IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A, MAIGE, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 376 OF 2020

SAFINATI SIMON NDEKOYA @ MDOKA .....APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mwenempazi, J.)

dated the 10th day of August, 2020

in

DC. Criminal Appeal No. 46 of 2019

JUDGMENT OF THE COURT

12th & 21st March, 2024

MWANDAMBO, J.A.:

The appellant Safinati s/o Simon Ndekoya @ Mdoka was convicted of unnatural offence and sentenced to life imprisonment before the District Court of Rombo. His appeal before the High Court sitting at Moshi was not successful. Undaunted, the appellant has preferred the instant appeal protesting his innocence.

The trial and conviction of the appellant resulted from facts which are not too difficult to tell. On 20 November, 2017 at about 18:30 hours the victim, whose name is concealed to be referred to as BA or PW1

sneaked unnoticed from home following his brother going by the name of Baraka who had been sent by the parents to collect milk from a neighbouring house. On the way, PW1 met a person going by the name of Mdoka who is said to have lured him to accompany him to his home to be given money. Instead of being given money, the victim was promised rice and thereafter, the appellant took him to a farm where he is said to have taken off his clothes before undressing himself and inserted his penis on the victim's anus. Thereafter, the victim was given the rice before being escorted back home late in the night. According to PW1, before doing the awful act, the appellant applied some oil on his anus despite which, he felt a pains as it was his first time to experience the ordeal. Upon return home around 23:00 hours, he disclosed to his parents what had transpired to him in the hands of the appellant.

According to PW4 Antigon Medad (the victim's father), the victim was trembling, exhausted and smelling bad. Within moments, PW4 had the victim undressed in the presence of PW3 Jesca Antigon, the victim's mother only to find some liquids on his back. A little later, PW1 led PW4 to a house he was alleged to have been sodomized which turned out to be of the appellant; a person familiar to PW4. Subsequently, PW4 took the victim to a Village Executive Officer (VEO). Upon the advice of the

VEO, PW4 proceeded to the police with PW1 where they obtained a PF3 before going to Hospital for medical examination. At Huruma Hospital, Dr. Wilbroad Kyejo (PW2) examined the victim at 06:00 a.m. on 21 November, 2017 and found some bruises on the victim's anus with loose sphincter muscles and open anus. He concluded that the boy had been penetrated. After the examination, PW2 posted his findings in a PF3 which was admitted in evidence as exhibit P1.

The appellant pleaded not guilty to the charge which triggered in a trial involving four prosecution witnesses including the victim who gave a sworn testimony. In his defence, the appellant distanced himself from the accusations maintaining that he did not leave his house on the material date. He attributed his arrest to a dispute with PW4 for his unpaid labour charges in his farm.

At the conclusion of the hearing, the trial court found the prosecution evidence watertight and proved the case beyond reasonable doubt. It convicted and sentenced the appellant. Before the first appellate court on his first appeal, the appellant faulted his conviction and sentence on 5 grounds of appeal but in vain. Despite sustaining ground 3 faulting the trial court for the relying on a PF3 which was

irregularly admitted, the learned first appellate judge found no merit in the appeal and dismissed it.

Before us, the appellant is faulting the concurrent findings of fact by the two courts below on 11 grounds; 6 in the memorandum of appeal and 5 in the supplementary memorandum. At the hearing of the appeal, the appellant appeared in person, unrepresented. Before addressing the Court on his grounds, he was granted leave to present a document titled "Appellants written submission" which, in effect, is equivalent to a statement of arguments in support of the appeal filed in pursuance of rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Although the appeal is predicated upon 11 grounds, the appellant's statement of written arguments refers to 6 grounds of appeal out of which, the appellant singled out two areas of complaint. These are: non- compliance with section 127 (2) of the Evidence Act and variance between the charge and evidence as to the name of the victim and time of the commission of the offence. Nevertheless, in order to accord the appeal its fair treatment, interest of justice dictates that we discuss all the grounds of appeal and give them the weight they deserve. In doing so, we shall follow the pattern adopted by the learned State Attorney in her submissions in reply.

The first relates to the complaint on the variance between the charge and evidence on the victim's names and time of the commission of the offence, subject of ground one in the memorandum of appeal. The appellant, pointed out that whereas the name of the victim in the charge sheet is shown to be BA, he introduced himself before giving evidence as BJ. According to him, this was fatal citing the Court's decision in **Victor Goodluck Munuo v. Republic,** Criminal Appeal No. 357 of 2017 (unreported). Ms. Moshi branded this complaint as an afterthought as the appellant never challenged it before the first appellate court and relied on the Court's decision in **Charles Haule v. Republic,** Criminal Appeal No. 250 of 2018 (unreported) to argue that as this ground never featured before the High Court, the Court cannot entertain it. In any case, the learned State Attorney contended that the variance was minor and curable under section 388 of the Criminal Procedure Act (the CPA).

We agree that this ground is new and, in terms of section 4 (1) of the Appellate Jurisdiction Act, the Court has no jurisdiction to entertain it unless it involves a point of law which is not the case. At any rate, we are firmly settled that the complaint is baseless considering PW1's evidence in cross-examination appearing at page 12 of the record of appeal running as follows:

"We were alone. You did Tabia Mbaya to me. I saw you at first at Kilimani you told me your name is Kidoko. You promised to give me money and mchele to eat. Yes. you [gave] the mchele and I ate."

There can be no better evidence than the above identifying the culprit as it were. Quite unfortunate to the appellant, the case he cited to us is distinguishable because, unlike here, that case related to the victim's making reference to different names of the assailant which is not the case in the instant appeal. Otherwise, in view of the victim's evidence reproduced above, we are at a loss why the appellants did not challenge the victim in cross examination as he did on other aspects if he seriously thought that there was any variance in the victim's name now challenged in this appeal. The complaint never featured before the first appellate court for its determination which can only mean that it is, at best an afterthought. We accordingly reject it.

Next for our consideration is the complaint on the variance in relation to the time the offence was committed; was it 18:30 hours as per charge sheet or 18:00 hours according to PW2? Relying on section 234 (3) of the CPA, Ms. Moshi urged that, such variance was immaterial to the appellant's conviction. That may be so but, the issue is whether

there was any such variance, in the first place. Like the first category of the variance, this complaint did not feature before the High Court but we shall consider it as it has a bearing on the soundness of the conviction.

It is common knowledge that there was an impression in PW2's evidence in chief that he examined the victim on 20 November, 2017 at 18:00 hrs suggesting that he examined the victim ahead of the commission of the offence. However, answering questions from the appellant in cross-examination, PW2 was categorical that, he examined PW1 at 06:00 hours and filled in the PF3 at 07:00 hours on 21 November, 2017. That evidence was in tandem with PW4 which shows that the victim who returned home at 23:30 hours on 20 November, 2017, was taken to Huruma Hospital for examination after obtaining a PF3 from the Police Station. We find no merit in this complaint and reject it.

The next complaint relates to non-compliance with section 210 (3) of the CPA on which the appellant made no submission. We note from the record that there was omission, by the trial Magistrate to indicate that section 210 (3) of the CPA was complied with by informing each witness of his entitlement to have his evidence read to him. We agree

that that was an irregularity. However, the Court has consistently held that, such an irregularity is not fatal unless there is a complaint from the appellant that his evidence was not read. See for instance: **Omary H. Mponela v. Republic**, Criminal Appeal No. 414 of 2019 citing, **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 and **Republic v. Hans Aingaya Macha,** Criminal Appeal No. 449 of 2016 (all unreported). As urged by Ms. Moshi, since there was no suggestion of any prejudice by such omission and, mindful that such omission is curable under section 388 of the CPA, we reject the complaint in ground 2 of the memorandum of appeal.

The appellant's complaint in ground 3 is against non-compliance with section 127 (2) of the Evidence Act. The gravamen of the complaint is that the trial magistrate strayed into an error in conducting a *voire dire* on the victim instead of asking PW1 to promise to tell the truth and not lies as required by the law following amendment to section 127 of the Evidence Act vide Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016. However, as rightly submitted by Ms. Moshi, such course did not have the effect of invalidating PW1's evidence. It is plain that, PW1 gave sworn evidence after the trial court had conducted a *voire*

dire test and satisfied itself that the tender age witness possessed sufficient intelligence and knew the meaning of an oath.

We agree with Ms. Moshi that, the fact that a tender age witness gave sworn evidence instead of making a promise to tell the truth and not lies, did not vitiate his testimony. Luckily, the Court has pronounced itself on this in many of its decision including; **Ally Ngozi v. Republic**, Criminal Appeal No. 216 of 2018 (unreported) in which it made it clear that, giving evidence on oath and promising to tell the truth and nothing but the truth is equivalent to making a promise to tell the truth and not lies. See also: **Elibariki Naftal Mchomvu v. Republic**, Criminal Appeal No. 332 of 2019 (also unreported). There is no merit in this complaint and we dismiss it.

We shall now turn our attention to the list of complaints against reliance on weak and contradictory evidence in grounding conviction, subject of grounds 5 and 6 in the memorandum of appeal and grounds 2 and 5 in the supplementary memorandum. As indicated earlier, the appellant's submissions were limited to only two areas of complaint. Ms. Moshi's submission was that the complaint is baseless. Counsel submitted that, since the appellant was convicted on a sexual offence, on the authorities, including, **Selemani Makumba v. Republic** [2006]

T.L.R. 379, the best evidence has to come from the victim. In this case, it was further submitted that PW1, the victim of the offence gave credible and reliable evidence pointing to the appellant's guilt and we respectfully agree with her.

For a start, the complaint in the grounds argued conjointly by the learned State Attorney raise the issue whether the appellant's conviction was grounded upon sufficient evidence proving the case against him beyond reasonable doubt. Owing to the nature of the offence, it was incumbent upon the prosecution to prove penetration of a male sexual organ into the victim's anus, the culprit and age of the victim. There was no dispute in relation to the age. Similarly, through the evidence of PW1 sufficiently proved penetration corroborated by the oral evidence of the medical doctor (PW2) who examined the victim. The remaining hurdle for the prosecution was to prove that the culprit was no other than the appellant. In determining the appeal, we shall be guided by the principle of reputable antiquity that is; sexual offences are offences easy to allege but difficult to prove and difficult to defend, though never so innocent laid down by the Lord Chief Justice of the Kings' Bench, Sir Mathew Hale. That means, whilst observing the rule that the best evidence in sexual offences must come from the victim articulated in **Selemani**

Makumba v. Republic (supra), that principle must be weighed in the light of the caution made by Lord Hale.

Mindful of the foregoing, as alluded to earlier on, there was no dispute as to the victim's age; one of the important aspects in the charged offence for the purpose of sentence. Secondly, PW1's evidence on penetration of a male sexual organ into his anus was not shaken. Even though corroboration was not necessary, PW2's evidence corroborated PW1's evidence on this aspect. The first appellate court addressed itself to this aspect in its judgment in concurring with the trial court's finding. We have seen no justification to differ with the first appellate court. Furthermore, PW1's evidence established beyond any flicker of doubt that the culprit was no other than the appellant. His evidence was not controverted in cross-examination. Indeed, part of the evidence reproduced earlier in this judgment when addressing the complaint on variance between the charge and evidence on the name of the victim was watertight pointing to no other than the appellant as the person responsible for the awful act.

It will be recalled that, one of the appellant's complaints before the first appellate court was that he was not properly identified. Addressing the complaint that the appellant was not properly identified

due to PW1's failure to give a proper description of his appearance, the learned first appellate judge stated:

> *".... According to the record of proceedings, it shows (sic!) that the victim identified the appellant by name and he even remembered where the appellant [stayed] that is where he took PW4 and showed him the house. The identification of the appellant is not doubted as the circumstances were favourable because the victim met the appellant in the evening around 16:00 hours and given the time they spent together when he convicted him to go with him to his house and give him food to eat, he cannot say he could not identify him properly or mistook him with somebody else...." [At pages* 59 and 51 of the record].

We are satisfied with the first appellate court's analysis of the evidence that he was properly identified. Accordingly, we hold that the appellant's complaint that his conviction was grounded on weak evidence is baseless and we dismiss it.

Finally on ground 4 in the supplementary memorandum of appeal raising the complaint that the courts below failed totally to consider the defence case. Addressing us, Ms. Moshi invited the Court to dismiss the complaint considering that it was raised before the first appellate court

and sufficiently addressed it. We agree with her. The record shows at page 62 that the first appellate court dismissed the appellant's complaint agreeing with the trial court that the appellant's defence was considered but rejected because it did not raise any reasonable doubt in the prosecution case, particularly PW1's evidence. As reasoned by the learned first appellate judge, the fact that PW3 and PW4 differed on whether they knew the appellant was immaterial to the prosecution case. Accordingly, we find no merit in this ground and dismiss it.

The above said, we are satisfied that the appellant's appeal is devoid of merit and dismiss it.

DATED at **MOSHI** this 20th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 21st day of March, 2024 in the presence of the appellant in person and Ms. Bora Msafiri Mfinanga, learned State Attorney for the respondent-Republic, is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL