IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MUSSA, J.A., WAMBALI, J.A., And KOROSSO, J.A)

CRIMINAL APPEAL NO. 473 OF 2016

HALID HUSSEIN LWAMBANO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of

Tanzania at Iringa)

(Sameji, J.)

Dated the 7th October, 2016
In
DC. Criminal Appeal No. 54 of 2016

JUDGMENT OF THE COURT

10th & 15th May , 2019

MUSSA, J.A.:

In the District Court of Iringa, the appellant was arraigned for an unnatural offence, contrary to section 154(1) (a) of the Penal Code, Chapter 16 of the Laws (the Code). It is noteworthy that the alleged victim was, at the material time, a child aged ten years and, to disguise her identity, we shall henceforth refer to her by the prefix letters "**XYZ**" or by the reference **"PW2"** which was accorded to her by the trial court.

For reasons which will shortly become apparent, it is instructive to fully extract the charge sheet which was couched thus:-

> ***"STATEMENT OF OFFENCE***
>
> ***UNNATURAL OFFENCE:*** *Contrary to section 154(1)(a) of the Penal Code [Cap. 16 R.E. 2002]*
>
> ***PARTICULARS OF OFFENCE***
>
> ***HILDA HUSSEIN S/O LWAMBANO*** *on the 19th day of September, 2015 at Frelimo area, within the District in Iringa Region, had carnal knowledge of one XYZ a girl of Ten (10) years against the order of nature."*

The appellant refuted the charge, whereupon the prosecution featured five witnesses and a medical examination report (exhibit P1) in support of its accusation. On his part, the appellant gave an affirmed reply through which he completely disassociated himself from the prosecution accusation and protested his innocence. He featured his wife, namely, Merina Amir Mfugale (DW2), as a witness to support his denial of the case for the prosecution.

But, as we shall later elaborate, both courts below were more impressed by the version unfolded by the prosecution witnesses. For the moment, we deem it apposite to recapitulate, albeit briefly, the factual background giving rise to the apprehension, arraignment and the ultimate conviction of the appellant.

The substance of the case for the prosecution was built around the allegation that the appellant sexually abused XYZ (PW2) by sodomising her. From the available factual setting, it is not disputed that, at the material time, PW2 was a class IV pupil who was residing at Frelimo area, Iringa Municipality, with her mother (DW2) and the appellant, who happens to be her step father.

Furthermore, it is not disputed that PW2 had a maternal grandmother, namely the Reverend Anna Mfugale (PW5) who is the mother of DW2 as well as Rebeca Amiri Mfugale (PW4). In addition, it was common ground that PW2 had a paternal aunt, namely, Eliza Mgeni who was featured by the prosecution as PW1.

The prosecution version was to the effect that on the 18th August, 2015 PW5 lost her husband following which PW1, PW4 and DW2 attended the burial funeral at the residence of PW5. Incidentally, DW2 went there in the company of her four children, including PW2. It was said that XYZ was vividly sickly, much as she was unable to properly walk and sit. Three days later the funeral attendees left, but PW2 was left behind, ostensibly, for medical attention. Her grandmother told the trial court that she took her to hospital but nothing of material substance was unveiled by the medical checkup. Two weeks later, PW1 took PW2 to her home after she was agreed with PW5 to submit the child to churches for prayers. Upon taking her, PW1 enquired from PW2 as to the cause of her health deterioration and it was whence PW2 disclosed, for the first time, that the appellant had severally sodomised her.

In the wake of PW2's astounding disclosure, PW1, PW4 and PW5 took her to hospital on the 19th September, 2015. Upon examination, a clinical officer, namely, Fatuma Hassan Ponda (PW3) was of the opinion that PW2 was sodomised for several times and posted her findings in

exhibit P1. Thereafter, on the 28th September, 2015, the appellant was formally arraigned on the charge which we have extracted.

During the trial, PW2 told the court that she used to share a sleeping bed with the mother and the appellant in their single roomed residence. She further claimed that, when she was in class I, the appellant started a habit of sodomising her. According to her, he used to perpetrate the act at night, each time when her mother fell asleep. The appellant, she further claimed, on some occasions sodomised her in afternoon when her mother was outside the room. She could not disclose the appellant's wrong doing to anyone since he had warned her that, if she does so, he would kill with a knife. PW2, however, finally claimed that she later disclosed the misdeed to her mother whose immediate response was to rebuke her for telling lies against her step father.

As we have already intimated, in reply to the foregoing condemnation, the appellant refuted the accusation which, he said, was pure fabrication. His account was tacitly supported by his wife (DW2) who wondered as to how the appellant could commit the alleged act for he always left home early in the morning and returned at night. DW2 also

revealed the existence of ill-blood between her mother (PW5) and the appellant on account that the latter had not paid bride price.

With the foregoing detail, so much for the factual background as well as the summary of the evidence adduced from both sides either in support or to counter the accusation which was laid at the appellant door.

At the height of the trial proceedings, the learned presiding Resident Magistrate (Mpitanjia, R.M.) was satisfied that the prosecution had proved its case to the hilt. In the result, the appellant was found guilty, convicted and handed down a sentence of life imprisonment.

Aggrieved by both the conviction and sentence, the appellant preferred an appeal to the High Court. Upon its deliberations, the High Court (Sameji, J., as she then was) found no valid cause to vary the appellant's conviction. As regards the imposed sentence, the learned first appellate Judge took strong exception to the sentence of life imprisonment which she said, "*denies any possibility for the accused person to reform and redeem from the previous behaviour and become a good citizen.*" Nevertheless, she took the position that her hands were tied and that her

duty was to apply the law as it presently stands. Thus, in fine, the appellant's appeal was dismissed in its entirety.

Still discontented, the appellant presently seeks to impugn the decision of first appellate court upon a memorandum of appeal which is comprised of six (6) grounds, namely:

"1. *That, honourable Judge of the High Court erred in law for holding that the testimony of PW2 was clear without considering that the same was not only contradictory but fabricated and not credible to form the basis to conviction particularly in terms of dates, time and places.*

2. *That, honourable Judge erred in law in holding that the evidence of PW2 was corroborated without addressing her mind properly that the findings of PW3 was irrelevant due to lapse of time furthermore that the testimonies of PW1, PW4 and PW5 were purely hearsay.*

3. *That, honourable Judge misapplied the provision of section 127(7) of the Tanzania Evidence Act without justification*

thereof, furthermore misdirected herself for failure to draw adverse inference against unreasonable delay to PW2 to report the alleged incidence of charged offence.

4. *That, the High Court erred in law for failure to discover that the profession level of PW3 was not explained, furthermore that PW2 was examined by PW3 even before being given the PF3 hence a great possibility of cooking the findings.*

5. *That, honourable Judge of the High Court erred in law for holding that the appellant's defence was evaluated without addressing properly her mind that a mere mentioning the defence evidence does not amount its evaluation.*

6. *That, honourable Judge of the High Court contradicted herself in holding that the prosecution side proved this case beyond reasonable doubt without considering that a number of doubts were left unresolved by the prosecution side".*

When the appeal was placed before us for hearing, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Pieazia Nichombe, leaned State Attorney. As it were,

the appellant fully adopted his memorandum of appeal but, when we asked him to expound on it, he deferred its elaboration to a later stage, if need be, and he, instead, impressed on us to permit the learned State Attorney to address us first.

On her part, Ms. Nichombe resisted the appeal by fully supporting the conviction as well as the sentence meted out against the appellant. In resisting the appeal, the learned State Attorney serially responded to all the six grounds of appeal and, it was her submission that the first three grounds which fault the reliability of the prosecution witnesses have no merits at all. Ms. Nichombe contended that although she did not assign the specific dates of the several occurrences of the sodomy, PW2 elaborately stated that, on each occurrence, the appellant inserted his male organ into her anus. There was an unnatural penetration and, she added, true evidence of a sexual abuse has to come from the victim. To buttress her latter contention, the learned State Attorney sought reliance in the case of **Selemani Mkumba v. The Republic** [2006] TLR 379. As regards the fourth ground of appeal Ms. Nichombe submitted that PW3

clearly stated her credentials and, more particularly, she expressly introduced herself as a doctor.

Finally, with respect to the last two grounds of appeal the learned State Attorney conceded that apart from giving a summary of what the appellant stated in defence, the trial court did not, at all, critically consider the defence case. When we asked her whether or not the shortcoming was remedied by the first appellate court, Ms. Nichombe just as well conceded that the first appellate court similarly did not critically consider the appellant's defence but, if at all, the first appellate court simply brushed aside the appellant's defence on account that the same was an afterthought. Ironically though, when we enquired of her as to the effect tied to such a failure, the learned State Attorney was prevaricative and left the issue to the Court's determination.

At the conclusion of the learned State Attorney's address to us, we asked her to comment on an issue which was not raised in the memorandum of appeal. This is in relation to the variance between the charge sheet and the adduced evidence with respect to the date when the offence was committed. It is noteworthy that, in the charge sheet, the

prosecution boldly alleged that the offence to which the appellant stood arraigned was committed *"on the 19th day of September, 2015."* But, when the evidence is put together, the unavoidable conclusion is that on the 19th day of September 2015, PW2 was not at the locus of the crime, much as with effect from the 18th day of August 2015, when she attended her grandfather's funeral, she had been staying with her grandmother (PW5). The learned State Attorney appreciatively conceded that the alleged date of the commission of the offence on the charge sheet constitutes a variance with the evidence adduced at the trial. Nonetheless, once again, Ms. Nichombe was dilatory when we asked her to comment on the effect of the variance. In sum, the learned State Attorney reiterated her support of both the conviction and the sentence imposed on the appellant.

In his brief rejoinder, the appellant submitted that the grievances he raised in the memorandum of appeal will suffice to exonerate him from the prosecution accusation. He, accordingly, impressed on us to allow the appeal with an order setting him at liberty.

Having heard the contetious submissions from either side as well as the issue of variance between the charge sheet and the evidence adduced which we raised *suo motu,* we are obliged to consider the contentious issues and determine the appeal. For a start, we propose to address our issue of concern with respect to the variance between the date of the commission of the offence, as posted on the charge sheet, and the evidence adduced in support of the charge.

Upon numerous decisions, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the person accused will be expected to know and prepare his reply. In, for instance, the unreported Criminal Appeals Nos. 74 of 2003 - **Ryoba Mabiba@Mungare v. The Republic**; 222 of 2004 – **Christopher Raphael Maingu v. The Republic**; 144 of 2005 – **Simon Abongo v. The Republic**; 195 of 2009 – **Anania Turian v. The Republic**; and 24 of 2015 – **Abel Masikiti v. The Republic**; the convictions were quashed and the respective sentences were set aside on account that the adduced evidence showed that the offence was committed on a date other than the

one alleged in the charge sheet. More particularly, in **Abel Masikiti** (Supra), the Court made the following observation:-

> *"If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal."*

In the matter under our consideration, on the whole of the evidence, there was uncertainty as to the exact date when the offence was committed but, as we amply demonstrated, certainly that date could not have been the 19th day of September 2015 which is alleged in the charge sheet. To this end, on a parity of the referred authorities, the shortfall with respect to the variance of dates would alone suffice to dispose of the appeal but, for the sake of completeness, we think we are obliged to as well consider the appellant's complaint raised in his ground No.5 of the memorandum of appeal. In this ground, the appellant faults the two courts below for their failure to consider his defence.

As we have already intimated, Ms. Nichombe concedes that both courts below did not, as such, critically consider the appellant's defence.

Only, the learned State Attorney did not go so far as to advise on the effect of the shortcoming.

In this regard, it is, perhaps, pertinent to observe that one of the pioneer and ice breaking decisions on the subject of failure to consider the defence case is comprised in the High Court case of **WJ Lockhart-Smith v. The United Republic** [1965] EA 211. In that case, the appellant, an Advocate, was convicted in the District Court of Dar es Salaam on three counts of contempt of court. The offence arose from certain remarks made by the appellant when representing his client in the District Court. The trial Magistrate found the words spoken by, and the conduct of the appellant were discourteous and disrespectful to the court and amounted to contempt of court. As he was convicting the appellant, the trial Magistrate remarked:-

> *"In the instant case, I believe the evidence of the prosecution witnesses. I find corroboration in their testimonies. I also find that the accused uttered the words alleged and perpetrated the conduct alleged. I therefore reject the accused's statement. In the result, I find the accused guilty as charged. I*

hereby convict the accused on each of the three counts of the charge."

On appeal, the High Court (Weston, J.) faulted the trial Magistrate for rejecting the appellant's evidence solely because he believed that of the witnesses for the prosecution. In the upshot, the court held:-

"The trial magistrate did not, as he should have done, take into consideration the evidence in defence, his reasoning underlying the rejection of the appellants statement was incurably wrong and no conviction based on it could be sustained."

The foregoing **Lockhart** statement of principle has been consistently adopted and referred by the Court (See, for instance, the unreported Criminal Appeals No. 243 of 2007 – **Michael Alais v. The Republic**; and No. 416 of 2013 – **Jeremiah John and Four others v. The Republic**.) To say the least, it is now trite law that failure to consider the defence of the person accused is fatal and vitiates a conviction. That concludes the appeal in the appellant's favour and, it is needless for us to belabor on the other grounds raised by the appellant.

All said, we allow the appeal and, in the result, we quash the conviction and set aside the sentence imposed on the appellant. We, accordingly, order that he be set at liberty forthwith unless he is held for some other lawful cause. It is so ordered.

DATED at **IRINGA** this 14th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL