IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., MAKUNGU, J.A. And MDEMU. J.A.)

CRIMINAL APPEAL NO. 435 OF 2020

ISSA SAID ISSA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Arusha at Arusha)

(Nkwabi, RM- Ext. Jur.)

dated the 26th day of February, 2020

in

Criminal Appeal No. 129 of 2020

JUDGMENT OF THE COURT

20th & 29th September, 2023

MAKUNGU, J.A.:

In Criminal Case No. 177 of 2017, before the District Court of Babati at Babati (the trial court), the appellant, Issa Said Issa was charged and convicted of three counts of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). He was sentenced to life imprisonment on the first count and thirty (30) years for each second and third counts.

It was alleged before the trial court that on diverse dates between February, 2017 and 22nd September, 2017; 3rd February, 2017 and 19th

September, 2017; and between February 2017 and 4th September, 2017 at Nangara area within the District of Babati in Manyara Region, the appellant did have carnal knowledge against the order of nature of a seven (7) years old boy who testified during the trial as PW2, a ten (10) years old boy who testified during the trial as PW3 and a fourteen (14) years old boy who testified as PW4 whom we shall maintain reference to them as " PW2", "PW3" and "PW4" or " the victims" in order to conceal their identities.

As above said, after the conviction, the appellant was sentenced to thirty years imprisonment for each second and third counts. If we may pause here a little, we note that, the sentence imposed by the trial court and confirmed by the first appellate court is illegal.

Where conviction is properly grounded on the offence of unnatural offence against a child under the age of eighteen (18), the punishment under section 154 (2) of the Penal Code, is life imprisonment. Since in the instant case the victims were under eighteen years old then the proper sentence which ought to have been imposed is life imprisonment for each count.

The appellant's first appeal against conviction and sentence was dismissed by Nkwabi, RM-extended jurisdiction sitting at Arusha. He is

now before the Court in a second and final appeal in a bid to vindicate his innocence.

The tale behind the commission of the charged offence is somewhat awkward. The appellant and the victims stayed in a house at a place called Nangara Ziwani, Babati District, Manyara Region. The victims' father (PW1), stayed in the said house with his family which included his wife one Hawa Abidena and victims. It is PW1 revelation that the appellant was employed by him since 2014 to take care of cattle and used to share the same room with the victims.

The prosecution's accusations were that the appellant seized the moment to spend nights in that room to sodomise the victims and thereafter warned them not to disclose the ordeal to anybody lest they risked death. According to PW1, it was not until 22/09/2017 when he saw PW2 walks with a limp and asked him on the problem. PW2 replied that during night the appellant sodomised him. Following that, PW1 called his neighbours one Elifuraha Mollel and Mkoloni and questioned the victims who admitted that the appellant used to penetrate them against their order of nature. They summoned the appellant and asked on the matter but he strongly denied.

Prior to the appellant's arraignment, PW1 had taken the victims to Babati Town Hospital for medical examination after obtaining a PF3 from Babati District Police station. Dr. Bernadina Edward Mitatana (PW5) who examined the victims, made her findings which she posted in the PF3 (Exhibit P1) revealing relaxed sphincter muscles which suggested penetration. PW5 testified as such during the trial.

In his defence, the appellant did not dispute the fact that he and the victims slept in the same room but denied having sodomised them. He associated his arrest and arraignment with grudges PW1 had against his salary claims.

The trial court found the prosecution evidence proved the case on the required standard. It did so on the basis of the testimonies of the victims which it found to be sufficient to prove the case relying on the principle in **Selemani Makumba v. R.** [2006] TLR 379. Besides, the trial court found that the victims' evidence was self-sufficient, PW5's evidence corroborated the victims with regard to penetration; an essential ingredient in sexual offences. At the end of it all, the trial court convicted the appellant as charged and sentenced him as stated above.

The record shows that the appellant had preferred 9 grounds of appeal before the first appellate court punching holes in the trial court's

judgment on various areas of complaint ranging from procedural errors to evidential ones but none of them found purchase with the first appellate court resulting into the impugned judgment. The first appellate court concurred with the trial court on findings of fact on both proof of penetration and the fact that the appellant was responsible for the awful act, hence this appeal.

The appellant seeks to impugn the decision of the first appellate court on 11 grounds of appeal in the memorandum of appeal lodged earlier.

At the hearing of the appeal, the appellant, who was self-represented, presented his written arguments in Kiswahili amplifying his grounds of appeal. He stood by his grounds of appeal which he urged the Court to find meritorious enough to allow the appeal. He had nothing in elaboration reserving the right to rejoin after hearing submissions from the respondent Republic should that be necessary. However, he abandoned his rejoinder.

Appearing for the respondent Republic, Ms. Lilian Kowero, Ms. Naomi Mollel and Ms. Donata Kazungu, all learned State Attorneys, appeared resisting the appeal. It was Ms. Kowero who took the floor presenting her submissions in reply for the respondent.

Essentially, out of the grounds raised before the Court, only nine of them featured before the first appellate court and determined as such. The rest are new, which can only be considered if they are on point of law in terms of section 6 (7) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019]. It is for this reason, Ms. Kowero urged the Court to refrain from entertaining those grounds. The learned State Attorney singled out grounds 4 and 5 for failure to meet the threshold of grounds worth the Court's consideration and determination.

We respectfully agree with the learned State Attorney guided by various Court's previous decisions, notably; **Galus Kisaya v. R.,** Criminal Appeal No. 196 of 2015 and **Mathias Bundala @ Swaga v. R,** Criminal Appeal No. 386 of 2015 (both unreported).

Consequently, we are constrained to reject ground 4 in relation to the complain on the contradiction and in consistence evidence of the prosecution. We shall likewise decline entertaining ground 5 complaining against the failure of the victims to disclose the crime earlier. Both complaints do not meet the threshold of grounds to be determined by the Court on a second appeal as it were. We thus endorse the submissions by Ms. Kowero and reject the two grounds.

Similarly, we do not think the issue of notice of appeal can be brought up. In the eleventh ground of appeal the complaint is that the notice of appeal was defective and the appellant prays to be allowed to lodge a fresh notice of appeal out of time. Ms. Kowero pointed out that the notice of appeal was lodged 7 days after the judgment, therefore it was within time. We go along with her that the record of appeal shows that the notice of appeal was filed within time. We therefore dismiss this ground of appeal.

We propose to begin our discussion with grounds touching on procedural errors in the conduct of the trial before the trial court. The first of such errors relates to the evidence of PW2 and PW3 that was taken contrary section 127 (2) of the Tanzania Evidence Act, Cap. 6 R.E. 2019 (TEA). This was the applicant's complaint in ground one. The appellant submitted on this ground quite impressive in his written arguments, pointing out that the law requires a witness of tender age to make a promise to tale the truth. Ms. Kowero submitted in support of argument that the witnesses did not promise to tell the truth as shown in the record of appeal. However, she invited us not to disregard their evidence based on our decision in **Wambura Kiginga v. The Republic,** Criminal Appeal No. 301 of 2018 (unreported). She urged us

to examine and see whether the said witnesses told the truth and not lies in compliance with subsection (2) of section 127 of TEA. The learned State Attorney contended that the core function of courts is to ensure that justice is done before them, not only to the accused but also to the victim of crime in particular the victim of illicit sexual torture. Based on that argument she urged us to treat the non-compliance not fatal and their evidence may be considered.

The main question for our determination here is whether the two courts below were correct in relying on evidence of the two witnesses to conclude that it is the appellant who sodomised them. This takes us to the manner in which those witnesses, being 7 and 10 years old at the time of testifying, were made to pass out as competent witnesses. Section 127 (2) of TEA is very clear that, a person of tender age may testify without oath, but all what such a witness needs to do is to promise to tell the truth and not to tell lies. Was that procedure followed in this case?

With profound respect, the procedure adopted by the learned trial magistrate in this case was totally different and strange. Here is what happened:

"PW2 . . . . . 7 years, student, standard 1, Babati, Chagga, muslim.

Court: *The witness was well interrogated by this court, after interrogation the witness, I am satisfied that he understands the duty of telling truth and he is capable of testifying in court, his evidence is therefore recorded without oath due to his age. And since the witness is a victim to sexual offences his evidence is recorded in camera."*

Similarly, in recording the evidence of PW3 the court had this:

" PW3: 10 years, Nangara, Chagga, student std. 4, muslim.

Court: *After interrogation of the witness, I am satisfied that he understands the duty to tell the truth and he is capable of testifying [to this] court, thus his evidence is therefore recorded without oath due to his age. And since the witness is a victim of sexual offence, his evidence is recorded in camera."*

That procedure conforms to neither the old position of the law, nor the present procedure. We gather that the trial magistrate was obviously trying, without conducting a *voire dire,* to get the witness make his promise to tell the truth. Unfortunately, the learned trial

magistrate surrendered to himself, the duty of ascertaining PW2 and PW3's competence to testify, and that is not what the law mandates.

We think even after doing away with the requirement of conducting a *voire dire* examination, trial magistrates retain the duty of assessing the witnesses of tender age before they allow them to testify with or without oath. In the case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported) we issued some guidelines. These guidelines have been subsequently followed, such as in **Selemani Bakari Makota @ Mpale v. Republic,** Criminal Appeal No. 269 of 2018; **Issa Salum Nambaluka v. Republic,** Criminal Appeal No. 272 of 2018 and; **Medson Manga v. Republic,** Criminal Appeal No. 259 of 2019 (all unreported). In all these cases we made it clear that in the absence of a promise to tell the truth and not to tell lies, the testimony of a child of tender age is of no evidential value.

We think the learned State Attorney's reference to the case of **Wambura Kigingi** (supra) is not helpful because the circumstances of that case is different to our present case. In that case the trial court relied on the victim's evidence alone to prove the offence but in this case there are other evidence to prove that offences. That decision cannot be of any avail to the respondent.

In the instant case, as we have amply demonstrated above, PW2 and PW3's evidence was taken in contravention of section 127 (2) of TEA. That being the case, the said evidence is valueless and it is accordingly discounted. In the event, we find the first ground of appeal to be meritorious and we accordingly sustain it.

Grounds two and three raise issues of admission of PF3 report (exhibit P1) and the appellant's cautioned statement (exhibit P2) that both were wrongly admitted by the trial court. He invites the Court to expunge them. Ms. Kowero submitted in support of the appellant's argument that the exhibits were not read out and wrongly admitted in the trial court and invited us to disregard them. However, on exhibit P1, she maintained that the oral evidence of PW5 is intact and should be considered. With respect, we agree with the learned State Attorney that the appellant's complaint in these grounds has merit. This is the settled law which we have had occasion of reiterating in many of our previous decisions. The Court in **Shabani Hussein Makora v. Republic,** Criminal Appeal No. 287 of 2019 (unreported), held that: -

> *"It is settled law that, whenever it is intended to introduce any document in evidence, it should be admitted before it can be read out. Failure to read out documentary exhibits is fatai as it*

denies an accused person opportunity to knowing or understanding the contents of the exhibit because each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision."

In view of that position of law, the two exhibits deserve to be expunged from the record, as we do. Thus, this complaint has merit.

On ground 7 of the appeal, the appellant attacks the prosecution for its failure to call some material witnesses. He mentioned the victims' mother, Elifuraha Mollel and one Mkoloni who were material witnesses but they were not called and the lower courts failed to draw an adverse inference on such failure. The learned State Attorney agreed with the reasons given by the first appellate court that these witnesses were not material witnesses in this case because they had nothing new to offer. We think this complaint has no place since there is no missing link of evidence which was required to be proved by the victims' mother or the said other witnesses. We have also had in mind the principle that the prosecution is at liberty to choose its witness for the particular case. The ground is dismissed.

In ground 9 of appeal the appellant claimed that his defence was not properly evaluated and considered. Ms. Kowero submitted that the lower courts did consider the appellant's defence as it should have done. She invited us to hold that the appellant's defence did not raise any reasonable doubt in the prosecution case. We respectfully agree. All that he said in defence related to the alleged grudges with PW1 on his salary. Upon our own evaluation of the evidence on record, we are of the view that, granted, there were any grudges as claimed, the prosecution's case was not shaken in any manner. We dismiss this ground.

We now turn our attention to grounds six, eight and ten argued conjointly by the learned State Attorney. These grounds raise a general complaint that the case for the prosecution was not proved to the required standard.

Ms. Kowero urged the Court to dismiss these grounds for being baseless. She submitted that the charge against the appellant was proved beyond reasonable doubt by the victims, PW1 and PW5. She invited us to find the case against the appellant was proved to the required standard.

The appellant was charged with unnatural offence, the prosecution was bound to prove penetration into the victims' anus, their age and the culprit who was responsible for it. According to the evidence on record, the prosecution proved all to the required standard through the evidence of PW4 one of the victims and PW5 having discounted the evidence of PW2 and PW3 from the record. Both the trial and first appellate court concurred in their findings of fact that the ingredients necessary to prove penetration were proved against the appellant. In doing so, the two courts below relied on the evidence of the victims of the offence whom they found to be truthful guided by **Selemani Makumba v. R.** (supra). Besides, the two courts below concurred in finding that penetration was proved through the evidence of PW5; a doctor who examined the victims and found their sphincter muscles relaxed suggesting penetration into their anus. As to the person responsible, there was no dispute that it was the appellant who sodomised the victims continuously during the nights hours he slept with them in the same room and so the issue of mistaken identity could not have arisen.

The upshot of the foregoing is that, we are satisfied that the case against the appellant was proved to the required standard; proof beyond

reasonable doubt which disposes of grounds six, eight and ten against the appellant. As for the sentence, as stated above, it shall also be that of life imprisonment for the second and third counts.

In conclusion, we find no merit in the appeal and dismiss it as we hereby do.

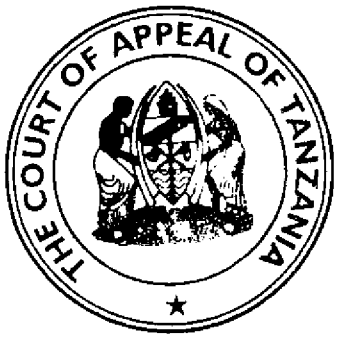
DATED at **ARUSHA** this 26th day of September, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The judgment delivered this 29th day of September, 2023 in the presence of the appellant in person and Ms. Adelaide Kassala, learned Principal State Attorney for the respondent Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL