IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., MAIGE, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 17 OF 2021

CHARLES MELKIORY MSELE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Robert. J)

dated 11th day of September, 2020

in

Criminal Appeal No. 105 of 2019

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JUDGMENT OF THE COURT

8th & 19th December, 2023

MASOUD, J.A.:

Before the District court of Babati, at Babati, the appellant was charged of unnatural offence contrary to section 154(1)(a) of the Penal Code, Cap 16 R.E 2020. The appellant's arraignment was a result of allegation that on 28th September, 2018, he carnally known a boy, then aged 11 years, and a standard five pupil at the Rift Valley Medium Primary School, against the order of nature.

Pursuant to the record of appeal before us, the incident occurred when the victim (PW2) was directed by the appellant (DW1), then a headteacher of the school, to go and wait for him at one of the school's dormitories of which he complied. Subsequently at the dormitory, the appellant turned up, examined the boy's anus after undressing him, dressed him up, closed up the windows and the door, undressed PW2 once again, and carnally known him against the order of nature by inserting his penis into the boy's anus having first smeared some oil, which he carried with him, on his anus. The remains of the oil in the plastic/nylon packet were found at and seized from the scene.

Later, on the same day of 28th September, 2018, whilst at home, the victim (PW2) narrated to his mother, one, Sylivia William (PW1), the ordeal that he went through, naming the appellant as culprit and how he carnally known him at school. Her mother reported the incident to the police. As a result, the victim was medically examined on 28th September, 2018.

Thereafter, on 29th September, 2018, the victim (PW2) in the presence of PW2, SSP Hamisi Fusi (PW3), Duddy Wilfred, Headmaster, Rift Valley Secondary School (PW7) and one, E 6749 DCPL Donald (PW8) identified the appellant, and the scene of crime at school as was the

appellant's office. In the process, some items collected from the appellant's office and the dormitory namely, oil plastic/nylon, a nylon containing some groundnuts were seized (Exhibit P3) and a certificate of seizure was signed and issued (Exhibit P2).

At the trial, the prosecution led evidence through its nine (9) witnesses in her bid to prove the charge laid against the appellant beyond any reasonable doubt. On the other hand, the appellant had himself as defence witness, who testified as DW1 and Ms. Mwajuma Mussa Amir, a teacher at the school, who testified as DW2.

The substance of the prosecution case was characterized by the evidence of the above-named witnesses and three others who included the victim's fellow pupils, aged 13 years (PW4), and 10 years (PW5) respectively, and Bernadina Edward (PW6), a medical doctor who examined the victim and tendered PF3 (Exhibit P4).

The hallmark of the entire evidence of the prosecution was hinged on, where, when, and how the victim, a day pupil at the school, was carnally known by the appellant against the order of nature; the fact that the victim was then aged 11 years, when he was allegedly carnally known by the appellant; the fact that the appellant was then his headteacher;

how the appellant ensured the victim gets into the dormitory and waits for him; how the victim complied with the appellant's directive and went to the dormitory to wait for the appellant; and the details given by the victims as to how the appellant committed the offence using oil to facilitate penetration of his penis into the victim's anus; the pains the victim felt thereafter and as a result he had to sleep for a while in the dormitory; the conducts of the appellant towards the victim after the incident; and items that were seized from the appellant's office and the crime scene.

Apart from the above, the evidence of the medical doctor (PW6) who examined the victim on 28th September, 2018, confirmed that the victim was indeed penetrated into his anus by a blunt object. The evidence established that the victim had bruises, inflammatory and a fresh wound caused by the blunt object. PW6 tendered PF3 in support of the examination he conducted which was admitted as Exhibit P3. The evidence linked with the testimony of PW2, who immediately after the incident, narrated the ordeal to his mother (PW1). The victim's mother on the same day, reported the incident to the police and as a result, the victim was medically examined as foresaid.

On the other hand, the gist of the defence evidence which came from the appellant himself (DW1) and DW2 was characterized by a general denial. It was to the effect that the appellant felt unwell at school at around 11:45 hrs on the fateful day, had to be given some medicine by DW2, and had, thereafter, to obtain a permit and left for home, leaving his responsibilities to DW2.

Having heard the evidence, the trial court was satisfied that the prosecution proved the charge levelled against the appellant beyond reasonable doubt. It thus convicted the appellant of the offence and sentenced him to life imprisonment, with four strokes of a cane to be inflicted to his buttocks and further ordered to compensate the victim of crime to the tune of three Million Shillings (TZS 3,000,000/-).

Dissatisfied, the appellant appealed in vain to the High Court. The first appellate court after reappraisal of the evidence in line with all grounds of appeal raised, was satisfied that the prosecution substantiated the case without leaving any reasonable doubt. It therefore held that the trial court was right in convicting the appellant of the offence and sentencing him to life imprisonment. It thus upheld the conviction and sentence and dismissed the appellant's appeal in its entirety.

Still aggrieved, the appellant appealed to this Court. From his memorandum of appeal and supplementary grounds, there were a total of twelve grounds of complaints.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent/Republic had the services of Ms. Janeth Sekule, Senior State Attorney, Ms. Amina Kiango, Senior State Attorney, Mr. Charles Kagirwa, Senior State Attorney, and Ms. Tusaje Samwel, State Attorney.

When the appellant was given opportunity to elaborate on the grounds, he elected to argue only the fifth ground from the original memorandum and five supplementary grounds. In his submission, he wanted us to interfere with the concurrent finding of the two lower courts. Ms. Amina Kiango, learned Senior State Attorney replied to the appellant's submission, supporting the concurrent finding of the two lower courts. She submitted that there was nothing entitling us to interfere with such finding.

Indeed, since there is in this appeal, a concurrent finding of facts of the two lower courts as to inculpability of the appellant, the issue as to whether this is a fit case to interfere with such finding is our primary

preoccupation in determining the appeal. See, **Noel Gurth aka Bainth and Another v R**, Criminal Appeal No. 339 of 2013 (unreported), and **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149). We would thus inquire into whether the appellant in his submission demonstrated any mis-direction or non-direction on the evidence, or a miscarriage of justice or violation of some principle of law or practice entitling us to interfere with the concurrent finding.

Having heard the rival oral submissions of both parties, we were contented that the appellant's grounds of appeal which were argued boiled down to three major grounds of grievances, built on a number of points of complaints. The major grounds of grievances are, **first**, irregularity of the proceedings that led to the appellant's conviction and sentence; **second**, the prosecution case was not proved beyond reasonable doubt; and **third**, the trial court had no jurisdiction to sentence him for life imprisonment.

On the first ground of grievance, we understood that the appellant challenges the conviction and sentence on the reason that there were fatal irregularities in the trial proceedings. Firstly, he argued that there was a delay of ten (10) days in taking him to court for trial which caused injustice on his part. Secondly, he assailed the charge sheet with which

he was convicted and sentenced. According to him, since the charge did not cite section 154(2) of the Penal Code which provides for the punishment for unnatural offence, it was defective. See, **Godfrey Simon and Another v Republic**, Criminal Appeal No. 296 of 2018 (unreported). The other irregularity complained about by the appellant was that the defence witnesses were not cross-examined, hence denial of fair hearing. With the above submission, the appellant urged us to quash his conviction, set aside the sentence and set him free.

Ms. Amina Kiango, learned State Attorney, responding to the submission on the first point of grievance, argued that the allegation of delay in taking him to court for trial after being arrested is an afterthought, for it was not raised by the appellant at the trial court and therefore, not determined by the trial court. This Court, she argued, is not competent to determine it. She cemented her argument by referring us to the case of **Gabriel Lucas v. Republic**, Criminal Appeal No. 557 of 2017 (unreported).

We agree with Ms Kiango that the record of appeal before us shows that the issue was neither raised in the trial court nor in the first appellate court. As we held in **Gabriel Lucas v. Republic** (supra), such complaint is not only an afterthought but also implausible. In so far as it was not

raised and determined by the trial court and again not raised in the first appellate court, we cannot deal with it at this state. In any case, we do not think the delay if any, occasioned injustice that would vitiate the trial. See also, **Jafari Salum Kikoti v. Republic**, Criminal Appeal No. 370 of 2017 (unreported).

As to the allegation of defective charge sheet, the learned State Attorney submitted in reply that the argument that the charge with which the appellant was convicted and sentenced was defective because of non-citation of the provision punishment is misplaced and should be dismissed because sections 132 and 135 of the Criminal Procedure Act, [Cap. 20 R.E 2020] (CPA) which provides for drafting of a charge does not require punishment section to be cited. He relied on our recent decision in **Abdul Mohamed Namwanga @ Madodo v. Republic**, Criminal Appeal No. 257 of 2020 (unreported) on the point at issue to fortify her submission. In that case, this court fully considered the provisions of sections 132 and 135 and held at pages 11 up to 12 of the typed judgment that:

> *....The statement of offence in every charge or information must describe the offence concerned in ordinary language and, if offence charged is one created by enactment, it must contain a reference to the section of enactment creating the offence.*

Undoubtedly, there is no mention of a reference to the punishment provision. It seems to us that if the legislature had intended to impose the obligation to indicate in the statement of offence the applicable provision along with the provision of the law creating the offence charged, it would have stated so in express terms.

.....It is not fortuitous but deliberate that forms of charges or informations set out in the Second Schedule to the CPA, prescribed under section 135(a)(i) above, to be used as models for drawing up charges or informations, do not cite in their respective statements of offence the applicable penalty provision along with the section creating the charged offence.

On our party, we were fortified by the record that the charge with which the appellant was convicted and sentenced did not cite the punishment section. Since citing of a punishment provision in a charge is not a requirement of sections 132 and 135 of the Penal Code, we are in agreement with the submission of the learned Senior State Attorney that the failure to cite section 155(2) of the Penal Code was in this case not a violation of law and was therefore, not fatal. Even if it were, it would still have been curable under section 388 of the Criminal Procedure Act, [Cap.20 R.E 2020], as we so maintained in **Abdul Mohamed**

Namwanga (supra). We thus hold that the point of complaint is not meritorious. It is dismissed.

As to the claim that the appellant's witnesses were not heard as they were not cross-examined, Ms. Kiango had it that the claim is misplaced if we were to go by the record. She demonstrated, rightly so, that the contents of the record from page 41 up to page 43 of the record of appeal clearly show that the appellant not only gave evidence as DW1, and called DW2 as his witness, but also, they were all fully cross-examined. We find it safe herein to add that in the end, the defence evidence was also sufficiently considered as is evident on the record. We are thus in agreement with Ms. Kiango that the claim is misconceived and has to be dismissed as we hereby do so.

On the second ground of grievance, the appellant alleged that the second appellate court failed to find that the prosecution did not prove the charge laid against him beyond reasonable doubt. In the first place, he attacked the evidence of PW2 and PW4 which, in his view, is valueless and ought to be expunged for being received in contravention of section 127(2) of the Evidence Act, [Cap. 6 R.E 2020]. He relied on **John Mkorongo v. Republic**, Criminal Appeal No. 498 of 2020, and **Hamim Yunusu v. Republic, Criminal Appeal** No. 293 of 2019. In the second

place, referring to the evidence of the prosecution witnesses, particularly, PW1, PW2, PW3 and PW6 argued that the witnesses gave contradictory evidence on the place where the offence was committed, items that were seized from the office and the dormitory, and how the victim, being a male, was allegedly penetrated. In the third place, referring again to the evidence of PW2, the appellant argued that the evidence ought not to be relied upon due the victim's failure to name the appellant at earliest possible opportunity.

In respect of the above, we understood the appellant as arguing that once such witnesses are discredited, there will be no sufficient evidence left to ground the conviction and sentence. He cited, among others, **Majaliwa Ihemo v. Republic**, Criminal Appeal No. 197 of 2020; **Abiola Mohamed@Simba v. Republic**, Criminal Appeal No. 291 of 2017; and **Shabani Gervas v. Republic**, Criminal Appeal No. 457 of 2019 all unreported.

In reply, Ms. Kiango submitted, rightly in our view, that the evidence of PW1 and PW4 were, taken in accordance with section 127(2) of the Evidence Act. Referring us to pages 14 and 25 of the record, the learned State Attorney pinpointed that the three child witnesses, then aged 11 years, 13 years, and 10 years, respectively, testified after promising to tell

the truth which is in compliance with the law. That is, in our scrutiny of the record, indeed, the position apparent on the record of appeal.

Ms. Kiango went further to cite in reliance the case of **Mathayo Laurance William Mollel v. Republic**, Criminal Appeal No. 53 of 2020, while also arguing, rightly so, against the misconceived claim of the failure of the trial court to conduct a test to verify whether the child witnesses knew and understood the meaning of oath or affirmation which, would only be necessary if the child witnesses gave evidence under oath or affirmation. We agree with Ms. Kiango that the requirement of the test does not apply as PW2, PW4 and PW5 testified after promising to tell the truth.

If we may add, the position we took in **Mathayo Laurence William Mollel** (supra), that promising to tell the truth would necessarily mean not to tell lies applies in the instant matter to render the promise given by PW2, PW4 and PW5 not to be held incomplete. We so hold because unlike in other cases, there is in the instant case, a promise from each of the witnesses. In the end, we find the complaint on violation of section 127(2) of the Evidence Act, devoid of merit.

With regard to the alleged contradictory evidence given by the prosecution witnesses, Ms. Kiango refuted the complaint. She argued that the evidence of PW1 did not contradict the evidence of PW2 as to the place where the incident occurred. He argued that, reading the evidence of PW1 as a whole, it is plain that it pointed to the fact that the crime scene mentioned to PW1 by PW2 was the dormitory which the victim (PW2) also identified in the presence of PW1, PW3, PW7, PW8 and the appellant. She also dismissed the claim that the victim did not name the appellant at the earliest opportunity possible.

In fortification, the learned Senior State Attorney, pointed out that the evidence of the victim (PW2) by itself was firm that the scene of crime was at the dormitory and not the office, although he was at some point in time called to the appellant's office as the appellant was insisting him to avail himself at the dormitory as directed.

Furthermore, as to the alleged contradiction in naming the seized items, Ms. Kiango, simply, argued that if any, they were trivial due to lapse of time. The same was to the alleged contradiction between PW2 who is recorded to have testified to have been penetrated into his vagina and not his anus, contrary to the evidence of PW6 and the PF3 (Exhibit P4).

Having given due consideration to the record in the light of the rival submissions on the alleged contradictions, we wondered as to whether there were indeed such contradictions and if so, whether they were material as to go to the root of the prosecution case. The substance of the evidence of the witnesses, characterized by the evidence of the victim (PW2), who named the appellant as the culprit on very same fateful day, rules out the allegation of presence of material discrepancies and delays in naming the appellant. If at all there were any discrepancies, they were minor and on the details which could not affect the prosecution case. See for instance, **Marmo Slaa Hofu and Others v. Republic**, Criminal Appeal No. 246 of 2011 (unreported) and **Mohamed Said Matula v. Republic** [1995] T.L.R 3, and **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported).

It is, for instance, a fact that the incident occurred at the school, and that before the victim went to the dormitory, he was called by the appellant in his office as the appellant was reminding and warning the victim to avail himself at the dormitory as directed. Again, it was a fact, which was not disputed that, the victim narrated the ordeal to his mother (PW1) on very same day. As to the items that were seized, there were no discrepancies at all rather variations in giving descriptions of the same

items if we look at the evidence of the items as whole, which is again, fortified by the certificate of seizure (Exhibit P2) admitted by the trial court without any objection from the appellant. Indeed, Exhibit P2 itemised the items that were seized from the scene of crime which are not distinct in any way from what emerged from the evidence of the victim. For the above reasons, we find and hold that, the complaint on contradictions is not well founded. In all, we equally find that the ground of grievance that the charge was not proved beyond reasonable doubt, is unfounded and is herein dismissed.

We are herein left with the last ground of grievance which seek to fault the second appellate court for failing to find that the trial court had no jurisdiction in terms of the provision of section 170(2) of the CPA to sentence the appellant to life imprisonment after convicting him of the offence as charged. We will not be detained much in determining the grievance. It is not in dispute that the appellant was charged with and convicted of unnatural offence contrary to section 154(1)(a) of the Penal Code, whose punishment is, under section 154(2) of the said Code, life imprisonment. It, therefore, follows that the offence with which the appellant was charged and convicted of is a scheduled offence which

means that the trial court had jurisdiction to sentence the appellant as he rightly did. The ground is equally dismissed.

Finally, as we did not find anything entitling us to interfere with the concurrent findings of the two lower courts based on the grounds of grievances raised and argued as shown herein above, we find the appeal devoid of merit. We dismiss it in its entirety.

DATED at **ARUSHA** this 15th day of December, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 19th day of December, 2023 via video conference from High Court Arusha in the presence of the appellant in person and Mr. Stanslaus Halawe, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL