IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MKUYE J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 87 OF 2018

BWANGA RAJABU .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Shinyanga)

(Kibella, J.)
dated 15th day of August, 2016
in
DC Criminal Appeal No. 68 of 2016

JUDGMENT OF THE COURT

12th & 22nd July, 2022

MKUYE, J.A.:

Before the District Court for Shinyanga District, the appellant, Bwanga Rajabu, was charged and convicted with unnatural offence contrary to section 154 (1) (a) of the Penal Code, [Cap 16 R.E. 2002; now R.E. 2022], (the Penal Code). It was alleged in the particulars of the offence that, the appellant on different dates and times between January and June, 2014 at Ngokolo area within Shinyanga Municipality in Shinyanga

Region, did have carnal knowledge of one T s/o T (name withheld to conceal his identity) aged nine (9) years against his order of nature.

Upon conviction, the appellant was sentenced to life imprisonment. Aggrieved with the decision of the trial court, he appealed to the High Court but his appeal was not successful.

In order to prove its case, the prosecution paraded five (5) witnesses and produced two (2) exhibits, that is, the cautioned statement of the appellant (Exh. P1); and the PF. 3 (Exh. P2). For the defence, the appellant was a sole witness who testified.

At it can be gleaned from the prosecution witnesses a brief account of the facts leading to this appeal is as follows:

Ines Gobo (PW1) was married to Twaha Hashim @ Mbamba and were blessed with two issues among them being T s/o T (who, in order to conceal his identity we shall refer him as a victim or PW2). Sometimes in June, 2014, the appellant arrived at their home and requested from the victim's mother (PW1) that she allow the victim to accompany him to a place known as Majengo. As PW1 was preparing lunch, she acceded to the

request on condition that the victim takes his lunch before leaving. After PW2 had finished eating, the appellant left with him by a bicycle and proceeded to a certain house. When they were inside the said house, the appellant asked PW2 to undress his shorts and he too undressed himself. The appellant then had carnal knowledge of the victim.

Meanwhile, Hafidhi Nyahiri (PW5) who had been once informed of the suspicious activity of the appellant, saw the appellant arrive with a young boy on that date. He then decided to make a follow up. He peeped through the window of the house where the appellant and the victim had entered and was able to see the appellant having carnal knowledge of PW2 against the order of nature. PW5 decided to way lay waiting and when the appellant came out with the victim, he put him (appellant) under restraint and interrogated him whereby he confessed to have committed the alleged offence. PW5 then informed the police via his mobile phone, who then came and arrested the appellant. He also interrogated PW2, who disclosed that, that was not the first time that the appellant had carnal knowledge of him.

In his defence, the appellant disassociated himself from the commission of the offence.

The appellant has fronted a memorandum of appeal based on five (5) grounds of appeal as follows:

"1. That, introduction and/or re assignment of successor magistrate was made out of the appellants consent. Yet still she was not in a good position to weigh out the witnesses' ability who (sic) never saw them, thus prejudiced the appellant.

2. *That, the presiding court erred to believe that the prosecution witnesses were credible despite the deficit in their evidence in matter of law and fact.*

3. *The penetration as a crucial ingredient of unnatural offence was not sufficiently established (proved).*

4. *That, the presiding court erred to convict the appellant basing on prosecution case/evidence which was neither corroborated nor proved to the hilt.*

5. *The presiding court had failed to properly analyse/evaluate the entire evidence before it, thus it ended in decision which is/was on serious prejudice to the appellant."*

At the hearing of the appeal, the appellant appeared in person and unrepresented, whereas the respondent Republic enjoyed the services of Ms. Verediana Peter Mlenza, learned Senior State Attorney teaming up with Ms. Immaculate Mapunda and Ms. Rehema Sakafu, both learned State Attorneys.

After having sought to adopt his grounds of appeal, the appellant opted to let the State Attorneys respond first, while reserving his right of rejoining later, if need would arise.

For the respondent, Ms. Sakafu took off by submitting that although the appellant has raised five (5) grounds of appeal, ground 5 is a new one as it was not raised at the first appellate court and determined. She contended that, since it was not determined by the first appellate court, this Court has no jurisdiction to deal with it, and hence, she urged the Court to disregard it.

As regards the first ground of appeal in which the appellant's complaint is that there was a change of magistrates without giving the appellant an opportunity to comment on it, Ms. Sakafu readily conceded to it. She also pointed out that at first the case was heard by Chabba SRM

who recorded the evidence of PW1 and PW2. Then, Gasabile RM took over and without assigning reasons for taking over proceeded to record the evidence of PW3, PW4 and DW1 and also composed the judgment thereof. However, she assailed the appellant for not complaining earlier on the omission. The learned State Attorney went on dismissing the complaint that the trial magistrate might not have understood the evidence taken by the predecessor magistrate, and argued that, the successor magistrate went through the evidence taken by her predecessor and was satisfied that it was truthful and credible evidence. At any rate, she argued that there was no prejudice to the appellant since he has not shown how he was prejudiced. To fortify her argument on the prejudice test, she referred us to the case of **Tumaini Jonas v. Republic,** Criminal Appeal No. 337 of 2020 (unreported) Pg 10 – 11.

Regarding the second, third and fourth grounds of appeal in which the appellant's complaints are based on the reliance on the prosecution evidence as being credible while it had weaknesses; that the penetration was not sufficiently corroborated; and that the prosecution evidence was not corroborated, it was the submission of Ms. Sakafu who argued all the

grounds generally, that the offence was proved beyond reasonable doubt. She elaborated that; **one,** PW2 explained on how the appellant used to undress him and sodomize him while giving details that he used to take his male member and inserted it into his anus since he was in Std I. **Two,** PW2 was familiar to the appellant as his neighbour and used to pick him from home to the scene of crime. **Three,** the appellant used to ask him from his mother (PW1) so that he can accompany him to various places.

Ms. Sakafu went on arguing that PW2's evidence was corroborated by his mother (PW1), Doctor Fredrick Mlewa (PW4) and Hafidhi Nyahiri (PW5). She elaborated that, for instance, PW1 explained how she knew the appellant and how he used to pick the victim for a company. PW1 also inspected the victim and observed that his anus had been loose.

With regard to PW4 and PW5's evidence, it was Ms. Sakafu's submission that, PW4 medically examined PW2 and observed that his anus had its external sphincter muscles loose; and PW5 witnessed the appellant sodomizing the victim and how the appellant admitted, on interrogation, to have sodomized the victim only once; and that PW2 divulged to him to have been abused by the appellant since he was a std I pupil.

In the premises, the learned State Attorney submitted that with the available evidence, the offence of unnatural offence against the appellant was proved beyond reasonable doubt and, therefore, the two courts below were justified to convict and sentence him to life imprisonment and hence, their decisions cannot be faulted.

In the end, she implored the Court to find that the appeal is devoid of merit and dismiss it.

In rejoinder, the appellant urged the Court to consider his grounds of appeal, since it was his view that the offence against him was not proved beyond reasonable doubt. He, then, prayed to the Court to allow the appeal and release him from custody.

We have anxiously examined and considered the grounds of appeal and the submissions from either side and, we think, we are now in better position to determine it. We shall start with the issue that the fifth ground of appeal is new as it was not raised and determined by the first appellate court. Indeed, having revisited the grounds of appeal which were raised in the High Court at page 70 of the record of appeal and the memorandum of

appeal to this Court we have observed that, the said ground was not raised and determined by the first appellate court.

Times without number, this Court has pronounced its stance that it does not have jurisdiction to entertain a matter which was neither raised nor determined by the High Court or a Resident Magistrate Court with Extended Jurisdiction unless it raises a point of law (see **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015 and **Omary Saimon v. Republic,** Criminal Appeal No. 358 of 2016 (both unreported). For instance, in the latter case of **Omary Saimon** (supra), the Court had put it clear that its jurisdiction on matters of fact is derived from section 6 (7) (a) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002, now R.E. 2019] (the AJA) and that it was only inclined to look into matters which were raised in the lower courts and decided and not on matters which were not raised or decided neither by the trial court nor the High Court on appeal. (See also **Jumanne Mondelo v. Republic,** Criminal Appeal No. 10 of 2018 (unreported). In this regard, therefore, we disregard it and refrain ourselves from entertaining it.

We, now move to the first ground of appeal in which the appellant's complaint is on the change of magistrates without giving him opportunity to comment. On our part, we are in agreement with Ms. Sakafu that the case was dealt with by two magistrates whereby Chabba, SRM recorded the evidence of PW1 and PW2 as shown at pages 12 to 21 of the record of appeal and then, Gasabile, RM, took the evidence of PW3, PW4, PW5 and DW1; and composed the judgment which was pronounced on 19th October, 2015 (See pages 55 – 68 of the record of appeal). However, as was correctly submitted by Ms. Sakafu, when Gasabile, RM took over the case on 19th May 2015, he did not assign reasons for such taking over the case from the predecessor magistrate since the record of appeal is silent on that. Neither did she give opportunity to the appellant to comment as required by section 214 (1) which states:

> *"214(1)Where any magistrate after having heard and recorded the whole or any part of the evidence in any trial... for any reason unable to complete the trial or unable to complete trial or ... within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the*

trial ... and the magistrate so taking over may act on the evidence or proceedings recorded by his predecessor and may, ***in the case of a trial and if he considers it necessary, re summon the witness and recommence the trial or ...*** "[Emphasis added].

We think, the part of the section we have emphasized is where the appellant's complaint is premised that he was not given a chance to comment. We must note that, having looked at the record of appeal we have observed that, it is silent whether the appellant was asked if he was willing for the successor magistrate to proceed from where the predecessor magistrate ended or to re-summon the witnesses and recommence the trial. It is our view that, the successor magistrate could have been in a position to determine if it was necessary or otherwise to do so had she invited the appellant to comment on that. It was, therefore, improper for the magistrate not to afford the appellant such an opportunity.

However, it is notable that, before the wake of the overriding objective principle which was introduced by sections 3A and 3B of the AJA through the Written Laws (Miscellaneous Amendments) Act, 2018 (Act No.

8 of 2018), failure to comply with the provisions of section 214 of the CPA was a fatal irregularity which rendered the proceedings and judgments a nullity with an order for a retrial depending on the circumstances of the case. (See **Abdallah Said Akilimali v. Republic,** Criminal Appeal No. 203 of 2015; **DPP v. Laurent Neophitus Chacha and Others,** Criminal Appeal No. 252 of 2018. Also, failure by a successor Judge/Magistrate to assign reasons for re-assignment was translated to a lack of jurisdiction to take over the trial of the case and therefore the proceedings, judgment and decree were nullified (see **Mariam Samburo (Legal Personal Representative of Late Ramadhani Abas) v. Masoud Mohamed Joshi and Another,** Civil Appeal No. 109 of 2016 (unreported).

However, as alluded to earlier on and rightly submitted by Ms. Sakafu, the situation has now changed whereby the test of prejudice is applied. The current position is that the Court looks into two issues; **one,** whether the conviction was vitiated by non-compliance with section 214 of the CPA; and **two,** whether the appellant was materially prejudiced by a conviction on account that the evidence was not recorded by the successor magistrate. (See **Tumaini Jonas'** case (supra)).

Luckly, the provisions of section 214 of the CPA were tested in the case of **Charles Yona v. Republic,** Criminal Appeal No. 70 of 2019 (unreported) where the Court observed that:

> *"... that before the High Court decides to quash conviction, it must be satisfied of the existence of two conditions, **First,** the appellants conviction was vitiated by non compliance with section 214(1) of the CPA. **Second,** and perhaps the most critical one, the appellant must have been materially prejudiced by the conviction by reason of the evidence not wholly recorded by the successor magistrate."*

Having applied the prejudice test in this matter, we are satisfied that the appellant was not prejudiced anyhow. We are of such view because, **one,** the appellant has not explained the manner in which the non-compliance with section 214 of the CPA has prejudiced him or rather he has not shown how non-compliance with the said provision or that, for the reason that the whole evidence was not recorded by the successor magistrate, prejudiced him.

Two, the circumstances of the case do not reveal any wrongful assumption of jurisdiction or unauthorized take over of the case by the successor magistrate, despite the fact that no reason was assigned by the successor magistrate for taking over the case.

We have also given thought of an attempt to link prejudice test on the basis of the successor magistrate not having opportunity to assess the demeanor of the witnesses and we find it to be rather remote. This is because, the successor magistrate examined the evidence recorded by his predecessor and found it to be truthful. We also see no relevance to the appellant's contention that he was not given a chance to comment on the change of magistrate since he was given and exercised all the rights during trial including cross examining witnesses and defending himself. We therefore find the first ground of appeal lacking merit and we dismiss it.

With regard to the complaints raised in the second, third and forth grounds of appeal, we are in agreement with the learned State Attorney that the offence was proved beyond reasonable doubt. We must state at the outset that in relation to the proof of sexual offences, it is a settled law that the best evidence comes from the victim – see **Selemani Makumba**

v. Republic, [2006] TLR 379; **Makende Simon v. Republic,** Criminal Appeal No. 412 of 2017; **Said Majaliwa v. Republic,** Criminal Appeal No. 2 of 2020; **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 and **Alex Ndendya v. Republic,** Criminal Appeal No. 207 of 2018 (all unreported). Though the appellant's complaint is that penetration was neither sufficiently proved nor corroborated we find that such contention is not true. We shall explain.

As was correctly submitted by Ms. Sakafu, the offence of unnatural offence was proved by PW1, PW2 and PW4. PW2 explained how the appellant used to take him to certain houses and how on reaching there he used to tell him to undress and he as well undressed and had sexual intercourse against the order of nature. For instance, at page 18 – 19 of the record of appeal, the victim clearly stated that the appellant "...used to unzip my trousers and took his penis and place or put it into my anus." At another stage PW2 stated that "...the accused has been knowing me carnally through my anus severally since I was in standard I." Yet at another stage he said, "...took me to Majengo area where he sent me into a certain house and asked me to take off my short (kaptula). I did so the

accused also took off his trouser and he laid me on the bed. Then he took his penis and placed penetrated into my anus..."

As it is, the victim was consistent in explaining how the appellant used to sodomize him. This was done on several occasions. In our view, despite the fact that PW2 was a witness of tender age, we think, his evidence was sufficient to establish penetration beyond reasonable doubt.

That notwithstanding, PW2's evidence on penetration, was corroborated by PW1 who examined the victim and observed that his anal orifice was loose. This evidence was further corroborated by PW4, a medical doctor who examined PW2 and confirmed that on examining the victim's anus, he found it with loose external sphincter which had developed keratin tissue. Apart from that, PW5 witnessed when the appellant had carnal knowledge of PW2 against the order of nature. For these reasons, we do not find any merit on the appellants' complaint that penetration was not proved.

As regards the appellant's complaint that he was convicted on the basis of uncorroborated evidence, we think, his challenge is based on who committed the offence. However, before venturing on the relevant issue

we find it appropriate to begin with revisting the position of the law on the issue. Matters relating to corroboration in sexual offences, is governed by section 127 (6) of the Evidence Act, [Cap 6 R.E. 2022] (the Evidence Act). The said provision provides as follows:

> *"Notwithstanding the preceeding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of 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, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons 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."*

In the case of **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (unreported), the Court considered the import of provisions of section 127 (6) of the Evidence Act and observed that the rationale behind that section is to do away with corroboration of the evidence of a victim of

a sexual assault depending on the prevailing circumstances such as credibility of the witness.

In this case, as already alluded to earlier on, PW2 consistently mentioned the appellant to be the person who used to have carnal knowledge of him against his order of nature since he was in Std I. He narrated how he used to pick him from his home and even requesting him from his mother (PW1) to allow him to give the appellant company to various places. PW2 explained that sometimes he used to pick him from school and when they reached to those places he told him to undress and he did the same and that was when he abused him. Both trial court and first appellate court, found, and in our view rightly so, the witness to be truthful and convicted the appellant.

That notwithstanding, the fact that the appellant used to pick the victim was supported by PW1 who told the court that at several occasions he used to request for PW2 to accompany him at several areas and she used to allow him. Even on the fateful day he requested for him and PW1 allowed PW2 to accompany the appellant but after taking his meal. But

later she was informed about the incident and PW2 told her that he had been abused by the appellant.

Besides that, PW5 testified on how he was informed about a man who used to come with a child at his neighbor's house and how the child looked tired when they came out. On the fateful date, PW5 set surveillance on them and witnessed how appellant sodomized the victim and he apprehended him immediately after the commission of the offence. And, that when he interrogated him, he admitted to him to have done so only once. This evidence also offered corroboration to the evidence of PW2 that he was sodomized by the appellant. Apart from that, there is another factor which supports the evidence that the appellant was the one who committed the offence, which is that the victim was familiar to the appellant, the fact which was supported by PW1 from whom he used to request for the victim to accompany him. PW1, PW2 and PW5 whom we find to be credible witnesses gave cogent evidence to prove that it was the appellant who committed the offence he was charged with.

In the final analysis, in view of what we have endeavored to explain above, we are satisfied that the case against the appellant was proved

beyond reasonable doubt to warrant us uphold the two courts bellow's findings.

With that said, we find that the appeal is devoid of merit and we, hereby, dismiss it in its entirety.

DATED at **SHINYANGA** this 22nd day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 22nd day of July, 2022 in the presence of the appellant in person, and Ms. Caroline Mushi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

W. S. Ng'humbu
For: **DEPUTY REGISTRAR**
COURT OF APPEAL