

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 131 OF 2015

MBAGA JULIUS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Gwae, J.)

dated the 23rd day of February, 2015

in

HC. Criminal Appeal No. 84 of 2013

JUDGMENT OF THE COURT

21st & 25th October, 2016

MUGASHA, J.A.:

In the District Court of Geita, the appellant was charged with six counts of unnatural offence contrary to section 154 (1) (a) of the Penal Code [CAP 16 RE.2002].

It was alleged that on unknown dates and times in 2012, at lake view area at Nyamalembo village within Geita District in the region of

Mwanza, the appellant did have carnal knowledge of six male children against the order of nature.

To prove its case the prosecution called nine witnesses who are: **ZAMDA RASHID (PW1), HAMADI AMRI (PW2), KHALIMA HASSAN (PW3) RAMADHANI SHABANI (PW4), DIDAS PIUS (PW5), NICHOLAUS PANDO (PW6), LAURENT STANSLAUS (PW7), D.7740 D/CPL PETER (PW8)** and the medical doctor who testified as PW9. The prosecution also tendered the cautioned statement of the appellant (Exhibit P1) and five PF3s collectively admitted as Exhibit P2.

A brief account of the evidence which led to the conviction of the appellant is briefly as follows: The victims were all pupils of Mseto Primary School and met the appellant who used to go at their school during break time. He lured the victims with rice buns and took them to the dam and sodomized them. As this shameful act continued for quite some time, PW1, one of the parents realized that her son (PW2) who regularly went to school was not writing notes. She went to school together with PW2 to inquire from the teachers. Upon interrogation by the teachers, PW2 revealed that he and other children (PW4, PW5, PW6 and PW7) were regularly lured by the appellant who bought them sweets and rice buns,

then took them to the lake and forced them to smoke cannabis and sodomised them. The appellant threatened them not to reveal the shameful acts or else he would kill all of them.

PW3 was another parent who gave a similar account and that she came to know that her son (PW4) was being sodomized after being summoned by the teacher at Mseto Primary School.

A similar account was given by the victims PW2, PW4, PW5, PW6 and PW7 on how the appellant came to the school premises, took them to the dam and sodomised them. They also recalled that in some instances, the appellant was assisted by a group of street children who held the victims and forced them to bend to enable the appellant to accomplish the sodomy. Moreover, PW2 and PW4 recalled to have been introduced to the appellant by one Baraka. The incident was reported to the police where the victims were issued with the PF3s. Upon examination, the doctor established that the anus of each victim was enlarged due to penetration caused by a blunt object.

The appellant denied the charges. He claimed to have been assaulted and forced into making a confession statement.

The trial court convicted the appellant on 1st, 2nd, 3rd, 4th, and 6th counts on the strength of the credible evidence of the victims as corroborated by the evidence of the doctor. The appellant was sentenced to life imprisonment. He was acquitted on the 5th count.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed on account of credible evidence of the victims as corroborated by PW1, the PF3s (exhibit P2 collectively) and the cautioned statement of the appellant. Still aggrieved, the appellant has preferred this second appeal. In the Memorandum of appeal he has raised six grounds which are conveniently condensed into four main grounds as follows:

- 1. That the prosecution failed to prove the case against the appellant beyond reasonable doubt.*
- 2. That first appellate court wrongly relied on appellant's cautioned statement which was not evidence before the trial court.*
- 3. The conviction of the appellant was based on uncorroborated evidence of the victims.*

4. The conviction of the appellant is based on dock identification.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by the learned Senior State Attorney, Ms. Ajuaye Bilishanga.

The learned Senior State Attorney did not support the appeal. She submitted that the conviction of the appellant was properly founded on the strength of the credible evidence of the victims in terms of section 127(2) and (7) of the Evidence Act [**CAP 6 RE.2002**]. On prompting by the Court she conceded that, the trial magistrate did not comply with section 127(2) before proceeding to take the unsworn testimony of some of the victims which was acted upon to convict the appellant. However, she argued that, the evidence of the victims is corroborated by the documentary evidence of the doctor which shows that the victims were sodomised. She also conceded that, the first appellate court wrongly acted on the cautioned statement of the appellant which was not admitted into the evidence at the trial. As such, she urged that we expunge it from the record.

She challenged the appellant's complaint on dock identification as a new ground not raised in the first appellate court and urged the Court not to consider it. When asked by the Court as to who arrested the appellant she conceded that the arresting officer was not called as a prosecution witness and the victims were not made to identify the appellant at any identification parade. However, she maintained that the victims knew the appellant by the name of Mbagu. She urged us to dismiss the appeal.

The appellant had nothing useful in reply apart from reiterating that he did not commit the offence.

The conviction of the appellant as upheld by the first appellate court is based on credibility of the account of the prosecution witnesses that it is the appellant who sodomised the victims. We are alive to the principle that in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because we have not had the opportunity of seeing, hearing and assessing the demeanour of the witnesses. (See **SEIF MOHAMED E.L ABADAN vs REPUBLIC, Criminal Appeal No. 320 of 2009** (unreported)). However, the Court will interfere with concurrent findings if there has been misapprehension of the nature, and quality of the

evidence and other recognized factors occasioning miscarriage of justice. This position was well stated in **WANKURU MWITA VS REPUBLIC.**, Criminal Appeal No. 219 of 2012 (unreported) where the Court said:

"...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 and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

At the outset, we wish to begin with the cautioned statement of appellant which was acted upon by the first appellate court to conclude that the appellant confessed to have sodomised Juma and Ramadhani who were among the victims. The impropriety of such reliance was pointed out by the learned Senior State Attorney. The procedure for admission of a confession is regulated by the Evidence Act and case law. Therefore, like any other documentary evidence whenever it is intended to be introduced in evidence, it must be initially cleared for admission and then actually admitted before it can be read out. (See **WALII ABDALLAH KIBUTWA AND**

TWO OTHERS VS REPUBLIC, Criminal Appeal No. 181 of 2006 and **ROBINSON MWANJISI AND THREE OTHERS VS REPUBLIC**, Criminal Appeal No. 154 of 1994 and **OMARI IDDI MBEZI VS REPUBLIC**, Criminal Appeal No. 227 of 2009 (all unreported). Failure to read the contents of the caution statement after it is admitted in the evidence is a fatal irregularity. (See **LACK KILINGANI VS REPUBLIC**, Criminal Appeal No.405 of 2015.

In the trial under scrutiny, at page 35 of the record, the cautioned statement was irregularly initially read out and the appellant raised objection on its admissibility. This was followed by a trial within trial whereby the trial magistrate having determined that the cautioned statement was voluntarily made, he admitted it as Exhibit P1. Thereafter, the statement was not read out to the appellant which is a fatal irregularity. Since the cautioned statement was not in the evidence on record, it was improper for the first appellate court to act on it. We agree with the learned Senior State Attorney and accordingly expunge the cautioned statement.

Another crucial area which we have carefully addressed our minds is on the concurrent findings on reliance on unsworn evidence of some of the prosecution witnesses taken without due regard to the requirements

of the law. The learned Senior State Attorney conceded that with some witnesses the trial magistrate did not comply with all the conditions stated in section 127 (2) before proceeding to take the unsworn evidence.

Section 127 (2) of the Evidence Act (supra) states as follows:

"Where in any criminal cause or matter a child of tender age is called as a witness does not, in the opinion of the court, understand the nature of 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 reception of his evidence, and understands, the duty of speaking the truth."

In terms of section 127 (2) of the evidence Act, a trial magistrate may receive unsworn evidence of a child if satisfied that the child: **One**, is possessed of sufficient intelligence to justify reception of his/her evidence and **two**, he/she understands the duty of speaking the truth. (See **DHAHIRI ALLY VS REPUBLIC (1987) T.L.R 218**). The two conditions must be cumulatively satisfied.

In the case at hand, the trial magistrate took unsworn testimony of PW2 and PW6 after finding that they were possessed of sufficient intelligence to justify reception of evidence. He did not go further to satisfy

himself if those witnesses understood the duty of speaking the truth. This partial compliance was against the mandatory requirements of section 127 (2) of the Evidence. As this was conceded by the Senior State Attorney, we accordingly discard the evidence of PW2 and PW6 which render the 1st and 4th counts not proved beyond reasonable doubt against the appellant. It is unfortunate that this anomaly was not addressed by the first appellate court.

With the remaining 2nd, 3rd and 6th counts, the question to be answered is whether there is evidence to support the charges. We are satisfied that the unsworn evidence of PW4 and PW5 was taken after the trial magistrate satisfied himself that each was possessed with sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth. Moreover, we also have the evidence of PW7 who gave a sworn testimony. The trial magistrate found these witnesses to be credible as reflected at pages 64, 65 and 66 of the record. The first appellate court also arrived at a similar conclusion.

It is settled law that the true and best evidence of a sexual offence is that of a victim. (See **SELEMANI MAKUMBA VS REPUBLIC** (2006) TLR

379). This is in line with section 127 (7) of the Evidence Act (supra) which states:

*"Notwithstanding the preceding provisions of this section, where **in criminal proceedings involving sexual offence, the only independent evidence is that of a child of tender years** or of a victim of the sexual offence, the court shall receive the evidence **and may, after assessing the credibility of the evidence of the child of tender years** or as the case may be the victim of sexual offence, on its own merits, not withstanding that such evidence is not corroborated, proceed to convict, if for reason to be recorded in the proceedings **the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth**".*

We have deemed it imperative to revisit what was said by the victims before making our conclusion. At page 17 of the record the PW4's account was as follows:

"..... I was introduced to the accused person by my friend Baraka. He told me that Mbaga was his friend... One day while on break at school accused person came. He brought us rice bun (vitumbua) at Mama Amina. He also told us to go to the dam. When he got there he took out a knife. He gave us bhang to smoke. He ordered us to bend down and his group held us (Walitushikilia). He then sodomised us. He was ordering us to bend, his group held us and they covered our face and he used to insert his penis into our anus. I was feeling pain. He sodomised me for the whole week i.e. every day in the week. He

threatened us that in case we tell anybody he would kill us and if we stop going he would kill us either. We did not tell anybody.”

PW5’s account is reflected at page 20 to 21 of the record as follows:

“I know this person (pointing at accused person). He is Mbaga Julius. He sodomises people. I knew him since 1/2/2012. Mbaga used to sodomize us.... He sodomised us at the anus. He used to insert his penis in my anus. He started to do that on me on 1/2/2012. On that day he found me at Mama Amina’s place at our school. He sodomised us at the white man’s dam. I was with my fellow. Mbaga had his group. When we got at the white man’s dam he took out the knife and started to sodomise us.... His group held us and he started to sodomise us. He removed his trousers, took out his penis and started to insert it in our anus. He started with me, I felt pain after he inserted his penis into my anus. I could not tell anyone of that. He promised to kill us in case we tell anyone.....”

At page 28 to 29 of the record PW7’s account is as follows:

“I know this one (pointing at accused). I used to see him passing at school. I met him at the first time at school. It was during 10.00hrs break. He called us telling us to go to the dam. When we got to the dam we began swimming. After swimming we got off the dam he started raping us. He raped us at our anus.... He entered his penis into my anus.... By the time he was entering his penis into our anus he was threatening us with a knife. He forced us to bend.... He sodomised me for a week. This exercise was repeatedly. I could not tell anyone

anyone because he threatened that in case we report he would stab us with the knife. I know the accused person. He is Mbagu by name....."

Moreover, in the available medical documentary evidence (Exhibit P2 collectively) the doctor established anal enlargement caused by blunt object at the magnitude of: PW4: 0.5 x 1.0 cm; PW5: 0.75 x 1.5 and PW7: 0.75 x 0.5cm.

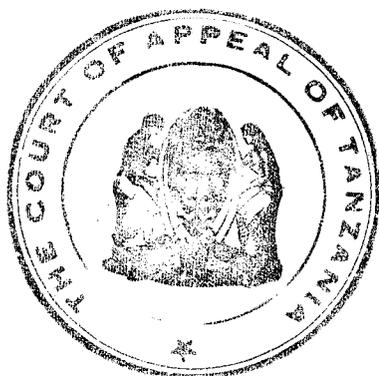
We on our part are of the considered opinion that the evidence adduced by PW4, PW5 and PW7, despite their tender age, sufficiently proved that the appellant committed the offence charged with. **Firstly**, they gave a coherent narration of the sad and shameful incident. **Secondly**, the record clearly shows that they knew the appellant who they regularly met at school; he used to buy rice buns for them and directed them to go to the dam where he sodomised them. In this regard, the appellant's complaint that he was identified in the dock is farfetched because he was identified by the victims before stepping in the dock.

In the premises, the credible evidence of PW4, PW5 and PW7 solely is sufficient to ground a conviction in terms of section 127(7) of the Evidence Act. Besides, in the instant case, the evidence of PW4, PW5 and PW7 is corroborated by the documentary evidence (PF3) Exhibit P2

collectively which established the victims' anal enlargement caused by blunt object. Even if Exhibit P2 is done away with, still the credible evidence of PW4, PW5 and PW7 point to the guilt of the appellant.

In view of the aforesaid, the appellant is cleared on 1st and 4th counts. We uphold the convictions and the sentences of the appellant in respect of 2nd, 3rd and 6th counts which were proved beyond reasonable doubt and we do not find cogent reasons to disturb the concurrent findings of the two courts below in respect of the three counts. We accordingly dismiss the appeal.

DATED at **MWANZA** this 24th day of October, 2016.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "P.W. Bampihya", is written above the printed name.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL