IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 56 OF 2019

BUNDALA NGUSSA @JINYEBU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

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

(Mutungi, J.)

dated the 22nd day of June, 2018
in
Criminal Appeal Case No. 15 of 2017

.....

JUDGMENT OF THE COURT

27th April, & 19th May, 2021

KOROSSO, J.A.:

In the District Court of Morogoro, the appellant, Bundala Ngussa @Jinyebu was charged with Unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code Cap 16 Revised Edition 2002. The allegations being that on 15th June, 2014 at Milama Makuture village, within Mvomero District Morogoro Region, the appellant had carnal knowledge against the order of nature of a boy aged (4) years, who henceforth shall be referred to as "the victim" or "PW6" to conceal his identity. The prosecution presented eight (8) witnesses and two exhibits

to prove their case while in defence, the appellant gave affirmed evidence and had only himself as a witness.

The factual setting of the case as gathered from the prosecution side is that on the material day, the appellant met the victim who was grazing goats with two of his siblings, that is, Gidiya Mandam (PW2) and Margreth Mwita (PW3) and requested them to escort him to buy sweets at a shop. PW2 asked the victim and PW3 to go with the appellant. Enroute, the appellant asked the victim to enter a bush, and ordered him to bend over, removed his trouser and then inserted his male organ into the victim's anus.

PW3 left the scene and went home having recounted what she witnessed to PW2. PW2 rushed home and told Mandalu Mhanga (PW1) their father who was at home that the appellant had sodomized the victim and subsequently left the crime scene. PW1 left his house to inform other people including the Hamlet Chairman on the incident, and thereafter left together to go to the crime scene. At the crime scene they found the victim crying and the appellant was nowhere to be seen. The appellant was later apprehended where he worked, at Mayunga Lusho (PW8)'s compound. It is alleged that when the appellant was queried on the issue, he admitted to have sodomized the victim claiming

he was drunk at the time and sought to be forgiven. He was then taken to the Police station and put into custody. The incident was reported at the police station and the victim provided with a PF3 and subsequently taken to hospital, where he was examined and treated by Dr. Yohanne Nsamia Shila (PW5).

In defence, the appellant vehemently denied committing the offence charged and contended that between February 2014 to 8th May, 2014 he worked with PW1 and then moved to work with PW8 despite the fact that PW1 still owed him Tshs. 300,000/=. That PW1 had promised to pay him the owed money on the 14th June 2014, though this was not realized and his quest to get his money on 15th June, 2014 ended with PW1 and his relatives accusing him of sodomizing the victim. He also narrated circumstances leading to his arrest and arraignment in court facing the charges he was convicted with.

After a full trial, the trial court being satisfied that the prosecution proved the case against the appellant beyond reasonable doubt, convicted and sentenced him to thirty (30) years imprisonment. His appeal to the High Court was unsuccessful, upholding the finding of the trial court, hence the current appeal. In the instant appeal, the appellant seeks to impugn the decision of the High Court predicated on twelve

(12) grounds of appeal in total. The memorandum of appeal filed on the 5th March, 2019 fronts five (5) grounds, three (3) grounds are found in the supplementary memorandum of appeal lodged on the 20th September, 2019 and another supplementary memorandum of appeal filed on the 18th June, 2020 presenting four (4) grounds. Essentially, the appellant challenges the first appellate court's decision on the following areas of contention:

1. Sustaining the appellant's conviction despite doubtful credibility of the evidence of PW1, PW2 and PW3 which was engrained with contradictions and inconsistences.
2. Failure to outline the language of translation for the one translating PW6's evidence.
3. Sustaining the appellant's conviction when the victim's age was not established.
4. Non-compliance with section 210(3) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA) with respect to the evidence of PW6, PW7, PW8 and DW1.
5. Failure to comply with the rights enshrined in the CPA and the Constitution related to period of detaining an accused before being arraigned in court.

6. Failure to comply with the requirements of section 127(2) of the Evidence Act, Cap 6 RE 2002 (TEA) in the conduct of the v*oire dire* test on PW1, PW2 and PW3.
7. Sustaining the appellants conviction without considering his defence evidence and failing to subject the entire evidence to objective scrutiny.
8. The case against the appellant was not proved beyond reasonable doubt.

When the appeal was called for hearing, the appellant appeared in person, unrepresented and commenced his submissions by adopting the grounds of appeal and opted to leave the learned State Attorney appearing to submit first and await to rejoin thereafter, if it shall so necessitate.

Ms. Salome Assey, learned State Attorney who entered appearance for the respondent Republic commenced her submissions by resisting the appeal thus supporting the conviction and sentence. Subsequently, in the midst of her submissions, after a brief dialogue with the Court, she made a turnaround, deciding to support the appeal and contended that upon further reflection of the evidence, she was persuaded that the Prosecution failed to prove their case to the standard

required. She thus prayed for the appeal to be allowed, conviction quashed and the sentence be set aside.

The appeal not being contested, before us for determination is whether the prosecution case was proved against the appellant to the standard required. In resolving this fundamental question, we shall confront issues raised in the grounds of appeal before us.

In determination of this appeal, we shall first deliberate on threshold grounds addressing points of law. With regard to the 6th ground of appeal, our scrutiny of the record of appeal shows that the High Court Judge discarded complaints of impropriety of the *voire dire* conducted on PW2, PW3 and PW6 and held that it was in conformity with section 127(2) of TEA. It is worth to note that the appellant was charged and convicted of an offence committed on 15th June, 2014, a date prior to the amendment to the said provision ushered in by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 which came into operation on 8th July, 2016. Before the amendment, Section 127(2) of TEA as it stood then, read:

> "(2) *Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received*

though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth".

Subsection (7) of the same section (before being renumbered by the amending Act) to be subsection (6) read:

"(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

The tenor and import of the above provisions were expounded in the holding of the Full Bench of the Court in **Kimbute Otiniel vs Republic**, Criminal Appeal No. 300 of 2011 (unreported) which

reproduced the following excerpt from our decision in the case of **Nguza Vikings @ 8abu Seya & 4 Others vs Republic**, Criminal Appeal No. 56 of 2005 (unreported), holding that the effect of section 127 (7) was not intended to override section 127 (2) and stated:

> *"From the wording of the section, before the court relies on the evidence of the independent child witness to enter a conviction, it must be satisfied that the child witness told nothing but the truth. This means that, there must first be compliance with section 127(2) before involving section 127(7) of the Evidence Act; "voire dire" examination must be conducted to ascertain whether the child possesses sufficient intelligence and understands the duty to speak the truth. If the child witness understands the duty to speak the truth, it is only then its evidence can be relied on for, conviction without any corroboration otherwise the position of the law remains the same, that is to say that unsworn evidence of a child witness requires corroboration*".

Suffice to say, what we gather from the excerpt above is that the procedure for conduct of *voire dire* essentially aims to ascertain, **one,** whether the child understands the nature of oath and **second**, whether

or not he or she has sufficient intelligence to justify reception of the evidence. (See also **Hassan Kamunyu vs Republic**, Criminal Appeal No. 277 of 2016 (unreported)).

Our read-through of the record of appeal shows that the *voire dire* test conducted by the trial court on PW2, PW3 and PW6 focused on ascertaining witnesses understanding of the meaning of an oath but did not determine on whether or not each of the witnesses had sufficient intelligence to justify reception of the evidence as can be seen from pages 19, 20 and 22 of the record of appeal with respect to PW2 and PW3. With regard to the evidence of PW6, we find it pertinent to reproduce the relevant record of proceedings.

> *"Date: 01/09/2015*
>
> *Coram: Hon. R. Futakamba - RM*
>
> *Pros: Janeth (S.A.)*
>
> *C.C.: Victor*
>
> *Accused: Present*
>
> ***PROS**: For Hg. We have a witness who speak only Sukuma language we pray to proceed if the court has a translate. (sic)*
>
> ***Court**: The Tranlalier (sic) is before court ready for Hg.*

Accused *: I am ready*

Sgd: Hon. Futakamba -RM

01/09/2015

COURT*: The witness (victim) is a child after voire dire test he proves to know nothing about oath.*

Sgd: Hon. Futakamba-RM

01/09/2015

Translate: Dafrosa A. Dagaa, 46 yrs, Christian, Sukuma, swear and will translate

IN CAMERA

VOIRE DIRE *(with translate).*

What is your name?

Timoku

Where did you live?

I don't know

What is your religion?

I do not know

How old are you?

Do you know the meaning of oath?

I do not know.

Sgd: Hon. Futakamba- RM

01/09/2015"

Adverting to the above excerpt, it is important to understand that although the typed version of the record of appeal shows the finding of

the court was prior to the conduct of the *voire dire,* on perusal into the file of origin in handwritten format we gathered that the holding of the court was after the conduct of the *voire dire* and therefore the perceived irregularity was in essence misconceived.

The first appellate court erred by disregarding the procedural errors in the conduct of the *voire dire* with respect to PW6 which can be discerned from the above cited excerpt. The trial court failed to determine on whether or not PW6 had adequate intelligence to testify in court and thus rendering the *voire dire* test conducted on PW6 to be defective, this by itself would have necessitated seeking of evidence to corroborate this evidence before relying on it to convict the appellant. When the said defect is considered together with the flouting of procedure during the trial related to translation of the proceedings for the victim, which essentially is a complaint addressed in the 2nd ground of appeal, it enhances the doubts on the propriety of the *voire dire* conducted on PW6 and recording of his evidence essentially renders his evidence, wanting. Undoubtedly, the record of appeal does not reveal which language the translator was translating from and to. Simultaneously, the trial court also failed to remind the translator that he was still on oath on the 9th September, 2015 nor was the name of the

translator recorded when hearing of PW6 evidence continued after being adjourned on the 1st September, 2015. The anomaly renders the proceedings related to recording the evidence of PW6 on the 9th September, 2015 to have been conducted without a translator. This anomaly, as rightly submitted by the learned State Attorney was fatal and rendered PW6's testimony indecorous. When addressing the discerned procedural irregularities, we should bear in mind the well settled principle that the best evidence of sexual offences is that of the victim as held in the case of **Selemani Makumba vs Republic** [2006] TLR 379). As such, such evidence must be impeccable and properly taken. Having regard to the findings related to flouting of procedures in conducting the *voire dire* of PW6 and recording of evidence, we agree with the learned State Attorney that his evidence cannot stand and should be expunged. Evidence of PW6 is henceforth expunged from the record.

Regarding propriety of the conduct of the *voire dire* test on PW2 and PW3, the trial court having failed to record findings on whether or not the witnesses possessed sufficient intelligence for reception of their evidence, the issue that arises, is what are the consequences thereto? It is now settled that despite the said anomaly, such evidence can be

accorded deserving weight where the court was to record that the testimonies were truthful and nothing but the truth in line with subsection (7) of section 127 of TEA or if it is corroborated as expounded in the case of **Kimbute Otiniel vs Republic** (supra).

As rightly argued by the learned State Attorney, the highlighted procedural irregularities by the trial court in the conduct of *voire dire* for PW2 and PW3 were fatal and rendered the said evidence to lack the requisite weight. It is evident from the record of appeal that the trial court did not indicate whether PW2 and PW3 possessed sufficient intelligence for the reception of the evidence nor record that it was nothing but truthful which meant that corroboration was required for the evidence to be relied upon in conviction of the appellant. Our perusal of the judgment of the trial court, has discerned that although near the end, the trial court warned itself of the danger of relying on the evidence of minors whose evidence is unsworn, it ended there, the court did not seek for corroboration of the said evidence as required by subsection (7) of section 127 of TEA. Unfortunately, this omission went unnoticed by the first appellate court which failed to seek to find evidence that corroborates the assertions therein. For the foregoing, we are of the view that the 2nd and 6th grounds of appeal have merit.

We now move to the 1st ground of appeal which faults the first appellate court for upholding the trial court's finding that the evidence of PW1, PW2 and PW6 was reliable and credible. With respect to PW2 and PW3, the first appellate court observed that their narrations were clear as to what exactly transpired, stating:

> "*These were eye witnesses, PW2 and PW3 did go along with the victim (PW6) up to the bushes in the company of the appellant. PW3 in particular did see the appellant remove PW6's shorts and ordered him to bend and sodomize him*".

The learned State Attorney did concede to inconsistencies in the evidence of prosecution witnesses finding them to leave doubts in the prosecution evidence. Evidently, PW2 did not witness the appellant sodomizing PW6. Whilst PW1 testified he saw the victim bleeding when they found him at the crime scene crying, this evidence was not supported by any other witness and even PW5 did not testify finding blood or any sign that the victim did bleed from the incident. The relevant excerpts are as follow:

> "*He asked us to take him to the shop to buy sweets and I escorted him with Gidiga and Jomuku, he asked Jimoku; he asked Timoku to bend (inama) and Timoku bend I run away to tell*

father ***I did not see what happened. I saw Bundala raped Jimoku and Moku was crying***..." [emphasis added]

There is also the testimony of PW2 found at page 20 stating:

> *"We graze far from home. He asked us to take him to the shop to buy sweets; I toid him Moku and Magreth will take you there; they took him to the shop; on the way Magreth told me the accused asked Moku to bend (inama) he took off Moku's short pensi and raped him, ... and she run away replying 'bee' while she was not called. There I run away with Magreth to inform baba (PW1).* ***When Moku came before we toid father he said Bundala gave him a ripe banana and he was said that the accused here raped him.****" [emphasis added]*

Another discrepancy in evidence arises from analysis of the evidence of PW2 and PW3, and it is not clear, **one**, whether all three that is, the victim, PW2 and PW3 left with the appellant when he asked them to escort him as stated by PW3 or **second**, that it was only the victim and PW3 as asserted by PW2. Suffice to say, the evidence on what transpired at the scene, is grounded on the evidence of PW3, since even PW2 testified that regarding the sodomy incident he was told on what transpired by PW3. With regard to PW3, while she stated she

witnessed the incident, she also stated not to have witnessed anything and then stated she witnessed the victim was raped. These inconsistencies taint the credibility of the said witnesses and essentially leave doubts on the prosecution case.

There is also the evidence of PW2 that before reporting the incident to PW1, the victim had told him that the appellant gave him a banana, which is not supported by the evidence of PW3. According to PW1 after receiving the report of the incident from PW2, he then went to gather other villagers and rushed to the scene where they found the victim. The question that remains is when did PW2 talk to the victim prior to rushing to his father to report? When was the banana exchanged? We find all the above presented inconsistencies are not minor because as presented the witnesses relate different accounts on similar incidents or undertakings. In determining whether the discrepancies are minor or not we are guided by what we stated in **Dickson Elia Shapwata vs Republic**, Criminal Appeal No. 92 of 2007 (unreported). We are of the firm view that the highlighted inconsistencies are not minor because some of them go to the root of the evidence which led to conviction of the appellant and raise doubts to the story on what really transpired at the crime scene.

With regard to the complaints that the victim's age was not established found in the 3rd ground, this ground should not take much of our time because undoubtedly it is misconceived, since PW1, the father of the victim testified that the victim was then five years old. It is now settled that the victim's ages can be provided for by various people including the parents of the victim. In **George Claude Kasanda vs The Director of Public Prosecutions**, Criminal Appeal No.376 of 2017 (unreported) which cited with approval the decision in the case of **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported) where we stated that: -

> "*.... it is most desirable that the evidence as to the proof of age be given by the victim, relative, parent, medical practitioner or, where avallable, by the production of a birth certificate...*"

Whilst it is true that the charge sheet avers the age of the victim to be four years old, it should be borne in mind that the charge was admitted on the 2nd July, 2014 and when PW1 testified in court it was on 3rd February, 2015, that is seven months later. For the above reasons we hold that the 3rd ground lacks merit.

In the 4th ground we tackle complaints related to non-compliance with section 210(3) of the CPA with respect to recording of evidence of

PW6, PW7, PW8 and DW1. The learned State Attorney conceded to the defects shown but argued that they were minor and occasioned no injustice because despite this anomaly the appellant was not denied the right to cross-examine the respective witnesses. The grievance was neither raised nor dealt with by the first appellate court but the concern being a point of law, we proceed to consider and determine it. We have perused the record of appeal and indeed it shows that the trial court omitted to indicate compliance with requirements under section 210(3) of the CPA after recording the testimonies of PW6, PW7, PW8 and DW1. Having regard to the fact that the evidence of PW6 and PW8 had been expunged hereinabove, our deliberations on this issue will be confined to the evidence of PW7 and DW1.

There being no question that there was non-compliance of section 210(3) on the evidence of PW7 and DW1, the obtaining issue is the consequences thereto. Essentially, the said provision requires the trial magistrate to inform the respective witness's right to have his/her evidence read of over to him/her. In the case of **Jumanne Shaban Mrondo vs Republic**, Criminal Appeal No. 282 of 2010 (unreported), we also tackled non-compliance with the provision and adopted a decision of the High Court in **Richard Mebolokini vs Republic** [2000]

TLR 90 stating that, where the authenticity of the record is in issue, non-compliance with section 210 may prove fatal but where authenticity of the record is not in issue and no complaint by the appellant, the non-compliance is curable under section 388 of the CPA (see also **Flano Alfonce Maslau @Singu vs Republic**, Criminal Appeal No. 366 of 2018 (unreported).

In the instant case, the sanctity of the record is not in doubt. The record is silent on whether PW7 and the appellant (DW1) asked for their evidence to be read over to each of them, neither has the appellant specified any piece of evidence that might have not been recorded to impeach the record, and thus we are of the view that the appellant was not in any way prejudiced by non-compliance of section 210(3) of the CPA and the anomaly is curable under section 388 of the CPA.

In confronting the 6th ground of appeal we venture to evaluate the overall evidence presented in court against the appellant to gather whether it pointed to the guilt of the appellant without leaving any doubts. As stated hereinabove, the evidence of PW2 and PW3 warranted corroboration so as to sustain conviction. The first appellate court found the evidence of PW6 to have been corroborated by the evidence of PW2 and PW3 on the fact that the appellant had forced his penis into his

anus. In our particular case, having decided to expunge the evidence of PW6, we shall not deliberate any issue relating to his evidence. The evidence that remains that may corroborate the evidence of PW3 is that of PW1, PW2, D. 2180/DSgt Romanus, (PW4), Dr. Yohanne Nsamia Shila (PW5), Kongwa Ndege Ntiza (PW7) and Mayungo Lusho (PW8).

Undoubtedly, what PW1 was told by PW2 on what transpired at the crime scene can only be described as hearsay evidence and thus has no value. With regard to the evidence of PW1, our scrutiny of the judgment of the first appellate court shows that his evidence was found to corroborate that PW6 was sodomized. This assertion was based on the evidence that PW1 found PW6 at the crime scene under circumstances showing he was sodomized. Our analysis of PW1's evidence was of finding the victim in the bush crying after the incident. PW1's evidence does not name the person who sodomized the victim.

We are also of firm view that taking into account the evidence on record, the first appellate court's finding that the evidence of PW2 and PW3 corroborated that of PW6 was erroneous. This is because, the evidence of PW2 and PW3 was unsworn evidence of minors, that required corroboration and thus cannot corroborate other evidence that requires corroboration (See **Mkubwa Said Omar vs SMZ** [1992] TLR

365; **Jimmy Runangaza vs Republic**, Criminal Appeal No. 159B of 2017 (unreported). In the absence of independent and credible evidence to corroborate the said evidence, essentially, PW3's evidence remained uncorroborated and lacked evidential value and thus cannot be relied upon to sustain conviction against the appellant.

The evidence of Dr. Yohanne Nasamia Shila (PW5) expounds on his examination of the victim and his findings that the victim's anus had bruises caused by entrance of a soft instrument and tendering the PF3 which was admitted as Exhibit P2. His evidence established high probability of the victim having been sodomized but the culprit was not revealed. The evidence of PW4, related to the arrest of the appellant and recording the cautioned statement, which was admitted as exhibit P1, but expunged by the first appellate court.

On the part of PW8, the record of appeal revealed that his testimony was not given under oath or affirmation and therefore delimiting its evidential value as rightly conceded by the learned State Attorney, and his evidence was consequently expunged. PW7's evidence only relates from where the appellant was arrested, not being a witness to the commission of the charged offence and thus his evidence cannot corroborate on any aspect of the evidence of PW2 and PW3. Therefore,

the evidence of these witnesses remains uncorroborated leaving the prosecution case not proved to the standard required as rightly argued by the learned State Attorney. Therefore, this ground has merit.

In the upshot, we find no reason to proceed to determine the remaining two grounds of appeal that is the 5th and 8th grounds of appeal finding that for the foregoing reasons the appeal has merit.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence against the appellant. The appellant is to be released from prison unless held for other lawful cause.

DATED at **DAR ES SALAAM** this 17th day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 19th day of May, 2021, in the Presence of the Appellant in person and the absence of the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL