IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 284 OF 2015

LUKA JOHN KAWISHE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Munisi, J.)

Dated the 6th day of March, 2015
in
DC Criminal Appeal No. 9 of 2004

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JUDGMENT OF THE COURT

18th & 21st July, 2016

MASSATI, J. A.:

The appellant was charged with and convicted of one count of unnatural offence contrary to section 154 (1) (a) of the Penal Code, and sentenced to life imprisonment.

It was alleged before the District Court of Rombo, in Kilimanjaro Region, that on the 7th day of September, 2010, at about 11:00 hours, at Mbomai Kati village, within Rombo District, he had unlawful carnal knowledge of one MAURINE D/O NOLASCO TARIMO, a girl of 5, against the order of nature.

Upon his conviction he appealed to the High Court which dismissed his appeal. This is therefore his second appeal.

The prosecution case was that on 7/9/2010, at around 9:00 hours, MEDIANA JOHN (PW3) came to JUDITH NOLASCO (PW1)'s home. PW1 is the mother of MAURINE NOLASCO (the victim) who testified as PW2. PW3 is the sister of the appellant. After sometime, PW3 asked PW1 to allow her take PW2 to her home to play. PW1 allowed them to leave. At around 11:00, PW2 came back home crying accompanied by PW3. At first, PW2 told her that her abdomen was in pain, and she (PW1) later asked her aunt to examine her. The latter discovered that the sphincter of her anus had expanded. PW2 was taken to Tarakea Health Centre where PW5 RENALDA NGARIKONI MTEY, examined her, and confirmed that PW2 had been ravished. PW2 was then taken to the police station where PW4 WP 2891 D/SGT. VERONICA issued a PF3, which was later received in evidence as Exhibit P1. PW4 told the trial court that she later took the victim's statement in which she mentioned the appellant as the person who carnally knew her against the order of nature. It was also the prosecution case that PW3 witnessed the appellant washing the victim's buttocks on her return from the shop where she had been sent by the appellant soon after arriving with the victim.

According to PW1, the appellant then went into hiding and was arrested after three weeks. But PW4 confirmed that the appellant was arrested on 18/10/2010, and appeared in court on 19/10/2010.

Faced with such evidence the appellant denied the accusations and raised the defence of *alibi*. He said that from 1/9/2010 to 19/9/2010 he was incarcerated at Tarakea Police cell, for a civil case, and taken to court on 19/9/2010. But in cross examination he admitted that he was arrested in respect of the offence in question on 15/9/2010.

After examining the prosecution and the defence cases, the two courts below, concluded that the appellant was guilty as charged, and sentenced him to life imprisonment.

The appellant is not amused by the unanimous decisions of the lower courts. He has come to this Court with two sets of memoranda of appeal. In the first memorandum, he raised six grounds and in the additional one, he came up with two grounds.

At the hearing of this appeal, the appellant appeared in person. He adopted his two sets of memoranda of appeal. In summary, in the **first ground**, the appellant complains that the offence was not proved beyond reasonable doubt. In the **second ground**, the complaint is that the charge sheet was incomplete and thus defective. In the **third**

ground, his grievance is that the prosecution evidence was contradictory, inconsistent and incredible. In the **fourth ground** the appellant thinks that his defence of ***alibi*** was not given the deserving consideration. In the **fifth ground,** the appellant is seeking to poke holes in Exhibit P1, and reduce its weight and credibility as an expert opinion on account of bias. In the **sixth ground** the appellant challenges the manner of recording the evidence of PW2. In his additional grounds, the appellant complains, **first** that he was not properly identified; and **secondly** that, the evidence of PW2 was taken contrary to section 127 (2) of the Evidence Act Cap. 6 R.E. 2002.

When the summary of his grounds of appeal was reminded to him, the appellant did not seem to have any intention of elaborating any of them presently, until after he had heard the respondent.

The respondent/Republic which was represented by Mr. Diaz Makule, learned State Attorney resisted the appeal against conviction. In response to **grounds 1 and 3** together, Mr. Makule submitted that the prosecution case was proved beyond reasonable doubt and that all the prosecution witnesses were credible. In answer to **ground 2**, he said that there was nothing wrong with the charge sheet, especially after considering that in his own defence, the appellant showed that he

understood what offence he was facing, and the first appellate court dealt with this grievance satisfactorily. As to the **4th ground,** the learned counsel submitted that although the appellant did not comply with the provisions of the law with regard to the defence of *alibi*, nevertheless the trial court considered and rejected it. With regard to the **5th ground**, Mr. Makule pointed out that the PF3 (Exhibit P1) was tendered by PW5 who was summoned at the request of the appellant. So the law was complied with. In tackling the **6th ground** Mr. Makule's view was that the trial court had power to examine PW2 as it did, under section 176 (1) of the Evidence Act (the Evidence Act) and section 195 (1) of the Criminal Procedure Act Cap. 20 R.E. 2002 (the CPA). So that ground was devoid of merit.

Turning to the additional grounds, Mr. Makule submitted that since the victim and PW3 knew the appellant well, the question of mistaken identity did not arise. On the last additional ground, the learned counsel agreed that section 127 (2) of the Evidence Act was not fully complied with, in that although the trial court found that PW2 did not understand the duty of telling the truth, it still took down her evidence not on oath. However, the learned counsel went on, even if the evidence of PW2 is expunged there was still sufficient circumstantial evidence to sustain the

conviction of the appellant. He therefore prayed for the dismissal of the appeal against the conviction.

However, Mr. Makule conceded that in view of the doubt in the appellant's age, the sentence of life imprisonment imposed on him was not safe. He prayed for his immediate release from custody.

In his reply, the appellant capitalized on the contradictions between the allegations in the charge sheet and the evidence of PW1, PW3, PW4 and PW5 as to the time of the commission of the offence. He said that while the charge alleges that the offence was committed at 11:00 a.m. PW1, PW3 and PW5 testified that PW2 was violated before 11:00 a.m. In his opinion, this was a material contradiction and prayed that on that ground the Court should find that the prosecution case was not proved beyond reasonable doubt and so the correct verdict should be an acquittal.

This appeal raises complaints against both procedural and substantive deficiencies. The second and sixth grounds in the first memorandum and the second complaint in the additional memorandum raise questions of procedural irregularities. The rest of the grounds deal with the substance and weight of the evidence. We shall first deal with the complaints relating to procedural irregularities.

The first irregularity relates to what the appellant describes as "charge sheet mistaken of law which does corrected at all." To him the wording of the charge was incomplete and so reduced his plea thereto "equivocal".

Doing the best we could from this, we could only gather that what he means is that the charge sheet is defective because it is incomplete.

The appellant was charged with the offence of unnatural offence contrary to section 154 (1) (a). There was some writing which looked like (2) which was deleted; and so as it is, the offence is covered by section 154 (1) (a) alone. Subsection 2 was omitted. We think that, this is the omission which the appellant is complaining about.

That section provides:-

154 (1)

Any person who .....

(a) Has carnal knowledge of any person against the order of nature; or

(b) .....

(c) .....

Commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

With due respect, this provision creates a complete offence, together with its attendant punishment. This was enough to charge the appellant. If subsection (2) was omitted, it did not prejudice the appellant, but the prosecution, because subsection (2) provides a minimum sentence of life imprisonment if the victim is below 10, which was the case here. So we agree with the respondent that the omission in the charge sheet did not prejudice the appellant at all. We accordingly reject this ground.

The second irregularity raised in the 6th ground relates to the manner in which the evidence of PW2 was recorded.

Mr. Makule seems to understand this complaint as pointing to the fact that the trial court examined PW2, hence his reference to the court's powers to section 176 (1) of the Evidence Act, and section 195 (1) of the CPA.

This ground should not detain us. Although, it is true that under section 176 (1) of the Evidence Act and section 195 (1) of the CPA, a

trial court has powers to order witnesses to answer questions or produce any document or thing in order to obtain proper proof of relevant facts, both the learned counsel and the appellant missed the point, because the trial court did none of those in the present case. As reflected on page 10 of the record, what the **court** did was to record when PW2 physically pointed to the accused, in a dock identification. What followed thereafter was a continuation of the record of the answers to questions from the prosecution. So the court did not call or put any questions to PW2. This complaint too is of little substance, and we dismiss it.

The third irregularity is in receiving the evidence of PW2.

Again this should not detain us because the respondent has conceded that much.

Section 127 (2) of the Evidence Act requires a trial court which is about to receive the testimony of a child of tender years (which is defined by section 127 (5) of that Act to be below of or below 14) to satisfy itself if the child understands the nature of an oath, in which case the child's evidence could be taken on oath or if the child possesses sufficient intelligence and understands the duty of speaking the truth, the child's evidence could be taken without oath, provided it records those findings.

In the present case, PW2 was a child recorded to have been 5 years old by then. Therefore she was a child of tender years. Indeed the trial court conducted a *voire dire* examination, at the end of which it concluded:-

> *"As witnesses (sic) do not understand the nature and implication of oath and the duty to tell the truth she shall proceed to testify without taking the oath."*

This was legally wrong. Once the court found that the witness did not understand the duty of telling the truth she was incompetent to testify. But now that PW2's evidence was taken her evidence is valueless and is to be expunged from the record.

The above disposes of all the complaints against procedural irregularities. We shall now move on to examine the merits of the appeal.

The rest of the grounds of appeal could be condensed into one; whether the prosecution had proved the case beyond reasonable doubt?

The appellant's view is that the prosecution case was not proved to the hilt. His reasons include the weight and value of the evidence of the prosecution witnesses, beginning with PW2. He also criticized the weak

evidence of visual identification; the value and weight of the PF3 (Exh. P1) and failure to consider his defence of *alibi* and the variance as to the time of committing the offence.

As shown above, Mr. Makule, thinks to the contrary. In his view the prosecution proved its case beyond reasonable doubt.

This is a second appeal against concurrent findings of facts by the lower courts that:-

i. PW2, the victim was ravished against the order of nature on 7/9/2010.
ii. That it was the appellant who did so.
iii. That PW1, PW2 and PW3 were credible witnesses.
iv. That the appellant's defence did not raise any reasonable doubt to the prosecution case.

The question is whether we have any reason to upset any of the above findings.

We agree with Mr. Makule, that even without the direct testimony of the victim, there is sufficient evidence on record that PW1 was ravished PW3 who is the appellant's own blood sister testified that when she came back from an errand to which the appellant had conveniently sent her, she found the appellant washing the victim's (PW2) buttocks.

She repeated this to PW1 the victim's mother. This piece of evidence enhances her credibility and demolishes the appellant's ground about mistaken identification. When the victim was immediately examined by PW5, it was medically shown that the victim's anus sphincter was not intact and there were bruises in the anus. Although this witness is attacked by the appellant as being biased, the criticism is unjustified because, first, PW5 was just answering questions, from the prosecution; secondly, the witness stood firm in cross examination by the appellant, and thirdly, she did not put this opinion in Exhibit P1 itself as alleged by the appellant.

The appellant's defence of alibi was considered by the trial court which was found to have been contradictory. We agree with that finding because, whereas the appellant told the trial court that he was in police custody from 1-9-2010 to 19-9-2010 he contradicted himself in two aspects. First, he said that on the day in question he was working in a farm of Theodenise Lemunge. Secondly, he admits that he was arrested on 15/9/2010. The question is, how could he be in the police custody and be working in the farm and be arrested outside the police custody at the same time. All this goes to show that the prosecution case was proved beyond reasonable doubt, and his defence of alibi could not

shake that case. His flight from the village and disappearance for about two weeks before his arrest is also further evidence of his guilty conscience. As to the variance between the evidence and the charge sheet as to the time of commission of the offence we think that such variance is immaterial in law, in terms of section 234 (3) of the CPA. So we have no doubt that the conviction of the appellant is very sound in law. We accordingly dismiss the appeal against it.

However we have serious reservations about the sentence of life imprisonment meted out on him. This is because, at the time of passing the sentence, the Law of the Child Act No. 21 of 2009 had already come into operation. Under section 119 (1) of that Act "a child" (who is defined as a person below the age of eighteen) should not be penalized with custodial sentence.

In the present case, the charge sheet shows that the appellant was 18 when he committed the offence. But when he was giving his defence, he was shown to have been 22. There was therefore a need to ascertain the age of the appellant before passing sentence in the circumstances (See, **NOEL SUNJILA V. R.,** Criminal Appeal No. 103 of 2010 (unreported)). So for the above reasons, we give him the benefit of doubt and allow his appeal against sentence.

Ordinarily, under the law, when a child is convicted of such an offence the permissible punishment is corporal punishment which, we should have proceeded to substitute for that of life imprisonment in the present case. However, we have taken into account that the appellant has spent more than 5 years in prison already. That is enough punishment. So we shall make no such order.

In the event we dismiss the appeal against conviction, but allow that against the sentence. We order his immediate release from prison, unless he is detained there for some other lawful cause.

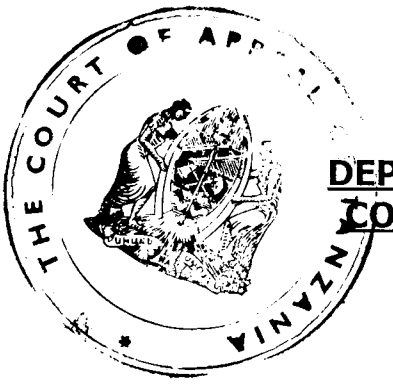
DATED at **ARUSHA** this 19th day of July, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL