IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MWARIJA, J.A., MZIRAY, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 18 OF 2017

MWILALI MUSSA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Twaib, J.)

dated the 5th day of December, 2016
in
Criminal Appeal No. 29 of 2016

JUDGMENT OF THE COURT

19th February & 5th March, 2019

MWARIJA, J.A.:

The appellant was charged in the District Court of Ruangwa with unnatural offence. According to the charge sheet, he was charged under section 154 (1) and (3) of the Penal Code [Cap. 16 R.E. 2002]. The particulars of the offence are that, on 17/2/2015 at about 12.30 hrs at Dodoma village within Ruangwa district in Lindi region, the appellant had a carnal knowledge of "U.A." a boy aged 10 years against the order of nature.

Having heard the evidence of eight prosecution witnesses and the appellant's defence, the trial court found the offence proved. As a result, the appellant was convicted and sentenced to life imprisonment. Aggrieved, the appellant appealed to the High Court. His appeal against conviction was unsuccessful. The sentence was however, reduced from life imprisonment to thirty (30) years imprisonment. He was further aggrieved hence this second appeal.

The facts leading to the appellant's arraignment can be briefly stated as follows: On 17/2/2015 the victim who was a Std III pupil, was in the company of his colleagues under a tree. While there, one person approached them and required them to follow him so that they could assist to remove his tri-cycle which had stuck at a place which he did not disclose. The victim who gave evidence as (PW1), stated that after having walked with the children for a certain distance, that person stopped the other children from accompanying him and asked PW1 to go with him. According to one of the children, Abuu Majid (PW2) who was with the victim, the culprit told them that from his physical appearance, being a "bonge", (meaning, having a big body) the victim looked strong enough and could be able to assist him alone. He walked with the victim for a

certain distance in the bush. Having arrived there, he started to accuse PW1 of having stolen TZS 4,000.00 from him (the culprit). He also threatened the victim that there were witches around who kept animals including cats and a number of dangerous animals. PW1 was horrified and the appellant, who had carried a log, forcefully removed the victim's shorts and proceeded to sodomize him. Having done so, he went away on the pretext that he was going to fetch water for washing the victim but when he returned, he repeated the act of sodomizing him.

PW1 was later taken to hospital for medical examination by DC Evance, one of the prosecution witnesses. (The witness was mistakenly recorded as PW7). The victim was examined by Dr. Nichodemus (PW4) who testified that his examination of the victim revealed that he was carnally known against the order of nature. He found that there was "*Evidence of tear and penetration of the anal orifice....*"

In his defence, the appellant did not have much to say. He merely denied the offence. He said that, sometime in February 2015 on the date which he did not mention, while returning home from his farm, he met a person who was known to him. Without giving details, he said that person

whom he asked for TZS 4,000.00. When cross-examined, he admitted that there was an identification parade conducted by police and that, in that parade, PW1 identified him as the person who committed the sexual assault on him.

As stated above, the trial court was of the view that the prosecution evidence had proved, **firstly**, that PW1 was carnally known against the order of nature and **secondly**, that it was the appellant who committed the offence. In upholding the decision of the trial court, the High Court found that there was sufficient evidence of PW1, PW2 and PW3 showing that the appellant was properly identified as the culprit. The learned first appellate judge relied also on the evidence showing that the appellant was the last person to be seen with the victim.

In his memorandum of appeal filed on 2/5/2017 the appellant had raised three grounds of appeal. Later on however, he filed a supplementary memorandum consisting of four grounds thus making a total of seven grounds. We think however, that the 2nd and 3rd grounds of the supplementary memorandum of appeal have been improperly raised. Whereas the 2nd ground contends generally that the case was not proved

beyond reasonable doubt, the 3rd ground is based on the evidence of identification parade register which was discounted by the High Court.

The remaining grounds of appeal can therefore be paraphrased as follows:-

1. That the High Court erred in upholding the decision of the trial court which was based on the statements of PW1 and PW2 recorded by the police while such statements were not produced in evidence thus contravening the provisions of S.166 of the Evidence Act.

2. That the two courts below erred in relying on the medical examination report (Exhibit P1) while the trial Court did not comply with S. 240(3) of the Criminal Procedure Act requiring the Court to inform the appellant of his right to require the doctor who prepared the report to appear for cross-examination.

3. That the High Court erred in imposing to the appellant a severe sentence without considering that he was a first offender.

4. That the High Court erred in upholding the decision of the trial court while the same was founded on a fatally defective charge.

5. That the High Court erred in upholding the decision of the trial court which was based on the evidence of children of tender age while **voire dire** test was not properly conducted on them.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Kauli George Makasi, learned State Attorney. The appellant opted to hear first, the learned counsel's reply to the grounds of appeal and thereafter make a rejoinder. At the outset, Mr. Makasi informed the Court that he was resisting the appeal.

Responding on the 1st ground of appeal, the learned State Attorney argued that the prosecution was not under a legal duty to produce in evidence the statements of PW1, PW2 and PW3 which were recorded by the Police. His construction of that section is that the same is permissive not mandatory. On the 2nd ground, Mr. Makasi argued that, since the medical officer who examined PW1 testified in court, the contention that

admission in evidence, of the medical report contravened S. 240 (3) of the Criminal Procedure Act (the CPA) is misconceived.

With regards to the complaint in the 3rd ground, that the sentence imposed on the appellant is excessive, it was Mr. Makasi's argument that the sentence of 30 years imprisonment which was substituted by the High Court was on the low side because under S. 154 (2) of the Penal Code the offence carries a minimum sentence of life imprisonment. He prayed to the Court to restore the sentence passed by the trial court.

Responding further to the 4th ground of appeal, the learned State Attorney submitted that the citation in the charge sheet, of S. 154 (1) (3) instead of S. 154 (1) (2) was a curable defect because the irregularity did not prejudice the appellant. And as to the 5th grounds of appeal, the learned State Attorney opposed the argument that a *voire dire* examination was improperly conducted. It was his submission that, from the record, the trial court complied with the requirement of conducting a *voire dire* test on PW1 and PW2 before they gave their evidence. He cited the case of **Issaya Renatus v. The Republic**, Criminal Appeal No. 542 of 2015 to

support his argument that the manner in which *voire dire* test was conducted was sufficient compliance with S. 127 (2) of the Evidence Act.

The appellant did not have much in rejoinder to the reply made by the learned State Attorney to the appellant's grounds of appeal. He reiterated his grievances based on the grounds of appeal and prayed that the appeal be allowed.

In determining the appeal, we intend to consider first, the 4th ground of appeal. The appellants complaint is that the charge is fatally defective because the prosecution cited S. 154 (1) and (3) instead of S. 154 (1) and (2) of the Penal Code. Having considered the nature of the irregularity, we agree with Mr. Makasi that the same did not render the charge fatally defective. Since S. 154 does not contain sub-section (3) but only sub-section (2) we are of the settled view that the intended provision was sub-section (2) of S. 154. Furthermore, the appellant has not said anything on how the error has prejudiced him. We do not therefore find merit is this ground of appeal.

Having so found, we now turn to consider the 1st and 2nd grounds. With regard to the 1st ground, we agree with the learned State Attorney

that the prosecution did not have a duty of tendering in evidence the statements of PW1 and PW2. Section 166 of the Evidence Act relied upon by the appellant states as follows:-

> *"166 –*
>
> *In order to corroborate the testimony of a witness, any former statement, written or oral, made by that witness relating to the same fact made either at or about the same time when the fact took place or before any authority legally competent to investigate the fact,* ***may be proved****."*
>
> *[Emphasis added].*

Although the appellant's complaint centres on the statements of PW1 and PW2 concerning the offence charged not the facts constituting the offence, from the wording of the section as reproduced above, the use by the prosecution of such statements to corroborate the testimony of witnesses is discretionary. That ground is therefore without merit.

The 2nd ground is also, in our view, devoid of merit. It is on record that the medical officer who conducted medical examination on the victim

testified in court. The complaint by the appellant that S. 240 (3) of the CPA was breached is therefore a misconception on the import of that provision.

As regards the 5th ground of appeal, we find that this ground is similarly not tenable. The appellant did not raise it in the High Court. The appellant's complaint in that Court was that the trial court erred in relying on the evidence of PW1 and PW2, the children of tender age. He did not complain that *voire dire* test was not properly conducted. The purpose of a *voire dire* test under S. 127 (2) of the Evidence Act is to ascertain whether or not a child of tender age is competent to testify. It is also intended to ascertain whether a child understands the nature of oath or if he does not, whether or not he knows the duty of telling the truth. See for example, the case of **Khamis Samwel v. The Republic**, Criminal Appeal No. 320 of 2010 (unreported). In this case, the trial magistrate conducted a *voire dire* examination on PW1 and PW2 and came to the conclusion that they knew the duty of telling the truth. Their evidence was then taken after they had been affirmed.

On the 3rd ground, although the appellant complains that the sentence of 30 years imprisonment which was substituted by the High

Court is a severe punishment, we agree with Mr. Makasi that the offence with which the appellant was convicted carries a sentence of life imprisonment. That sentence is mandatory where the offence is committed against a child under the age of eighteen years. The section was amended by the Law of the Child Act, 2009 vide S. 185 which provides as follows:-

> *"185. The Principal Act [the Penal Code] is amended by deleting the word 'ten' and substituting for it the word 'eighteen'"*

By amendment the section now reads as follows:-

> *"154 – (1) Any person who –*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b)*
>
> *(c)*
>
> *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 eighteen years the*

offender shall be sentenced to life imprisonment."

In the circumstances, we find with respect, that sentence of life imprisonment imposed by the trial court was in accordance with the law. We therefore hereby set aside the sentence of thirty (30) years imprisonment substituted by the High Court and restore that of life imprisonment metted out by the trial court.

In the event, on the basis of the foregoing reasons, the appeal is devoid of merit. The same is hereby dismissed.

DATED at **MTWARA** this 1st day of March, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL