IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 201 OF 2018

RIDHIWANI NASSORO GENDO .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Mugeta, J.)

dated the 5th day of July, 2018
in
Criminal Appeal No. 309 of 2017

JUDGMENT OF THE COURT

18th & 30th September, 2020

KEREFU, J.A.:

This appeal stems from the decision of the District Court of Bagamoyo where the appellant, Ridhiwani Nassoro Gendo was charged with and convicted of unnatural offence contrary to sections 154 (1) (a) of the Penal Code, [Cap. 16 R.E. 2002] (now Revised Edition, 2019) (the Penal Code). It was alleged that on 17th day of November, 2013 at about 14:00 hours at Mtoni – Makurunge within Bagamoyo District, Coast Region the appellant had carnal knowledge of a child aged seven (7) years against the order of nature. The appellant was sentenced to life imprisonment and

ordered to pay a compensation of TZS 300,000.00 to the victim. To conceal the victim's identity and for purposes of protecting his privacy, we shall refer to him as 'XYZ' or simply 'PW2' as he so testified before the trial court.

In a nutshell, the prosecution case as obtained from the record of the appeal indicates that, on 17th day of November, 2013 at about 14:00 hours Mwanahawa Jumanne (PW1), the mother of PW2 while at home sleeping with her two children and one of them was PW2, the appellant came and asked her to go and bring his maize flour from the house of Mzee Msesele. PW1 ordered PW2 to go and collect the said maize flour but the appellant insisted that she should go as PW2 being a child could not explain himself. PW2 stated that when PW1 was away, the appellant told him to run to the grasses in the farms, which he did. It was the testimony of PW1 that, upon her return, she noted that PW2 was nowhere to be found as it was only the appellant and her younger son (3 years old) who were around. PW1 gave the appellant his maize flour and asked him on the whereabouts of PW2. While still there the appellant told PW1 that he wanted to attend the call of nature. PW1 directed him to where the pit latrine was and she went to pick her phone call. PW1 went on to state that, she was puzzled to see

the appellant running into the bushes leaving his maize flour behind. PW1 went back to Mzee Msesele to inquire if he knew the appellant and he admitted to know him. After being informed by PW1 on what transpired, Mzee Msesele told PW1 to call her mother and step father, which she did. PW1 added that she also told her uncle who lived nearby and they mounted a search of PW2. A few moments later, they heard the voice of a child crying. Upon tracing the said voice, they found the appellant and PW2 in the bush, both with no trousers. PW1 said that she found PW2 with bruises on his face and buttocks and there was also semen. PW1 testified further that they apprehended the appellant and while still naked they took him to the office of street chairperson and then to the police station. PW2 was taken to the hospital for medical examination after they had obtained a PF3.

PW2 testified that when the appellant went to the grasses, he told him to undress his trousers which he refused. PW2 said that the appellant threatened to cut him with a knife, grabbed and undressed him. He stated further that the appellant unbuttoned his underwear and put his penis between his buttocks causing him a lot of pain. PW2 added that, PW1, his grandmother Kidawa Rashid (PW3) and grandfather Aboubakar Herman

(PW4) came to the scene of crime and found him lying down. PW2 said that the appellant attempted to run away but he was apprehended and tied with a rope by PW4. PW3 and PW4's testimonies in respect to their encounter with the appellant dovetailed, in many aspects, with that of PW1 and PW2. They both added that, at the scene of crime, they found the appellant with his pair of shorts on his knees lying on the back of PW2 who was naked and he was ravishing him from behind and they apprehended him at the scene of crime.

E. 4053 D/C George (PW5) the investigation officer testified that when he visited the scene of crime, he found the gumboot of green colour, a cap with red, black and green colours together with a knife. He sought to tender the said items and despite objection by the appellant, the same were admitted in evidence as exhibit P1, collectively.

At the hospital, PW2 was examined by Haroun Edwin Mwakilasa, a clinical officer (PW6), who established that PW2's anus had sperms with multiple superficial bruises and that his sphincter muscles were loose, oozing seminal fluid. PW6 filled the PF3 to that effect and the same was tendered in evidence as exhibit P2.

In his defence, the appellant denied involvement in the commission of the offence. He challenged the evidence of PW1, PW2, PW3 and PW4 that they gave untrue story before the trial court. He, in particular, asserted that, he was framed up due to a land dispute between him and PW4. He also denied to own the items admitted in court as exhibit P1. However, at the end of it all, the trial court found the charge proved against the appellant to the hilt. Hence, the appellant was found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still aggrieved, the appellant has preferred the present appeal. In the Memorandum of Appeal, the appellant raised fourteen (14) grounds of appeal which raise the following main complaints: **One,** that the conviction and sentence were unsustainable for being based on an incurably defective charge; **two,** that PW6, was not competent and qualified person to fill the PF3 as he was only a clinical officer; **three,** that exhibits P1 and P2 were unprocedurally tendered and admitted in evidence; **four,** that the trial magistrate erred in law for failure to comply with section 210 (1) (a) and (3) of the Criminal Procedure Act, [Cap. 20 R.E 2019] (the CPA); **five,** that

it was wrong for the first appellate court to find that the contradictions between the testimonies of PW1 and PW2 were immaterial and do not go to the root of the matter; **six,** that it was wrong for the lower courts to rely on the testimonies of PW1, PW2, PW3 and PW4 who were incredible and unreliable witnesses; and **finally,** that the prosecution case was not proved beyond reasonable doubt.

The hearing of this appeal was conducted through video conference linked to the Ukonga Centra Prison where the appellant appeared in person without legal representation. On the other side, Mses. Esther Kyara, learned Senior State Attorney and Imelda Mushi, also learned State Attorney joined forces to represent the respondent Republic.

When given an opportunity to amplify on his grounds of appeal, the appellant adopted his grounds of appeal and the written submissions he lodged in Court on 9th September, 2020 and urged us to consider the same, allow the appeal and set him free.

On the first issue on an incurably defective charge, the appellant contend that the charge was fatally defective for not indicating the provision of the law providing for the punishment of the alleged offence.

He further argued that, according to its title, the charge was directed to the police station and not to the trial court where he was arraigned. He cited sections 132 and 135 (a) (ii) of the CPA and argued that failure by the prosecution to cite specific provision of the law providing for the punishment of the alleged offence is fatal and had occasioned injustice to him as he could not appreciate the seriousness of the same. To buttress his position, he cited the cases of **Mussa Nuru @ Saguti v. Republic,** Criminal Appeal No. 66 of 2017 and **Zarau Issa v. Republic**, Criminal Appeal No. 159 of 2010 (both unreported).

On the second and third issues, the appellant submitted that PW6, a clinical officer was incompetent and unqualified person to conduct medical examination to PW2 and fill the PF3. That, PW6 did not mention his qualifications and the name of the hospital he was working with for the trial court to establish his credentials. The appellant also challenged the procedure used by the trial court to admit exhibit P2 as he said, the same was not read out before the court to enable him to understand its contents. In addition, the appellant challenged the admissibility of exhibit P1 that the prosecution did not establish the chain of custody and did not produce seizure certificate or receipts to show that the same was obtained

from him. To support his proposition, the appellant cited **Robinson Mwanjisi and 3 Others v. Republic** (2002) TLR 318 and **Director of Public Prosecutions v. Shirazi Mohamed Sharif,** Criminal Appeal No. 184 of 2005 (unreported).

As regards the fifth and six issues, the appellant faulted the first appellate court for finding that the contradictions between the evidence of PW1 and PW2 were minor defects that do not go to the root of the matter. It was his argument that, the evidence adduced by PW1 and PW2 was unreliable. To clarify on this point, the appellant submitted that PW1 testified that she saw the appellant and PW2 running into the bushes while PW2 said that the appellant told him to run to the bushes when PW1 left to pick the maize flour. It was his further submission that, though PW1, PW3 and PW4 testified that they found him at the scene of crime but they gave contradictory evidence on that aspect. He said, PW1 testified that she found them with no trousers on their bottom, while PW3 and PW4 said they found him on his knees lying on the back of PW2 ravishing him from behind.

The appellant also referred to the evidence of PW1 and PW6 and argued that it is not possible for PW2 to be in two places at the same time.

He clarified that, PW1 at page 11 of the record of appeal testified that on 17th November, 2013 at around 14:00hrs PW2 was at home asleep and then PW6 at page 27 said that he examined PW2 on the same date and at the same time. It was the argument of the appellant that, since what was testified by these witnesses was not possible, it raised serious doubts on the authenticity of the prosecution case and thus all prosecution witnesses were incredible and unreliable. To buttress his position, the appellant cited cases of **Mathias Timothy v. Republic** [1984] T.L.R. 83 and **Michael Haishi v Republic** [1992] T.L.R 92. Based on his submission, the appellant argued that the case against him was not proved to the required standard.

In response, Ms. Mushi from the outset, declared her stance that she is opposing the appeal. She started by referring us to the first ground item (iii), the third, sixth and ninth grounds of appeal and contended that the said grounds are new as they were not part of the grounds canvassed and determined by the High Court on first appeal. On that account, she implored us to disregard them.

As regards the first issue, Ms. Mushi readily conceded that the charge omitted to cite the provision of the law providing for the punishment of the

alleged offence. She further conceded that the title of the charge presupposed that it was directed to the police and not the trial court. She was however quick to argue that, the said omission is not fatal as the same is curable under section 388 of the CPA. She also added that, the infraction on the punishment provision was cured by particulars of the offence which sufficiently informed the appellant the nature of the offence he was charged with and the age of the victim. On the title of the charge, Ms. Mushi argued that, it is only a clerical error which did not affect its validity and the appellant was not prejudiced. To bolster her proposition, she referred us to our recent decision in **William Kasanga v. Republic,** Criminal Appeal No. 90 of 2017 and **Maulid Juma Bakari @ Damu Mbaya & Another v. Republic,** Criminal Appeal No. 58 of 2018 (both unreported) and urged us to find that the appellant's complaint on that aspect has no merit.

On the second issue that PW6 was unqualified person to conduct medical examination to PW2 and fill the PF3, Ms. Mushi argued that the same has no legal basis as it was adequately addressed by the first appellate court. To justify her proposition, she referred us to pages 65 – 66 of the record of appeal where the first appellate court considered the said

issue and found that a clinical officer is a medical practitioner in terms of sections 2 and 14 of the Medical, Practitioners and Dentists Act [Cap. 152 R.E. 2002] which was applicable at that time. To buttress her position, she cited the case of **Faraji Said v. Republic**, Criminal Appeal No. 172 of 2018 (unreported) and invited us to dismiss the appellant's claim for lack of merit.

As regards the third issue, Ms. Mushi conceded that exhibits P1 and P2 have no evidential value as they were unprocedurally admitted in evidence and urged us to expunge them from the record. However, she was quick to submit that, even if the PF3 is expunged, the testimony of PW6 is still sufficient to corroborate the evidence of PW2 as it explained in detail what was contained in the PF3. She also added that exhibit P1 has no direct connection with the commission of the offence the appellant is charged with.

In responding to the fourth issue where the appellant is faulting the trial court for failure to comply with section 210 (1) (a) and (3) of the CPA, Ms. Mushi contended that the same is baseless and is not supported by the record of the appeal. She said that the said provisions provide for the rights of the witnesses and not the appellant. To bolster her proposition,

she cited **William Kasanga** (supra) and argued that the record is clear that the trial court properly addressed the witnesses as required by the law.

Submitting on the fifth and sixth issues, Ms. Mushi argued that the pointed-out contradictions are immaterial and minor defects which do not go to the root of the matter as properly decided by the first appellate court. She insisted that, since as the appellant was caught red handed committing the offence and was apprehended at the scene of crime the said contradictions are minor defects which cannot water down the prosecution case. To support her proposition, Ms. Mushi referred us to our previous decision in the case of **Daffa Mbwana Kedi v. Republic,** Criminal Appeal No. 65 of 2017 (unreported).

On the credibility of prosecution witnesses, Ms. Mushi argued that the trial court was at a better position to assess the demeanour and credibility of the said witnesses. She referred us to pages 43 to 46 of the record of appeal and argued that the trial court properly scrutinized and considered the evidence adduced by the prosecution witnesses and was satisfied that the appellant was guilty of the offence charged. She elaborated further that, the trial court believed the evidence of PW2, the

victim which is the best evidence in cases of this nature was corroborated by PW1, PW3, PW4, PW5 and PW6. In conclusion, Ms. Mushi argued that the prosecution case was proved beyond reasonable doubt and prayed for the entire appeal to be dismissed for lack of merit.

In rejoinder submission, the appellant did not have much to say other than reiterating what he submitted in his written submission and insisted for the appeal to be allowed and he be set free.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we wish to begin with the point raised by Ms. Mushi pertaining to the first ground item (iii) and third, sixth and ninth grounds of appeal urging us to disregard them because they are new and were not canvassed by the first appellate court. Having examined the said grounds, we readily agree with Ms. Mushi that the said grounds are new and should not have been raised at this stage. Pursuant to section 6 (1) and (7) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) this Court is mandated to hear appeals from the High Court or court of the Resident Magistrate with extended jurisdiction on matters canvassed before them and determined by such courts. The Court has pronounced itself on that aspect in a number of

cases. See for instance the cases of **Abdul Athuman v. Republic** [2004] TLR 151 and **Yusuph Masalu @ Jiduvi v. Republic,** Criminal Appeal No. 163 of 2017 (unreported). In this regard, this Court will not entertain the said grounds.

In tackling the remaining grounds of appeal, we find it appropriate to start with the first issue on the propriety or otherwise of the charge preferred against the appellant, which is the foundation of the appellant's trial. It is evident that, the charge preferred against the appellant herein is titled '*Tanzania Police Force'* and mentioned only the provisions of section 154 (1) (a) of the Penal Code and omitted sub-sections (2) which provides for the punishment for the alleged offence. Therefore, the next question for our consideration is whether the said omission is fatal or can be cured under the provisions of section 388 of the CPA, as argued by Ms. Mushi. We are mindful of the current acceptable position that, whenever a complaint is raised at the appellate court on the defect in the charge preferred against the appellant during the trial, the test is whether the said defect(s) prejudiced the appellant. Certainly, in order to arrive at that conclusion, the Court must consider the particulars of the offence stated in the charge and assess whether the alleged defects have prejudiced the

appellant substantially or otherwise. In doing so, the Court should inquire whether the appellant understood the offence which faced him and the consequences that had to follow. See for instance the cases of **Jamally Ally @ Salum v. The Republic,** Criminal Appeal No. 45 of 2014 and **Omari Abdalla @ Bwanga v. The Republic,** Criminal Appeal No. 127 of 2017 (both unreported). Specifically, in **Omari Abdalla @ Bwanga** (supra) this Court stated that: -

> *"...we are of the considered opinion that the test to be applicable by an appellate court is first to determine the existence of the said defects in the charge and secondly to assess its effect on the appellant's conviction. The major question being whether conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant."*

Applying the above authorities in the case at hand, we are in agreement with Ms. Mushi that, the particulars of the offence in the case at hand, clearly mentioned the offence, the name, age of the victim, time, date and the place where the offence was committed. It is our considered view that, the said particulars enabled the appellant to understand the charge, as he properly pleaded and marshalled his defence. We are

therefore satisfied and have no hesitation to conclude that the pointed-out anomalies are curable under section 388 (1) of the CPA, as the appellant fully participated during the trial by cross-examining the prosecution's witnesses and made his defence. So, there was no any miscarriage of justice. In the circumstances, we find the appellant's complaint to have no merit.

As regards the second issue on the qualifications of PW6 the clinical officer who examined PW2 and filled the PF3, we hasten to remark that, we are in agreement with Ms. Mushi that as properly decided by the first appellate court, PW6 was a qualified medical practitioner competent to conduct medical examination on PW2. We find support from our previous decisions in the cases of **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016 and **Julius Kandonga v. Republic,** Criminal Appeal No. 77 of 2017 (both unreported) where we considered a similar issue and found that a clinical officer is a qualified and authorized medical practitioner to conduct medical examinations. In this regard, we also find the second issue devoid of merit.

The third issue is straightforward and should not detain us. Ms. Mushi had since conceded that exhibits P1 and P2 have no evidential value as

were unprocedurally tendered for admission and that the same deserves to be expunged from the record, as we hereby do. Having done so, the need of considering other issues raised by the appellant in relation to the said exhibits does not arise. We, however need to observe that, as eloquently argued by Ms. Mushi, even without exhibit P2, the testimony of PW6 is quite sufficient to cover the contents of the PF3 as PW6 explained in detail what was contained in that document. Likewise, the evidence adduced by other witnesses such as, PW1, PW2, PW3, PW4 and PW5 is sufficient to sustain the conviction against the appellant. This is so because, in cases of this nature, a PF3 is not the only evidence to prove that the offence was committed, other evidence on the record can as well do so. See for instance the case of **Ally Mohamed Mkupa v. Republic,** Criminal Appeal No. 2 of 2008 (unreported).

As regards the fourth issue, we are in agreement with Ms. Mushi that section 210 (1) and (3) of the CPA cited by the appellant, is on the manner of recording witness's evidence and is not on the appellant's rights. Therefore, the appellant's complaint on that provision is unfounded.

On fifth and sixth issues, the appellant's complaint is to the effect that the prosecution witnesses PW1, PW2, PW3, PW4 and PW6 were not

credible witnesses as their evidence is tainted with contradictions and inconsistences. Having revisited the testimonies of these witnesses and considered the contradictions and discrepancies complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW1, PW2, PW3, PW4 and PW6. It is indeed on record that, though PW1 testified that she saw the appellant and PW2 running into the bushes, PW2 said that the appellant told him to run to the bushes when PW1 left to pick the maize flour. It is also on record that PW1 at page 11 of the record of appeal testified that on 17th November, 2013 at about 14:00 hours PW2 was at home and then PW6 at page 27 said that on that same date he went to work at 14:00 hours and attended PW2. It is obvious that under normal circumstances, this is impossible. We have however noted that, the said discrepancies were addressed by the first appellate court and ruled out that they are minor discrepancies which do not go to the root of the matter and dispute that the appellant was found red handed or '*flagrante delicto*' committing the offence and was arrested at the scene of crime. The Court has always considered the evidence of finding somebody red handed committing an offence to be conclusive. For

instance, in **Abdallah Ramadhani v. Republic,** Criminal Appeal No. 141 of 2013 (unreported), the Court stated as follows: -

> *"When he responded to the call and went to the scene of crime, he found the appellant in 'flagrante delicto' raping the complainant. The evidence to prove the offence of rape was more than sufficient."*

In that case, after making that observation, the Court upheld the appellant's conviction and sentence because he was found by the witness committing the offence.

Similarly, in the instant case, we, like the first appellate court, are of the considered view that, since the appellant was caught red handed at the scene of crime committing the offence, the testimonies of PW1, PW2, PW3, PW4 and PW6 cannot be affected by minute discrepancies complained of. In **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported) when considering similar discrepancies in witnesses' testimonies, we quoted with approval, at page 7 of the decision, a passage of the learned authors of Sarkar, The Law of Evidence 16th Edition, 2007 which provides that: -

> *"**Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be.** Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. **While normal discrepancies do not corrode the credibility of a parties' case**, material discrepancies do'" [Emphasis supplied].*

Therefore, since in this case we have already observed and labelled the pointed discrepancies to be trifling and minor, the same cannot corrode the evidence adduced and shake the version of the prosecution case. The testimony of PW2, the best evidence in this case, that he was carnally known by the appellant against the order of nature was well corroborated by the testimony of PW6 who medically examined PW2's private parts and found that his anus had sperms with multiple superficial bruises and his

sphincter muscles were loose and oozing seminal fluid. It is also on record that testimonies of PW1, PW3 and PW4 gave a detailed account on how they found the appellant red handed committing the offence and apprehended him at the scene of crime. All these witnesses, in our considered view, proved the prosecution case and thus, the fifth and sixth issues are devoid of merit.

It is our considered view that the appellant's assertion that the case was framed up against him due to the existed land dispute between him and PW4 was highly improbable in the circumstances of this case. It is on record that, the appellant did not cross examine PW4 on that aspect. It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find support in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported). In the circumstances, we see no reason to differ with the lower courts' concurrent findings in respect of the evidence adduced by the prosecution witnesses.

In totality, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair and impartial decision.

For the foregoing reasons, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. More so, we find the sentence meted by the trial court and sustained by the first appellate court to be appropriate in terms of section 154 (2) of the Penal Code.

We wish to put it on record that this appeal was, as usual, heard by a panel of three Justices on 18th September, 2020 including the late Mmilla, J.A who was the presiding chairperson. After the hearing, we held a conference, which was, again, presided over by the late Mmilla, J.A, where we reached a consensus on the reasoning and the outcome of the appeal. Unfortunately, the late Mmilla, J.A passed away on 24th September, 2020 before the composition and signing of this judgment. Therefore, this judgment is made in terms of Rule 39 (11) of the Tanzania Court of Appeal

Rules, 2009 as amended by GN. No. 344 of 2019 and signed by the surviving members of the panel.

In the event, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

DATED at **DAR ES SALAAM** this 29th day of September, 2020.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 30th day of September, 2020 in presence of the Appellant - linked via video conference Ukonga and Mr. Adolf Kissima, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL