IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: ORIYO,J.A, KAIJAGE,J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 66 OF 2010

BOAY AHAY.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Sambo, J.)

Dated the 9th day of February, 2010
in
Criminal Appeal No. 102 of 2007

.....

JUDGMENT OF THE COURT

5th & 20th June, 2013

ORIYO, J.A:

The appellant, Boay Ahay, was arraigned before the District Court of Hanang sitting at Katesh, for unnatural offence, contrary to section 154(1) (a) & (2) of the Penal Code, Cap 16 as amended by section 16 of the Sexual Offences Special Provisions Act No. 4 of 1998. It was alleged that on the 6th day of June, 2001, at about 17:00 hours at Jorodom Village, Katesh, one Moi Gitime, a six year old boy, (PW1), was herding cattle together with his cousin, one Bude Baride, a seven (7) year old boy,

(PW2). The appellant, who lived in the same village followed the two boys to the pasture grounds and asked PW1 to accompany him to his residence so that PW1 could assist him with a certain task. While on the way passing through a maize farm, the appellant asked PW1 to sit down and undress and the appellant did the same thing. The appellant, thereafter forced PW1 to lie on his stomach and the appellant sodomized PW1 by penetrating his penis into PW1's anus. PW 1 felt severe pain, cried and screamed for help. The appellant threatened to kill PW1 unless he stopped screaming. After the appellant had ejaculated he fled to his residence abandoning PW1 in the maize farm. PW1, walking with difficulty returned to where PW2 was raring the cattle and confided to him what befell him.

One Michael Mombo, (PW3), the grandfather cum guardian of PW1 and PW2 was informed of the incident on the following day. He summoned the appellant for verification but the latter denied. PW3 referred PW1 to the Police where he was issued with a PF 3 and referred to the Katesh Health Centre for medical examination. Dr. Jumanne Adam(PW4), who medically examined PW1 at the Katesh Health Centre, and authored the PF3 (Exh "P1") testified to have found bruises on PW1's cheeks and in his anus.

On the strength of the Prosecution case, the trial court convicted the appellant as charged and sentenced him to life imprisonment. Aggrieved by the conviction and sentence, he unsuccessfully appealed to the High Court at Arusha. Still protesting his innocence, he has lodged this appeal.

In this second appeal the appellant had two grounds of complaint, namely:-

1. *That the courts below erred by failing to comply with section 147 (1) of the Evidence Act, Cap 6.*
2. *That the courts below erred by ignoring the appellant's defence.*

He appeared before us in person, fending for himself and prayed for leave of the Court, which was duly granted, to adopt the written submissions he had earlier on lodged in Court.

The respondent Republic was represented by Ms. Elizabeth Swai, learned State Attorney who supported the appeal. On ground one of appeal, the learned State Attorney stated that the appellant was unfairly treated when the trial court denied him a basic right to cross-examine the prosecution witnesses, to wit, PW1 and PW2.

On a prompting from the Court on the legal consequences of such an omission, in the event the complaint in ground one is found meritous,

the learned State Attorney submitted that if the complaint in ground one were to be upheld, it would effectively render the trial a nullity. However the learned State Attorney further submitted that in the event the proceedings in the trial court are nullified the Republic will not pray for a retrial in view of the length of time the appellant has spent in prison.

Confident that the first ground of complaint was meritous, the learned State Attorney abandoned the second ground of appeal.

As expected, the appellant, after adopting the written submissions he had nothing useful to add except to express his opinion that he agreed with the submissions of the learned State Attorney.

On a further prompting from the Court on the competence of the first ground of appeal which was being raised for the first time on a second appeal in this Court, Ms. Swai readily conceded that the complaint was not raised in the first appellate court. She submitted that under normal circumstances the first ground of appeal ought not to be raised for the first time on a second appeal. However, she stated that since the complaint is of a fundamental nature, she prayed that it be considered.

Section 147(1) of the Evidence Act, Cap 6 as amended, provides:-

"147-(1) Witnesses shall be first examined in chief, then (if the adverse party so desires) cross-examined then(if the party calling them so desires) re-examined"

Our study of the trial court record, reveals that at the end of the evidence of PW1 and PW2, there is no evidence that the appellant was informed of his right to cross-examine the two prosecution witnesses or that he was given the opportunity to cross-examine them and he refused to do so. The trial court record shows that PW1 and PW2 testified on 19/06/2001. The trial Principal District Magistrate duly conducted **voire dire** examination of the witnesses in terms of S. 127 (2) of the Evidence Act before receiving their testimonies. At the end of their respective testimonies at pages 10 and 12 of the record, respectively, the following is evident:-

"Section 210 (3) of the Criminal Procedure Act complied with.

Signed: J.K. Kimario, PDM

11/06/2001."

However, the trial court record reflects a different scenario for PW3 and PW4. There is evidence on record that the appellant was given an opportunity to cross-examine PW3 and PW4 but he opted not to do so. At the end of the evidence in chief of both PW3 and PW4, the record shows the following:-

"XXD Accused: Nil

"RXD Pros: Nil"

Section 210 (3) of the Criminal Procedure Act Complied with.

Sgd: J.K. Kimario, PDM

19/06/2001"

The procedure to be adopted in examination in chief, cross-examination and re-examination under section 147 (1) of the Evidence Act (supra), is provided for under section 229 of the Criminal Procedure Act. The relevant part of section 229 provides the following:-

> "**229- (1) If the accused person does not admit the truth of the charge, the prosecutor shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge.**
>
> **(2)The accused person or his advocate may put questions to each witness produced against him.**
>
> (3)If the person does not employ an advocate, **the court shall at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any question to that witness or make any statement.**

> **(4)If the accused person asks any question, the magistrate shall record the answer and, if he makes a statement the magistrate shall, if he thinks it desirable in the interest of the accused person, put the substance of such statement to the witness in the form of a question and record his answer."** (Emphasis ours).

We have studied the record thoroughly and we are firmly convinced that the complaint of the appellant in ground one of appeal has merit. As we have earlier observed, the complaint is raised in this Court for the first time. It was not raised as a ground of appeal in the High Court. That notwithstanding, it is apparent from the High Court proceedings that the appellant raised the complaint when arguing the appeal in the first appellate court as hereunder:-

> ***"Appellant:*** *I was not allowed to cross-examine prosecution witnesses allegedly because they were little children. The Public Prosecutor stopped me from cross-examining them."*

Apparently, Ms. Njiro, learned State Attorney who argued the appeal in the High Court for the respondent Republic, did not respond to the appellant's complaint that his right to a fair trial in the District Court had been

infringed. Neither did the learned High Court Judge take the complaint into consideration or make any reference to it.

There is no gainsaying here that the appellant, a layman without legal representation, was denied his basic right to a full and fair hearing, in terms of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap. 2, R.E. 2002. The omission by the trial court to comply with **section 147 of the Evidence Act** (supra),vitiated the proceedings: See **Lazaro Stephano V R**, Criminal Appeal No. 240/08 (unreported) and **Protas Kagaruki V. R**[1987] TLR 152.

In Kagarukis case, the only evidence by an eye witness was given by a boy of 8 years who was not cross-examined. As in this case, the trial court had prevented the witness from being cross-examined because his evidence was not given on oath. On a second appeal to this Court, it was held:-

> *"As a matter of trite law, the unsworn evidence of a child could be cross-examined, as his evidence as a witness affects the fortunes of the accused."*

With respect to the learned judge on first appeal, the appellant was entitled to a fair trial, which was denied by the trial court's refusal to allow

him to cross-examine PW1 and PW2; see the Court's decision in **Alex John V.R** Criminal Appeal No. 129 of 2006.

Considering the fact that the appellant has been incarcerated since June, 2001 when the incident took place, which is a period of over 12 years, in total; PW1, the victim, who was 6 years in 2001 is over 18 years old today. He is an adult. The parties lived in Jorodom Village, in Hanang District, Arusha Region at the time of the incident. They were pastoralists cum farmers. There is no assurance that the parties or the witnesses are still residing in the same village or will be available in the event a retrial is ordered. In this respect, we agree with Ms Elizabeth Swai, learned State Attorney that an order for a retrial in these circumstances may turn out to be impractical and a useless exercise.

We therefore allow the appeal, set aside the conviction and sentence and order for the immediate release of the appellant unless held for another lawful cause.

In view of what we have stated above and the conclusion arrived at, we leave it to the wisdom of the Director of Public Prosecutions, to decide on whether or not to institute a fresh charge against the appellant, in the

exercise of his wide powers, in terms of Article 59B (4) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002.

DATED at **ARUSHA** this 19th day of June, 2013.

K.K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

MALEWO, M. A.
DEPUTY REGISTRAR
COURT OF APPEAL