IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 376 OF 2018

IDD MOHAMED ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam

(Luvanda, J.)

dated the 24th day of October, 2018

in

HC. Criminal Appeal No. 38 of 2016

JUDGMENT OF THE COURT

25th November & 24th December, 2020

KITUSI, J.A.:

The District Court of Kinondoni in Dar es Salam convicted the appellant with an offence of grave sexual abuse, under the Penal Code, [Cap 16 R. E. 2002] (the Penal Code). There is a dispute, which we shall later resolve, as to the provision under which the charge was drawn.

Upon conviction, the trial court sentenced the appellant to 15 years imprisonment on top of which an order of payment of

compensation of TShs. 200,000/= was made against him. The appellant's appeal to the High Court brought to him more sorrow because not only was the conviction confirmed, but the sentence was enhanced to 20 years imprisonment. This appeal is against that decision, and it raises a total of eleven grounds, which we shall discuss in due course after our brief narration of the facts of the case.

It started with Zena Abdallah (PW1) suspecting that there was something wrong with her daughter (PW2), the victim of the alleged abuse. She confirmed her suspicion when she took PW2, aged four years, to the bathroom and noticed blood in the child's vagina. PW2 told PW1 and later testified in court that the appellant took her to his bedroom and inserted fingers into her vagina. PW1 called her neighbour one Zaina Lyagayo (PW3) to witness what had been done to PW2. PW3 testified in support of the version given by PW1 and PW2. The appellant was known by PW1, PW2 and PW3 as a neighbour working as night watchman at a nearby house.

The matter was reported to the police and a PF3 was issued for the victim's medical examination which was conducted by Doctor Julius Riwa (Pw4) on 19th March 2014. He detected bruises and bleeding from the victim's vagina and that the 4 - year old girl's hymen had been

perforated. However, for some reason he completed the PF3 and posted these results on 23rd March 2014. The appellant was arrested and charged.

In defence which was remarkably brief, the appellant alleged fabrication of the case because he had an affair with PW1 which went sour on 19/3/2014 at around 19:00 hours. He was consequently arrested by the police on the next day and stayed in police custody until on 2/4/2014 when he was charged in court.

We do not have the copy of the charge sheet with us, but what we gather from the introductory part of the judgments of the District Court and that of the High Court, the appellant was charged under section 138 (c) (1) and (2) of the Penal Code. The first and second grounds of appeal are in relation to the propriety of the charge. The appellant's complaint is that the provision under which he was charged is non-existent and that the trial court erred in convicting him with an offence which he had not been charged with.

Ms. Eveline Ombock, learned State Attorney who argued the appeal on behalf of the respondent Republic, submitted that the cited section 138(c) (1) (2) (b) of the Penal Code, was a typing error for showing 'c' instead of capital 'C', which the learned Judge who sat on

first appeal, correctly inserted. She prayed that grounds 1 and 2 be dismissed, and in support of her submission, the learned State Attorney cited the case of **Mwilali Mussa v. Republic**, Criminal Appeal No. 18 of 2017 (unreported). Th appellant simply stated in respect of all grounds, that we should be pleased to allow his appeal by considering the grounds of appeal.

We shall immediately deliberate on grounds 1 and 2 because they relate to the charge which is the foundation of a criminal trial. We note that the offence of grave sexual abuse ought to be charged under section 138C (1) and (2) of the Penal Code, so it is correct to argue that no offence is created when the 'C' in that provision is in the lower case. However, the learned Judge of the High Court addressed that fact and proceeded to reason that the particulars of the offence clearly spelt out grave sexual abuse despite the omission to cite capital 'C'. He then went on to make the necessary corrections.

Simply stated, our conclusion on this point is that it cannot be said that the appellant did not know what allegations had been placed at his door just because capital 'C' had been cited as 'c' in the lower case. We have long moved away from that position since our decision in **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017

(unreported) followed in many of our subsequent decisions. Consequently, we shall dismiss grounds I and 2 of appeal for want of merit because we see no reason to fault the learned High Court Judge in his findings. We shall proceed to consider other grounds.

We now move to consider ground 3, which is a complaint that the victim's evidence was recorded without conducting a proper *voir dire* examination. Although the learned State Attorney combined this ground with ground 11 which faults the trial court for acting on the prosecution's uncorroborated evidence, we will take ground 3 separately and consider ground 11 at a later stage.

Ms. Ombock was candid to admit that at the time PW2 was giving evidence it was mandatory for the court to conduct a *voire dire* test. We agree with her, and we think the learned Judge's observation at page 71 of the record that a *voire dire* test was no longer a requirement, was unfortunate. The requirement of a *voire dire* test was done away with through The Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 which came in force on 8th July 2016. Since PW2 testified on 5th September, 2014 a *voire dire* test was still a requirement.

Ms. Ombock also conceded that the trial court did not conduct a *voire dire* test as required, but she proceeded to argue that the omission

does not render the testimony of PW2 altogether unworthy. She cited the case of **Kazimili Samwel v. Republic**, Criminal Appeal No. 570 of 2016 (unreported) to support her view. The learned State Attorney submitted that PW2's testimony if corroborated could ground a conviction and went on to argued that there was evidence to corroborate PW2 in this case.

Once again, we agree with the learned State Attorney that evidence of a child of tender years recorded without a *voire dire* test required corroboration as it is considered to be unsworn evidence. Therefore, our conclusion is that there is merit in ground 3 and we hold so. Now, whether or not there was corroboration in this case is an issue to be determined later in the course of dealing with ground 11 of appeal.

Ms. Ombock conceded to grounds 4 and 5 of appeal as well. We shall begin with ground 5 under which the appellant criticizes the trial court and the High Court for relying on the evidence of PW1 whose testimony was recorded without oath or affirmation. The learned State Attorney submitted that section 198 of the CPA makes it mandatory for a witness to be sworn or affirmed. She urged us to expunge the evidence of PW1 for violating that clear provision of the law. With

respect, we agree with Ms. Ombock that PW1's evidence recorded without oath or affirmation is of no value so we shall discard it. This ground of appeal is upheld.

As for ground 4 of appeal, the complaint is that the trial court did not comply with section 210 (3) of the CPA in respect of the testimonies of PW1 and PW2. Since we have discarded the testimony of PW1, we shall consider this ground only in relation to PW2. Ms. Ombock submitted that the appellant was not prejudiced by the omission because he was in court and was given an opportunity to put questions to the witness.

With respect, our understanding of the provision of section 210 (3) of the CPA is that it is meant to render assurance to a witness that the court has recorded what represents the substance of his or her testimony. The said section provides: -

> *"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence".*

If anyone was supposed to raise issue with the above provision not being complied with, it is PW2 herself not the appellant. The

appellant cannot be heard complaining that the court did not read to him what was testified on by PW2 or any other prosecution witness. It would have been different if his complaint was that the court violated section 210 (3) of the CPA in relation to his own testimony. This ground of appeal is misconceived and without any merit. It is dismissed.

Next, we shall consider ground 6 briefly. Here the appellant complains that the victim's age was not proved by documentary evidence. Ms. Ombock submitted that PW2 stated that she was 4 years old and the trial court believed her. The learned State Attorney cited again the case of **Kazimili Samwel** (supra) to bring home this point. We respectfully agree with the learned Senior State Attorney that proof of age need not be by documentary evidence. We reiterated that position recently in the case of **Mbaruku Deogratias v. Republic**, Criminal Appeal No. 279 of 2019 (unreported). Conclusion that a particular victim is of a certain age may be drawn from factors other than birth certificate or evidence from parents. In this case PW2 was of such tender age that she could hardly communicate well when she was presented to the court to testify. We dismiss this ground as well because there is no basis for us to fault the findings of the two courts below on this.

All said, the question is still, whether the evidence of PW2 was corroborated, and this is the gist of ground 11. We have already discarded the evidence of PW1 for having been taken without oath or affirmation. There is left only the evidence of PW3, a neighbour whose evidence is mainly hearsay. She went to the house of PW1 who related to her what PW2 had told her. Importantly, while in the cases of **Kazimili Samwel** and that of **Mbaruku Deogratias** (supra) the victims were intelligent and able to articulate what happened, the victim in this case was not, as intimated a while ago. At page 16 of the record of appeal, the trial magistrate recorded the following about her: -

> *"she is a minor, she refused to mention her age, tribe and religion also she (sic) don't know the meaning of an oath".*

The appellant has complained in ground 7 of appeal, that his defence was not considered. We wish to consider that complaint along with ground 11. We see nowhere in the judgment of the trial court where the learned magistrate addressed her mind to the danger of relying on PW2 whom she had described as being so incapable of articulating things as shown above. Again, nowhere did the learned magistrate inform herself of the need to corroborate PW2's evidence and whether such corroboration existed. Surprisingly instead, after correctly

expressing her awareness that the accused had no duty to prove his innocence, just like flipping a coin and without assigning any reasons, the learned Resident Magistrate found the appellant guilty and convicted him. When we drew the attention of the learned State Attorney to the errors in the judgment, she prayed that we should order that the judgment be re - written by the trial court. We are afraid we cannot make such an order in view of the evidence demonstrated in this case. Our duty which we must perform right here, is to express that the conviction was based on weak uncorroborated evidence of the victim so it must be quashed. With respect, the learned first appellate judge erred in upholding that decision which as shown above, was arrived at without assigning any reasons as required by section 132 of the CPA. See also the case of **Ikindila Wigae v. Republic**, [2005] T.L.R 365, where the Court speaking through Samatta CJ (as he then was) stated: -

> *"It cannot be doubted that reasons enhance public confidence in the decision-making process. If a judge or magistrate were to decide a matter before him by tossing a coin, it is quite possible that his decision would be correct, but neither a lawyer nor a layman would regard it as being acceptable".*

Therefore, on the basis of grounds 3, 7 and 11 of appeal, we allow this appeal. We quash the conviction which was based on the uncorroborated evidence of PW2, and set aside the sentence that was imposed on the appellant as well as the order of compensation. We order the appellant's immediate release unless his continued incarceration is for another lawful cause.

It is so order

DATED at **DAR ES SALAAM** this 23rd day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of November, 2020 in presence of the Appellant via video link Ukonga Prison and Ms. Dhamir Masinde, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL