

TANZANIA / JUDGMENT

AHADI BURTON JDM

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (CORAM: SEHEL, J.A., MAIGE, J.A. And ISMAIL, J.A.)¹ CRIMINAL APPEAL NO. 94 OF 2021 AHADI BURTON APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the Judgment of the High Court of Tanzania, at Mbeya) (Mambi, J.) dated 20th day of July, 2020 in D.C. Criminal Appeal No. 170 of 2020 JUDGMENT OF THE COURT 3rd & 8th July 2024 MAIGE, J.A.: In the District Court of Kyela at Kyela, (the trial court), the appellant was charged with the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code and, in the alternative, the offence of indecent assault contrary to section 135 of the same law. The offence was alleged to have been committed against a girl of 10 years old, (PW1) on 6th day of September, 2019, (the material day) at Ngonga area within the District of Kyela in the Mbeya Region. Upon trial, the appellant was convicted of the offence of rape and sentenced to thirty years imprisonment. He is aggrieved and that is why he has commenced the instant appeal. The facts which justified the conviction and sentence of the appellant can briefly be narrated as follows. On the material date herein mentioned, PW1 and his relative Dito Sande (PW2), were asked by the appellant, which they accepted, to accompany him in his beef selling business. At the end of the business, during night, the appellant refused to escort them home. Instead, he took them to the homestead of his grandmother where they spent the night. PW1 testified that, while PW2 was asleep, the appellant undressed her and inserted his manhood in her vagina. When PW2 woke up, she witnessed the incident and started crying. PW2's father who is the uncle to the victim, heard the noises and forcibly broke into the room where he arrested the appellant and produced him to the hamlet chairperson. The matter was reported to the police and eventually, PW1 was rushed to hospital where she was examined by Mary Lucas (PW4) who established as per exhibit PI that, she had been raped. In his defence, the appellant totally denied the charge. 2 After examining the evidence, the trial court was satisfied that the offence of rape had been proved beyond reasonable doubt. Accordingly, it convicted the appellant and sentenced him to 30 years imprisonment. Being aggrieved, the appellant appealed to the first appellate court faulting the decision for: One, failure to notice that the case against the appellant was fabricated; Two, failure to take into account that the person who is alleged to have arrested the appellant (the uncle) was not called as a witness; Three, failure to notice that the appellant was not properly identified; Four, failure to notice that a prim a facie case against the appellant was not made out; Five, failure to notice that the appellant was forced to sign a cautioned statement; Six, failure to take

into account that the chairperson or village ward executive officer were not called as a witness; and Seven, failure to take into account that it was improbable for the victim's uncle to suspect commission of the offence and break into the room while PW1 and PW2 did not raise alarms. While at pages 46 and 47 of the record of appeal, the High Court Judge reproduced all the seven grounds of appeal, in his deliberation appearing at pages 48, 49, 50 and 51 and his findings appearing at page 52 thereof, he determined and dismissed the appeal based solely on the issue as to whether the case against the appellant was proved beyond reasonable doubt. The appellant was not happy with the decision, hence the current appeal in which the following grounds have been raised:

1. That; the High Court Judge erred in law and fact when he dismissed the appellants appeal without regarding and evaluating deeply the appellant's petition of appeal.
2. That; the High Court Judge erred in law and fact by dismissing the appellant's appeal without taking into consideration that the person who allegedly arrested the appellant at the scene of the crime was not called as a witness.
3. That, the prosecution failed to prove the charge as per the law.
4. That) the High Court Judge erred in law and fact by not evaluating the evidence from the prosecution and defence.
5. That; the appellant's defence was not considered by both courts below. When the appeal came before us for hearing, the appellant appeared in person without representation. The respondent Republic was represented by Ms. Veneranda Masai and Mr. Emmanuel Bashome, both learned State Attorneys. In his address to the appeal, the appellant did not have anything to say rather than fully adopting the grounds in the memorandum of appeal and urging us to allow the appeal. Ms. Masai who submitted for the respondent Republic, supported the appeal to the extent of the first ground. She submitted, making reference to the record of appeal that; while the grounds of appeal before him were seven, the High Court Judge reduced them into three issues and finally addressed only two issues namely; whether the case was proved beyond reasonable doubt and whether the medical report was necessary. She submitted further that in address of the said issues, the complaints in some of the grounds of appeal such as failure to call material witnesses and failure to properly identify the appellant were not considered. In effect, she submitted, the appeal was not fairly decided as the appellant was denied a right to be heard on the unattended complaints. This, she submitted, was a fatal irregularity which vitiates the said judgment. She placed reliance on the case of *Salum Njewe @ Salum @ Scorpion v. R* (Criminal Appeal No. 182 of 2019) [2022] TZCA (24 October 2020; TANZLII). She thus urged us to allow the appeal to the extent of the first ground of appeal and remit the record to the High Court for rehearing of the appeal before another Judge. With the proposed approach, she submitted, correctly in our view, it would be premature for the Court to consider the remaining grounds. In what appeared as a rejoinder submission, the appellant urged us to consider the appeal in its entirety, reason being that he had been in incarceration for quite a long time. We have duly

considered the rival submissions and examined the record of appeal. We are in agreement with the learned State Attorney that; while the appeal before the first appellate court was based on seven grounds, its determination was essentially confined to the complaint that the case was not proved beyond reasonable doubt which perhaps would partly capture the 1st and 6th grounds of appeal. The complaint in the 2nd and 6th grounds that some material witnesses were not called; the complaint in the 3rd ground that the appellant was not properly identified; and the complaint in the 4th ground that the trial continued in the absence of a ruling on *prima facie* case, were not considered at all. We also agree with the learned State Attorney that, the omission amounts to a fatal irregularity with the effect of rendering the respective judgment a nullity. There are many judicial pronouncements in support of that proposition. For instance, in *Nyakwama s/o Ondare @ Okware v. Republic* (Criminal Appeal No. 507 of 2019) [2021] TZCA 592 (21 October 2021; TANZILII), we observed: 'We therefore, agree with Mr. Byamungu that failure to consider appellant's grounds of appeal was a fatal irregularity rendering the first appeal court's judgment a nullity. In this regard, we wish to emphasize that though it is not the duty of the first appellate court to resolve the issues as framed by the trial judge, yet it is expected and bound to address and resolve the complaints of the appellant in the grounds of appeal either separately or jointly depending on the circumstances of each appeal.' See also *Mwajuma Bakari* (Administratrix of the Estate of the Late Bakari Mohamed) v. *Julita Semgeni and Another*, Civil Appeal No. 71 of 2022 and *Salum Njwete* (supra). We understand from the above authorities that, the appellate court has option, in as long as it addresses all the complaints raised in the appeal, to either determine each of the grounds separately or determine them jointly. In this case, it would appear, the first appellate court took the second approach. That was by itself in order. The problem, however, is that, in dealing with those grounds, some of the material complaints which were raised in the appeal as aforesaid were not attended at all. With such a failure, it is obvious that the appellant was denied a right to be heard on the unattended grounds of appeal. On that account, we find that the first ground of appeal has merit. The learned State Attorney did not submit on the rest of the grounds in understanding that the first ground is capable of disposing of the appeal. She has advised us to remit the record to the High Court for reconsideration of the appeal. The appellant has urged us to determine the appeal in its entirety. A similar invitation was made in *Salum Njwete* (supra), and the Court was of the view that, a second appellate court would not, except in a very exceptional circumstances, determine a ground of complaint which was not determined by the first appellate court. In reaching such a decision, the Court reasoned as follows: 'We understand it to be a settled general rule of law that; a matter not decided upon by the High Court or subordinate court exercising extended jurisdiction, cannot be decided by this Court. This is indeed the effect of the provision of section 4(1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019]. The rationale behind is easy to explain. Appeal is a right and process as well. A party losing in the first appeal, has a right to appeal in the second appeal if the statute allows.' We have considered the invitation in line with the circumstances of the case in its totality and satisfied ourselves that, justice requires remittance of the record to the first appellate court for redetermination of the appeal.

Guided by the authority just referred, therefore, we nullify the judgment and proceedings of the High Court and remit the record thereof for redetermination of appeal before another judge. Since this is an old case, we direct that the rehearing of the appeal be done expeditiously. DATED at MBEYA this 5th day of July, 2024. B. M. A. SEHEL JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL M. K. ISMAIL JUSTICE OF APPEAL The Judgment delivered this 8th day of July, 2024 in the presence of Appellant in person and Ms. Hannarose Kasambala, learned Senior State Attorney assisted by Mr. Davice Msanga, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

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