IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 306 OF 2016

ELIA JOHN.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mwaimu, J.)

dated the 11th day of February, 2016
in
Criminal Appeal No. 44 of 2015

.....

JUDGMENT OF THE COURT

13th & 30th August, 2019

LILA, J.A.:

We must confess, at least, that this case may serve as an illustration of a situation where the famous swahili saying "mgeni njoo mwenyeji apone" may turn out not to be always true. We shall explain. The appellant herein was accused of ravishing, against the order of nature, his host's son, who, for the purpose of smacking his identity, we shall, in the course of this judgment, be referring him to as "the victim" or PW4. It was alleged that the incident occurred sometime before sunrise on the 6/2/2008. Consequently, he was arraigned before the

District Court of Kiteto facing a charge of unnatural offence which was couched thus:-

> ***OFFENCE SECTION AND LAW:*** *Unnatural offence c/s 154 of the Penal Code Cap. 16 Vol. 1 of the Laws as repealed and replaced by section 5(2)(e) and 6(1) of the Sexual Offences Special Provisions Act No. 4 of 1998.*
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> ***PARTICULARS OF THE OFFENCE:*** *That Elia s/o John charged on 6th day of February 2008 at about 05:00hrs at Orkesmet town within Simanjiro District and Manyara Region did unlawfully have carnal knowledge against the Nature of order "the victim".*

At the conclusion of the trial, the trial magistrate was satisfied that the prosecution had proved the charge beyond all reasonable doubt and the appellant was convicted and sentenced to serve the minimum prescribed sentence of thirty years imprisonment. Save for the accused's caution statement which was expunged for being irregularly taken, the appellant's appeal before the High Court was unsuccessful. Still aggrieved, he has preferred the present appeal.

The case for the prosecution was predicated, briefly, on the following facts. The appellant and his friend whose name was not immediately disclosed were residents of Lengai village. The two visited

Orkesmet looking for job in the farms and were hosted by one Abel Jackson in a room in which the latter was sleeping with his son, the victim. The sleeping arrangement was that Abel Jackson (PW3) and his son shared a bed while the appellant and his friend slept on a mat laid on the floor. On the fateful date, early in the morning (at 05:00), PW3 and the appellant's friend woke up and left leaving behind the appellant and the victim. The victim stated that soon after his father had left he saw the appellant rise from the floor, went to him, held him by the mouth, undressed him and penetrated his male organ into his anus.

Moments later, the victim reported the matter to his grandmother (PW5) at 08:00am naming the appellant as his ravisher after which he was taken to a police station where he was issued with a PF3 and was then taken to hospital. He said at 05:00am the sun was about to shine. The appellant's first statement which was tendered for identification only was taken by E 8898 D/C Allen (PW1) in which he is said to have had admitted committing the offence. PW1 also tendered a PF3 (exh. P1) and then took the appellant to D.9332 D/CPL Alois (PW2) who recorded a caution statement (Exh. P2). It is plain that there was no other eye witness to the incident.

In his defence, the appellant, while admitting that on the fateful date he was at Olerkesmet and was working in the farms and used to sleep in PW3's room who used to share a bed with his son (the victim), he denied sodomising the victim. He named other people sleeping in the room to be George Madeje and another youth called George. He stated that he was surprised to be arrested on 6/2/2008 on accusation of sodomising the victim.

The learned trial magistrate was satisfied with the prosecution evidence, found the appellant guilty as charged, convicted him and accordingly sentenced him to serve thirty (30) years imprisonment.

In his first appeal to the High Court, the appellant's complaints were directed towards improper conduct of the *voire dire* examination, failure to assess the credibility of the prosecution witnesses and failure by the prosecution to prove the case against him beyond reasonable doubts. The High Court (Mwaimu, J.) was satisfied that *voire dire* examination conducted was proper and sufficient to enable the trial court make a finding that the victim (PW4) understood the meaning of an oath and was also properly sworn before he testified. He, however, found that the cautioned statement was taken in contravention of section 50(1)(a) of the Criminal Procedure Act, Cap, 20 R. E. 2002 (the

CPA) hence expunged it from the record. Lastly, relying on the evidence by the victim supported by his grandmother (PW5) regarding how the offence was committed, he found that the prosecution had sufficiently proved the charge against the appellant. In sum, he found the appeal seriously wanting in merit and dismissed it in its entirety.

Still aggrieved, the appellant accessed the Court fronting, initially, four grounds of complaints. He, subsequently, filed a supplementary memorandum of appeal consisting of three grounds, all being legal matters by their nature, hence making a total of seven grounds. He, further filed written submissions elaborating the grounds of appeal. The grounds of appeal run thus:-

> *"1. That, the first appellate court erred in law in upholding the decision of the trial court while the trial magistrate did not conduct the voire dire examination in accordance with the law.*
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> *2. That, the first appellate court erred in law and in fact when it failed to scrutinize the evidence as regards the identification of the appellant.*
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> *3.That, the first appellate court erred in law and in fact when it held that PW3 and PW5 proved the prosecution case beyond reasonable doubt.*

4. That, the trial court erred in law and in fact by not complying with the provisions of section 192(3) of the CPA Cap. 20 R. E. 2002.

5. That, the first appellate court erred in law and in fact, when it upheld the conviction and sentence imposed by the trial court while the charge sheet was defective.

6. That, the first appellate court erred in law and in fact in upholding the judgment of the trial court which is erroneous because it does not contain essential elements of a proper judgment.

7. That, the first appellate court erred in law and in fact in not finding that the PF3 (exhibit P1) was wrongly admitted by the trial court."

The appellant appeared in person, unrepresented, at the hearing of the appeal whereas, Mr. Innocent Njau, learned Senior State Attorney, argued the appeal on behalf of the respondent Republic.

At the commencement of hearing the appeal, the appellant adopted the grounds of appeal and the written submissions without more. However, when the learned Senior State Attorney brought to his attention that the PF3 was expunged from the record by the first appellate court upon finding that it was improperly admitted in evidence,

he withdrew ground seven (7) of appeal. He then opted for the learned Senior State Attorney to respond to the grounds of appeal before he could make a rejoinder, if any.

Mr. Njau was not hesitant to expressly intimate to the Court that in view of the evidence on record, he was of the settled view that the appellant's conviction and sentence was improper hence he was not resisting the appeal. He was convinced that the charge sheet was fatally defective for citing wrong charging provisions of the law and failure to state the age of the victim which was crucial in the determination of the appropriate sentence. Elaborating on the former ailment, he said as by the time the offence was committed the Revised Editions of the Laws, 2002 were already in place, there was no need of citing the Sexual Offences Special Provisions Act, No. 4 of 1998 (SOSPA). In addition, he argued that if the victim was a child below the age of ten years the appropriate charging provision would have been section 154(1) (a) and (2) of the Penal Code while if the victim was above the age of ten years, the charge ought to have had only cited section 154(1)(a) of the Penal Code. He was also quick to note that the age of the victim was not disclosed in the particulars of the offence and that even though *voire dire* examination was conducted; the age of the victim was not established by evidence. Given the situation, he argued that the defect

in the charge is not curable under section 388(1) of the CPA. He added that even the Court's decision in the case of **Jamal Ally @ Salum vs. Republic**, Criminal Appeal No.52 of 2017 (unreported) which he had filed in the list of authorities could not come to his assistance. Since the charge is the foundation of any criminal trial, he argued, the above infraction was fatal and vitiated the proceedings and judgment of the trial court. That ailment, in his view, was sufficient to dispose of the appeal.

On our prompting in respect of whether, apart from the defects in the charge, there was proper identification of the perpetrator of the offence as complained by the appellant in ground 2 of appeal, Mr. Njau did not mince words. He was of the view that the conditions for favourable identification were not ideal on account of the source of light and its extent not being explained and also the chances of another person committing the offence other than the appellant not being eliminated. Substantiating, he said, the offence was committed at 05:00hrs hence it was still dark and that although the victim stated that he saw the appellant, he was not able to tell how he managed to see and identify the ravisher as being the appellant in the absence of explaining the source and extent of light in the room. Submitting further, Mr. Njau contended that it is not evident if the door was closed after the

victim's father and the appellant's friend had left so as to disallow any other person from gaining entry into the room and commit the offence. In the circumstances, he said, it cannot, with certainty, be concluded that it was the appellant who ravished the victim.

Having realized that the learned Senior State Attorney had supported his appeal, the appellant saw no need to make a rejoinder. He, instead, simply urged the Court to allow his appeal and, ultimately, let him free.

There is no dispute here that the appellant was charged under section 154 of the Penal Code without being specific on the relevant sub-section. In addition, as rightly argued by the learned Senior State Attorney, the charge cited SOSPA which introduced into the Penal Code the amendments made to the provisions dealing with sexual offences. While we agree that it was unnecessary to do so on account of the 2002 Revised Edition of the Laws being already in place, we find it not fatal as, by itself, would not be prejudicial to the appellant if other material particulars, as will be disclosed soon, were in order. It is, however, instructive that once Revised Editions incorporating all the amendments for a certain period of time are already in place, there is no need of

citing the amending Acts in the charge sheet. It would suffice citing the provision as it reads after the amendment.

It is undisputable that a charge of unnatural offence is predicated under the provisions of section 154(1)(a) of the Penal Code and if the victim of the offence is aged below ten years of age, sub-section (2) should be cited. That section provides:-

> *"154. - (1) Any person who-*
>
> *(a) Has carnal knowledge of any person against the order of nature;*
>
> *(b) .....(N/A)*
>
> *(c) .....(N/A)*
>
> *Commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(2) Where the offence under sub-section (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment."*

From the foregoing provisions of the law, it is clear that, in the present case, it was insufficient to cite only section 154 of the Penal

Code as the offence section in terms of section 135(a)(ii) of the CPA which requires the statement of offence to contain a reference to the section of the enactment creating the offence where the offence is, as is the case herein, created by an enactment of the law. That alone, before the Court's decision in **Jamal Ally @ Salum vs. Republic** (supra), would be sufficient to render the charge fatally defective. However, that decision is instructive that we should also consider the particulars of the offence, the prosecution evidence as a whole and the line of defence taken by the appellant so as to determine whether the charge was not informative enough to the appellant. In the event they are found to be sufficiently informative, then the appellant is taken to have not been prejudiced and the defects in the charge are taken to be curable under section 388(1) of the CPA.

In terms of the recited section 154(1)(a) and (2) of the Penal Code, age of the victim is very material and elementary when it comes to the issue of considering the appropriate sentence to be meted to the culprit of the offence. This, therefore, calls for the need to ascertain the age of the victim before a charge under this provision is levelled against the perpetrator. This is also the case before a *voire dire* examination is conducted in terms of section 127(1), (2) and (5) of the Tanzania Evidence Act, Cap.6 R. E. 2002 (the TEA) which before the amendment

through the Written Laws (Miscellaneous Amendments) (No.2) Act No. 4 of 2016 required a trial court before receiving a testimony of a child of the age below fourteen (14) years, to satisfy itself if the child understands the nature of an oath in which case his evidence will be taken on oath or if he possesses sufficient intelligence and understands the duty of speaking the truth in which his evidence will be taken not on oath. It is settled law that proof of age can be done by the victim himself, relative, parent or a medical practitioner leading evidence on that or else by production as evidence of a birth certificate [see **Isaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015 (unreported)].

In the present case the age of the victim was not disclosed in the charge sheet. Neither was it proved by evidence during the trial. All that is on record is the victim's preliminary answers given before the *voire dire* examination was conducted. During that interview, the victim indicated that he was twelve (12) years old. Unfortunately, preliminary answers given prior to giving evidence are not part of evidence as the same are given not on oath (see **Simba Nyangura vs. Republic,** Criminal Appeal No. 144 of 2008). The details given at that stage simply serve as general information [see **Nalogwa John vs. Republic,** Criminal Appeal No. 588 of 2015 (unreported)]. Concrete evidence on the true age of the victim is required from, as indicated above, the

parent, relative, teacher, close friend or any other person who knew the victim. So, in the present case, the age of the victim remained a matter of speculation and conjecture. And as pointed out earlier, age of the victim is very material in considering the appropriate sentence. That ailment obtained throughout the trial until when the appellant was sentenced. We are, in the circumstances not sure if the sentence meted by the trial court and sustained by the first appellate court is the appropriate one. We are of the view that fair trial includes ensuring that convicted culprits are properly sentenced. We, accordingly, agree with the learned Senior State Attorney that failure to properly cite the charging provisions coupled with failure to disclose the age of the victim were fatal defects and could not be cured under section 388(1) of the CPA.

The foregoing ailments therefore vitiate the proceedings and judgment of the trial court hence rendering them a nullity. Similarly, the proceedings and judgment of the first appellate court are a nullity since they are founded on invalid proceedings and judgment of the trial court.

Given the serious nature of the offence, we could have ordinarily considered whether we should order a re-trial. However, the prosecution evidence, as rightly argued by Mr. Njau, falls far short of supporting that

idea. The learned Senior State Attorney reasoned that identification evidence of the appellant as the perpetrator of the offence was insufficient. On that account, he desisted from urging the Court to order a re-trial.

The record bears us out that both courts below were satisfied that it was the appellant who committed the offence relying very much on the victim's assertion that he saw the appellant rise from the floor and carnally knew him against the order of nature. As demonstrated above the offence was committed at 05:00am. It was still night time. Mr. Njau did not find it wise to support that the victim sufficiently identified the ravisher on account of failure to explain the source and extent of light in the said room as well as the circumstances did not exclude the possibility of the offence being committed by another person other than the appellant.

After examining the evidence on record, we are agreed with Mr. Njau that the conditions were unfavourable for a proper and unmistaken identity. The visual identification upon which the conviction was grounded was not watertight. In a range of decisions we have maintained that before a court can find conviction basing on visual identification such evidence must be watertight so as to eliminate the

possibility of mistaken identity. One amongst them is **Raymond Francis vs. Republic**, [1994] TLR 100 where the Court stated:-

> *"It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring correct identification is of utmost importance."*

As regards what should be done to eliminate the possibility of mistaken identity was explained with lucidity in the case of **Said Chaly Vs. Republic**, Criminal Appeal No.69 of 2005 (unreported) that:-

> *"We think that where a witness is testifying about identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or stranger."*

Even in situations where a person being identified is familiar to the identifying witness, this Court, in the case of **Shamir John vs. Republic**, Criminal Appeal No. 166 of 2004 (unreported) which was

cited in the case of **Frank Joseph @ Sengerema vs. Republic**, Criminal Appeal No. 378 of 2015 (unreported), warned that:-

> *"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*

In the present case the identifying witness is the victim. According to him, this is what transpired:-

> *"At 05:00am my father and another youth who came to knock the door at 05:00 left home and went to their shamba jobs. Also that youth who was sleeping on the floor left out at that time of 05:00am. I inside there I remained on the bed sleeping also accused remaining sleeping on the floor. Later after my father have left this accused rose up from the floor where he had slept and come up on our bed and started to put his hands on my mouth and took out my trouser which I had wear then enter his penis to my anus. Latter he left me free and got out and is when got chance to raise alarm..."*

When this piece of evidence is carefully inspected it suggests that the victim had known the appellant prior hence his was an evidence of

recognition. We are alive to the settled position of law that best evidence in sexual offences comes from the victim, but, such evidence should not be accepted and believed wholesome. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s). In that case, therefore, the victim's evidence should be considered and treated with great care and caution. It should be subjected and considered in the backdrop of the principles we have endeavoured to explain above. We have applied such principles in our present case and we find it apparent that the victim's evidence is wanting in terms of providing an impeccable explanation that it was the appellant who committed the offence. It was still night and no explanation was availed of the nature, source and extent of the light that enabled him to recognize the ravisher to be the appellant. In addition, it was not open whether upon the victim's father and the appellant's friend having left, the door was locked. In all criminal trials, it is the duty of the prosecution to, apart from proving all the elements of the offence charged, also eliminate the possibilities of the offence having been committed by another person other than the one charged. This duty, to say the least, was not discharged. On the facts above demonstrated, there existed, in the present case, a possibility of an

intruder having utilised the opportunity to commit the offence taking into consideration the appellant was not arrested at the scene of crime.

It seems to us that the appellant was associated with the commission of the offence merely because he was said to be the only one who remained in the room with the victim after his father and his friend had left. As the circumstances did not eliminate the possibility of the offence being committed by another person, the appellant's association with the commission of the offence remained to be based on suspicions only. It is trite law that suspicion alone however strong it may be is not sufficient to sustain conviction in a criminal case where the standard of proof is that of beyond all reasonable doubt (see **Evarist Maro @ Mangi and Two Others vs. Republic**, Criminal Appeal No. 139 of 2006 (unreported). As the conditions for correct identification was unfavourable, the victim's evidence, in the circumstances, should have not been relied upon to base the conviction.

In view of the above, we concur with the learned Senior State Attorney that identification evidence of the appellant as the culprit was not watertight. It was, therefore, unsafe to sustain the conviction on such evidence of the victim.

In the end, like the learned Senior State Attorney, we don't think it is proper and in the interest of justice to order a re-trial on account of the prosecution evidence on record being very weak [see **Saidi Shabani vs. Republic**, Criminal appeal No. 206 of 2008 (unreported)]. An order of re-trial will definitely pave way for the prosecution to fill up the obtaining gaps which will therefore occasion an injustice to the appellant. That stance was lucidly stated in the decision of the defunct East African Court of Appeal in the case of **Fatehali Manji v. R,** [1966] EACA 343 as follows:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective.* ***It will be not ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the 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."* (Emphasis added).

For the foregoing reasons, we find that the appeal has merit. We, accordingly, allow it. Conviction is hereby quashed and the sentence meted is set aside. The appellant be released from prison forthwith unless held for any other lawful cause.

DATED at **ARUSHA** this 28th day of August, 2019.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 30th day of August, 2019 in the presence of the Applicants in person and Mr. Jeremiah Siay holding brief for Mr. Peter Shayo for the Respondents is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL