IN THE HIGH COURT OF TANZAN IA

AT DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 74 OF 2022

JUMA SAID MOHAMED.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of Criminal Case No. 59 of 2014 District Court of Mkuranga at Mkuranga, J.B. Kinyange, RM)

JUDGMENT

Date of Last order 21/09/2022
Date of Judgment 17/10/2022

A. Z. BADE, J

In this criminal appeal the appellant was convicted of unnatural offence contrary to section 154 of the Penal Code, [cap 16 RE 2002] and sentenced to serve thirty (30) years imprisonment.

The facts of the case are succinctly put that on 3rd August 2014 at Videte Village in Mkuranga district, the appellant had carnal knowledge against the order of nature of a minor child of tender age; a 5 year old victim whom we shall pseudonym XY (to conceal the child victim identity). To this charge, the appellant pleaded not guilty, and the prosecution led 5 witnesses to prove their case. At the end of the prosecution case, the court found the appellant with a case to answer where he raised a two person defense and raise an alibi defence to no avail.

The appellant has preferred this appeal and has herein raised 7 grounds of appeal wherein he took his own representation and prayed to argue his case by written submissions. The respondent is represented by Ms Rehema Mgimba, learned state attorney, who did not object to filing the submissions and aptly complied.

I shall now consider the grounds of appeal as argued and counter argued by the parties, where the appellant argued ground 1, 4, 5, 6 and 7 in seriatim; and joined grounds 2 and 3 together.

Ground one is about a defective charge arising from an uncategorized provision of the Penal Code. The appellant urged that in a criminal trial a charge sheet is the foundation of any prosecution facing an accused person and provides him with a road map of what to expect from the prosecution witness during his trial; and it informs the accused, with sufficient clarity the allegations against him, which enables him to prepare his defense properly.

This he says, is the essence of section 132 of the Criminal Procedure Act, [cap 20 RE 2019] that:

> *"every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offence with which the accused person is charged, together with such particulars as maybe necessary for giving reasonable information as to the nature of the offence charged"*

The appellant was simply charged with section 154 without any mention of the categories laid out under (a), (b) and (c), and that the said non-citation of proper provisions of the law specifying the type of unnatural offence and resulting sentence should the conviction be obtained, but the important elements of which type of the unnatural offence he was going to face was omitted. The non-citation of proper provisions is said to have prevented the appellant from appreciating the important element of punishment he would face if convicted. This he elaborates was the position in **Mussa Mwaikunda vs. Republic [2006] TLR 387**,where the Court of Appeal of

Tanzania observed that "the principal has always been that an accused person must know the nature of the case facing him and that this can be achieved if the charge disclosed the essential elements of an offence."

In the instant appeal, citation of section 154 which is a general provision without specifying which type of unnatural offence under section 154 the appellant was about to face, amounted to failure to specify the important elements of the type of the unnatural offence thus became prejudicial to his defence.

In countering this ground, the learned state attorney explained that the cited particulars of the offence charged the appellant with section 154 (a) of the Penal Code. Since the particular of the charge cited provided for clear details of the case facing the appellant, he thinks omitting to cite the sub section did not occasion any injustice to appellant. This was also held in the case of **Osward Mokiwa Sudi vs Republic Criminal Appeal No 190 of 2014** where the Court of Appeal observed as there was an omission while referring to another case said:

"in both decisions, the court held that the non-citation in applicable provisions on the charge sheet occasioned no injustice as the disclosed charge offence and the particulars of the offence sufficiently disclosed the charged offence; and that the prosecution evidence on record gave a detailed account of the incident to enable the appellant appreciate the case against him and defend himself effectively, the defect therefore were held to be remediable under the curative provision of section 388 of the Criminal Procedure Act."

In looking at the arguments forth I am minded to see what does section 388 of the Criminal Procedure Act provides:

> *Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings*

under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the Court may order a retrial or make such other order as it may consider just and equitable.

I have received comfort in reading section 388 that it rectifies the irregular framing of the charge that is being complained by the appellant. I understand the impetus of knowing the actual offence that one is being charged with is as important as knowing what sort of defense to mount on your own behalf. The appellant cited several cases including **Charles Mlande vs. Republic, Criminal Appeal No. 270 of 2013** (unreported) quoting with approval the case of **Jaffar Mohamed vs. Republic, Criminal Appeal No. 495 of 2016** (unreported), where it was held:

> "The statement of offence must contain a reference and for that matter, a correct reference to the section of the enactment creating the offence"

Despite this pronouncement by the Court of Appeal, I still I do not think that the appellant was prejudiced with the said omission because the charge sheet explained the details of the offence to have been committed against a child aged 5, and more importantly, all of the categories of the offence attract the same punishment between 30 years and life imprisonment, even before the law was amended to be more strict with the offenders against children, who if convicted attracts non-negotiable punishment of life imprisonment. This means to say the appellant knew or ought to have known the seriousness of the offence through these details, and all the evidence that was adduced was to prove these facts. This ground of appeal fails as I find no merit with it.

As for the 2nd and 3rd grounds of appeal, the main complaint by the appellant is that the learned trial magistrate erred in law and fact by convicting the appellant relying upon hearsay evidence of pw1, pw3, pw4 and pw5 which had no evidential value as the same did not witness the incident; since they did not witness the incident on the fateful day. Their

evidence is thus hearsay. The appellant contend that hearsay evidence is of no evidential value as was the case of **Vumi Liapenda Mushi vs Republic, Criminal Appeal No. 327 of 2016** (unreported).

The appellant also contends that the evidence that implicated the appellant was that of PW2 (the victim). However, since the victim at the time of testifying was 5 years old, he gave unsworn evidence which requires corroboration. He made reference to the case of **Mkubwa Said Omary vs S.M.Z (1992) TLR 365 and Kimbute Otiniel vs Republic, Criminal Appeal No. 300 of 2011** (unreported) quoted with approval in the case of **Vumi Liapenda Mushi vs Republic** (supra) where it was held that:

> "The evidence of PW1, PW2, PW4 and PW5 being hearsay evidence could not corroborate the testimony of PW3 because the evidence which requires corroboration cannot corroborate another evidence"

The respondents heatedly countered that from the trial court proceedings at p3, PW1 testified as victim's mother who on the incident date inspected her son on his anus and found it being wide and open, and also state PW2 to have identified the appellant. PW3 (chairperson) at p 13 of trial court proceedings testified to recognize the appellant and identified the appellant. PW4 at p 15 of trial court proceedings testified to be an investigator and PW5 at p 17 of trial court proceedings testified to be a doctor who attended the victim and observed bruises on the victim's anus that amplified a blunt soft object penetrated.

In that regard, the learned state attorney adduced in conclusion that considering PW1, PW3, PW4 and PW5 testimony as highlighted above altogether give evidence as regard to what they had observed from the victim after the incident, rather she urges, the pieces of evidences adduced by the named witnesses were not hearsay evidence but rather circumstantial evidence that connect the appellant with the incident.

They also responded on the issue of the court relying on PW2 unsworn testimony being 5-year-old at the time he testified, which was uncorroborated contrary to procedure of law.

The learned state attorney adduced that the offence happened in 2014 where the legal requirement was that before a child of tender age testify, a voire dire test has to be conducted first as per section 127(2) of the Tanzania Evidence Act [CAP 6 RE 2002] which provided that:

> *"Where in any criminal cause of matter a child of tender age called as a witness and in court's opinion the child understands the nature of an oath his evidence may be received even through not given upon oath or affirmation, if in the opinion of the court s/he possessed sufficient intelligence to justify the reception of his evidence and understand the duty of speaking the truth"*

This was the legal position in the case of **Kimbute Otiniel vs Republic, Criminal Appeal No 300 of 2011** (unreported).

The learned state attorney explained that at p 7 of the trial court proceeding the trial court conducted voire dire test after which the trial court wrote a ruling with regard to the intelligence of the child as observed from the voire dire test in compliance with section 127 (2) of the Criminal Procedure Act [CAP 20 RE 2002]. It follows therefore that the evidence of PW2 was neither unsworn nor was it uncorroborated with that of other witnesses as shown in the trial court proceeding pp 6 to 14.

The appellant rejoined and insist that all these witnesses knew of the sodomy issue much later, and so their evidence is not cogent or credible and insist it is hearsay evidence.

On looking at the arguments for these two grounds I am inclined to agree with the learned state attorney that the testimony received in evidence from PW1, PW3, PW4 and PW5 are all building up onto the evidence of PW2's account of what had happened to him. They testified to what they have seen after the victim gave his account. The mother of the victim is the one who testified to the condition of her son on coming back after a long escape, the doctor corroborated what the mother observed by medical examination, the police investigator and the hamlet chairperson all testified

on their roles and observation around the incident and the apprehension of the accused person who is now the appellant.

None of the witnesses was narrating a heard story, but matters of their own knowledge. So I refuse to be convinced that that was a hearsay evidence, and I firmly believe that it was circumstantial evidence and relevant to the incident that brought the charge to the accused person who is now the appellant. I find support in the law evidence where in Section 7 and 8 of the Tanzania Evidence Act it is provided:

> *7. Subject to the provisions of any other law, evidence may be given in any suit or proceeding of the existence or nonexistence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others; and*
> *8. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.*

The testimonies of these prosecution witnesses are all part of indirect witness testimony and scientific testimony which in evidence are relevant to prove a fact in issue and thus was rightly admitted and relied upon by the trial court in making the logical inferences of the guiltiness of the accused now the appellant, and probability of the PW2 testimony which is the victim of the offence.

On the final analysis this ground fails as I find trial court was right to receive and rely on this evidence of credible witnesses to infer what the accused appellant did or the act or state of affair of the victim of the sexual offence. I also refuse to discount and discard PW2 evidence since it is well recorded on the proceedings of the trial court that the child was sufficiently intelligent to understand the nature of the questions and provide testimony of what had happened to him.

On the 4th ground of appeal, the appellant complains that he was convicted while the court failed to analyze and evaluate the prosecution evidence in its totality; and observing that the evidence was marked with lies and

material contradictions that vitiated the credibility and reliability of PW1, 3, 4 and 5.

He chimes that looking at p 3 of the court proceedings, when PW1 was being examined in chief by the public prosecutor she stated that

> "The chairperson (PW3) went to collect all youth at **Mahege's Family** and came with them at my house (PW1's house)"

Likewise as regard to the 3rd limb of ground number 4, it is evidence at page 3 of the court proceedings that PW1 testified that PW2 returned home about 15 hours while PW4 at p 15 of the court proceedings testified that he was told by PW1 that PW2 (the victim) returned home about 14hours which renders their evidence to be improbable asking if these were credible witnesses? In response, the learned state attorney sum up the appellant's contention in prosecution evidence having contradiction and lies in three fold

i. PW1 and PW3 evidence contradicted each other as regard the person who called the youth.
ii. PW3 contradicted himself as where appellant was residing
iii. PW1 testimony that PW2 returned home at 15 hrs, while PW4 stated the victim to have returned home at 14 hrs.

At p 3 of the trial court proceedings PW1 state the chairman went to collect the youth at **Maheges family**, PW3 at p 13 of trial court proceedings states "when we reached her home, we found a group of youngsters about 5, they were all relatives of **Juma Ngabeleka Maeges**"

While the learned state attorney concedes that PW1 statement and PW3 statement differ mainly on who (which person) called the youngsters. That difference he reason, is minor to not have the effect of eliminating the crucial issue that the victim had been sodomized on the incident date.

PW3 stated on examination in chief to know the appellant as one of his subordinates and while being cross examined, stated that the accused have been residing at his relative's house.

The two statements put together he reasoned, proves the fact that PW3 knew the appellant; the contradiction by PW3 on where exactly the appellant resides still does not eliminate the fact that the offence occurred hence the contradiction does not go to the root of the evidence and is thus minor.

On the issue of when exactly did the accused return home between the hours of 14 and 15, where PW1 put it at 15:00 hrs and PW4 at 14:00 hrs, while he conceded at the differing times, he puts it to human error in estimation as on probability of the witness to not have been looking at the time; and the fact that the time the victim returned home does not eliminate or raise a doubt on the fact that the victim was sodomized.

In rejoinder, the appellant insist that these contradictions are not minor and they vitiate the credibility of the witness.

I am inclined to agree with the learned state attorney on his reasoning and find support on the decision of the court of appeal of Tanzania in **Goodluck Kyando vs Republic [2006] TLR 363** where the Court stated,

> "Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness"

This was further cemented in the cases of **Aloyce Maridadi vs Republic, Criminal Appeal NO. 208 of 2016** (unreported) quoting with approval the case of **Godfrey Masabu Kabambu vs Republic, Criminal Appeal No. 93/2017** where the Court firmly stated:

> "Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses"

There is nothing that has been materially contradicted in the 3 separate statements that were related above by the witnesses, other than human

error in time estimation and reported speech discrepancies. I have not been able to find anything that would amount to good cogent reasons making the evidence implausible or improbable and am not convinced this evidence is improbable or implausible. The vitiating factor only comes in if the differences are material which would impair or spoil the quality of a piece of evidence. I have no reason to fault the trial magistrate's finding. This ground too must fail as I find no merit on it.

On the 5th ground of appeal it is the appellant complaint that the way the case leading to this appeal was investigated and subsequently prosecuted it is clear that, there was some laxity in investigating it that is why some key (material) persons were not brought to the scene particularly the purported father of PW2, (the victim) whom it is alleged he was phoned to hear the allegation. The appellant contends that the alleged father of PW2, should have testified to prove whether the appellant made any confession before him through the phone to corroborate their story. He also contends the alleged three (3) members of Hamlet council namely ALLY SAID, MAKUMBATU, ALLY MIRAJI NGWEA and the alleged 5 Youth who witnessed the alleged appellant admission were material witnesses but for the reasons known by the prosecution they were not procured to testify creating doubts on the possibility of the case being a concocted one.

In response to this ground, the respondent retorted that no particular number of witnesses is required to prove a case, and that the prosecution key witness was PW2; whose evidence was corroborated by the testimony of PW5, PW1 and PW3.

I refuse the invitation to draw adverse inference on the prosecution's case, in terms of section 122 of the Evidence Act, Cap 6 RE 2002 and take note of the right guidance that the appellant has taken of the provision of section 143 of the Tanzania Evidence Act, that no particular number of witnesses is required to be called by the prosecution to prove its case, the requirement being to prove a case beyond reasonable doubt.

On the 6th ground the appellant complains that the procedure which was adopted to admit PF3 (Exh. P1) at p 4 of the court proceedings was illegal, as the said exhibit was not read out after being admitted in evidence.

In response to this ground, the learned state attorney expounds that this a legal requirement as it was was held in the case of **Robinson Mwanjisi and 3 Others vs Republic (2003) TLR 2018** where the Court held a document:

> " (a) should first be cleared for admission
>
> (b) be actually admitted
>
> (c) before it can be read out"

Looking into the court proceedings at p 17, PW5 tendered PF3 but the said PF3 after being tendered was not read out in court with regard to the requirement set in the above case. PW5 did complete the procedure of tendering the exhibit without having read it out. The learned state attorney conceded that failure to read an exhibit as required by the law renders the said exhibit to be expunged from record. This is the position of the law as held in the case of **Issa Hassan Uki vs Republic, Criminal Appeal No. 129 of 2017:**

> "As already said, it was admitted in evidence but was not read out in court after admission. Given a plethora of authorities on the point some of which have been discussed above, we are of the considered view that this omission constituted a fatal irregularity. We thus expunge exhibit P3 from record"

At the same time, it was further held in the same case that if an exhibit has been expunged but the witness's testimony can stand, then the same should be used without the exhibit and the evidence will still have probative value.

I think that is the correct position and further convinced that PW5 testimony has enough probative value; which is the extent that it is probable for a piece of evidence to reach its proof purpose of a relevant

fact in issue. PW5 was the doctor that examined PW2 (p 17 of the proceedings of the trial court) stated what he had observed the condition of the victim's anus, and he is the one who filled in the PF3. The same I have no doubt can stand on its own, without the expunged exhibit. So this ground is partly allowed in expunging the exhibit off record, but without the consequential benefit of disallowing PW5 testimony and its corroborative effect to PW2 testimony.

On the 7th ground, the appellant charges that he was convicted on very shaky and unsatisfactory evidence as the prosecution had failed to prove the charge beyond all reasonable doubts. The appellant observed and rightly so, as per section 3 (2) of the Evidence Act

> "In criminal case the burden of proof is on the prosecution to prove the case against the appellant beyond reasonable doubt. The burden never shifts to the accused"

In responding to this ground of appeal, the learned state attorney expounded that as the appellant was charged with section 154 of the penal code of unnatural offence, which is a sexual offence. He made reference to several cases expounding the said position including the case of **Emmanuel Josephat vs Republic, Criminal Appeal No 323 of 2016** which also cited with approval the **Selemani Makumba's** case that:

"the best evidence in a case of rape comes from the victim"

She insisted that in this case, PW2's testimony was essentially the piece of evidence which was corroborated with PW5, a doctor who noted the victim had bruises on his anus, PW1 who witnesses the victim of the incident and noted his anus to be wide open; and PW4 who witnessed PW2 identifying the appellant.

I think this evidence that was tendered by the prosecution was sufficient enough to prove the case beyond reasonable doubt. Furthermore, the PW2 is recorded to have explained sufficiently and elaboratively what has happened to him, how the appellant took him and inserted his penis on his anus while laying on the mattress. The victim consistently pointed to the

appellant despite there being many youth that were packed together as Mahege's family members. I would extend my mind to include nit just raoe cases, but those of unnatural offences as this one, as at the end of the day, it's the kind of offence that is done in secrecy.

Despite the appellant's rejoinder that the court should have satisfied itself before convicting on uncorroborated evidence of a child of tender age, I think this testimony of the child was much coherent to fit the requirement as laid in the case that the appellant put forth, i.e the case of **Selemani Yahya @Zinga vs Republic, Criminal Appeal No 533 of 2019** (unreported) where it was observed:

> "The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including that of the accused"

The appellant also rejoined on which hospital the child victim was taken to, whether its Mbande or Mbagala hospital. Surely it is not expected that a 5 year old child would remember and know for sure the hospital he was taken to was Mbande or Mbagala, and especially on a point whose relevancy was never at issue during trial. I have checked the record of the proceedings and found nowhere that the appellant cross examined PW2 or the PW1 on which hospital he was taken to or took her son. This appears as an afterthought, and even on its appearing as a rejoinder, since the respondent did not make any representations on these new issues.

This was purely a sexual offence case and the essential evidence that was required to prove a case against the appellant was the victim himself. I found as the trial court below did, the victim of the offence to be a credible witness and the trial court was right to rely on his evidence.

On the final analysis I find the appeal without merit and is dismissed in its entirety. The conviction and sentence of the trial court is upheld.

It is so ordered.

A. Z. Bade
Judge
17/10/2022

COURT: Judgment is delivered by Hon. Nyembele, DR in the presence of Appellant in person and Mr. Maleko the learned state attorney for the Respondent this 17th day of October 2022.

DR
17/10/22

Right of appeal is explained.

Signed