IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 335 OF 2018

ROBERT FRANCIS MWANKENJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Mbeya at Mbeya)

(Herbert, SRM. – Ext. Juris)

dated the 17th day of July, 2018
in
Ext. Juris. Criminal Appeal No. 40 of 2017

.....

JUDGMENT OF THE COURT

17th & 21st September, 2021

NDIKA, J.A.:

By this appeal, the appellant Robert Francis @ Mwankenja impugns the judgment of the Resident Magistrate's Court of Mbeya at Mbeya (Hon. G.H. Herbert, SRM – Ext. Juris) dated 17th July, 2018 by which it affirmed the judgment of the District Court of Chunya at Chunya (Hon. O.N. Ngatunga, RM) dated 31st January, 2017 convicting him of unnatural offence and sentencing him to the mandatory life imprisonment.

The accusation at the trial was that the appellant, on 5th January, 2017 at Karungu Juu Hamlet in Makongolosi village within Chunya District in Mbeya Region, had carnal knowledge of a boy aged four years against the

order of nature. We shall refer to the child as the victim or simply as PW2, the codename by which he testified.

To establish its case, the prosecution relied upon the evidence adduced by four witnesses, namely PW2, his father (PW1), a police investigator No. D.8471 Sergeant Hassan (PW3) and a clinician Otho Mkisi (PW4). The appellant gave evidence on oath but did not call any witness.

The setting for this case was the settlement of Karungu Juu in Makongolosi village in Chunya District where artisanal gold mining was going on. On 5th January, 2017 around 14:00 hours, the victim and his father (PW1) were at a ball mill in Karungu Juu ("the ball mill") owned and operated by one Mr. Thomas Mapunda for crushing gold-bearing stones. To be sure, a ball mill is a key mineral processing machine for milling the materials into powder form after they are crushed. PW1 was an artisanal miner waiting for his turn to feed his stones into the mill but he allowed the appellant and his three fellow miners to have their bags of rocks processed first because they were hungry and could not wait any longer. After the appellant and colleagues were done, they left the place for lunch. It turned out that they picked PW2 along for lunch as PW1 remained at the mill.

According to PW1, the victim returned later after forty-five minutes, visibly walking with difficulty. On being probed, the victim revealed that

Kirikuu, an apparent reference to the appellant, had sodomized him. PW1 took the trouble to examine his son's anus, finding it ruptured and blood-spattered. Soon after confirming this distressing revelation, he went out looking for the appellant whom he found at a nearby place playing a card game with his colleagues. He arrested him right away and took him to a local leader, one Mwanginde, and later to Makongolosi Police Station. The victim, a four-year-old at the time as per his birth certificate (Exhibit P.1), was then issued with a request for medical examination (PF.3) and thereafter, taken to hospital.

PW2 recounted that the appellant took him along River Karungu where he stripped him naked and then sodomised him. He experienced serious pain and was bleeding from his anus. After the appellant was through, he washed him and took him back home. At home, he told his parents all what had befallen him.

PW4 Otho Mkisi, a clinician, attended the victim about six hours after the incident. He declared in his medical examination report (PF.3 – Exhibit P.2) that the victim had a discharge of mucus from anus with bruises around the anal area. In his opinion, the injury was caused by a blunt object that penetrated into the anal orifice. Police Officer No. D.8471 Sergeant Hassan

(PW3) gave an account of various aspects of the investigations into the matter but his evidence was mostly hearsay.

In his sworn defence, the appellant denied the alleged criminal transgression, blaming his predicament on his disagreement with PW1 over the distribution of shared proceeds of sale of gold. His version was that on 1st January, 2017, he and his fellow artisanal miners including PW1 had excavated four bags of gold-bearing stones which they took to the ball mill for processing. The work ended at 18:00 hours and that they got 2 grams of gold, worth TZS. 120,000.00. It was agreed that PW1 take the gold for sale at Karungu Juu. When PW1 came back on the following day, he gave the appellant TZS. 30,000.00 instead of the expected TZS. 60,000.00, claiming that the outstanding TZS. 30,000.00 had been spent to clear tax dues for their primary mining licence.

The appellant adduced further that he did not see PW1 until 5th January, 2017 when they met up again at the ball mill, each one with his own bags of gold-bearing stones. Although he admitted that the victim was present on that day and that he interacted with him, he recounted the events of that day such that there was no moment that he remained alone with the victim. However, he averred that at some point in the afternoon PW2 was crying hungry. He and his colleagues cooked lunch which they shared with

PW2. After the meal, he went to River Karungu to wash his hands as there was no water where they ate lunch.

It was the appellant's further testimony that he was taken aback when the angry PW1 came to him later that day assaulting him and alleging that he had sodomised the victim. He particularly bewailed that he was never taken to hospital for medical examination to see if whatever samples of fluid that had been collected from the victim matched up with samples collected from him. In cross-examination, he denied that his name was Kirikuu.

The trial court was impressed by PW1's evidence. It took into account that the appellant did not dispute being with the victim and PW1 on the material day. It also considered that the appellant averred that after lunch he went to River Karungu to wash his hands and that it believed the victim's testimony that he went along with the appellant to the river whereupon the depraved sexual encounter occurred. The court found the victim's age proven as per PW1's testimony as well as the certificate of birth (Exhibit P.1).

The trial court considered the appellant's defence that the case was a set up but brushed it aside. It reasoned that it was in the evidence that the quarrel alluded to by the appellant was referred to the ball mill owner, Mr. Mapunda, who resolved it. As to the appellant's name of Kirikuu which he denied, the court found that PW2 identified the appellant in the dock as

Kirikuu who ravished him. It means Kirikuu was none other than the appellant.

On the first appeal, the learned SRM – Ext. Juris upheld the trial court's findings. He concluded from the evidence on record that the appellant sodomised PW2 and, accordingly, proceeded to dismiss the appeal.

The appellant has cited eight grounds of grievance in the appeal as follows: **one**, that the victim's evidence was received in violation of section 127 (1) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) ("the Evidence Act"). **Two**, that PW2's evidence was uncorroborated. **Three**, that PW2 mentioned that he was with another person, a material witness who was not called at the trial. **Four**, that PW1 and PW2 were family members, hence their evidence was unreliable. **Five**, that PW4's evidence did not corroborate PW2's evidence because he was not a medical doctor. **Six**, that the evidence of PW3, the police officer, lacked cogency. **Seven**, that one Mwanginde, the local leader, was a material witness not called as a witness. **Eight**, that the first appellate court failed to evaluate the evidence on record.

At the hearing of the appeal, the appellant, who was self-represented, adopted his grounds of appeal without highlighting them and urged us to allow his appeal. He reserved his right to rejoin, if need be. For the respondent, Mr. Davice Mshanga, learned State Attorney, who accompanied

Principal State Attorney Saraji Iboru and State Attorney Sara Anesius, resolutely opposed the appeal.

We have examined the record of appeal and taken account of the contending submissions and the authorities relied upon. This being a second appeal, in terms of section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, our mandate is mainly to deal with issues of law, not matters of fact.

We propose, at first, to deal with Mr. Mshanga's contention that the fifth ground of appeal was a new grievance; that it was not raised before the first appellate court. Citing **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016 (unreported), he submitted that the Court is precluded from entertaining such a new ground unless it was a pure point of law. The appellant, understandably being unacquainted with the thrust of the learned State Attorney's submission, offered no counter argument.

Certainly, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal – see, for instance, **Hassan Bundala v. Republic**, Criminal Appeal No. 385 of 2015; **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016; **Florence Athanas @ Baba Ali and Emmanuel Mwanandenje v. Republic**, Criminal Appeal No. 438

of 2016; **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016; and **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017 (all unreported).

Following the above stance, we looked at the complaint in the fifth ground of appeal and came to agreement with the learned State Attorney that it raises a new factual matter. It is on record that the medical witness (PW4) was presented as a qualified and experienced practitioner and that his credentials and standing were not impeached at the trial nor was it an issue before on the first appeal. Seeking to impeach him at this stage is rather belated. We thus desist from entertaining the complaint.

Turning to the first ground of appeal, it is the appellant's claim that PW2's evidence was received without a *voire dire* test having been conducted to determine if he knew the meaning of oath and the duty of telling the truth. He argued that the trial court's approach in this aspect was violative of section 127 (2) of the Evidence Act. Conversely, Mr. Mshanga disagreed, contending that the said provisions were complied with.

The record of appeal shows, at page 10, that the victim was four years old on 19th January, 2017 when he testified at the trial. He was a child of tender years in terms section 127 (4) of the Evidence Act, which stipulates thus:

"For the purposes of subsections (2) and (3), the expression 'child of tender age' means a child whose apparent age is not more than fourteen years."

Subsection (2) of section 127 referred to in the above provisions, inserted following the amendment of section 127 of the Act by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, Act No. 4 of 2016, provides in permissive terms the procedure for the giving of evidence by a child of tender age as follows:

"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 any lies."

The Court underlined in **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported) that, on a plain meaning, the above subsection is couched in permissive terms as to the manner in which a child of tender age may give evidence. It is instructive to extract the relevant passage from that decision, at page 10 of the typed judgment:

"From the plain meaning of the provisions of sub-section (2) of s.127 of the Evidence Act which has been reproduced above, ***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 the 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.*** *Section 127 of the Evidence Act is however,* ***silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not****."* [Emphasis added]

While acknowledging in the above passage that section 127 of the Act was silent on the manner of determining how a child of tender age may be required to testify either on oath or affirmation or to make a promise to tell the truth and not lies, the Court, referring to its earlier decision in **Geofrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), stated, at page 11 of the typed judgment, that:

" ... where a witness is a child of tender age, a trial court should at the foremost, ***ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath****. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness.* ***If such child does not understand the nature of oath, he or she should, before giving***

evidence, be required to promise to tell the truth and not to tell lies." [Emphasis added]

See also the following unreported decisions: **Hamisi Issa v. Republic,** Criminal Appeal No. 274 of 2018, also referred to in **Nambaluka** (*supra*); **Masanja Makunga v. Republic**, Criminal Appeal No. 378 of 2018; and **Ramadhani s/o Aito v. Republic**, Criminal Appeal No. 361 of 2019.

In the case at hand, it is evident from record, at page 10, that the presiding Resident Magistrate was cognizant of the new position of the law as stated by section 127 (2) of the Evidence Act as amended. Crucially, he made the child witness promise to tell the truth thus:

"I promise to tell the truth to the court and not to tell any lies."

Given that the witness gave a promise to tell the truth, it did not matter whether or not he knew the meaning of oath. In the premises, we find no basis to fault the trial court. The second ground of appeal fails.

Coming to the second ground, the appellant contended that PW2's evidence as a single witness required corroboration particularly by DNA evidence. Referring to pages 8 and 10 of the record of appeal, he bemoaned that the victim's evidence contradicted with PW1's testimony in material terms. It was his further complaint that the testimony of the medical witness (PW4) by the name of *"Otho Mkisi"* could not corroborate PW2's account

because, going by the PF.3 (Exhibit P.2), the examination was made by *"Otto Muisi."* He added that the prosecution was also bedevilled by a variance in respect of the name of the victim in the birth certificate and the PF.3.

Mr. Mshanga, on his part, countered that, in terms of section 127 (6) of the Evidence Act, PW2's evidence required no corroboration. To bolster his submission, he cited the case of **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008 (unreported) where the Court reiterated what it stated in **Selemani Makumba v. Republic** [2006] T.L.R. 379 that the best evidence of rape (or any other sexual offence) must come from the victim.

On our part, we agree with the learned State Attorney that since the trial court gave full credence to PW2's evidence after its assessment, that evidence was the best proof and that it required no corroboration in terms of section 127 (6) of the Evidence Act, which states thus:

> *"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 of 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."*
[Emphasis added]

We also examined the appellant's claim that PW1 and PW2 differed in material terms. In our view, the evidence, at pages 8 and 10 of the record referred to by the appellant, reveals no discernible incongruity to discredit PW2's account. As a matter of fact, PW2 deserves further credit for naming the appellant to PW1 as the perpetrator of the crime at the earliest opportunity after he came back from the scene of the crime. In **Marwa Wangiti and Another v. Republic** [2002] T.L.R. 39, the Court aptly observed that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his credibility.

The appellant's two complaints regarding the medical witness and the variance of the victim's name in Exhibits P.1 and P.2 are clearly beside the point. Beginning with the medical witness, it is not true that his name on the PF.3, at page 23 of the record, is *"Otto Muisi"* as he claimed. Our view is that the name shown on the document is *"Otto Mkisi."* Of course, we noted that the trial Resident Magistrate recorded PW4's name at page 13 of the record

as *"Otho Mkisi."* Nonetheless, we think the difference in spelling is of no moment. It does not warrant an inference that *"Otto Mkisi"* and *"Otho Mkisi"* were two different persons and, by extension, PW4 was not the maker of the PF.3. By dint of the same reasoning, the variance in respect of the name of the victim in the birth certificate as *"Tumainiel Willisoni"* and in the PF.3 as *"Tumaini s/o Wilison"* inconsequential. In the premises, the second ground of appeal fails.

The third and seventh grounds of appeal cite in common the grievance that two material witnesses were wrongly left out by the prosecution. These are the said Mwanginde (a local leader) and another person who was alleged to have been with PW2 at some point on the fateful day. Here we hasten to endorse Mr. Mshanga's submission that, in terms of section 143 of the Evidence Act, no particular number of witnesses is required to prove a case. What is important is the quality of the evidence – see, for example, **Yohanis Msigwa v. Republic** [1990] T.L.R. 148. In any event, we do not think that the absence of the two persons watered down the prosecution case as none of them could testify on any crucial aspect of the case. Nor would it merit to draw an adverse inference for the prosecution's election not to call them. As a result, we dismiss the third and seventh grounds.

The fourth ground questions the reliability of the evidence of PW1 and PW2 based on their familial relationship that they had an interest to serve. To support his contention, the appellant cited **Paulo Taray v. Republic,** Criminal Appeal No. 216 of 1994 (unreported). Conversely, Mr. Mshanga submitted, relying on **Edward Nzabuga** (*supra*), that the law does not bar relatives or near relatives from testifying on an event they witnessed or saw. We agree.

There is no rule or principle of law which proscribes or limits the use of the evidence of family members or relatives. What is important in any trial is the credibility of the said witnesses and the circumstances of each case. In **Paulo Taray** (*supra*), cited by the appellant, this Court observed that the evidence of each of such witnesses must be considered on merit, as should also the totality of the story told by them. For clarity, we excerpt the relevant passage in that case thus:

> *"We wish to say at the outset that it is of course not the law that wherever relatives testify to any event they should not be believed unless there is also evidence of non-relatives corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind,* ***the evidence of each of them must be considered on merit, as***

> ***should also the totality of the story told by them.*** *The veracity of their story must be considered and gauged judicially just like the evidence of non-relatives...."* [Emphasis added]

See also **Esio Nyamoloelo & 2 Others v. Republic,** Criminal Appeal No. 49 of 1995; **Geofrey Mahenge v. Republic,** Criminal Appeal No. 248 of 2011; and **Simon Emmanuel v. Republic,** Criminal Appeal No. 531 of 2017 (all unreported). In the instant case, the evidence of the two witnesses as well as the rest of the evidence was duly considered and its veracity properly gauged. We, consequently, find no fault in the appraisal of the evidence on record. That said, we find the fourth ground equally unmerited. We dismiss it.

The sixth ground of appeal is plainly wide of the mark. While we agree with the appellant that the testimony of the police investigator, PW3 Sergeant Hassan, focusing on various aspects of the police investigations into the matter, did not further the prosecution case as it was mostly hearsay, it was not relied upon by the courts below to found the appellant's conviction.

We now round off with the eighth ground of appeal. It censures the first appellate court for failure to re-appraise the evidence on record. On his

part, Mr. Mshanga, referred us to pages 53 to 55 of the record of appeal, positing that the first appellate court dutifully re-appraised the evidence in its judgment.

Having examined the record, at pages 53 to 55, we are satisfied that the first appellate court properly executed its mandate by evaluating the evidence on record. It affirmed the finding, based on the evidence by PW2, supported by the testimonies of PW1 and PW4, that the appellant sodomised the victim on the fateful day.

By way of emphasis, we wish to stress that the evidence on record shows that the victim gave a candid, spontaneous and consistent narrative of how the appellant took him along River Karungu and then ravished him. PW1 confirmed that shortly after the victim had been violated, he saw him walk in difficulty as he was returning to the ball mill. After PW2 had revealed what has befallen, PW1 inspected his anus, finding it ruptured and bloody. In addition, PW3's findings as documented in the PF.3 (Exhibit P.1) were consistent with the victim having be sodomized.

Before us the appellant rehashed his claim that his travails were due to his disagreement with PW1 over the distribution of proceeds of sale of gold. We note that the trial court rejected that claim on the ground that it

was resolved by the owner of the ball mill, Mr. Mapunda. On our part, however, we think that the said claim was an afterthought. The record at page 9 indicates clearly that he did not cross-examine PW1 on that aspect, leaving us wondering why did he not cross-examine PW1 on that matter. We thus conclude that ground eight is similarly without substance.

In sum, we hold that the appeal is devoid of merit. It stands dismissed.

DATED at **MBEYA** this 20th day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 21st day of September, 2021 in the presence of the Appellant in person and Mr. John Kabengula, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL