IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 03 OF 2017

JULIUS JOSEPHAT .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Sumari, J.)

dated 29th day of November, 2016
in
Criminal Appeal No. 40 of 2016

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JUDGMENT OF THE COURT

10th & 18th August, 2020

MMILLA, J,A.:

This is a second appeal by Julius Josephat (the appellant). He is impugning the judgment of the High Court of Tanzania, Moshi Registry (the first appellate Court), which upheld conviction and sentence that was imposed on him by the District Court of Moshi in Criminal Case No. 281 of 2014. Before that court, he was charged with unnatural offence contrary to section 154 (1) (a) of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code), and sentenced to thirty (30) years' imprisonment.

The victim in this case was a male child (name withheld) who was then 10 years old. He testified as PW2. The sequence of events leading to the appellant's arrest traces back to 3.6.2014 when PW2 resurfaced after he had disappeared on 1.6.2014 from his grandmother's home at which he was living. On returning home on 3.6.2014, his grandmother one Hawa Shaban (PW1), noticed that he was not walking normally, a fact which signaled that he was troubled. On asking him where he was, the boy told her that he was at Njoro Pepsi at the home of a certain man. She took PW2 inside the house, stripped him naked, and inspected him. She discovered that he had bruises at his anus. Upon his grandmother's such discovery, PW2 knelt down and disclosed to her that the said man at whose home he was for all the days he was away from home was regularly sodomizing him. Confounded, PW1 took the victim child to Majengo Police Station at Moshi at which she lodged a complaint. The police prepared and gave them a PF3 with instructions to PW1 to take the child to hospital for medical examination and treatment.

PW1 and PW2 returned the PF3 to Majengo Police Station on 6.6.2014. Upon interrogation, PW2 informed the police about the sexual

abuse he suffered in the hands of the appellant and undertook to lead them to his home at Njoro Pepsi. A squad of nine people, including PW1 and Ally Rashid (PW5), proceeded to Njoro Pepsi whereat PW2 led them to the house of the appellant. On arrival at that house, the victim child knocked the door and called out for the appellant to open for him. The latter readily opened for him, only to find that the child was not alone, but was flanked by the policemen who straightaway arrested and took him to Majengo Police Station. After the usual preliminaries, he was eventually charged before the court with unnatural offence as it were.

The appellant's defence before the trial court constituted of general denial that he did not commit the alleged crime. In fact, he denied knowing the victim child, and that he saw him for the first time in court.

The appellant filed a seven (7) point memorandum of appeal which may be paraphrased as follows; **one** that, the prosecution did not prove the case against him on the standard required by law**; two** that, the victim boy did not mention him at the earliest possible opportunity, a fact which shows that he did not identify him; **three** that, exhibit P1 (the PF3) was wrongly relied upon as evidence because after its admission it was not read

out in court; **four** that, the evidence of the prosecution side was weak and unreliable as it was characterized by numerous unresolved contradictions; **five** that, the first appellate judge wrongly upheld conviction and sentence in that she did not give reasons why she believed the testimony of PW2; **six** that, the prosecution failed to call as witnesses the victim boy's friends, to wit, Brian and Elisha, as well as the victim's father; and **seven** that, his defence was not considered by both lower courts.

On the date of the hearing the appeal, the appellant was not physically present in court, but was linked to it through a video conference facility, and was unrepresented. He prayed the Court to consider the grounds of appeal he filed, subsequent to which he elected for the Republic to respond first but reserved the right to say something thereafter, if need be.

On the other hand, the respondent/Republic was represented by Mr. Innocent Njau, learned Senior State Attorney, and was assisted by Ms Upendo Shemkole and Ms Tusaje Samwel, learned State Attorneys. Mr. Njau readily informed the Court that they were supporting the appellant's appeal on account of the seventh ground of appeal in which, as already

pointed out, the appellant alleges that his defence was not considered by both lower courts.

The submission of Mr. Njau in respect of the seventh ground was briefly that upon carefully reading both lower courts' judgments, he realized that none of them considered the appellant's defence. According to him, the trial court glossed it, and surprisingly the error went unnoticed by the first appellate court, as a result of which it was not fixed. Mr. Njau was firm that the irregularity contravened section 312 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA) which directs a court to give reasons in its judgment for determination it may have reached. Relying on **Ally Patrick Sanga v. Republic,** Criminal Appeal No. 341 of 2017 (unreported), he said under such circumstances the conviction was unsafe. He thus requested us to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), on account of which we may quash the proceedings and judgment of the first appellate court, so also the judgment of the trial court with the effect of vacating conviction and sentence and remit the record to the trial court with instruction to re-write the judgment.

Upon the Court's probing, Mr. Njau discussed the other grounds too. To begin with, he submitted that the second, third and fifth grounds were new in so far as they were not raised before the first appellate court. He therefore contended that except for the third ground which is based on a point of law, the second and fifth grounds should be ignored on account that the Court lacks jurisdiction to determine them.

Concerning the first ground, M. Njau rebutted the appellant's assertion that the prosecution failed to prove the case against him beyond reasonable doubt. He submitted that the prosecution case immensely depended on the evidence of four key witnesses; PW1, PW2, PW3 and PW5. According to him, PW2 gave details on how he initially encountered the appellant, also how he enticed him into that shameful and dehumanizing practice, the discovery which was made by his grandmother, and finally his resolve to lead the police to the appellant's home at Njoro Pepsi to effectuate the latter's arrest. Mr. Njau talked as well on how the evidence of PW2 was corroborated in material particulars by that of PW5. He was confident therefore, that the prosecution proved the case against

the appellant beyond reasonable doubt. He urged us to likewise dismiss this ground for lack of merit.

As regards the third ground of appeal, Mr. Njau quickly conceded that indeed, exhibit P1 was bad evidence because it was not read out in court after its admission. Guided by the case of **Robinson Mwanjisi & 3 Others v. Republic** [2003] T.L.R. 218, he asked for that exhibit to be expunged from the record. That notwithstanding however, Mr. Njau hurried to submit that in fact, the evidence in that document was not relied upon, and that their case stands even without it.

As regards the fourth ground, Mr. Njau negated the appellant's assertion that the prosecution evidence was weak and incapable of supporting the charge against the appellant, and that it was free from any contradictions. He urged us to dismiss this ground too.

Concerning the sixth ground in which the appellant is requesting the Court to draw an adverse inference because crucial witnesses were not called namely, Brian and Elisha, as well as the victim's father, Mr. Njau was firm that this ground was likewise baseless because those persons were not crucial witnesses as purported by the appellant. He impressed that

after all, in terms of section 143 of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the EA), no specific number of witnesses is required to prove a fact. He repeated his assertion that the evidence of PW1, PW2, PW3 and PW5 sufficiently proved the case against the appellant beyond reasonable doubt.

On Court's probing, Mr. Njau submitted that the sentence of 30 years' imprisonment which was meted out against the appellant was illegal in terms of section 154 of the Penal Code as amended by section 185 of the Law of the Child Act No. 21 of 2009 (the LCA) because PW2 was then 10 years old, for which the befitting sentence ought to have been life imprisonment. He thus urged us to vary the sentence with a view to imposing a legal sentence.

On his part, the appellant reiterated his prayer for expulsion of exhibit P1 from the record for the reason that it was not read out after it was admitted in evidence. He also said that there was a contradiction between the evidence of the victim and that of PW1 as regards the school at which PW2 was enrolled. While PW1 said the child was attending school at Chemchemi Primary School, PW2 allegedly said he was enrolled at

Miembeni Primary School, therefore that both of them were not witnesses of truth.

As regards the sentence, the appellant submitted that the sentence of 30 years' imprisonment was according to law and urged us to abstain from varying it as proposed by the learned Senior State Attorney.

Over all, the appellant requested us to uphold the grounds of appeal he raised, allow the appeal, and eventually release him from prison.

Like Mr. Njau, we wish to initially address the seventh ground of appeal which queries that in composing the respective judgments, neither the trial court nor the first appellate court considered the appellant's defence.

After carefully going through the judgments of those two lower courts, we hasten to appreciate that indeed, the trial court did not consider the appellant's defence. Astonishingly, the mistake went undetected by the first appellate court, as a result of which the defect was not fixed. The grand issue becomes; what is this Court supposed to do now?

Before we may proceed to find resolve to the question we have just posed however, we have found it imperative to deal first with grounds 2, 3 and 5 which Mr. Njau has said are being raised before the Court for the first time as they were not raised, discussed and determined by the first appellate court. We checked the memorandum of appeal featuring at page 60 of the Record of Appeal and satisfied ourselves that sincerely, those three grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction – See the cases of **Abdul Athuman v. Republic** [2004] T.L.R.151 and **Juma Manjano v. The DPP,** Criminal Appeal No. 211 of 2009, CAT (unreported). In the circumstances, except for the third ground which we are duty bound to address because it is based on a point of law, we are constrained to ignore grounds 2 and 5 as requested by Mr. Njau.

Perhaps we should now revert to the question we earlier on posed on what this Court is supposed to do given that the appellant's defence was not considered. We think we should consider first the supposed duty of the second appellate court.

As may be recalled, it is the practice that in a second appeal, the Court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate court. In exceptional circumstances, it may nevertheless interfere as such only when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law or procedure by the courts below. This has been expressed in several cases, including those of **Pascal Christopher & 6 Others v. The DPP, Joseph Safari Massay v. Republic,** Criminal Appeal No. 125 of 2012, and **Felix s/o Kichele & Another v. Republic,** Criminal Appeal No 159 of 2005 (all unreported). In the case of **Felix s/o Kichele & Another v. Republic** the Court said:-

> *"This Court may, however, interfere with such finding if it is evident that the two courts below misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been misdirections or non-directions on the evidence."*

As already pointed out, the fact that both courts below in the present case did not consider the defence case is in our view a misapprehension of

evidence and entitles us to intervene in an endeavour to put matters in their proper perspective. We have sought guidance from our earlier decision on the point in **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) in which, encountered with a situation like the present, we appraised the appellant's defence and weighed it against that of the prosecution witnesses in relation to the matter at hand. In the end, we reached at our own conclusion. This is indeed the approach we desired to follow in the present case.

In view of their relatedness, we desire to consider ground 7 along with the first and fourth grounds. While the first ground alleges that the prosecution did not prove the case against him beyond reasonable doubt; the fourth ground asserts that the evidence of the prosecution side was weak and unreliable as it was characterized by numerous unresolved contradictions.

As correctly submitted by Mr. Njau, the prosecution case was principally anchored on the testimony of PW2, the victim of the appellant's shocking acts. That witness informed the trial court how he encountered the appellant, the pain he experienced as a result of being regularly

sodomized, including the consistent problem of the itching of his anus. After his grandmother had discovered that filthy act, the victim boy readily named the appellant as the person who was responsible for the violation he suffered, and repeated the narration to the police when the incident was reported at Majengo Police Station. Likewise, he told them that the appellant was living at Njoro Pepsi. Indeed, he promised to, and led them to the house at which the appellant was living, following which the latter was arrested. That showed that he was very well known him. In fact, on arrival at the appellant's house, PW2 was asked to knock the door which he did, and called him. The appellant's response was that **"chalii wangu umekuja"** meaning "**my friend, you have come**", and opened the door. It was at that point that he landed in the hands of the police. Also, we failed to get any hints suggesting that the prosecution witnesses' evidence was in anyway contradictory.

There is no doubt therefore, that the victim's evidence dwarfed the appellant's claim in his defence that he did not know PW2 until the day he saw him when he appeared to testify in court. Also, his allegation that PW2 never accompanied the police to his home on the day they arrested him

does not appeal because the testimony of PW2 that he was the one who led them to the appellant's home was corroborated by the evidence of PW1 (grandmother) and PW5. Both of them testified that the victim boy led them to the appellant's house at Njoro Pepsi. PW5 was express that on arrival at the appellant's house, PW2 called **"Babu, Babu",** whereupon the appellant responded that **"chalii wangu umekuja"** and opened the door, whereupon he was arrested. In the circumstances, we find that the appellant's evidence in defence did not raise any reasonable doubt, and that it could not have availed him. Thus, while the seventh ground succeeds to a limited extent that his defence was not considered, we nevertheless hold that it did not shake the prosecution case. Hence, to that extent, the seventh, first and fourth grounds of appeal lack merit and are hereby dismissed.

We now turn to address the third ground of appeal which queries that exhibit P1 (the PF3), was wrongly relied upon as evidence because after its admission it was not read out in court. Rightly so in our view, Mr. Njau readily conceded that on that basis, the PF3 was invalid evidence. He urged us to expunge it from the record.

In the first place, we agree with Mr. Njau that the PF3 was not read out after its admission as evidence in court. Apart from the case of **Robinson Mwanjisi & 3 Others** (supra) cited to us by Mr. Njau, there are several other cases in which we emphasized the obligation to read any document on becoming part of the evidence in court. Among them are the cases of **Florence Atanas @ Baba Ali and Another v. Republic**, Criminal Appeal No. 438 of 2016 and **Jumanne Mohamed & 2 Others v. Republic,** Criminal Appeal No. 534 of 2015 (both unreported). In **Jumanne Mohamed & 2 Others** (supra) we underscored that:-

> *"It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. In* ***Thomas Pius*** *the documents under discussion were: Post Mortem Report, cautioned statement, extra judicial statement and sketch map. We relied on our previous unreported decision of* ***Sumni Amma Aweda v. Republic,*** *Criminal Appeal No. 393 of 2013 to hold that the omission to read them out was a fatal irregularity as it deprived the parties to hear what they were all about."*

It follows that, because exhibit P1 in the present case was not read out in court, we are constrained to expunge it from the record as prayed by Mr. Njau.

Mr. Njau quickly added, and we agree with him that exhibit P1 was nonetheless not relied upon in the judgments of both lower courts, and that the prosecution case was principally based on the oral evidence of PW1, PW2, PW3 and PW5. Let's explain.

The evidence to establish that the victim boy was sodomized came from the child himself who, as earlier on pointed out, did not mince words that after enticing him to his home on the first day of his encounter with the appellant, the latter striped him naked, procured his penis which he inserted into his anus. He similarly said that with time, the appellant was regularly doing that act to him. We are satisfied that both courts below rightly held that he was a credible witness, hence that his evidence was reliable. We wish to repeat what we said in **Selemani Makumba v. Republic** [2006] T.L.R. 379 (page 384) that:-

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in*

case of any other woman where consent is irrelevant that there was penetration."

The evidence of PW2 on that aspect was firmly corroborated by that of PW1 who said that she inspected the child on 3.6.2016 soon after he resurfaced after disappearance and noticed that he was sexually abused. Another such evidence came from PW3, the doctor who as afore pointed out, examined the victim child after he was presented to her and found that his anus had bruises, discharging white fluid, also that the sphincter muscles of his anus were loose, which was an indication that his anus was tempered with in a huge way.

On the basis of the above, we are firm that even without the PF3; it was established beyond doubt that PW2 was sexually abused, and that on the weight of the evidence on record, both lower courts correctly found that the appellant sexually molested that child.

Next is the sixth ground which allege that the prosecution failed to call as witnesses the victim boy's friends, to wit, Brian and Elisha, as well as the victim's father, thus entitling the Court to draw an adverse inference against the prosecution. As already pointed out, Mr. Njau refuted the

appellant's assertion that those were crucial witnesses. Also, he resorted to the provisions of section 143 of the EA under which he said, no specific number of witnesses is required to prove a fact.

In the first place, we agree with the learned Senior State Attorney that there is nothing to attract anyone to think that the named persons; Brian, Elisha and the victim boy's father were crucial witnesses in this case. They witnessed nothing in connection with the offence with which the appellant was faced. Likewise, we agree with Mr. Njau that in fact, under section 143 of the EA, there is no particular number of witnesses in any case required for the proof of any fact. This has been stressed in a range of cases including those of **Yohanis Msigwa v. Republic** [1990] T.L.R. 148, **Gabriel Simon Mnyele v. Republic,** Criminal Appeal No. 437 of 2007, and **Nicodemus Awe and 2 Others v. Republic,** Criminal Appeal No. 155 of 2014 (both unreported). In the case of **Gabriel Simon Mnyele v. Republic,** the Court emphasized that:-

> *"... under section* 143 *of the Evidence Act (Cap 6-RE 2002) no amount of witnesses is required to prove a fact - See* ***Yohanis Msigwa v. Republic,*** *[1990] T.L.R.* 148. *It is also the law* ***(section* 122**

> ***of the Evidence Act)*** *that the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons – See* ***Aziz Abdallah v. Republlc*** [1991] T.L.R. 71."

In the circumstances, this ground too is baseless and we dismiss it too.

That said and done, except for the third ground to the extent explained, the appeal is devoid of merit and we dismiss it.

Before we may conclude, we need to address the legality or otherwise of the sentence of 30 years' imprisonment which was meted out against the appellant based on the amendment to section 154 of the Penal Code by section 185 of the LCA.

On his part, Mr. Njau was swift that since the victim child was 10 years old at the time he was molested by the appellant, the sentence of 30 years' imprisonment was an illegal sentence in terms of section 154 of the Penal Code as amended by section 185 of the LCA. He submitted that in the circumstances of this case, the legal sentence was a life imprisonment term, and urged us to rectify the error.

On his part, the appellant submitted that the sentence of 30 years' imprisonment he is currently serving is legal in the circumstances of this case. He urged us to decline the request by the learned State Attorney to vary it.

It is certain that prior to the 2009 amendment of section 154 of the Penal Code by section 185 of the LCA, the sentence for offences falling under that section was 30 years' imprisonment. After the said amendment however, in case of a victim below the age of 18 years, the sentence was enhanced to life imprisonment. In the circumstances, the 30 years' imprisonment term which was meted out against the appellant was *ipso facto* an illegal sentence.

As we said in the case of **Marwa Mahende v. Republic** [1998] T.L.R. 249 which was followed in the cases of **Johnson Charles v, Republic**, Criminal Appeal No. 53 of 2018 and **Joshua Mgaya v. Republic**, Criminal Appeal No. 205 of 2018 (both unreported), superior courts have a duty to ensure the correct application of the law, including substituting improper and/or illegal sentences with the correct ones, of course subject to affording a party who will be adversely affected by such

variation an opportunity to be heard. In **Marwa Mahende's case**, the Court said:-

> *"We think, however, that there is nothing improper about this. The duty of the courts is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the Courts below. In the instant case this Court is pointing out that the correct procedure as sanctioned by law i.e. Section 226 (2), as construed hereinbefore, was not followed, and that this should be put right. We think that it was not only proper for this Court to adopt such a course, but that the Court had a duty to do so, provided that in carrying out that duty it affords adequate opportunity to both parties or their counsel to be heard on the matter as indeed was done in this case."*

Since PW2 was as of June 2014 aged 10 years, in terms of section 154 of the Penal Code as amended by Act No. 21 of the LCA, the correct sentence ought to have been a life imprisonment term. In the light of what we have just expressed, we invoke the revisional powers we have under

section 4 (2) of the AJA on the basis of which we substitute the proper sentence of life imprisonment.

Order accordingly.

DATED at **ARUSHA** this 17th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 18th day of August, 2020 in the presence of the appellant in person and Ms. Tusaje Samwel, State Attorney for the respondent is hereby certified as a true copy of the original.

E. F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL