IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LUANDA, J.A., MZIRAY, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 134 OF 2016

PETER PAULO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence from the Judgment of the High Court of Tanzania at Tanga)

(Aboud, J.)

Dated the 5th day of April, 2016
In
Criminal Appeal No. 39 of 2016

JUDGMENT OF THE COURT

11th & 14th July, 2017

LUANDA, J.A.:

This is a second appeal. The above named appellant is challenging the concurrent findings of facts of the lower courts which convicted him with unnatural offence c/s 154 (1) (a) (2) of the Penal Code, Cap 16 R.E. 2002 (the Act) and sentenced to life imprisonment.

The prosecution led evidence to the following effect that on the fateful day around evening hours, the appellant ordered the complainant (PW1) to buy cigarettes for him. The complainant did the needful. On

return, however, the appellant told him to go to a certain place where he would be rewarded. The complainant (PW1) went to the place where it is reported there were no houses around. To his surprise when he arrived at the place he was ordered by the appellant to lie down which he complied. It was at that juncture where the appellant undressed the trouser of the complainant he was wearing and put his penis into his anus. The complainant felt pain and he was ordered not to disclose the matter to anyone.

At home the complainant told his mother one Mwajuma Bantenga (PW2) about the ordeal he encountered and that it was the appellant who did it. The matter was reported at police where PW1 was given PF3 and went to hospital. The investigator of the case DC. Mussa (PW3) told the trial court that the appellant confessed to have committed the offence. PW3 took the cautioned statement of the appellant and he tendered as Exhibit P2 without any objection.

In his defence the appellant denied to have committed the offence. Further, he was wondering as to what was the exact age of the complainant following two versions of the PW3 and PW1 who said he was 10 years and 6 years respectively.

In this appeal the appellant appeared in person; whereas the respondent/Republic had the services of Ms. Shose Naiman, learned State Attorney. Ms. Naiman resisted the appeal. The appellant raised four grounds of complaint. One, as the offence was committed around 19.00 hours the trial and the first appellate courts did not address the issue of identification. Two, the courts below did not show the complainant to have known the appellant before and what factors enabled the arrest of the appellant. Three, the first appellate court sustained conviction basing on the decision of full bench which was not in force when the alleged offence was committed. Four, the first appellate court contravened Article 13(6) (c) of the Constitution of the United Republic of Tanzania in sustaining conviction basing on the decision of the full bench which was not in force when the alleged offence was committed.

When the appeal came for hearing, the appellant exercised his option by letting the respondent to start first. Ms. Naiman took the floor and argued. First, she said, she would argue grounds number one and two together. Then ground number three and four together. As to ground Nos. 1 and 2, she said the grounds raised are quite new. They are being raised for the first time now. She said that was not proper. She referred us to two

cases **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 and **Haji Seif v. Republic**, Criminal Appeal No. 66 of 2007 where this Court held that this Court will only look into matters which came up in the lower court and were decided not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal.

As regards to the second limb, Ms. Naiman said the decision which is the source of the appellant's complain was the case of **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011. It is her submission that the decision of that case has not come up with a new proposition. It elaborates what s. 127 (2) of the Evidence Act, Cap. 6 entails. Turning to Article 13 (6) (c) of the Constitution she said it has no relevancy whatsoever with our case. Unnatural offence was and still is an offence. She submitted that the appeal has no merits. On the other hand the appellant still maintained that he is innocent.

We wish to point out that this case depends wholly on the credibility of witnesses. So, the trial court is better placed in assessing their credibility. This Court will only interfere if there is a misdirection or non-

direction (See **DPP v Jaffer Mfaume Kawawa** [1981] TLR 149 and **Salum Mhando v Republic** [1993] TLR 170).

It is the evidence of PW1 that it was the appellant who sodomized him by putting his penis in his anus. That evidence was not challenged at all by the appellant. When the appellant was given opportunity to cross-examined PW1, the record shows he had no objection. In **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 CAT (unreported) for failure to cross-examine a witness, this Court takes it that the witness was telling nothing but the truth. This is what we said, we quote:-

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness."*

Turning to grounds number one and two of appeal, the same are now raised for the first time in the second appeal. Those complaints ought to have been raised at the trial stage and not at this stage.

In **Haji Seif** case cited above, we said thus:-

"...generally it is not proper to raise a ground of appeal in a higher court based on facts which were not canvassed in the lower courts."

We entirely agree with Ms. Naiman that the raising of a new ground of appeal at a higher Court without first doing so in the lower courts is not proper.

As regard the other remaining grounds, we also agree with Ms. Naiman. First, Article 13 (6) (c) of the Constitution has no relevancy with our case under discussion. Article 13 (6) (c) reads as follows:-

"no person shall be punished for any act which at the time of its commission was not an offence under the law, and also no penalty shall be imposed which is heavier that the penalty in force at the time the offence was committed."

Unnatural offence as pointed by Ms. Naiman was and still an offence in the Act. Further, the penalty meted out was imposed in accordance with the law as amended in 1998 vide Act No. 4 of 1998.

Finally about the application of the decision of **Kimbute** case. It is true the learned first appellate judge cited that case to see whether the *voire dire* examination was properly conducted before PW1 who was reported was 6 years old gave his evidence. We think that was not proper to use that case as the same was delivered on 17/6/2014 when already PW1 had already given evidence. He gave evidence on 5/3/2014.

Indeed, the record of the trial District Court shows very clearly that *voire dire* examination was properly conducted as per the requirement of s. 127 (2) of the Evidence Act, Cap. 6 notwithstanding the citation of **Kimbute** case which added nothing useful. The complaint raised has no leg to stand on. The evidence on record is loud and clear that the appellant committed the offence. We are unable to fault the concurrent findings of facts of the lower courts. The appeal has no merit.

As to sentence we have the following to say. There are two versions as to the age of the victim. As we have shown earlier, PW3 said he was 10 years old; whereas PW1 himself said he was 6 years old. PW3 gave that statement on oath. We think it is proper, under the circumstances, to rely on that said by PW3. So, we give the benefit of doubt to the appellant.

Since PW1 was taken to be 10 years old at the time the offence was committed, the proper sentence ought to have been imposed in terms of s. 154 (2) of the Act, was 30 years imprisonment.

In the upshot, the appeal is devoid of merits. We dismiss it in its entirety. Exercising our revisional powers under s. 4(2) of the AJA, the sentence of life imprisonment is set aside. In its stead we impose that of 30 years from the date of conviction.

It is so ordered.

DATED at TANGA this 13th day of July, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL