IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 208 OF 2016

ALOYCE MARIDADI.....APPELLANT

VERSUS

THE REPUBLIC.....REPUBLIC

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

(Gwae, J.)

dated the 28th day of April, 2016
in
HC. Criminal Session No. 51 of 2014

JUDGMENT OF THE COURT

3rd & 6th July, 2017

MUGASHA,J.A.:

In the District Court of Lindi, the appellant was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [**CAP 16 RE.2002**].

It was alleged that on 7th November, 2013, at Ng'apa village within the Lindi District in the region of Lindi, the appellant did have carnal knowledge of a male child against the order of nature.

To prove its case the prosecution called four witnesses who are: **SALUMU ABDALLA (PW1), KARIMU MATWELA (PW2), DR. HAMISI AJALI SAIDI (PW3) and WP 5544 DET. CONSTABLE MACKREENA JOHN (PW4).** The prosecution also tendered two documentary exhibits, PF3 which was admitted as Exhibit P1 and the cautioned statement of the appellant which was admitted as Exhibit P2.

A brief account of the evidence which led to the conviction of the appellant is briefly as follows: On 7th November, 2013, the victim together with his friends went to pick mangoes at Lindeko's farm. While there, the appellant appeared holding a bush knife. He chased the group, caught PW2 and took him to his hut. Then, the appellant tied PW2 with a rope, pushed him down and sodomised him. Due to severe pains PW2 raised alarm crying for help. Having finished his desire, the appellant released PW2 who while going home, met his brother and narrated what befell him. The episode was also reported to PW1 the victim's father. Thereafter, the victim led his father and some other

villagers to the scene of crime where the appellant was found and he was arrested. At the Police Station the victim was issued with a PF3. Upon examination, the doctor established that PW2 was sodomised.

The appellant denied the charges. He claimed to have found the victim together with other colleagues picking mangoes in the farm, chased them, caught PW2, punished him with two strokes of a cane and released him. However, PW2 was crying and later a group of people surfaced and started to beat the appellant.

The trial court convicted the appellant on the strength of the credible evidence of the victim and sentenced the appellant to imprisonment for thirty years.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed on account of credible evidence of the victim (PW2). Moreover, having been satisfied that the victim was below ten (10) years, the first appellate court invoked section 154(2) of the Penal Code and enhanced the sentence from a term of thirty years to life imprisonment.

Still aggrieved, the appellant has preferred this second appeal. In the Memorandum of appeal he has raised six grounds which are conveniently condensed into four main grounds as follows: **One,** that the prosecution failed to prove the case beyond reasonable doubt. **Two,** that the first appellate court wrongly relied on PF3 which was not properly tendered as the evidence before the trial court. **Three,** the conviction was based on uncorroborated evidence of the victim. **Four,** the sentence was wrongly enhanced by the first appellate court.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by the learned Senior State Attorney, Mr. Ladislaus Komanya and Ms.Lulu Twalib Mangu learned State Attorney who addressed us at the hearing of the appeal.

The appellant opted to initially hear the submission of the learned State Attorney but reserved the right to reply.

The learned State Attorney did not support the appeal. She submitted that, the conviction of the appellant was properly grounded on the strength of the credible evidence of the victim in terms of section

127 (7) of the Evidence Act **[CAP 6 RE.2002].** She argued that, on account of sufficiency of the victim's evidence, there was no need of parading other witnesses for the prosecution as asserted by the appellant. When prompted by the Court she argued that, the medical Doctor's evidence having established that the victim was sodomised it corroborated the victim's account. This is regardless of the PF3 which was not improperly tendered by the prosecuting State Attorney. She thus urged us to expunge the PF3 from the record.

Moreover, the learned State Attorney pointed out that, since the victim was six (6) years, the first appellate court was justified to enhance and impose the sentence to life imprisonment which is in accordance with the requirements of section 154(2) of the Penal Code. She urged us to uphold the findings of the courts below and dismiss the appeal in its entirety.

The appellant had nothing useful in reply apart from reiterating that he did not commit the offence.

The conviction of the appellant as upheld by the first appellate court is based on credibility of the account of the victim's evidence that

he was sodomised by the appellant. The first appellate court also enhanced the sentence to life term instead of thirty years.

It is evident that, according to PW3's evidence, PW2 was sodomised. What is contentious in this appeal is whether or not the appellant sodomised PW2.

We are alive to the principle that in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. The rationale behind is that, being the second appellate court we have not had the opportunity of seeing, hearing and assessing the demeanour of the witnesses.(See **SEIF MOHAMED E.L ABADAN vs REPUBLIC, Criminal Appeal No. 320 of 2009** (unreported). However, the Court will interfere with concurrent findings if there has been misapprehension of the nature, and quality of the evidence and other recognized factors occasioning miscarriage of justice. This position was well stated in **WANKURU MWITA VS REPUBLIC.**, Criminal Appeal No. 219 of 2012 (unreported) where the Court said:

"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

We are as well, aware that in **GOODLUCK KYANDO VS REPUBLIC,** (2006) TLR 363, the Court laid down the following principle:

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."

Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. (See **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No. 62 of 2004 (unreported).

It is settled law that the true and best evidence of a sexual offence is that of a victim. (See **SELEMANI MAKUMBA VS REPUBLIC** (2006) TLR 379.) This is in line with section 127 (7) of the Evidence Act (supra) which states:

> *"Notwithstanding the preceding provisions of this section, where* ***in criminal proceedings involving sexual offence, the only independent evidence is that of a child of tender years*** *or of a victim of the sexual offence, the court shall receive the evidence* ***and may, after assessing the credibility of the evidence of the child of tender years*** *or as the case may be the victim of sexual offence, on its own merits, not withstanding that such evidence is not corroborated, proceed to convict, if for reason to be recorded in the proceedings* ***the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".***
>
> *[Emphasis supplied]*

We shall be guided by the stated principles to determine the present appeal.

We have deemed it imperative to revisit what was said by the victim before making our conclusion. At page 16 of the record the PW2's recounted how he was on the fateful day sodomised by the appellant. After PW2 was released, he reported the incident to his brother and

father (PW1). Moreover, PW2 on the same day,led his father and other people to the scene of crime where the appellant was found.

As earlier stated, the medical doctor's (PW3) account is reflected at page 17 to 18 of the record of appeal to the effect that: having examined the victim found bruises and sperms at the anal area. PW3 identified the PF3 (exhibit P1) which was initially tendered by the prosecuting learned State Attorney at page 11 of the record of appeal.

On our part, we are of the considered opinion that the evidence adduced by PW2, despite his tender age, sufficiently proved that the appellant committed the offence charged with in that: **Firstly,** PW2 gave a coherent narration of the sad and shameful incident by the appellant. **Secondly,** the record clearly shows that, at the earliest moment PW2 narrated the incident to his brother and father who gave his account at the trial on what befell his son. **Thirdly,** on the very day, the arrest of the appellant was facilitated by PW2 who led his father and the villagers to the crime scene.

In the premises, the credible evidence of victim (PW2) solely, is sufficient to ground a conviction in terms of section 127(7) of the

Evidence Act. Besides, in the instant case, the evidence of PW2 is corroborated by the testimonial account of PW3 who upon examining PW2 established that the poor boy was actually sodomised. As such, even if Exhibit P1 is done away with, still the credible evidence of PW1, PW2 and PW3 point to the guilt of the appellant.

However, the manner in which the prosecuting State Attorney tendered the PF3 is most wanting because since he was not a witness, he was incompetent person to tender the said documentary exhibit. On this accord, we wish to repeat our observation in the cases of **FRANK MASSAWE VS REPUBLIC,** Criminal Appeal No. 302 of 2012 and **THOMAS ERNEST MSUNGU@NYOKA MKENYAA VS REPUBLIC**, Criminal Appeal No. 78 of 2012 (both unreported) that:

> *"a prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect, that was wrong because in the process the prosecutor was not sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98(1) of the*

Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined."

Since the prosecutor was not competent to tender the PF3 at the trial, we accordingly expunge it from the record. However, no miscarriage of justice was occasioned because the PF3 was not acted upon by the trial magistrate to convict the appellant.

We are as well satisfied that, on the sentence of life imprisonment as enhanced by the first appellate court. The victim testified to be six (6) years which was supported by the evidence of his parent PW1 whose evidence on proof of age is the best evidence. (See **EDWARD JOSEPH VS REPUBLIC,** Criminal Appeal No. 19 of 2009 (unreported).

In view of the aforesaid, we agree with the learned State Attorney that the appeal is without merit and we do not find cogent reasons to disturb the concurrent findings of the two courts below. As such, we

uphold the conviction and the sentence of the appellant and accordingly dismiss the appeal.

DATED at **MTWARA** this 4th day of July, 2017.

M.S MBAROUK
JUSTICE OF APPEAL

S.E. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL