IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 303 OF 2019

STEPHEN EMMANUEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mkeha, J.)

dated the 31st day of July, 2019
in
Criminal Appeal No. 36 of 2018

JUDGMENT OF THE COURT

8th & 15th November, 2022

KEREFU, J.A.:

This is a second appeal by Stephen Emmanuel, the appellant who was before the District Court of Shinyanga at Shinyanga, charged with unnatural offence contrary to section 154 (1) (a) of the Penal Code. It was alleged that on 24th April, 2017 at Iselamagazi Village within Shinyanga District in Shinyanga Region, the appellant had carnal knowledge of a boy aged fourteen (14) years old against the order of nature.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. In proving the charge, the prosecution

relied on the evidence of five witnesses and one documentary evidence, the PF3 (exhibits P1). The appellant relied on his own evidence as he did not summon any witness.

In a nutshell, the prosecution case as obtained from the record indicate that, the victim, who testified as PW1 (name withheld) stated that he was a student of Standard VI at Iselamaganzi Primary School and he was living at Iselamagazi Village with his mother, one Agness Sebastian (PW2) together with his siblings. That, on 24th April, 2017 while going to school, he changed his mind and went to a nearby bush, removed the school uniform and remained with home clothes. Thereafter, PW1 went to a certain saloon and started watching television. PW1 testified further that, in the said saloon, he met the appellant who asked for a friendship and gave him TZS 1,000.00 for food. PW1 stayed at the said saloon until 20:00hrs when it was closed. After the closure of the said saloon, the appellant asked PW1 to follow him. PW1 followed the appellant and upon reaching at the bush, the appellant ordered him to undress his short, which he complied and thereafter, the appellant also undressed himself and inserted his penis into the PW1's anus. PW1 said that, he felt bad. After the awful incident, the appellant gave PW1 TZS 2,000.00 and ordered him to

go home. That, on the other day when PW1 visited the same saloon, the appellant, sodomized him again and, as usual, gave him TZS 2,000.00.

Some few days later, while at the same saloon, a friend of his mother saw him and ordered him to go home. Upon reaching home, and being suspicious that, his relationship with the appellant had been discovered, PW1 decided to disappear and went direct to the appellant's home. PW1 stated that, he stayed with the appellant until 23:00hrs, when the appellant ordered him to go home. On the way home, PW1 met one Bahati who asked him where he was, but PW1 kept quiet. The said Bahati picked a stick with a view to punish him and that is when PW1 revealed the ordeal. Bahati took PW1 home where PW1 narrated the entire incident to his uncle one Bahebe John (PW3) and later to PW2.

In their testimonies, PW2 and PW3 confirmed that they were informed by PW1 that he was sodomized twice by the appellant. PW3 added further that, he became suspicious on PW1's conduct after he noted that PW1 was not attending school and he was also missing at home. Thus, PW3 requested PW4 to trace PW1's movement. Thereafter, on 15th May, 2018 while coming back home, PW3 found Bahati with PW1, who

later revealed what had happened to him. Thus, PW3 reported the matter to Iselamagazi Police Post and finally, the appellant was arrested.

PW1 after obtaining a PF3 from the police, was taken to the hospital for medical examination, where Dr. Michael Gigameja (PW5) conducted an examination and found that PW1's anus had bruises and his sphincter muscles were loose indicating that the anus had been entered by a blunt object. PW5 filled the PF3 to that effect and the same was tendered in evidence as exhibit P1.

In his defence, the appellant, apart from admitting that he was working at one saloon located at Iselamagazi Village, he denied any involvement in the commission of the offence he was charged with.

After a full trial, the trial court accepted the version of the prosecution's case and specifically placed much reliance on the evidence of PW1, the victim and best witness, whose evidence was found to have been corroborated by the evidence of PW2, PW3, PW4 and PW5. Thus, the appellant was found guilty, convicted and sentenced to life imprisonment.

Aggrieved by that decision, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still protesting his innocence, the appellant has preferred the instant

appeal predicated on eight (8) grounds which can conveniently be paraphrased as follows: **one**, that, the evidence of PW1 was taken contrary to the mandatory provisions of section 127 (2) of the Evidence Act; **two**, the case against the appellant was cooked and fabricated; **three**, the delay to arraign the appellant raise suspicion on the prosecution case; **four**, that, PW5 was an incompetent witness to tender exhibit P1; **five,** PW5 was incredible and unreliable witness; **six,** the evidence adduced by prosecution witnesses was weak and unreliable to mount the appellant's conviction; **seven,** the evidence on record was not properly evaluated; and **finally,** that, the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person without legal representation whereas Ms. Ajuaye Bilishanga Zegeli, learned Principal State Attorney assisted by Ms. Gloria Ndondi, learned State Attorney represented the respondent Republic.

When invited to argue his appeal, the appellant adopted his grounds of appeal and preferred to let the learned State Attorney respond first but he reserved his right to rejoin, if the need to do so would arise.

In response, Ms. Zegeli from the outset, declared the respondent's stance of opposing the appeal. Nonetheless, before starting to respond to the grounds of appeal, she referred us to the second, third, fourth, fifth, seventh and eighth grounds and contended that the same are new as they were not part of the grounds canvassed and determined by the first appellate court. It was her argument that, since the said grounds were not deliberated and decided upon by the first appellate court, they were improperly before the Court as it lacked the requisite jurisdiction to entertain them. She thus urged us not to consider them. To support her proposition, she cited the case of **Jacob Mayani v. Republic,** Criminal Appeal No. 558 of 2016 (unreported).

Responding to the first ground of appeal Ms. Zegeli challenged the appellant's complaint regarding the evidence of PW1 by referring us to page 12 of the record of appeal where PW1 testified and argued that, PW1's evidence was properly recorded as the trial court had complied with the provisions of section 127 (2) of the Evidence Act. She added that, before recording the said evidence, the learned trial Magistrate clearly indicated that PW1's evidence was taken under oath. She thus invited us to

find the appellant's complaint unfounded as it is not supported by the record.

Upon being prompted by the Court as to whether PW1 was sworn before his evidence was recorded, although, she readily conceded that the record is silent on that aspect, Ms. Zegeli still insisted that, PW1 was sworn and invited us to find that the first ground of appeal is devoid of merit.

On ground six, Ms. Zegeli argued that the prosecution case was proved beyond reasonable doubt as PW1, the best witness in this case clearly testified on how he was sexually abused by the appellant twice. She added that the evidence of PW1 was corroborated by the evidence of PW2, PW3, PW4 and PW5. In addition, and relying on the principle established by this Court in proving sexual offences, Ms. Zegeli argued that, the evidence of PW1 was the best evidence which could be used by the trial court to mount the appellant's conviction even without any corroboration, as long as the court was satisfied that the witness was telling the truth. She thus rested her case by urging us to find the appellant's appeal unmerited and dismiss it in its entirety.

In a brief rejoinder, the appellant did not have much to say. He insisted that the case against him was fabricated and urged us to consider his grounds of appeal, allow the appeal and set him at liberty.

Having carefully considered the grounds of appeal, the submissions made by the parties and after having examined the record before us, we should now be in a position to determine the grounds of appeal. We are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-directions or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149, **Salum Mhando v. Republic,** [1993] TLR 170 and **Mussa Mwaikunda v. The Republic**, [2006] TLR 387.

At first, we are enjoined to determine Ms. Zegeli's submission that the second, third, fourth, fifth, seventh and eighth grounds of appeal as enumerated above are new complaints and should not be considered by this Court as they were not raised and determined in the first appeal.

Indeed, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined at the first appeal. This position has been reaffirmed by the Court in numerous decisions - see, for instance, the cases of **Abdul Athuman v. Republic** [2004] TLR 151 and **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 (unreported). In that regard, this Court will not entertain the said grounds of appeal for lack of jurisdiction as per the dictates of the provisions of sections 4 (1) and 6 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] which specifically empowers this Court to deal with appeals from the High Court and subordinate courts with extended jurisdiction.

On the remaining grounds, we wish to begin our consideration of the appeal by addressing the first ground of appeal concerning the validity or otherwise of the evidence of PW1. Our starting point, in respect of this ground will be section 198 (1) of the Criminal Procedure Act (the CPA) which requires every witness in a criminal case, subject to the provisions of any other written law, to give evidence upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act. The said provision states thus:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be*

examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

One of the exceptions to this provision relates to witnesses of tender age whose procedure is provided under 127 (2) of the Evidence Act. The said section provides for a procedure of taking the evidence of a child of a tender age and it states that:

"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."

In the case of **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) we lucidly expressed the import of the above section and we stated that: -

*"To our understanding, the ...provision as amended provides for two conditions. **One,** it allows the child of tender age to give evidence without oath or affirmation. **Two,** before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies."*

In that case we went ahead and observed that the plain meaning of the provisions of sub-section (2) of section 127 of the Evidence Act is that,

a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In a situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.

In the instant appeal, it is undisputable fact that at the time of giving his evidence, PW1 was a child aged fourteen (14) years and thus a child of tender age as provided under section 127 (4) of the Evidence Act. It is also undisputable fact, and as correctly conceded by Ms. Zegeli that, although, the trial Magistrate stated that evidence of PW1 is taken under oath, the record is silent on that aspect. To paint the picture, we wish to reproduce what transpired on 12th September, 2017 when PW1 was fielded to testify as reflected at page 12 of the record of appeal:

> *"Voire Dire test has been conducted and the court has satisfied itself that the witness knows the meaning of oath and the duty of speaking the truth. His evidence is therefore taken under oath."*

It is clear from the record that, upon stating in the said extracted paragraph, that the evidence of PW1 is taken under oath, the learned trial

Magistrate proceeded to receive the evidence of PW1 without first administering the said oath to him, as the record is silent on that aspect. Worse still, the same record is also silent as whether PW1 promised to tell the truth and not lies. This, in our view, is contrary to the mandatory requirement of section 127 (2) of the Evidence Act indicated above.

We are mindful of the fact that, in her submission, although she conceded that the record is silent on the procedure used by the trial court to take the evidence of PW1 upon oath, Ms. Zegeli urged us to find that PW1's evidence was properly recorded. With profound respect, we are unable to agree with Ms. Zegeli on this point, as it is settled that, evidence received without oath or affirmation, amounts to no evidence in law and thus, becomes invalid. We find solace, in this view, from our recent decisions in **Shabani Said Likubu v. Republic,** Criminal Appeal No. 228 of 2020. In that case, having observed that the evidence of the victim (PW1) was improperly received as the record was silent on the procedure adopted by the learned trial Magistrate to receive such evidence, we found the said evidence with no evidential value and discounted it from the record.

Likewise, in the instant appeal, since the learned trial Magistrate received the evidence of PW1 contrary to the mandatory requirement of the law, the same has no evidential value and we accordingly, discount it from the record.

Having discounted the evidence of PW1, the best evidence in sexual offences, we find that the remaining evidence of PW2, PW3 and PW4 is insufficient to prove that the appellant had committed the offence he was charged with, as all these witnesses testified on what they were told by PW1, thus hearsay evidence incapable of incriminating the appellant with the offence he was charged with. Furthermore, the evidence of PW5, the doctor, was only to establish that PW1's anus was penetrated but not to the effect that it was the appellant who had unlawful carnal knowledge of him - see the case of **Parasidi Michael Makulla v. Republic,** Criminal Appeal No. 27 of 2008 (unreported).

In the circumstances, we are satisfied that there is no evidence on record which could have been safely relied upon by the trial court to convict the appellant. It is our further view that, had the first appellate court considered the issues discussed above, it would have come to the inevitable finding that it was not safe to sustain the appellant's conviction.

Since the above finding disposes of the appeal, we see no compelling reasons to consider the remaining ground of appeal.

Consequently, we find merit in the appeal and allow it. Accordingly, we quash the appellant's conviction and substitute it with an acquittal resulting into setting aside the sentence imposed on the appellant. We order that he be released from custody forthwith unless he is otherwise lawfully held.

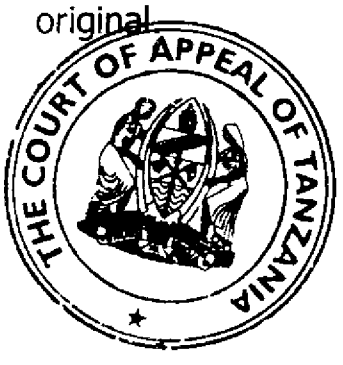
DATED at **SHINYANGA** this 11th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 15th day of November, 2022 in the presence of the appellant in person and Ms. Edith Tuka, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL