IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MMILLA, J.A., MZIRAY, J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 300 OF 2016

EZEKIEL HOTAY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Moshi, J.)

dated the 7th day of March, 2016
in
Criminal Appeal No. 58 of 2015

JUDGMENT OF THE COURT

24th September & 2nd October, 2018

MZIRAY, J.A.:

The Appellant herein is appealing against the decision of High Court of Tanzania at Arusha (Moshi, J.) dated 07/03/ 2016 in Criminal Appeal No. 58 of 2015 whereby the Court upheld conviction and sentence of life imprisonment meted out by the Resident Magistrate's Court of Arusha at Arusha which convicted him for unnatural offence c/s 154(1) (a) of the Penal Code R.E. 2002. He was alleged to have committed the offence against J.H, a boy of 6 years old on unknown dates in June, 2014.

The prosecution lined up six witnesses to prove their case namely; J.H (PW1), the victim, Redempta Vicent Mushi (PW2), Dr. Hussein Omari Mohamed (PW3), WP 3865 D/CPL Etropia (PW4), WP 3460 D/C Prudencia (PW5), and Goodluck Anderson (PW6). From a total of six prosecution witnesses it was common ground that the alleged victim (PW1), was, at the material time, a boy aged 6 years and a standard one pupil at Ebeneza English Medium School. The boy was residing with his aunt at Oldadai, Arusha. Sometimes in June, 2014, on divers dates, the appellant and one Sharifu Saidi Mwela, who was the first accused in the trial, sodomised him alternatively at different times in the same premises. J.H could not reveal the ordeal to anybody because the appellant threatened him that if he discloses the same he would cut him with a panga.

On 17/9/2014, the victim's mother (PW2) who was in Tanga received a message in her mobile phone informing her that her son is a gay and that she should wait for dowry when he grows up. This shocked her and planned a journey to Arusha. On her arrival, PW2 immediately sought confirmation from her son, following which PW1 frantically explained the entire story on how the appellant and his colleague sodomized him. The matter was thereafter reported to the police whereby a PF3 was issued to the victim. PW1 was examined by a medical officer, namely, Dr. Hussein Omary

Mohamed (PW3). The Doctor noted that PW1's anal muscles were a bit loose suggesting that a blunt object had been pressed into it. The appellant together with his colleague were arrested and charged in connection with the offence.

In his defence, the appellant denied to have committed the offence and maintained that the case is just a frame up against him, designed to deny him a claim of right for his four years unpaid salaries he owed the victim's aunt.

At the hearing of this appeal the appellant was represented by Mr. Shilinde Yusuph Ngalula, learned counsel, while Mr. Innocent Njau, learned Senior State Attorney, appeared for the respondent Republic. The memorandum of appeal, which Mr. Ngalula relied on to argue the appeal contained three grounds of appeal upon which he invited the Court to nullify the proceedings and judgment of the two courts below and set aside the sentence. The grounds of appeal are:

1. *That the first appellate court erred in law and in fact in not finding that the offence of unnatural offence was not proved to the required standard. The adduced evidence fell short of proving an*

essential element of unnatural offence namely penetration.

2. *That the first appellate court erred in law and in fact when it failed to scrutinize the evidence of PW5 and Exh. P.3 and hence arrived at erroneous decision.*
3. *That there is variance between the charge sheet and the evidence as regards the name of the victim.*

The learned State Attorney did not seek to support the conviction and sentence. Taking together the grounds of appeal, the learned State Attorney also raised two other infirmities in relation to the procedure adopted in the trial of the appellant, the first of which, we think is capable of disposing the appeal. It states that on 4/5/2015 following the application by the prosecution, the trial court granted leave under section 234 (1) of the Criminal Procedure Act, Cap 20 R.E 2002 (CPA) to substitute the charge. He pointed out that the substituted charge was lodged after five prosecution witnesses had already testified and that the same were not called for cross-examination as the law provides under section 234 (2)(b) of the CPA.

On our part, we are in agreement with Mr. Njau's submission that the substituted charge had problem and that failure to recall the five (5) prosecution witnesses to be examined on the substituted charge contravened the provision of section 234 of the CPA.

The provision reads:-

> *234 (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just.*

(2) Subject to subsection (1), where a charge is altered under that subsection–

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross- examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.

According to the preceding cited provision, it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross-examined. This was not done. In failure to do so, rendered the evidence led by the five prosecution witnesses to have no evidential value.

Given the shortcomings in the procedure, which with respect the High Court failed to detect, we are not inclined to vouch that the appellant's conviction was safe. We therefore exercise our revisional jurisdiction under section 4(2) of the Appellant Jurisdiction Act, Cap 141, R.E 2002 and revise and quash the lower courts' proceedings and judgment and set aside the sentence.

We have also given a deep thought over the idea whether or not to order a retrial.

It is not in dispute that the appellant was charged with unnatural offence committed to a boy of six (6) years old. On the other hand, we are also aware that the appellant has been in prison for at least 3 years. We sympathize with the appellant's predicament. However, taking into

consideration the prevalence and seriousness of the offence and the fact that it is the learned State Attorney who noted the shortcomings in the procedure, it would be in the interest of justice to order a retrial, as we hereby do.

We make such order taking into consideration the principles laid down in **Fatehali Manji** v **R** [1966] EA 341. In that case the then Court of Appeal of East Africa stated:

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

With the shortcomings we have aforementioned and based on the principle enunciated in the case of **Fatehali Manji** *(supra),* we order that the appellant be retried by a court of competent jurisdiction constituted by another magistrate with requisite jurisdiction, with immediate dispatch. In the mean time the appellant to remain in custody until he is brought to the trial court for his fresh trial.

Ordered accordingly.

DATED at ARUSHA this 1st day of October, 2018.

B.M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL