to clear the doubt that Joseph "Masai" who was named by PW2 as his assailant was this appellant. This is particularly so when we consider the fact that there were more than one "Masai" who were regularly going to that place. Also, the watchman who was sent to call the said "Masai" was not called to testify.

On our part, we think that recognition of a person by a single name, particularly a child in the shoes of PW2, is an unsafe account on which to base conviction. In essence, to recognize a person by a single name amounts to guess work of the identity of such person; this has no room in criminal trials. In the circumstances, we agree with the appellant that the prosecution did not prove the case against him beyond reasonable doubt. Thus, this ground is meritorious and we allow it.

That said and done, we allow the appeal, quash conviction, and set aside the sentence. Consequently, we order the appellant's immediate

release from prison unless he is being continually held for some other lawful cause.

Order accordingly.

DATED at **ARUSHA** this 8th day of October, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL