IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 325 OF 2017

RAJABU JUMA MWELELA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Mutungi, J.)

dated the 18th day of May, 2017
in
HC Criminal Appeal No. 216 of 2016

.....

JUDGMENT OF THE COURT

26th February & 12th March, 2020

NDIKA, J.A.:

On appeal is the judgment of the High Court of Tanzania at Dar es Salaam (Mutungi, J.) in Criminal Appeal No. 216 of 2016 affirming the decision of the District Court of Temeke convicting Rajabu Juma Mwelela, the appellant, of unnatural offence and sentencing him to life imprisonment.

It had been alleged before the trial court that the appellant, on 19th February, 2015 at Chamazi, Mbagala area within Temeke District in Dar es Salaam Region, had carnal knowledge of RY, a boy aged seven years, against the order of nature.

To prove its case, the prosecution produced five witnesses including RY, the victim, who gave an unsworn testimony. We shall refer to him interchangeably as RY or PW2.

The witnesses' evidence, on the whole, presents the following storyline: Alphonce Choda (PW4) and his wife, PW1 Jamaena Rashid, lived at Chamazi, Mbagala in Temeke together with their two sons one of whom being RY. At some point, PW4 allowed the appellant, then his good friend, to move into his home to live with the family. The sleeping arrangement was that the appellant and RY occupied one bedroom, sharing the same bed.

In the morning of 20th February, 2015 when the appellant had left for work, RY chillingly complained to his mother (PW1) that the appellant had sodomized him the previous night. He gave graphic details of what "Baba Mdogo White", an obvious reference to the appellant, did before and after he had inserted his male member into his anus. In the

course of that act, he muffled RY's mouth to stifle his possible screams for help. PW1 examined her son's anus and found it loose as he complained of it being sore.

PW1 promptly called PW4 and informed him of the matter. She then took RY to Chamazi Police Post where a formal complaint was lodged and a request for medical examination (PF.3) issued. Thereafter, RY was taken to Zakhem Hospital where he was examined by a Clinician. A police investigator, F.5897 D/C Alipo (PW5) from Mbagala Police Station, tendered in evidence the PF.3 which the Clinician filled out and it was admitted as Exhibit P.1. The Clinician remarked on the PF.3 that although he did not see any bruises or discharges on the anal orifice, there was discernible relaxation of the anal sphincter muscles consistent with RY having been sexually assaulted. Another police investigator, WP.2669 D/Cpl. Elianawe (PW3) from the Kilwa Road Police Station, recounted that RY mentioned "Uncle White" as the sodomite that ravished him.

The appellant's defence was a general denial of liability. He charged that all prosecution witnesses spoke lies against him. Yet, he admitted in cross-examination that RY's father (PW4) was his friend,

that he was living at the victim's home, and that he used to sleep with him in the same bedroom for over two years prior to his arrest.

Acting on the evidence of PW1 and PW2 as well as the medical opinion as documented in the PF.3, the trial court held that there was proof beyond reasonable doubt that RY was carnally known against the order of nature. As to who the perpetrator of the crime was, the learned trial magistrate accepted RY's evidence as credible and that it was sufficient proof that the appellant was the culprit. Even though he indicated that RY's evidence did not need corroboration, he took into account the evidence that the sexual act was committed in a bedroom that the appellant shared with the victim and that no other person entered the room that fateful night. He was unimpressed by the appellant's defence of denial and the contention that RY had been drilled by his parents to frame him.

On the first appeal, the learned High Court Judge, at first, found merit in the complaint that the PF.3, tendered by a police investigator (PW5), was wrongly admitted in evidence in contravention of section 240 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 ("the CPA") because the appellant was not informed of his fair trial right to demand

the medical expert who made the report to be summoned for cross-examination. Acting on the authority of the decision of this Court in **Nyambuya Kamuoga v. Republic**, Criminal Appeal No. 90 of 2003 (unreported), the learned Judge rightly discounted the PF.3.

Secondly, the learned Judge upheld the complaint that the *voire dire* test conducted on RY, a child of tender years, before he took the witness stand was conducted in contravention of section 127 (2) of the Evidence Act, Cap. 6 RE 2002 ("the Evidence Act") as it was then before it was amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016. However, relying on the decision of the Court in **Tumaini Mtayomba v. Republic**, Criminal Appeal No. 217 of 2012 (unreported) citing **Kimbute Otiniel v. Republic**, Criminal Application No. 300 of 2011 (unreported), she held that despite that procedural infraction, RY's unsworn evidence was not liable to be expunged from the record and that it needed no corroboration. Acting on that testimony accepted as truthful, and considering the undisputed evidence that the appellant and the victim spent the fateful night in the same room and that nobody else entered the room, the learned Judge affirmed the appellant's conviction.

Still discontented, the appellant has appealed to this Court on six grounds which raise the following questions: **one**, that the *voire dire* test was improperly conducted rendering PW2's evidence worthless. **Two**, that PW2's testimony required corroboration. **Three**, that there was a material variance between the charge sheet and the evidence. **Four**, that the trial proceedings were wrongly conducted in open court, not in camera, in contravention of the law. **Five**, that the testimonies of PW1, PW2, PW3 and PW4 were contradictory on who the culprit was. And **finally**, that the case was not proven beyond peradventure.

At the hearing of the appeal, the appellant was self-represented whereas the respondent appeared through Ms. Florida Wenceslaus, learned State Attorney.

In his oral argument, the appellant adopted the contents of his Memorandum of Appeal along with the written submissions he had filed. With leave of the Court in terms of Rule 81 of the Tanzania Court of Appeal Rules, 2009, he argued two additional grounds of appeal: on the first additional ground, he faulted the trial court's manner of recording of the evidence; that the evidence was taken down in a reported speech instead of a narrative. He said the recording gave an impression that it

was the learned trial magistrate, not the witnesses, who gave evidence. It was his conclusion that the said course was illegal and hence, all evidence on record was vitiated and should be expunged. As regards the second additional ground, he claimed that all trial proceedings were a nullity on the reason that the trial court contravened the mandatory provisions of section 210 (3) of the CPA requiring the court to inform each witness of his right to have his evidence read over to him.

Replying, Ms. Wenceslaus conceded that the trial court at times recorded the evidence in a reported speech in violation of section 210 (1) of the CPA requiring evidence to be recorded in a form of a narrative. Nonetheless, she submitted that the said anomaly did not occasion any failure of justice. As regards the second additional ground, she said that section 210 (3) of the CPA was complied with.

We propose to dispose of the additional grounds of appeal first, beginning with the complaint that the evidence was wrongly recorded. Section 210 (1) governs the manner of recording evidence in a trial before a subordinate court. It enacts that:

> *"(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the*

witnesses shall be recorded in the following manner–

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; and

(b) ***the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.***"[Emphasis added]

Of particular interest in this case is subsection (1) (b) of section 210 above from which it is clear that every testimony must be taken down in the form of a narrative but not necessarily in the form of question and answer. It is of utmost importance that the trial magistrate takes down the testimony of the witness as accurately as possible and in the exact words used by the witness. The transcript of evidence should show that the narrative was given by the witness.

We have revisited the trial proceedings and it is evident that, at times, the trial magistrate did not record the evidence in a conventional manner but in a reported speech. To illustrate this unusual recording,

we need not go further than extract from the evidence in chief of the first prosecution witness (PW1) at its very beginning. It runs thus:

> *"I stay at Chamazi with my family. I have two children one is 'RY' and [the other is] 'JA'. I live also with my brother in law. His name is White (accused person).* ***PW1 remembers*** *on 20/2/2015 my son 'RY' said* ***that I remember*** *... then my son told me that the accused person put his* ***penis in my buttocks*** *then he used his shirt to* ***clean me then*** *..."*[Emphasis added]

Apart from being in a reported speech, the above extract could possibly be mistaken as portraying the witness as the person on whom the depraved sexual act was committed.

irregularity in **Juma Bakari v.**

of 2009 (unreported) and took

is fatal. In this particular case,

however, we take a different course as we are of the opinion that this unconventional recording of evidence did not render the evidence on record incoherent, distorted or difficult to comprehend. We have carefully looked at the entire evidence and have had no serious difficulty in deciphering what we perceived to be its intended meaning. It is

significant that the appellant did not go beyond pointing out the anomaly; he did not suggest that this peculiar manner of recording evidence prejudiced him. In fact, he had no particular grudge with the authenticity of the evidence on record. Thus, we are of the view that the infraction complained of did not occasion injustice and thus it can be ignored in terms of curative provisions of section 388 of the CPA. However, we hope that the learned trial magistrate would, in the future when taking down evidence, be attentive of the letter and spirit of section 210 (1) of the CPA.

As regards the alleged non-compliance with section 210 (3) of the CPA, we agree with Ms. Wenceslaus that this complaint is bereft of merit. It is manifest on the record of proceedings that the learned trial magistrate was aware of the aforesaid provisions and that he recorded that he complied with them after taking down the testimony of each witness. At this point, we conclude that both additional grounds of appeal fall by the wayside.

Having disposed of the additional grounds of appeal, we now deal with the original grounds of appeal starting with the first and second grounds, which we consider and determine conjointly. In these grounds,

the appellant posits that the *voire dire* test on PW2 was improperly administered rendering his evidence worthless and that, in the alternative, PW2's evidence required corroboration but there was none.

The essence of the appellant's complaint in respect of the *voire dire* test is that the trial court did not put any questions to PW2 to examine if he understood the duty of telling the truth and that it was wrong that he was allowed to testify. On that basis, he made three points: first, he urged that PW2's testimony be discarded. Secondly, he contended, most probably in the alternative, that the learned first appellate Judge erred in holding that PW2's unsworn evidence did not require corroboration. Thirdly, he argued that RY's unsworn evidence did not establish penetration and that it was uncorroborated.

Ms. Wenceslaus conceded to the anomaly on the conduct of the test but, relying on the unreported decisions of the Court in **Tumaini Mtayomba v. Republic**, Criminal Appeal No. 217 of 2012 and **Hassan Kamunyu v. Republic**, Criminal Appeal No. 277 of 2016, she submitted that RY's unsworn evidence was not liable to be discarded. While also acknowledging that RY's evidence required corroboration, she

submitted that the said testimony did not stand alone as it was cogently supported by the evidence adduced by PW1 and PW4.

We have reviewed the record in the light of the above arguments of the parties. To be fair, as indicated earlier, the learned first appellate Judge rightly applied her mind to the issue and concluded that the *voire dire* test was conducted in contravention of the then section 127 (2) of the Evidence Act. For, contrary to the settled practice, the learned trial magistrate omitted, as shown at page 14 of the record, to indicate the questions that he put to the witness before he hurriedly concluded that:

> *"Court: The witness does not know the meaning of oath but has sufficient intelligence to speak the truth. He [shall testify] not in oath."*

Like the first appellate Judge, we are of the view that the *voire dire* test was improperly conducted. The critical issue at this stage, then, is the effect of the said irregularity on PW2's evidence. On this aspect, we agree with Ms. Wenceslaus that the said anomaly does not render that evidence liable to be discarded. The authority on the point is our decision in **Kimbute Otiniel** (supra) which we cited in **Tumaini Mtayomba** (supra), both of which were referred to us by Ms.

Wenceslaus. We wish to excerpt the relevant holding in **Kimbute Otiniel** (supra) thus:

> *"Where there is a misapplication by the trial court of section 127 (1) and/or 127 (2) the resulting evidence is to be retained on record. Whether or not credibility, reliability, weight or probative force is to be accorded to the testimony in whole, in part or not at all is the discretion of the trial court. The law and practice governing the admissibility of evidence; cross-examination of the child witness, critical analysis of the evidence by the court and the burden of proof beyond reasonable doubt, continue to apply."*

In the instant case, the learned trial magistrate misapplied the *voire dire* test but that there was no complete omission by him to properly address himself to the requirements of the law. Thus, the resulting unsworn evidence of RY was not liable to be discarded but to be retained on record.

As regards whether PW2's unsworn evidence required corroboration or not, we hold without demur that the learned first appellate Judge slipped into error in holding that none was required.

The Full Bench of the Court settled the issue in **Kimbute Otiniel** (supra), citing the decision of the Court in **Nguza Vikings @ Babu Seya & Four Others v. Republic**, Criminal Appeal No. 56 of 2005 (unreported), that corroboration of the evidence of a child of tender years is not necessary where it was recorded after full compliance with section 127 (2) of the Evidence Act. Since in the instant case, the *voire dire* test was misapplied, the unsworn testimony of RY required corroboration.

We now have to determine whether RY's evidence was sufficiently corroborated. We hasten to say, with respect, that we agree with Ms. Wenceslaus that RY's narrative that the appellant undressed him that fateful night and inserted his penis into his anal orifice was cogently supported. First, it is in evidence that RY complained to his mother, PW1, of the bestial act and named the appellant as culprit at the earliest opportunity after the appellant had left for work in the morning of 20th February, 2015. Secondly, even in the absence of the PF.3 that was discounted, PW1 related how she examined the victim's anus and noticed signs of ravishment. At that time, RY complained of pain in his anus. Thirdly, both PW1 and PW4 testified to the sleeping arrangement in which the appellant shared the same room and bed with RY. It was

not suggested that in the fateful night somebody else crept into the room and slept there. It is significant that the appellant acknowledged that sleeping arrangement in his testimony.

We would thus conclude that while we agree with the appellant that the *voire dire* test was misapplied, we reject his contention that PW2's resulting testimony was liable to be discarded. Furthermore, even though we uphold the appellant's argument that the first appellate Judge erred in holding that PW2's evidence required no corroboration, we are decidedly of the view that the said evidence was sufficiently corroborated. The two grounds of appeal are ultimately determined against the appellant.

We now turn to the third and fifth grounds of appeal, which we as well consider and determine at once. It is the appellant's contention that there was a material variance between the charge sheet and the evidence. Moreover, he argued that the testimonies of PW1, PW2, PW3 and PW4 were contradictory on who the culprit was.

On the alleged variance between the charge sheet and the evidence, the appellant argued that while the sodomy was alleged as per the charge to have occurred on 19th February, 2015, PW1's

evidence-in-chief said that she learnt of the incident on 20th February, 2013 before she backtracked in cross-examination and claimed that the incident occurred on 19th February, 2015. As regards contradictions, he contended that while RY named the culprit as "White Man" or "Baba Mdogo", both his mother (PW1) and the investigator (PW3) mentioned the victim's uncle as the guilty party. He added that at page 19 of the record the victim's father mentioned Rajabu Yusuph as his friend who was presumably the sodomite that assaulted his son.

Ms. Wenceslaus countered that there was no variance as alleged. She argued that the evidence was consistent that the fateful incident occurred on 19th February, 2015 and that PW1 learnt of it in the morning of 20th February, 2015. As regards the contradiction on who the culprit was, the learned counsel for the State contended that the contradiction was not material as the names "White Man", "Baba Mdogo" and "Uncle White" referred to the appellant.

We have re-examined the record and it is evident that the alleged variance between the charge and the evidence is plainly beside the point. Indeed, the testimonies of PW1, PW2 and PW4 alluded to the sodomy having been committed in the night of 19th February, 2015 as

alleged in the charge sheet. Both PW1 and PW2 were consistent that the crime came to light in the following morning after PW2 had apprised his mother. At that time the appellant had left the home for work.

It would appear that the present complaint is but an attempt to make a meal of apparent typographical error in PW1's evidence in chief as captured in the typed record of appeal. Admittedly, the typed record shows that PW1 mentioned **20th February, 2013**, not 20th February, 2015, as the day on which she learnt from RY of the sexual attack. However, on perusal of the original record, we confirmed that PW1's narrative was that her son apprised her of the perverted sexual act on 20th February, 2015, saying that the act had been committed t previous night.

As for the actual name of the culprit, we move along with M Wenceslaus' submission that the appellant was referred to variously the witnesses as "Baba Mdogo", "Baba Mdogo White", "Uncle White" or "White." His further contention that the victim's father (PW4) mentioned Rajabu Yusuph as his friend who might have sodomized RY features nowhere on the record. PW4 did not make any such claim. In actual fact, he mentioned the said Rajabu Yusuph as his other son. The

complaints in the third and fifth grounds of appeal are, as a result, unmerited.

Next, we consider the fourth ground of appeal whose thrust is the contention that the entire trial proceedings were vitiated due to being wrongly and illegally conducted in open court. Ms. Wenceslaus readily conceded to the anomaly but submitted that the error was curable, the appellant having not been prejudiced thereby.

Although the appellant did not cite any provisions of the law supposedly violated by the trial court, we presume that he had in mind section 186 (3) of the CPA, which prescribes thus:

> *"**Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera,** and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media ...."* [Emphasis added]

Undoubtedly, this is not the first time the Court is being confronted with the question at hand. In **Goodluck Kyando v. Republic** [2006] TLR 363 the Court dealt with the non-compliance with section 3 (5) of the then Children and Young Persons Act, Cap. 13 RE

2002 requiring a similar procedure for proceedings involving a child as a witness or a child in conflict with the law. The Court took the view, at page 368, that:

> *"The provisions of the Act were designed to safeguard the personal integrity, dignity, liberty and security of women and children. It is therefore not surprising that in sexual offences, under section 3(5) of the Children and Young Persons Act,* ***such trials are to be conducted in camera so that children as defined under the Act are not, for instance, exposed to publicity which may inhibit a fair trial, subject them to fear stigma and the like."***
> [Emphasis added]

The Court went on to hold that the aforesaid prescribed procedure was mandatory but that its omission, on the facts of the case, occasioned no failure of justice to the appellant. The omission was, accordingly, adjudged curable under section 388 of the CPA.

The Court took the same stance in **Leonard Salim Kimweri v. Republic**, Criminal Appeal No. 453 of 2015 (unreported) as it emphasized that the procedure under consideration was intended to protect the victims of sexual offences and not the accused person. The

appellant in that case having failed to demonstrate how prejudicial the non-compliance was to him, the Court ignored the irregularity.

In the instant case, it is common cause that the trial court did not heed to the prescribed procedure for conducting the trial in camera. That was a clear contravention of the law. But guided by the two decisions cited above, we would respectfully agree with the learned State Attorney that the irregularity is not fatal as the appellant failed to demonstrate if he was thereby prejudiced. It was not enough for him to point out the infraction without substantiating its adverse effect on him. At any rate, it was the prosecution, not him, that stood to be prejudiced by this anomaly. The fourth ground of appeal fails.

The final ground of appeal raises the issue whether the case against the appellant was proven beyond peradventure.

To prove the offence as charged under section of the Penal Code, Cap. 16 RE 2002, the prosecution had to establish beyond reasonable doubt that the appellant had carnal knowledge of RY against the order of nature and that the said victim was under the age of ten years at the material time.

At the start, we would reiterate RY's tale, accepted as truthful by the two courts below, that the appellant undressed him that fateful night and inserted his penis into his anal orifice. To his credit, RY raised a red flag against the appellant at the earliest opportunity drawing his mother's attention the following morning right after the appellant had left for work. It is settled that in sexual offence cases, the best evidence is that of the victim who is found to be truthful by the courts – see **Selemani Makumba v. Republic** [2006] TLR 379 and **Vincent Ingi v. Republic**, Criminal Appeal No. 527 of 2015 (unreported).

Like the two courts below, we find that the victim's unsworn narrative was sufficiently corroborated. First, PW1 related how she examined RY's anus and noticed signs of ravishment while her son complained of that part of his body being sore. Secondly, it is in evidence the appellant and the victim shared the same room and bed in the fateful night. It was not suggested that anybody else except the two slept in the room. Finally, it was undisputed that the victim's age was seven years at the material time.

We should add that the appellant's defence of sweeping denial was duly considered by the two courts below but it failed. Being

inherently weak and self-serving, we are not surprised that it was rejected. The High Court, therefore, rightly upheld the conviction and sentence against the appellant. The sixth ground of appeal is, accordingly, without merit.

In the upshot, the appeal lacks merit. We dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 9th day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of March, 2020 in the presence of the appellant in person and Mr. Benson Mwaitenda, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL