IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 416 OF 2018

HABIBU MTILLA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlyambina, J.)

dated the 8th day of November, 2018
in
Criminal Appeal No. 50 of 2018

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JUDGMENT OF THE COURT

23rd March & 30th July, 2021

MWARIJA, J.A.:

The appellant, Habibu Mtilda was charged in the District Court of Morogoro with unnatural offence contrary to s. 154 (1) (a) and (2) of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019). It was alleged that on 3/4/2017 at Mwanzo Mgumu area, within the District and Region of Morogoro, the appellant did have carnal knowledge of a boy child aged nine years. For the purpose of hinding the boy's identity, he shall be referred to by his initials of "G.D" or the victim.

The appellant denied the charge and as a result, the case proceeded to a full trial at which, while the prosecution called four witnesses, the appellant was the only witness for his defence. At the conclusion of the trial, the trial court found the appellant guilty. He was consequently convicted and sentenced to thirty (30) years imprisonment. Aggrieved by the decision of the trial court, he unsuccessfully appealed to the High Court hence this second appeal.

The facts leading to the appellant's arraignment and eventually his imprisonment may be briefly stated as follows: Until the date of the incident (on 3/4/2017), the appellant's mother and the victim were neighbours. The victim was living with his mother whose residence was opposite the house in which the appellant was residing. On the material date at about 20:00 hrs, the appellant who was sitting on the veranda of the house in which he was residing, called the victim and sent him to buy for him (the appellant) local liquior made of banana. He repeatedly sent the victim to buy other things. The last time he was sent to buy a matchbox at a nearby shop. When the victim returned from the shop, the appellant asked him to take the matchbox in the former's room. The victim did so and shortly thereafter, the appellant went into the room.

As both the appellant and the victim were in the room, one mama Sadick, who was also living in a neighouring house, became suspicious of the appellant's act of locking the door after he had followed the victim in the room. She therefore, informed another neighbour, one mama Nasri, of her suspicion and the said mama Nasri went to inform another neighbour, Fatuma Abdallah (PW3). Following that information, PW3 went with the said women to the appellant's residence where they found that the door to his room had been locked from inside.

According to her evidence, they looked through the window of the appellant's room and saw him lying on the back of a person whom she could not immediately identify. Together with the other women, she raised an alarm and a person referred to as Baba Nasri arrived at the scene. It was her further evidence that the said person knocked the door and the appellant opened it. She then saw the victim coming out crying while pulling up his short trousers. PW3 went on to state that, together with the other women, they took off the victim's short trousers and upon inspecting his private parts, she saw feces having spread around his anus. PW3 went on to testify that the appellant, who had been apprehended, was taken to the street chairman on the directions of the area's ten cell leader.

When she was cross-examined by the appellant, PW3 said that she was able to witness the appellant lying on the back of the victim because there was light from a lamp which was on the table in the appellant's room.

The prosecution relied also on the evidence of the victim, G.D and Mohamed Makunyaga (PW4). In his evidence, which was taken after the old procedure of *voire dire* test had been conducted on him, PW2 averred that on the material date, the appellant repeatedly sent him to buy different things and when for the last time, he returned from buying a matchbox, the appellant followed him in the room, pushed him on the bed, covered his mouth and had carnal knowledge of him against the order of nature. It was PW2's further evidence that, after the door of his room was opened, the appellant wanted to run away but he was apprehended and taken to the office of the street chairman.

On his part, Mohamed Makunyaga (PW4) who was at the material time a member of the street council, testified that on the material date while at his home, he saw the appellant being taken by a group of people to the office of the street chairman. As he was aware that the chairman was not present, he went to the office to attend those people. Having been informed of the incident and after having inspected the victim, he called the police. Shortly thereafter, he said, police officers arrived and took both

the appellant and PW2 to Morogoro police station where PW2 was issued with a PF3 and taken to hospital for medical examination.

The investigation of the case was conducted by Samwel Mlela (PW1) of Dawati la Jinsia na Watoto (the Gender and Children's Desk, Morogoro Central Police Station). He visited the scene of crime and drew a sketch map (exhibit P1) and later charged the appellant as shown above.

In his defence, the appellant did not deny that he was found in his room with PW2. He however, denied that he committed the offence charged. It was his evidence that, on the material date, he sent PW2 to buy, among other things, a matchbox which, after having brought it, he asked the victim to take it to the room. The appellant went on to state that, later he went into the room and called PW2 to show where he had put the matchbox. While he was with PW2 in the room, a group of people arrived and took him and PW2 to the office of the mtaa chairman where he was beaten. Thereafter, he said, the police arrived and took him to Morogoro Central Police Station.

In its judgment, the trial court found that the evidence of PW2 which was supported by that of PW3 and PW4 sufficiently proved the case against the appellant. It was of the view that, despite the absence of medical evidence, the evidence of PW2, whom it found to be credible, was

sufficient to found the appellant's conviction. The trial court relied on the provisions of s. 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] (now s. 127 (6) of Cap. 6 R.E. 2019) (the evidence Act). It also relied on the cases of **Prosper Mnjoera Kisa v. Republic**, Criminal Appeal No. 73 of 2003 and **Simon Mreta v. Republic**, Criminal Appeal No. 292 of 2015 (both unreported).

On appeal, the High Court (Mlyambina, J.) upheld the appellant's conviction and sentence. The learned first appellate Judge was of the opinion that the appellant, who was apprehended red handed with the victim who was half naked, was, on the basis of the evidence tendered by the prosecution, rightly found guilty of the offence charged. Relying on the case of **John Makolobela Kulwa Makolobelwa and Another v. Republic** [2002] T.L.R 296 in which the High Court restated the legal position as regards the burden of proof in criminal cases, the learned Judge held that in this case, the appellant's conviction was based on the strength of the prosecution evidence, not otherwise. Like the trial court, he found that, despite the absence of medical evidence, the fact that the victim was carnally known against the order of nature was proved by the evidence of PW2 and PW3 who were found by the trial court to be credible witnesses.

In his memorandum of appeal, the appellant has raised eight grounds of appeal. Before commencement of hearing however, he sought leave to raise an additional ground. But upon being probed on the gist of the ground which he intended to introduce he admitted that in effect, he intended to reiterate what he had raised in his 3rd ground of appeal. It is noteworthy to state also that in the course of hearing, the appellant conceded that the 6th ground was misconceived. He had contended on that ground, that the learned trial Resident Magistrate did not comply with s. 210 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (now R.E. 2019) (the CPA) which requires a magistrate to inform each witness that he has a right to require his evidence to be read out to him and if he so requires, the magistrate shall do so. The appellant agreed that, according to the record, that requirement was complied with.

With regard to the rest of the grounds of appeal, the same can be consolidated into the following six grounds:-

1. That the learned first appellate Judge erred in law and fact in failing to find that the prosecution had failed to prove the age of the victim of the offence.
2. That the learned first appellate Judge erred in law and fact in upholding the appellant's conviction while the evidence of the victim was unprocedurally taken.

3. That the learned first appellate Judge erred in law and fact in upholding the appellant's conviction while the trial court had relied on the testimony of the victim who did not identify the appellant in court. (dock identification).
4. That the learned first appellate Judge erred in upholding the trial court's finding to the effect that the appellant was carnally known against the order of nature while such finding was not supported by medical evidence.
5. That the learned first appellate Judge erred in law in failing to consider the appellant's defence.
6. That the learned first appellate Judge erred in law and fact in upholding the trial court's decision while the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Doroth Allan Massawe, learned Senior State Attorney assisted by Ms. Esther Chale, learned State Attorney.

When he was called upon to argue his appeal, the appellant opted to let the learned Senior State Attorney submit in reply to the grounds of appeal and thereafter make a rejoinder if the need to do so would arise.

In her reply submission, Ms. Massawe, who opposed the appeal, argued that the first ground above which subsumes the appellant's 1st and 2nd grounds of appeal, is devoid of merit. According to the learned Senior State Attorney, at the preliminary hearing of the case, it was not disputed that the victim was aged nine (9) years at the time of the incident and therefore, the contention that there was variance between the evidence and the charge is meritless.

With regard to the 2nd ground, that the first appellate court erred in upholding the appellant's conviction while the evidence of the victim was unprocedurally taken, Ms. Massawe argued that, although it is true that the evidence of PW2 was taken on oath after *voire dire* test, the procedure which was no longer applicable, the irregularity did not invalidate his evidence. On the 3rd ground, it was the learned State Attorney's reply that the issue on identification of the appellant did not arise because, first, he was known to the victim and secondly, the appellant was arrested in his room while with the victim.

As for the 4th ground, Ms. Massawe argued that, despite the absence of medical report, the fact that PW2 was molested was sufficiently proved by his evidence and the evidence of the witnesses who inspected him and found that he had feces spread on his private parts. On the fifth ground,

the learned Senior State Attorney submitted that, the appellant's complaint that his defence was not considered is incorrect. It was Ms. Massawe's argument that the learned first appellate Judge analysed the appellant's evidence at pages 67 and 68 of the record of appeal and found that the same did not raise any reasonable doubt in the prosecution case.

Finally, on the 6th ground, Ms. Massawe argued that, from the evidence of the prosecution witnesses, particularly PW2 and PW3, the appellant's conviction was well founded and therefore, the appeal lacks merit. She thus prayed that the appeal against the appellant's conviction be dismissed. With regard to the sentence which was imposed by the trial court and upheld by the first appellate court, the learned Senior State Attorney argued that the same contravened the provisions of s. 154 (2) of the Penal Code. She urged us to enhance the sentence to life imprisonment as provided by the law.

In rejoinder, the appellant did not have any response to make. He reiterated the contents of his grounds of appeal and urged us to allow his appeal.

We have duly considered the contents of the appellant's grounds of appeal and the submission made in reply thereto by the learned Senior State Attorney. To start with the 1st ground of appeal, we agree with Ms.

Massawe that during the preliminary hearing which was conducted in terms of s. 192 (1) – (5) of the CPA, the age of the victim was one of the facts which was undisputed. According to the memorandum of agreed facts which the appellant signed, that relevant part reads as follows:-

> *"The accused agreed to the fact that the victim is a boy aged 9 yrs residing near accused's home at Msamvu area."*

That being the case, under s. 192 (4) of the CPA, such fact did not require proof and therefore, this ground of appeal is devoid of merit.

The 2nd ground is based on the procedure which was applied by the trial court to receive the evidence of PW2. As correctly pointed out by the appellant, the trial court conducted *voire dire* test to PW2 before taking his evidence. It then proceeded to record his sworn evidence after a finding that he understood the nature of oath. That procedure ceased to be applicable after the amendment of s. 127 (2) of the Evidence Act by the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016. After the amendment, s. 127 (2) of the evidence Act now reads as follows:-

> *"127 (2) – (1) ...N/A*
> *(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before*

giving evidence, promise to tell the truth to the court and not to tell any lies."

From the wording of the new provision which has been reproduced above, a child of tender age is not barred from giving evidence on oath or affirmation. Apart from doing away with the requirement of conducting *voire dire*, in addition, the new section allows reception of evidence after a child witness has promised to tell the truth and after having undertaken not to tell any lies – see for instance, the cases of **Selemani Moses Sotel @ White v. Republic**, Criminal Appeal No. 385 of 2018 and **Bashiru Salum Sudi v. Republic**, Criminal Appeal No. 379 of 2018 (both unreported). In the latter case, the Court observed as follows:-

"It is true that her (PW1) evidence was received on affirmation after the trial court had conducted a voir dire test despite the fact that it is no longer a requirement. However, we are settled in our mind that the fact that the trial court determined PW1's ability to give evidence on oath or affirmation on the basis of the practice obtained under the repealed law, did not invalidate that evidence. This is because, as observed in ***Godfrey Wilson v. R*** *[Criminal Appeal No. 168 of 2018] and later is* ***Issa Salum Nambabuka v. R.*** *[Criminal Appeal No. 272 of 2018] (both unreported), the law is silent on the*

method of determining whether such child may be required to give evidence on oath or affirmation or not."

In this case therefore, even though the trial court received the evidence of PW1 after it had conducted a *voire dire* test on him, his evidence did not become invalid because, as stated above, the amendment did not have the effect of barring a child of tender age from giving evidence on oath or affirmation. The 2nd grounds of appeal is therefore, equally without merit.

As for the 3rd ground of appeal, the same need not detain us long. We agree with the learned Senior State Attorney that the issue whether or not the appellant was properly identified did not arise. He was arrested in his room while he was with the victim. The appellant did not dispute that fact either during the trial or in his defence. He only disputed the allegation that he sodomized him. We find therefore, that this ground of appeal is also devoid of merit.

In the 4th and 5th grounds of appeal, the appellant complains first, that the finding to the effect that he did have carnal knowledge of PW2 against the order of nature was not supported by medical evidence and secondly, that his defence was not considered by the first appellate Judge. To start with the 5th ground, the contention by the appellant that the first appellate court did not consider his defence is, as submitted by Ms.

Massawe, not correct. As pointed out above, in his defence the appellant did not deny that at the time when he was apprehended in his room, he was with the victim. He however, disputed the evidence made in support of the charge. That such was his line of defence, is stated by the High Court at page 65 of the record of appeal. Stressing that defence in his appeal before the High Court, he argued that the absence of medical evidence showing that the victim was carnally known against the order of nature, left the prosecution case unproved. At page 66 of the record of appeal, the learned first appellate Judge considered that complaint and found as follows:-

> *"Though Doctor never adduced evidence,* ***section 127 (8)*** *(sic)* ***of the Tanzania Evidence Act, 1967 as amended by Act No. 2*** *(sic)* ***of 2016*** *provides that the evidence of a victim in sexual offences is the best evidence, the victim is the best witness. So evidence of PW2 and PW3 suffices to convict the appellant."*

From the excerpt quoted above, it is not true that, in his judgment, the first appellate Judge did not consider the appellant's defence. It is actually the finding on the appellant's denial of the offence based on the absence of a medical evidence, that the appellant has raised the 4th ground of appeal, which we now turn to consider.

The main complaint in this ground is that the evidence of PW2, that he was carnally known by the appellant against the order of nature was insufficient because it lacked medical evidence corroborating PW2's testimony. The appellant is in effect, faulting the first appellate court for upholding the conviction which, according to him was founded on the evidence which is insufficient for lack of medical evidence showing that the victim was penetrated against the order of nature.

It is now trite position that in a sexual offence case, the only independent evidence of a victim of the offence, including a child of tender age, may be sufficient to prove penetration notwithstanding that such evidence is not corroborated. See for example, the case of **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported). In that case, the Court observed as follows:-

> *"...the appellant suggests that the prosecution ought to have proved penetration through medical evidence. With respect, whilst there may be cases where medical evidence is relied upon to establish the occurrence of rape, but as this Court has consistently stated, the best evidence in any given occurrence of rape is that of the victim.... In the present case, the most crucial witness was the victim (PW1) who categorically stated that the appellant penetrated her by inserting his manhood into*

the sexual organ. The appellant's demand is clearly a misapprehension which we accordingly reject."

In the case at hand, there is no dispute that the appellant was found in his room with the victim. The evidence of the victim that he was lured by the appellant to take a matchbox in his room where he thereafter followed the victim and forcefully had carnal knowledge of him against the order of nature was believed by the trial court. As stated above, the trial court considered the evidence of the victim and, in terms of s. 127 (6) of the Evidence Act and the case of **Selemani Makumba** (supra) found him to be a credible witness. In his evidence at page 18 of the record of appeal, PW2 states as follows:-

"He then told me to take the matchbox to his room. I did so. But suddenly he pushed me to the room and then forced me to his bed. He then closed my mouth and took out his ...penis and penetrated it to my anus."

The trial court also believed the evidence of PW3 to the effect that, when he looked into the appellant's room through the window, she saw the appellant on the bed lying on the back of another person and after the appellant had been compelled to open the door, she saw PW2 who got out of the room while pulling up his short trousers and after inspecting him,

she found that he had feces scattered over his private parts. The first appellate court upheld those findings of the trial court.

It is settled law that this Court is not entitled to interfere with that concurrent findings of two courts below unless such findings are unreasonable or where the same are based on misdirections or non-directions as regards the evidence – see for instance, the cases of **William Gerson v. Republic**, Criminal Appeal No. 69 of 2004, **Masumbuko Charles v. Republic**, Criminal Appeal No. 39 of 2000 (both unreported) and **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R 149.

Having duly considered the contents of the appellant's 4th ground of appeal, the reply submission made thereto by the learned Senior State Attorney and the position of the law as stated above, we are settled in our mind that there are no justifiable reasons for faulting those findings. This ground of appeal is therefore, also devoid of merit. For these reasons, we dismiss the 4th and 5th grounds of appeal for want of merit.

On the basis of the foregoing reasons, the appeal against conviction fails and we thus hereby dismiss it. With regard to the sentence, we agree with the learned Senior State Attorney that the same is illegal. Under s. 154 (2) of the Penal Code, the proper sentence for unnatural offence

committed against a child under the age of eighteen years, is life imprisonment. The sentence of thirty (30) years imposed on the appellant by the trial court and upheld by the first appellate court is therefore, set aside and substituted therewith, the sentence of life imprisonment as provided by the law.

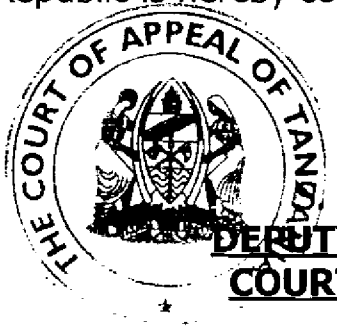
DATED at **DAR ES SALAAM** this 29th day of July, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 30th day of July, 2021 in the presence of the Appellant in person linked to the Court from Ukonga Prison by video conferencing facility and Ms. Deborah Mushi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL