IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 31 OF 2017

THOBIAS MICHAEL KITAVI ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

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

(Sumari, J.)

dated 28th day of December, 2016
in
(DC) Criminal Appeal No. 58 of 2016

JUDGMENT OF THE COURT

14th & 20th August, 2020

KWARIKO, J.A.:

Before the District Court of Rombo, Thobias Michael Kitavi, the appellant in this appeal, stood charged with the offence of grave sexual abuse contrary to section 138 C (1) (2) (b) of the Penal Code [CAP 16 R.E. 2002 now R.E. 2019]. The prosecution alleged that on the 24th day of October, 2015 at or about 14:30 hours at Kakuyuni-Holili Village within Rombo District, the appellant unlawfully inserted his penis into the mouth of a male child aged 14 months, his identity withheld.

Having denied the charge, the appellant was fully tried. At the conclusion of the trial, he was convicted and sentenced to twenty years' imprisonment. Aggrieved by that decision, the appellant unsuccessfully appealed before the High Court of Tanzania at Moshi. He is therefore before this Court on a second appeal.

To prove the charge, the prosecution brought before the trial court four witnesses. Their evidence can briefly be stated as follows. Karoline Peter (PW1) had a son, the victim of the offence aged 14 months at the time of the incident. On 24/10/2015 at or about 14:30 hours, she was at her place of work selling food and drinks. Her son was playing around. Whilst there, the appellant came and asked for a drink which PW1 did not have and she continued with her work while the appellant sat outside in an unfinished building. Sometime later, another customer cum sister Ester Selis (PW2) called PW1 to go and see what the appellant was doing to her son. She quickly responded and found the appellant had unzipped his trousers giving his penis to her child to suck. Upon inquiry as to what he was doing, the appellant became furious and said to PW1, **"wewe msenge nini,**

nitakubomoa", meaning, **"are you a homosexual, I will destroy you".**

Thereafter, PW1 snatched her baby and the appellant run away. Among the witnesses to the incident was PW2 and Fabian Thomas Moshi (PW3) who was also a customer. These witnesses said when they inquired as to why the appellant was doing that act, he responded that; **"namsaidia mama yake kumnyonyesha mtoto"**- meaning, **"I am helping his mother to suckle her baby".** At the Police Station, the appellant was interrogated by No. WP 3175 Detective Cpl. Selestine (PW4) where he denied the allegations.

On his part, the appellant did not call any other witness in his defence. In his testimony, he did not deny the fact that he was at PW1's place of work on the material day. He said he had gone there and asked PW1 whether there was meat but was told that there was none hence he went back home. The following day he heard that the police were looking for him and later was arrested at his place of work and taken to the police station. He denied to have committed the offence which he was accused of. In cross-examination, he denied to

have had any grudges with any of the prosecution witnesses and that the baby was not at the scene at the material time though he used to see him playing around there.

The trial court found that the prosecution case was proved to the standard required in law; it convicted the appellant and sentenced him as indicated earlier.

Dissatisfied with the trial court's decision, the appellant appealed before the High Court of Tanzania at Moshi which dismissed his appeal. In its decision, the first appellate court after considering the grounds of appeal vis- a'- vis the evidence on record, it concurred with the trial court that the prosecution case was proved against the appellant beyond reasonable doubt.

Before this Court, the appellant lodged a memorandum of appeal containing four grounds as follows:

> *"1. That, both the learned trial magistrate and the first appellate judge erred in law and in fact for failing to notice the variance between the charge sheet and the evidence as regards the name of the victim, the*

defect which was not remedied by the trial court by way of amendment under section 234 of the CPA Cap. 20 R.E. 2002.

2. *That, both the trial magistrate and the first appellate judge erred in law and in fact in not finding that the prosecution evidence was full of doubts and failed to prove the charge against the appellant beyond reasonable doubt.*

3. *That, the first appellate judge erred in law and in fact when he failed to take into account the glaring contradictions that were apparent in the testimonies of the witnesses.*

4. *That, the prosecution failed to prove their case to standard required by the law when it failed to summon the arresting officer who was a key witness as the trial court ought to have drawn an adverse inference against the prosecution as there was no single piece of evidence from the arresting officer that indeed the appellant was arrested on alleged material moment."*

At the hearing of the appeal, the appellant appeared in person through video link between the Court and prison, unrepresented. On

the other hand, the respondent was represented by a team of four learned State Attorneys led by Mr. Abdallah Chavula, assisted by Ms Sabina Silayo, both learned Senior State Attorneys, together with Ms Grace Madikenya and Mr. Ahmed Hatibu, learned State Attorneys.

Arguing his appeal, the appellant submitted generally that the prosecution failed to prove the charge beyond reasonable doubt. He contended that the prosecution ought to have brought the child victim in court for the trial court to rule out whether he could testify or not as per section 127 of the Evidence Act [CAP 6 R.E. 2019] (the Evidence Act). The appellant argued further that there were contradictions in respect of the name of the victim between the names mentioned by PW1 and those PW2 mentioned in her testimony despite which, the prosecution did not amend the charge to rectify the anomaly.

Additionally, the appellant complained that the Hamlet chairman to whom the incident was reported first and issued a letter to PW1 to go to the police station was a crucial witness but did not testify. He finally urged us to allow his appeal.

At the outset, Mr. Hatibu who argued the appeal on behalf of his colleagues informed the Court that the respondent was supporting the conviction and sentence against the appellant. In response to the appellant's complaint in relation to the Hamlet chairman, he argued that it was a new complaint which was not raised before the first appellate court. He thus argued that the Court had no jurisdiction to determine it. To buttress his argument, he placed reliance on section 4 (1) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the AJA) and our previous decision in **Jamal Ally @ Salum v. R,** Criminal Appeal No. 52 of 2017 (unreported). He urged us to refrain from entertaining the ground.

Responding to the first ground of appeal, Mr. Hatibu argued that although the victim had two names reflected in the charge sheet, PW1 mentioned only one while PW2 mentioned the first name and an additional one. The learned State Attorney submitted that this contradiction was addressed by the High Court Judge who was satisfied from the evidence that the victim was as reflected in the charge sheet. He went further to argue that the appellant stated in his evidence that he knew the child victim and did not cross-examine the witnesses in

relation to his name(s). In any case, the variance in the names did not prejudice the appellant, Mr. Hatibu argued.

As to the complaint that the child was not brought before the trial court, the learned State Attorney argued that it was inconceivable to demand a child of 14 months who cannot speak or understand court proceedings to testify.

In respect of the second and third grounds of appeal, Mr. Hatibu argued that the prosecution case was straight and it proved the charge beyond reasonable doubt. He contended that the prosecution produced eye witnesses who saw the appellant on a broad day light inserting his penis into the child's mouth. The learned counsel went further to contend that there were no contradictions in respect of the prosecution witnesses and it is on record that when PW1 inquired about the appellant's act, he became furious and threatened to beat her.

Responding to the fourth ground of appeal, the learned State Attorney argued that the arresting officer was not an important witness more so because section 143 of the Evidence Act does not require any specific number of witnesses to prove a fact. He argued that the

prosecution was satisfied that the four witnesses were sufficient to prove the charge. The learned State Attorney concluded that the prosecution case was proved beyond reasonable doubt and implored us to dismiss the appellant's appeal in its entirety.

In his brief rejoinder, the appellant reiterated his complaint that the three witnesses differed in their evidence despite being eye witnesses.

Upon careful consideration of the grounds of appeal and the parties' submissions, we are enjoined to decide a germane issue whether the prosecution case was proved beyond doubt to warrant the appellant's conviction. It is common ground that the lower courts made concurrent findings of facts that the appellant committed the offence of grave sexual abuse. It is settled law that, unless there has been a misdirection or non-direction of the evidence occasioning a miscarriage of justice, the second appellate court as in this case, is not entitled to interfere with such findings. See some of the Court's decisions in **Osward Mokiwa @ Sudi v. R,** Criminal Appeal No. 190 of 2014, **Nchangwa Marwa Wambura v. R,** Criminal Appeal No. 44 of 2017

and **The Director of Public Prosecutions v. Simon Mashauri,** Criminal Appeal No. 394 of 2017 (all unreported).

With the foregoing, we are now poised to decide whether the courts below correctly appreciated the evidence on record. In so doing, we will consider the appellant's grounds of complaints. Perhaps, before we tackle the grounds of appeal, we find it appropriate to start with the complaint raised by the appellant during hearing of the appeal. This is in relation to the omission by the prosecution side to call the Hamlet chairman as a witness. As correctly argued by the learned State Attorney, this complaint was not one of the grounds raised by the appellant before the first appellate court and therefore the Court has no jurisdiction to determine it. Section 4 (1) of the AJA clothes this Court with its jurisdiction as follows:

> *"(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction".*

In **Charles Juma v. R,** Criminal Appeal No. 391 of 2016 (unreported), the Court stated thus:

> *"That ground was raised for the first time in the appellant's memorandum of appeal. It was not canvassed and determined in the trial court or the High Court. As correctly argued by the learned State Attorney therefore, it cannot be entertained at this appellate stage of the proceedings".* [At page 7]

(See also **George Maili Kemboge v. R,** Criminal Appeal No. 327 of 2013 and **Omary Lamini @ Kapera v. R,** Criminal Appeal No. 91 of 2016 (both unreported). Therefore, since the appellant did not raise the complaint regarding the Hamlet chairman not being among the prosecution witnesses be it in the High Court or the trial court, this Court lacks jurisdiction to determine it. It is thus rejected.

Likewise, in his submission the appellant complained that the child victim ought to have been brought to testify before the court. Although the appellant did not raise this complaint in his memorandum of appeal before the Court, it was one of the grounds of appeal before the first appellate court. That court dismissed the complaint for the reason that, a child of 14 months could not speak and explain what had

happened. We hold a similar view in that it is inconceivable that a child of 14 months can be called to testify in court. This complaint is dismissed.

As regards the first ground of appeal, the appellant complained and to a certain extent correct that there is variance of the name of the victim between the charge and evidence on record. It is true that the name of the victim is as reflected in the charge sheet while the victim's mother (PW1) mentioned only the second one and PW2 mentioned the first one and a new name as the second. The High Court dealt with this complaint at page 32 of the record of appeal. It stated that the difference in the name does not change the fact that a child aged 14 months was sexually abused and his mother who very well knew her son was better placed to know his name. The first appellate Judge stated further that, the fact that PW2 stated a different name did not occasion any injustice. We agree with the finding of the learned Judge. We wish to add that the appellant did not cross-examine PW1 or PW2 regarding this issue during the trial. He is therefore estopped from complaining at this stage. This Court has stated in many occasions that failure to cross-examine on a certain issue during trial amounts to an

admission of that fact. For instance, in the case of **George Maili Kemboge** (supra), the Court relied on its earlier decision in **Damian Ruhele v. R,** Criminal Appeal No. 501 of 2007 (unreported) in which it was stated thus:

> *"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 evidence".*

Accordingly, the variance in the name of the victim in this case was not fatal neither did it occasion any injustice to the appellant. This ground of appeal fails.

In relation to the second and third grounds of appeal, the appellant complained that the prosecution evidence was contradictory and did not prove the case beyond reasonable doubt. The appellant did not mention any other contradiction apart from the variance in the name of the victim which we have already decided in the preceding ground of appeal. As to the proof of the charge, we agree with the learned State Attorney that the prosecution evidence was clear and straight. PW2 and PW3 witnessed the appellant inserting his penis into the mouth of the victim and when they reacted, he told them that he

was helping the victim's mother to suckle the baby who had allegedly failed to do so. Thereafter, PW2 informed the child's mother (PW1) of this bizarre act and when the mother hurried to the scene, the appellant reacted by uttering very derogatory words with threats to beat PW1. He said thus; "**wewe msenge nini nitakubomoa!".** Then PW2 snatched the baby from the appellant and reported the matter to the police.

Moreover, in his defence, the appellant did not deny the fact that he was at the scene during the material time neither did he have any grudges with the prosecution witnesses. We therefore find that the prosecution witnesses had no reason to lie against the appellant with such abnormal and inhumane act. We do not think that any sensible woman could craft false allegations like the present one concerning her own child had it not been what really happened.

It is settled law that the prosecution is under the duty to prove its case beyond reasonable doubt, and the accused is only required in his defence to raise reasonable doubt on the prosecution's case. In **Mohamed Haji Faki v. R,** Criminal Appeal No. 225 of 2018 (unreported), the Court reiterated the principle and stated as follows:

"Consequently, we agree with both learned that in criminal cases, the burden of proof is always on the prosecution to prove the case against the appellant beyond reasonable doubt and the burden never shifts".

[See also **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016 (unreported). Consistent with the principle, we have no hesitation to uphold the findings of the lower courts that the prosecution evidence proved the case against the appellant beyond reasonable doubt and thus the second and third grounds of appeal also fail.

The appellant's complaint in the fourth and last ground of appeal is that the prosecution ought to have called the arresting police officer in order to prove its case. First of all, the law under section 143 of the Evidence Act does not prescribe any specific number of witnesses in order to prove a fact. Secondly, witnesses are called to testify on matters which are disputed. In this case, the appellant did not dispute that he was arrested by the police. In his evidence, he said that the following day he heard the police were looking for him before he was actually arrested and taken to Holili Police Station and then to Mkuu Police Station and eventually to court. For these reasons, we agree with

the learned State Attorney that there was no need to call the arresting police officer because he was not a material witness; the other witnesses were sufficient to prove the case to the required standard which they did.

The foregoing said, we find no reason to disturb the concurrent findings of the two courts below. We therefore hold that the appellant's appeal is devoid of merit and we hereby dismiss it in its entirety.

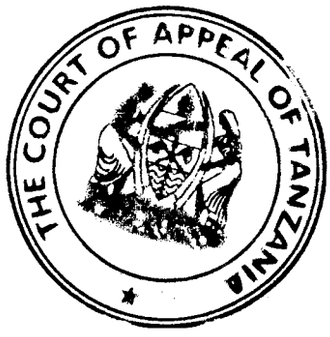
DATED at **ARUSHA** this 20th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 20th day of August, 2020 in the presence of the appellant in person through Video Link and Ms. Sabina Silayo learned Senior State Attorney for the respondent /Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL