IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 170 OF 2009

BENEDICT KILEMBE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Lukelelwa, J.)

dated the 29th day of July, 2008
in
(DC) Criminal Appeal No. 12 of 2008

JUDGMENT OF THE COURT

25th & 29th November, 2010

MSOFFE, J.A.:

In the District Court of Mbeya the appellant BENEDICT KILEMBE was charged with rape contrary to sections 130 and 131(2) (a) of the Penal Code. The particulars of offence alleged that on 26/9/2000 at about 17.30 hours at Lyhamile Nyeregele village within Mbarali District in Mbeya Region the appellant had carnal knowledge of one Yudith Mkowogo, a girl of three years of age. After a full trial the District Court found that the evidence did not establish the offence of rape. It found that the evidence on record established an unnatural offence contrary to

section 154 (1) of the Penal Code. The appellant was accordingly convicted of the latter offence and sentenced to life imprisonment.

We wish to pause here and observe in passing that under **sections 131 (3)** and **154 (1) (a)** and **(2)** of the Penal Code the offences of rape and unnatural offence, respectively, attract sentences of life imprisonment.

Aggrieved, the appellant unsuccessfully appealed to the High Court at Mbeya. In response to the fact that the evidence was at variance with the charge sheet the judge on first appeal had this to say: -

> *...The learned trial Resident Magistrate was enjoined to have substituted the charge of unnatural offence to the offence of rape by acting under the provisions of section 234 as there was a variance between the charge and evidence adduced. In fact, I'm at a loss why the prosecution did not prefer the charge of unnatural offence when it had both oral and medical evidence proving that offence right from the beginning. It is apparent therefore that the learned trial Resident Magistrate had resorted to the provisions of sections 300 and*

> *304 of the Criminal Procedure Act 1985 to make substituted convictions. This move in my view was unfortunate, as it's debatable whether the offence of unnatural offence is minor to the offence of rape.*

In conclusion on this point the judge stated: -

> *In the case at hand, there is no doubt that the appellant was fully aware of the case against him, that it was of unnatural offence or sodomy. I think this irregularity can be saved by the provisions of section 388 as the irregularity has not infact occasioned a failure of justice to warrant this court to order a retrial.*

With respect, the question we have to resolve at this early stage is whether or not the judge was correct in his reasoning that the variance between the charge and the evidence did not occasion a miscarriage of justice.

To start with, we are in agreement with the judge that the trial Resident Magistrate having found that the evidence established an unnatural offence instead of rape could have easily invoked the

provisions of **Section 234 (1)** (*supra*) and substitute the charge accordingly. The magistrate could have done so, subject of course to the provisions of **sub-section (2)** thereto.

In **Joseph Shoggi** v **Republic** 1976 LRT no. 22, a High Court decision but which we think is persuasive for our purposes, the appellant was charged with store-breaking when all the evidence showed that the proper charge that should have been laid against him was either stealing or receiving stolen property. On appeal, Mwakasendo, J. (as he then was) had this to say: -

> *... it seems clear to me on the facts, as I conceive them to be in this case, that this court can properly in its exercise of its appellate and revisional jurisdiction under sections 319 (1) (a) (ii), 329 (1) and 346 of the Criminal Procedure Code, do what the trial court ought to have done and to this extent it can alter both the charge and the conviction,* ***provided it is satisfied that no failure of justice would result therefrom and provided further that it is satisfied that the substituted charge is one which the appellant had notice of from the face of original charge.*** *As I am so satisfied in the*

> *instant case I alter the original charge from store-breaking to one of stealing contrary to section 265 of the Penal Code.*
>
> (Emphasis supplied.)

In **Maulidi Abdullah Chengo** v **Republic** (1964) EA 122 at page 124 the Court of Appeal for East Africa cited with approval the case of **R** v **Pople** (1954) I KB 53 at page 54 where in construing the word "defective" in **section 209 (1)** of the Criminal Procedure Code (equivalent to our **Section 234 (1)** (*supra*), the Court of Criminal Appeal said: -

> *The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore was bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description,* ***and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person****.*
>
> (Emphasis supplied.)

From the above authorities it occurs to us that: -

(i) **Section 234** can be invoked at any stage of a trial. In this sense, as stated above, the trial Resident Magistrate could have invoked it at any stage of the trial.

(ii) the necessary prerequisite of **Section 234** is that the charge shall have been defective.

(iii) an alteration can always be made so long as the court is satisfied that no failure of justice would result therefrom.

(iv) an alteration may be made in order to meet the evidence in the case.

(v) in making an alteration the court has to be satisfied that the substituted charge is one in which the appellant had notice of from the face of the original charge.

In the instant case, the evidence laid against the appellant was that of an unnatural offence. Indeed, when he testified on 15/2/2001 he did so when he was quite aware that the prosecution evidence laid against him was in respect of an unnatural offence. In this sense, the conviction entered against him by the District Court and upheld by the High Court did not prejudice him in anyway. Therefore, the judge did not err in saying that the failure by the prosecution to prefer a charge of

an unnatural offence, and the failure by the Magistrate to alter the charge as per **Section 234**, were curable under **Section 388** because no failure of justice was occasioned thereto.

In view of the position we have taken above, there will be no need for us to discuss the point raised by the judge on first appeal on whether or not the offence of unnatural offence is cognate to that of rape. Having decided that in the circumstances of this case, the failure by the Magistrate to invoke **Section 234** was curable under **Section 388** as correctly held by the judge on first appeal, a discussion on whether or not one of the above offences was cognate to the other will be merely academic.

In this appeal the appellant has canvassed a total number of eight grounds in his memorandum of appeal. In a nutshell however, all the grounds crystallize on two major grounds of complaint. **One**, that the case against him was not proved beyond reasonable doubt. **Two**, that the courts below erred in not taking into account that he had always said that he was "sick of madness 5 years ago", to suggest that the defence of insanity was/is available in the case.

At the hearing of the appeal, the appellant who appeared in person reiterated the above points. On the other hand, Mr. Faraja Nchimbi, learned State Attorney appearing for the respondent Republic, had at first sought to support the appeal. On reflection however, he changed his mind and argued in opposition to the appeal. With respect, as we shall demonstrate hereunder, Mr. Nchimbi was justified in supporting the conviction and sentence.

At this juncture, we think it is pertinent to state the facts, *albeit* briefly. PW1 Otavina Kajinga and PW2 Rodrick Mhoogo were wife and husband, respectively. They lived in the same village with PW3 Onesmo and the appellant. In fact, the appellant lived just 10 paces away from the household of PW1 and PW2. On 26/9/2000 PW2 took out his father's cattle for grazing leaving behind his wife and Yudith, their three year old child. At about 4.30 p.m. PW1 went out to fetch water from a tap which was about 30 metres away. She left the child behind. In her absence, the child went to the appellant's home to play. When PW1 went back, she met the child at the appellant's door, crying. On asking the child as to why she was crying, the said child answered "Baba ndani humo". She entered into the appellant's house. She met the appellant seated and on asking him as to what he had done to the child

he replied that he had "disciplined" her. She held the child and on examining her she observed that her anus was bleeding and there was a big rupture thereat. She reported the incident to the village authorities, notably PW3. Upon arrest, the appellant admitted before PW1, PW2, PW3 and PW4 D250 DC Michael that it was true that he had sodomized the said child. According to these witnesses, at that time the appellant's trouser was stained with blood. On 27/9/2000 PW5 Dr. A. Lusekelo examined the child and observed that she had been sodomized. Indeed, the PF3 which was filled in by PW5 and eventually produced in evidence by PW3 without objection by the appellant is clear that the child was sodomized.

The appellant's defence was a general denial of guilt. He denied sodomizing, let alone meeting, the child on the fateful day. Before us, he repeated this same story and reiterated that if at all he committed the offence then it was due to "madness" because he was "sick of madness 5 years ago", as indicated in his evidence when he was cross-examined by the prosecution.

Without hesitation, we are of the considered view that any properly constituted court directing itself carefully on the law and the evidence

would have convicted the appellant. With respect, the evidence against him was circumstantial in the sense that none of the witnesses testified to have seen him sodomizing the child. But given the evidence of PW1, and the appellant's own admission before PW1, PW2, PW3 and PW4, lead to the inevitable inference and conclusion that he committed the offence. Furthermore, the irresistible inference from the medical evidence, when considered in the light of the other circumstantial evidence, was that the appellant committed the offence. The courts below believed the prosecution witnesses. We have no basis for faulting them in the credibility they attached to the evidence of these witnesses.

As already stated, the appellant appeared to raise the defence of insanity. It is to be noted however, that he did not seriously canvass the defence at the trial. In his evidence in chief he did not raise the defence. It was during cross-examination when he said "I was sick of madness 5 years ago". Of course, if he was sick of "madness five years ago" that would not necessarily mean that he was still suffering from the sickness on the date and time of incident! Furthermore, in our reading and understanding of the evidence as a whole, we do not get the impression that the appellant might have been insane at some point. He was cross-examined on what happened on the date of incident and it

appears he was composed and responded well to the questions put forward to him. In similar vein, in his defence he testified in such manner that it is obvious to us that he knew quite well as to what exactly he was talking about.

Anyhow, in law the defence of insanity is available under **section 13 (1)** of the Penal Code. However, before the court can exercise its power under **section 220 (1)** of the **Criminal Procedure Act** to inquire into an accused person's insanity it must first appear to the said court that the said accused person might have been insane at the material time. As observed by this Court in **Danstan Authony Luambano** v **R** (1990) TLR 4 at page 5; -

> *... There must be some material which would make it appear to the court, and reasonably so if we may add, that the accused person might have been insane when he committed the deed...*

In the instant case, we are of the view that there was no material that would make the court feel that the appellant might have been insane at the material time. There was no suggestion by any of the witnesses that he might have been insane at any one time. Evidence, if any, by the

witnesses was only that the appellant was an alcoholic person, and that on the material day he was drunk but not to the extent of failing to control himself or appreciate what was going on around him.

There is no dispute that when the offence was committed on 26/9/2000 the child, Yudith, was three years old. Thus, she was below the age of ten years. If so, under **Section 154 (1) (a)** and **(2)** of the Penal Code, the offence attracts a sentence of life imprisonment. Therefore, the sentence meted on the appellant is legal under the circumstances.

For the above reasons, we hereby dismiss the appeal.

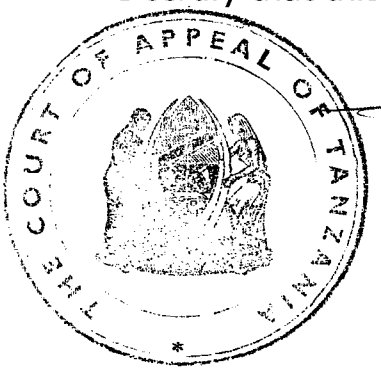
DATED at MBEYA this 26th day of November, 2010.

H. R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL