IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., KWARIKO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 537 OF 2016

ABASI MAKONO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Massengi, J.)

dated the 11th day of August, 2016
in
(DC) Criminal Appeal No. 30 of 2016

JUDGMENT OF THE COURT

21st & 30th August, 2019

KWARIKO, J.A.:

Abasi Makono, the appellant, was arraigned before the District Court of Kiteto with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [CAP 16 R.E. 2002] (the Penal Code). For the purpose of hiding the identity of the victim of the sexual offence we shall only refer to his initials 'LT'. The particulars of the offence were that; on the 12th day of December, 2015 at about 19:00 hours at Laprima Guest House within Kiteto District in Manyara Region the appellant had carnal knowledge of one 'LT' aged 15 years against the order of nature.

Having denied the charge, the appellant was fully tried. At the end, he was convicted and sentenced to thirty (30) years imprisonment with corporal punishment of twenty four (24) strokes of the cane. He was also ordered to pay a compensation of TZS 2,000,000.00 to the victim of the offence. Aggrieved, the appellant unsuccessfully appealed to the High Court. Before the Court the appellant has come on a second appeal.

We find it appropriate to recapitulate, albeit briefly, the evidence adduced at the trial as follows. The victim, 'LT' (PW1) on his way from church on 12/12/2015 at about 20:00 hours, he sheltered himself from rain at Laprima Guest House. At the guest house, PW1 was offered a soda by one policeman No. E. 7296 Corporal Dominic (PW3). Thereafter, the appellant, who was known to PW1 before as a shopkeeper who used to go to Lutheran church, appeared. The appellant made advances to PW1 for sexual favours promising to buy him clothes. PW1 declined the advances even after the appellant had given him Tshs 20,000/=. Thereafter, the appellant booked room number 101 for Tshs. 8,000/= from a guest house attendant one Khadija James (PW2). The appellant invited PW1 into the room on pretence to shelter him from rain. When PW2 inquired why the two were entering the same room, the appellant dismissed her saying it was not her business.

Inside the room, the appellant asked for sexual intercourse with PW1 but he declined. However, the appellant undressed PW1 by force, covered his mouth and took him to bed. He forced his penis into PW1's anus and when he felt pains, he raised alarms where PW2 came and peeped through a hole in the door where she saw the appellant sodomizing PW1. PW2 called her colleagues and reported to PW3 who came and knocked the door which was opened by PW1. The appellant was found naked. PW3 called for assistance from the police station where No. F. 8875 DC Ally (PW4) came and the appellant was arrested and taken to the police station. PW1 was given a PF3 and went to hospital for examination where he was attended by Dr. Nassoro Bakari (PW6) who found PW1 with bruises and blood spots in the anus. He did not find sperms and the PF3 was admitted in evidence as exhibit PE2.

When the police visited the said room the following morning, they found bedsheets with sperms and the appellant's T-shirt and shoes were there. These items were admitted as exhibit PE1 collectively.

In his defence, the appellant denied the allegations. He claimed to have been framed up as his co-businessmen had promised to fix him. He said that, on 8th and 9th July, 2015 his beer was drugged by unknown person where his relatives took him home. He testified further that on the material day he had Tshs 380,000/= but later he found himself at

the police station with only Tshs 90,000/= and was told that he had committed the present offence. He denied to have visited Laprima Guest House on the material day. On cross-examination, the appellant said that Abasi Makono is also his other name and it was raining on the material day. At the end of the trial, the appellant was convicted and sentenced as such.

The appellant filed his memorandum of appeal on 7/11/2017 containing four (4) grounds of appeal whilst on 19/8/2019 he filed a supplementary memorandum of appeal containing single ground of appeal. The five grounds of appeal are as follows: -

1. *That, the first appellate court erred in law and in fact when it failed to notice the contradictions and discrepancies in the prosecution evidence which should have been resolved in favour of the appellant.*

2. *That, the first appellate court erred in law and in fact for failing to notice the variation/discrepancy between the charge sheet and the evidence on record.*

3. *That, the first appellate court erred in law and in fact in sustaining the conviction for unnatural offence on the*

inconsistent and implausible evidence of prosecution witnesses which did not prove the charge.

4. *That, the first appellate court erred in law and in fact in upholding the finding that the prosecution witnesses were credible.*

5. *That, the first appellate court erred in law and in fact when it upheld the decision of the trial court whiles the charge sheet was defective.*

The appellant also filed written submission on 19/8/2019 in support of the appeal.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented, whilst the respondent Republic was represented by Ms. Agnes Hyera, learned Senior State Attorney.

On taking the stage to argue his appeal, the appellant first adopted the grounds of appeal and the written submission to form part of his oral submission. In his written submission the appellant dropped the fourth ground of appeal. Submitting in relation to the first and third grounds of appeal regarding the contradictions and inconsistencies in the prosecution evidence, the appellant referred to what was PW1's account when he got at the guest house and PW2's inquiry from the

appellant when she saw the two entering the same room. He also referred to the evidence of PW2 when she answered the cries by PW1 and what PW3 said when he went to see what was going on at room number 101 after he was called by PW2. He contended that those are contradictions which should have been resolved in his favour. To support the foregoing, the appellant cited to us the case of **Mohamed Matula v. R** [1995] T.L.R 3.

In relation to the second ground of appeal, the appellant's submission referred to the difference in the time of the incident between 19:00 hours mentioned in the charge sheet and 20:00 hours mentioned by PW1, PW2 and PW5. The appellant also mentioned the alleged variance to be the name of 'Mwamba' mentioned by the victim and other witnesses to be that of the assailant and the name Abasi Makono appearing in the charge sheet. He referred the Court to the decision in **Anania Triuna v. R,** Criminal Appeal No. 195 of 2009 (unreported) to that effect.

The complaint in the fifth ground of appeal is that the charge laid down at the appellant's door is defective. The appellant submitted that sub-section (2) of section 154 of the Penal Code was not relevant because the victim of the offence was aged above ten (10) years. His contention is that, the charge did not contain sufficient particulars for

him to understand the nature of the offence so that he could properly prepare his defence.

On the other hand, the learned Senior State Attorney prefaced her submission by opposing this appeal. In relation to the fifth ground of appeal, she argued that although sub-section (2) of section 154 of the Penal Code was wrongly cited but the anomaly is curable under section 388 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA). She contended that the particulars of the offence mentioned the name, age of the victim and the place the offence was committed and that the punishment meted out was legally proper. The learned counsel argued that the appellant understood the charge hence he was not prejudiced. To cement her contention, Ms. Hyera referred us to the Court's decision in **Jamali Ally @ Salum v. R,** Criminal Appeal No. 52 of 2017 (unreported).

In the 1st and 3rd grounds of appeal, the learned Senior State Attorney contended that the contradictions in the prosecution witnesses were minor because the appellant was found sodomizing the victim. She submitted that PW2 explained sufficiently how she heard the victim's cries after he had entered into the room the appellant had booked and that, each witness explained what he/she saw at the scene.

In respect of the appellant's complaint in the second ground of appeal is that the charge was at variance with the prosecution evidence in respect of the time of the incident, Ms. Hyera argued that the difference between 19:00 hours and 20:00 hours mentioned as the time of incident in the charge sheet and the evidence respectively is very minor. The case **Emmanuel Josephat v. R,** Criminal Appeal No. 323 of 2016 was cited to support her argument.

In relation to the name 'Mwamba' which was referred by the victim to be that of his assailant, the learned Senior State Attorney argued that it is also a minor anomaly because the appellant was the one found committing the offence and no any other person was arrested in that connection. For these reasons, Ms. Hyera urged us to dismiss the appeal.

In rejoinder, the appellant contended that 'Mwamba' and Abasi Makono are two different persons. The appellant also raised one legal issue to the effect that the PF3 was tendered by the Prosecutor and it was not read out by the doctor (PW6) who authored it. Responding to this issue, Ms. Hyera did not dispute that it was the Prosecutor who tendered the PF3 which was contrary to law. She therefore urged us to expunge the PF3 from the record of evidence. She, however argued

that, the remaining evidence is sufficient to uphold the appellant's conviction.

Upon hearing submissions from both parties, we find it convenient to start with the fifth ground of appeal which concerns the propriety of the charge it being the foundation of the criminal trial. Section 154 (1) (a) and (2) of the Penal Code which was cited in the charge reads thus;

> *(1) Any person who–*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b) not relevant;*
>
> *(c) not relevant;*
>
> *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.*
>
> *(2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment.*

The anomaly complained of in respect of the charge is the inclusion of sub-section (2) which relates to victims of the age below 10 years whereas the victim of the offence in this case was aged 15 years

which has been covered by sub-section (1) (a). Now, the question to be answered is whether this addition is fatal. It is our considered view as rightly argued by the learned Senior State Attorney, that the anomaly is not fatal. This is so because the relevant provision was cited, that is section 154 (1) (a) of the Penal Code. The particulars of the offence mentioned the name, age, the place where the offence was committed and the time. It is our considered view that the appellant understood the charge and properly pleaded and marshalled his defence. The above position is supported by our recent decision in **Jamali Ally @ Salum v. R** (supra) where it was held thus;

> *"In the instant appeal before us, the particulars of the offence were very clear and, in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, and the name of the victim and her age."*

Having regard to the nature of the defect complained of, we are of the settled view that the anomaly in the charge citing an inapplicable provision in addition to the proper provision in the statement of the

offence is inconsequential and therefore curable under section 388 (1) of the CPA.

The appellant's ground one and three fault the lower courts for relying on the contradictory testimonies of the prosecution. The law regarding contradictions and inconsistencies in the evidence is settled. That is, the contradictions and inconsistencies must be material going to the root of the prosecution case. In the case of **Mohamed Said Matula v. R** (supra) cited by the appellant, the Court said *inter alia* thus;

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them if possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."*

(See also **Mwita Chacha Kabaila v. R,** Criminal Appeal No. 356, **Shukuru Tunungu v. R,** Criminal Appeal No. 234 of 2015 and **Simon Cleophance Bangilana and Another v. R,** Criminal Appeal No. 442 of 2015 (all unreported), which followed the principle in **Matula's** case (supra).

What is gathered from the above legal position is that, not every contradiction or discrepancy in the evidence is fatal unless it is so fundamental and capable of dismantling the prosecution case. In the case at hand, we are satisfied that there is no contradiction between PW1, PW2 and PW3 because each one testified on what he/she witnessed and saw at the scene. Their evidence as shown earlier connects the events which unfolded from the time the appellant and PW1 entered Laprima Guest House, how PW1 was offered a soda by PW3, what the appellant said to PW1 and PW2 until he was found in room number 101 in the act sodomizing PW1. Hence, the account of the events cannot be said to be contradictions because the witnesses gave evidence on what they saw or heard on the material date. The events did not happen at the same time and thus one cannot expect the witnesses to tell identical stories. Accordingly, the 1st and 3rd grounds of appeal fail.

The appellant's first complaint in the 2nd ground of appeal is that the charge is at variance with the prosecution evidence. We are in agreement with both parties that 19:00 hours and 20:00 hours were mentioned in the charge sheet and by the witnesses respectively as being the time of the incident. As correctly argued by the learned Senior State Attorney we find this to be a minor and immaterial variance. As to

the variance between the charge and evidence regarding the time of the commission of the offence, section 234 (3) of the CPA provides thus: -

> *(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof.*

Faced with the similar situation in the case of **Emmanuel Josephat v. R** (supra) cited by Ms. Hyera, the Court said thus: -

> *"While PW1 said that the complained of incident occurred around 11:00 a.m. in the morning, PW3 was recorded to have said that she met PW1 and the appellant at about 3:00 p.m. in the evening. Basing on the two cases we have cited above, we find that the said contradiction on the aspect of time was inconsequential as it did not go to the root of the charged matter."*

Now, following the above decision, we find that the difference between 19:00 hours and 20:00 hours is very minor and does not go to the root of the case. This complaint is therefore rejected.

On the other hand, the appellant complained that the witnesses referred to one 'Mwamba' as the person who is alleged to have committed the offence. This complaint should not detain us much. **One;** the appellant never cross-examined the witnesses when the name 'Mwamba' was mentioned. **Two;** when he was cross-examined by the Prosecutor while giving his defence the appellant said thus;

> *"The name ABASI MAKONO is also used as my name."*

This answer connotes that the appellant is well known at his home ground by the name of 'Mwamba'. Hence, Abasi Makono and Mwamba is one and the same person. **Three;** the appellant is the one who was caught *in flagrante delicto* sodomizing the victim. There was no any break of events from the commission of the crime, arrest and appearance in court and no any other person was arrested in this connection apart from the appellant. We find this complaint baseless.

Lastly, we agree with both sides that the PF3 was tendered by the Prosecutor and not the doctor (PW6). This was contrary to law and thus the PF3, exhibit P2 is not good evidence and it is hereby expunged from the record. Despite the PF3 being expunged, the doctor's evidence showed that the victim had blood spots and bruises in the anus which is

consistent with the evidence by other witnesses that they found the appellant sodomizing the victim. The appellant did not deny that he was arrested and taken to police station on the material day. He did not say if he had any other business of being taken to the police station that day hence the only explanation is that he was responsible with the instant crime.

All said and done, we are satisfied that the appellant's conviction and the sentence were proper. We thus find the appeal devoid of merit and we hereby dismiss it in its entirety.

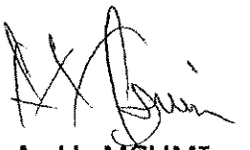
DATED at **ARUSHA** this 19th day of August, 2019.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 30th day of August, 2019 in the presence of the Appellant in person and Ms. Agnes Hyera learned State Attorney appeared for the respondent is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL