IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CORAM: LILA, J.A. LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 603 OF 2021

HAMADI MZAMILO MARAFYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Dodoma with Ext. Jurisdiction at Dodoma)

(Mpelembwa, SRM, Ext. Jur.)

dated the 15th day of September, 2019
in

Criminal Appeal No. 25 of 2021

JUDGMENT OF THE COURT

12th & 21st December, 2023

MWAMPASHI, J.A.:

In Criminal Case No. 49 of 2019, before the District Court of Kondoa at Kondoa (the trial court), the appellant herein, Hamadi Mzamilo Marafya, was charged and convicted of unnatural offence contrary to section 154 (1)(a) and (2) of the Penal Code [Cap. 16 R.E. 2019, now R.E. 2022] (the Penal Code). He was sentenced to life imprisonment by the trial court and his first appeal against conviction and sentence, before the Resident Magistrates' Court of Dodoma with Extended Jurisdiction, was dismissed in its entirety. This is now his second appeal.

It was alleged before the trial court that, on 25.09.2020, at Idindiri Village within the District of Kondoa in Dodoma Region, the appellant had carnal knowledge against the order of nature of a five (5) years old boy whom, for the sake of protecting his modesty and privacy, shall henceforth be referred to as "PW1" or "the Victim".

A total of six (6) witnesses testified for the prosecution. According to PW1's grandmother, Mamita Kamunga, who testified as PW2, she was at home on 25.08.2020 when the appellant who was well known to her, appeared and bought a chicken from her for Tshs. 4000/=. The appellant had a 5000 Tshs banknote and PW2 had no change. That being the case, the appellant asked PW2 to let him go with PW1 to look for the change. When the appellant returned with PW1, the latter was crying and it was after the appellant had left when PW1 revealed to his grandmother (PW2) that the appellant had just carnally known him against the order of nature. PW2 examined PW1 and observed faeces and blood oozing from PW1's anus. The appellant was pursued, apprehended and was taken to the Ward Executive Officer (WEO) before being taken to Pahi Police Post and later to Kondoa Police Station. PW2 did also testify that PW1 was taken to Busi Hospital for medical examination. PW2's testimony was supported by

that of her husband Mr. Kasembe Ragwiga (PW3) and their neighbour Masteh Kurenda (PW4) from whom the appellant had bought two chickens before proceeding to PW2's home before he returned later with PW1 for the 5000 Tshs banknote change.

PW1's testimony which was recorded after he had promised to tell the truth and not to tell lies as required by the law, was to the effect that, he was at home when his grandmother, PW2, sold a chicken for Tshs. 4000/= to the appellant. As the appellant had a 500 Tshs banknote and as no one had a change, the appellant left with him to go and look for the change. On the way, the appellant fell him down, undressed him, unzipped his pair of trousers and sodomised him by inserting his penis in PW1' anus. Having been so ravished he got home where he reported the appellant to his grandmother, PW2, and told her what had befallen him.

PW5, Ally Ogola, was the medical doctor who medically examined PW1 at Kondoa Government Hospital on 27.08.2020. He observed that PW1's anus had semi-healed bruises around it. He then posted his observations in the PF3 which was tendered in court as exhibit P.1 without any objection from the appellant. PW5 opined that PW1 had been penetrated in his anal part. The last prosecution witness

was the case investigation officer, PW6, WP.4242 D/Stg. Magreth, whose testimony was just a recount of the testimony of other prosecution witnesses.

On his part, the appellant denied to have committed the offence against PW1. He told the trial court that on the material morning at about 08:00 hrs, he left for Idindiri Village where he had been sent to fetch five chickens from one Nyundo. On his way back he was arrested by unknown people who took him back to Idindiri Village then to Keikei at the WEO's office where he spent the night. On the following day he was accused of committing sodomy and was taken to Pahi Police Post then to Kondoa Police Station. In cross-examination, the appellant denied to have known or to had ever seen PW1 before. He also denied to have bought chickens from anyone else but from one Nyundo.

It should also be noted that, in the course of the hearing after four prosecution witnesses had testified, the trial magistrate doubted about the behaviour and soundness of appellant's mind (mental status). He thus ordered the appellant to be detained in a mental hospital for him to undergo medical examination. The trial resumed and was finalized after the mental examination report had been submitted showing that the appellant was of sound mind.

The two lower courts concurrently found that the prosecution proved the case against the appellant to the hilt, hence the conviction and sentence. In the instant appeal, the appellant is therefore challenging the said concurrent findings of the two lower courts. He has fronted a total of 14 grounds contained in two memoranda of appeal. The substantive memorandum which is comprised of five (5) grounds was filed on 10.01.2022 while the supplementary memorandum containing nine (9) grounds was produced on the date of hearing of appeal.

Having examined the 14 grounds raised in support of appeal, we find that, in essence, the following eight grounds of complaints are being raised; **One,** that that the trial was marred by procedural ailments, that is, a copy of the complainant's statement was not furnished to the appellant contrary to sections 9 (3) and 10 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) and further that the memorandum of the matters agreed was not read out to the appellant contrary to section 192 (3) of the CPA; **Two**, that the report on the appellant's soundness of mind was not produced in court; **Three**, that PW1's evidence was recorded contrary to section 127 (2) of the Evidence Act [Cap. 6 R.E. 2022]; **Four**, that PW1 was medically

examined three days after the commission of the alleged offence; **Five,** that there was a delay of 15 days in arraigning the appellant to the court; **Six**, that despite the seriousness of the offence involved, the appellant was not informed of his rights to legal representation; **Seven**, that the defence evidence was not considered and **Eight**, that the case against the appellant was not proved beyond reasonable doubt as the conviction was based on circumstantial evidence and on evidence from family members.

At the hearing of the appeal, the appellant appeared in person without legal representation while the respondent/Republic had the services of Ms. Beritha Benedictor Kulwa and Mr. Gothard Mwingira, both learned State Attorneys.

In support of his appeal, the appellant, without more, just adopted his grounds of appeal contained in the two memoranda of appeal and prayed for his appeal to be allowed on the said grounds.

On the part of the respondent/Republic, Ms. Kulwa argued on the first ground of complaint that, the trial was properly conducted in accordance with the relevant procedure. She submitted that sections 9 (3) and 10 (3) of the CPA, were not contravened to the extent of prejudicing the appellant because the complainant testified and was

cross-examined by the appellant. As regards the complaint about the Preliminary Hearing, Ms. Kulwa referred us to page 6 of the record of appeal where it is on record that the appellant appended his signature on the memorandum of matters agreed. She thus contended that looking at page 5 to 7 of the record of appeal, the Preliminary Hearing was properly conducted.

Regarding the second ground of complaint, it was submitted by Ms. Kulwa that, having doubted about the soundness of the appellant's mind, the trial magistrate properly ordered for the appellant to be detained at Isanga Mental Institution for the soundness of his mind to be examined. She also argued that after it had been ascertained that the appellant was of sound mind and upon the examination report to that effect had been submitted, the trial resumed. To buttress her argument that no relevant procedural law was contravened, Ms. Kulwa referred us to our decisions in **Thomas Pius v. Republic**, Criminal Appeal No. 145 of 2019 and **John Ulirick Shao v Republic**, Criminal Appeal No. 151 of 2019 (both unreported).

Turning to the third ground of appeal on the complaint that PW1's testimony was recorded in contravention of section 127 (2) of the Evidence Act, Ms. Kulwa simply referred us to page 8 – 9 of the

record of appeal where it is indicated that PW1 who was of the age of 5 years promised to tell the truth to the court and not tell any lies as required by the law. She thus urged us to outrightly dismiss the ground.

As on the complaint on ground four that there was a delay of three days to send PW1 to the hospital for medical examination, it was argued by Ms. Kulwa that under the circumstances of this case where PW5's observation and the PF3 (Exhibit P1) was to the effect that there were semi healed bruises around PW1's anus, the delay in examining him is immaterial. She also submitted that according to PW2 who examined PW1 immediately after the commission of the offence, faeces and blood were oozing from PW1's anus.

Regarding the fifth ground of appeal on delay to arraign the appellant, it was argued by Ms. Kulwa that, as rightly observed by the first appellate court before whom the same complaint was raised, the appellant failed to substantiate his claim that there was such delay and what were the rights infringed. She argued that as there is no evidence that the appellant was refused police bail, this ground of appeal is baseless and it should be dismissed.

With respect to the sixth ground of complaint that the appellant was not informed of his right to legal representation, Ms. Kulwa contended that in consideration of the nature of the offence in question the right to legal representation was not automatic. Ms. Kulwa argued that the appellant could have applied for such representation under section 33 (1) of the Legal Aid Act [Cap 21 R.E. 2019]. She also referred us to the case of **Makenji Kabura v. Republic,** Criminal Appeal No. 30 of 2018 (unreported).

On the seventh ground that the defence evidence was not considered, it was argued by Ms. Kulwa that the ground is plainly baseless because according to page 47 of the record of appeal, the trial court evaluated the defence evidence and considered it in its judgment.

Finally, on the eighth ground of complaint, it was submitted by Ms. Kulwa that basing on the evidence from PW1, PW2, PW3, PW4, PW5 and that from Exhibit P1, it was proved to the hilt that PW1, a boy aged 5 years, was carnally known against the order of nature and that it was the appellant who committed the said offence against him. She insisted that the evidence on which the conviction was based was not circumstantial. Ms. Kulwa further submitted that based on the

evidence on record, the two lower courts did not err in finding that the case against the appellant was proved beyond reasonable doubt. She thus prayed for the appeal to be dismissed.

In his brief rejoinder, the appellant reiterated his earlier prayer for the Court to consider his grounds of appeal and allow the appeal.

On our part, having dispassionately and carefully heard and considered the arguments made for and against the appeal as well as the record of appeal, we are all set now to determine the appeal. Beginning with the first ground of complaint which is procedural in nature, we agree with Ms. Kulwa that though it is true that the record of appeal does not show that the appellant was furnished with statement of the complainant as required by section 9 (3) of the CPA, under the circumstances of this case, the omission did not cause any prejudice to the appellant. The record of appeal show that the case was reported to the police by PW2 and PW3. These two witnesses were therefore the complainants for purposes of section 9 (3) of the CPA and their statements ought to have been furnished to the appellant. However, under the circumstances of this case, where the said two witnesses testified in the presence of the appellant and where the appellant cross-examined them, it cannot be said that, the

omission in question prejudiced the appellant. The omission was curable under section 388 of the CPA. In the case of **Daniel Kivati Monyalu v. Republic**, Criminal Appeal No. 224 of 2021 (unreported) in which the Court was confronted with a similar complaint, that section 9 (3) of the CPA had been violated, it was stated that:

> *"Taking into account all the circumstances obtaining, we agree with the learned State Attorney that the appellant was not in any way prejudiced by the said anomaly for the following reasons:* ***Firstly****, is because the complainant (PW2) gave his evidence in the presence of the appellant and was thereafter duly cross- examined by him. The substance of the complainant's evidence was thus known to the appellant at the time he gave his defence...Consequently, we find that although the trial court failed to comply with section 9 (3) of the CPA, the appellant was not prejudiced and the anomaly is curable under section 388 of the CPA. Thus the grievance lacks merit".*

The second limb of the first ground of complaint that, during the Preliminary Hearing, the memorandum of matters agreed was not read out to the appellant, is outrightly found baseless. As rightly argued by

Ms. Kulwa, the record of appeal at page 6, clearly show that the appellant appended his signature to the said memorandum. The first ground thus fails and it is accordingly dismissed.

As on the second ground on which it is complained that the report from Isanga Mental Institution where the appellant had been detained, was not produced during the trial, it is our observation, after revisiting the record of appeal on what transpired on 31.12.2020, as it is indicated at page 21 of the record of appeal, that the said report was produced. The proceedings on that particular date goes thus:

Date: 31/12/2020

Coram: Hon. M.M. Mvungi- RM

PP: S/A Mfinanga

ACC: Present

C/C: Elizabeth.

IN CAMERA

SA/ For Mention.

-We have received Medical report from Isanga Mental Institution. Hence, we pray to proceed with the hearing of the case.

SGD: M. M. MVUNGI -RM

13/12/2020

***COURT**: We have received the Medical report from Isanga Institution - Dodoma where the accused was sent and examined by a psychiatrist who gave evidence via his report prepared in 1st December 2020. Dr. Enock Eteregho Changarawe (Psychiatrist) reveal the accused is mentally normal and fit during the time he committed the alleged crime he faces, hence hearing of this case resumes.*

***State Attorney**: We have one witness for today and ready to proceed.*

***Accused person**: I am ready for hearing.*

***COURT**: Prosecution case proceeds".*

As it can be gleaned from the above proceedings, the relevant examination report was produced to the trial court in the presence of the appellant. In fact, the report is contained in the original trial court's file or record.

The above notwithstanding, we have, however, observed that, the trial magistrate misdirected himself in stating that the appellant had been sent to Isanga Mental Institution for examination to ascertain his state of mind as at the time he committed the offence. According to the proceedings on what transpired on 16.10.2020 when the order to detain the appellant was made, at page 17 of the record of appeal, at issue was not the appellant's mental state of mind at the time of committing the offence but his state of mind at the time of the trial. The order for the detention and medical examination was made in

course of the trial following the trial magistrate's doubts about the behaviour and soundness of the appellant's mind on whether he was of sound mind capable of following the proceedings. We have also noted that under the circumstances of this case, the detention order was wrongly made under section 220 (1) of the CPC instead of section 216 (1) of the CPA. All the same, notwithstanding the above ailments, we are satisfied that from what transpired on 31.12.2020, as evidenced at page 21 of the record of appeal, the medical report was produced during the trial in the presence of the appellant. The appellant can, thus, not complain that the same was not produced. We also further note that although the record of appeal is silent as to whether after its production, the contents of the report was read out to the appellant, the record show that after the report had been produced, the appellant was asked whether he was ready for the hearing to proceed and he had no objection. We take that the appellant was made aware of the contents of the report that is why he had no objection to the trial to continue. See- **Francis s/o Siza Rwambo v. Republic,** Criminal Appeal No. 17 of 2019 (unreported). For the above reasons, the second ground of appeal fails.

Regarding the third ground on the complaint that PW1's evidence was recorded contrary to section 127 (2) of the Evidence Act, we again agree with Ms. Kulwa that the ground is baseless. The record of appeal at page 8 is very clear that, before recording PW1's evidence, PW1 being a boy of tender age of 5 years, promised to tell the truth to the court and not tell any lies. In his own words PW1 is on record stating that, *"I don't understand the nature of oath.* ***I promise to tell the truth and not to tell lies before the court"***. This was in line with section 127 (2) of the Evidence Act, under which it is provided 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 any lies"*

In respect of the fourth ground of complaint that there was a delay of three days to take PW1 to the hospital for medical examination, though we agree with the appellant that there was such a delay because while the relevant offence was committed on 25.08.2020 PW1 was examined by PW5 on 27.08.2020, we find that the delay did not render the evidence given by PW5 and that of Exhibit

P1 valueless. As rightly argued by Ms. Kulwa, the evidence from PW5 and Exhibit P1 that PW1 had semi-healed bruises around his anus corroborated other pieces of evidence which was to the effect that PW1 was penetrated. The fourth ground is thus found baseless and it is accordingly dismissed.

Turning to the fifth ground where it is being complained that the appellant was arraigned in court 15 days after his arrest, we observe that according to the record of appeal, the appellant was arrested on 25.08.2020 and was arraigned in court on 10.09.2020. It is therefore true that there was a delay of 15 days. This notwithstanding, we find that under the circumstances of this case, the complaint is immaterial. We are of the view that although the reason for the delay is not given still the delay does not in any way defeat the prosecution evidence in support of the charge. It could have been different if there was a delay in reporting the crime. In this case, there is evidence that the crime was immediately reported to Pahi Police Post and then to Kondoa Police Station. PW1 (the Victim) cannot be blamed for the delay in arraigning the appellant in court by the relevant authorities. See- **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 and **Muhsin Mfaume v. Republic**, Criminal Appeal No. 99 of

2012 (both unreported). In the latter case where there was a delay in medically examining the victim, the Court made this observation:

> *"In this case PW1 reported the rape immediately in the morning following the night when it took place. Whether PW2 and PW4 dragged their feet and failed to take action immediately but that inaction cannot be blamed on PW1".*

Next is on the complaint that the appellant was not informed by the trial court of his right to legal representation. On this, though not stated by the appellant, we take that the complaint is based on section 310 of the CPA which merely gives the right for legal presentation. The provision does not require that an accused person must be informed of the right. Section 310 of the CPA provides that:

> *"Any person, accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court subject to the provisions of any other written law relating to the provisions of professional services by advocate."*

As we have alluded to above, the law does not impose to the court the duty to inform an accused person that he has the right to be defended by an advocate. The law simply provides that it is a right of

an accused person to be defended by an advocate. After all, every person is presumed to know the law. That being the law, the appellant who was not charged with a capital offence carrying a capital punishment, cannot therefore be herd complaining that he was not informed of his right to legal representation. See- **Maganga s/o Udugali v. Republic,** Criminal Appeal No. 144 of 2017 (unreported). Thus, the sixth ground fails as well.

Just like the preceding grounds of complaint, the seventh ground that the defence evidence was not considered also lacks merit. As rightly argued by Ms. Kulwa, the defence was considered by the trial court but it was refused. At page 47 of the record of appeal, the trial magistrate in his judgment had this to say:

> *"Looking at the defence, the accused pointed being arrested at "Kijiweni" and implicated with this sodomy offence. It was not clear from the accused why the prosecution should fabricate the case falsely...Actually, I would say that, the defence given by the accused is an afterthought because it is inconceivable that, the accused did not mention or cross-examine prosecution witnesses on this issue when they gave evidence. DWI did not cross-examine prosecution witnesses on the above critical and*

incriminating facts even did not cross-examine PW1 when he implicated him to have committed sodomy to him in order to challenge the facts".

Finally, it is on the eighth and last ground of complaint that the case against the appellant was not proved to the required standard, that is, beyond reasonable doubt. In this ground, the appellant's main complaint is that the conviction was based on circumstantial evidence and also that the evidence came from family members. As rightly argued by Ms. Kulwa, the evidence on which the conviction was based was not circumstantial. There was direct evidence from PW1 who testified on what the appellant did to him. He gave an account of what happened that, while on the way from looking for the change, the appellant fell him down and inserted his penis in his anus. This was direct evidence and not circumstantial. Further, there was direct evidence from PW2, PW3 and PW4. These witnesses testified that they saw the appellant when he went at PW2's house to buy chickens. PW2 let the appellant leave with PW1 to go look for change and she also saw the appellant coming back with PW1 before the boy reported to her that he had been sodomised by the appellant. That is not circumstantial evidence, it is direct evidence.

Regarding the complaint that the evidence on which the conviction was based came from family members it is our observation that while it is true that PW1, PW2 and PW3 were related, there is nothing wrong in law, in accepting and relying on evidence from family members. Conviction can be grounded on such evidence if it is found credible. Whether or not the evidence from family members can ground conviction depends on their credibility and reliability and not on how they relate to each other. This is a settled position stated in a number of the decisions of the Court including in **Esio Nyamoloela and Two Others v. Republic,** Criminal Appeal No. 49 of 1995 and **Khatibu Kanga v. Republic**, Criminal Appeal No. 290 of 2008 (both unreported).

We thus, find the complaint that the case against the appellant was not proved beyond reasonable doubt baseless. In the instant case, all the ingredients of the relevant charge were proved beyond any reasonable doubt. The fact that PW1 was a boy of tender age of 5 years which was not in dispute was proved by PW3 who is PW1's grandfather. That PW1 was penetrated in his anus or that he was carnally known against the order of nature was proved by the best evidence from PW1 himself. The trial court believed PW1's evidence

and the first appellate court also agreed with the trial court that PW1 was a credible witness. We find no reason of faulting the concurrent finding of the two lower courts. After believing that PW1 had told the truth, the trial court properly convicted the appellant basing on her evidence. In sexual offences the best evidence, if believed to be true, is that which comes from the victim. This principle was laid down by the Court in **Seleman Makumba v. R** [2006] TLR 379 where it was stated that:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant that there was penetration".*

We also find that PW1's evidence in that aspect was well corroborated by evidence from PW2, PW3 and PW5 as well as by exhibit P1. As on the fact that it was the appellant who committed the relevant offence against PW1, again there is evidence from PW1 and that from PW2, PW3 and PW4. The concurrent findings by the two lower courts that the case against the appellant was proved to the hilt can thus, not be faulted.

In the event and for what we have endeavoured to discuss above, we find the appeal devoid in merit and we accordingly dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 20th day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered on this 21st day of December, 2023 in the presence of the appellant in person and Ms Rose Ishabakaki, learned State Attorney for the respondent, via video link from High Court Dodoma is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL