IN THE COURT OF APPEAL OF TANZANIA
<u>AT DAR ES SALAAM</u>

(<u>CORAM</u>: <u>MWARIJA, J.A., KOROSSO, J.A. And SEHEL, J.A.</u>)

CRIMINAL APPEAL NO. 21 OF 2018

TWAHA SALUM... APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(<u>Kitusi, J.</u>)

dated the 15th day of September, 2017
in
<u>HC Criminal Appeal No. 141 of 2017</u>

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<u>JUDGMENT OF THE COURT</u>

20th July, & 6th October, 2020

<u>SEHEL, J.A.:</u>

This is a second appeal by the appellant, Twaha Salum who was charged with two counts of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code in the District Court of Temeke at Temeke (the trial court). It was alleged that the appellant, on diverse dates between January and 16th day of March, 2016 at Mwembe Yanga area within Temeke District in Dar es Salaam Region did have carnal knowledge against the order of nature of two boys, SR and HK. Their names are

withheld for the purposes of hiding their identities but they will be referred to as PW1 and PW5, respectively. It was further alleged that PW1 and PW5 were 8 and 10 years old, respectively. The appellant was convicted and sentenced to 35 years' imprisonment. His appeal to the High Court of Tanzania at Dar es Salaam (the first appellate court) was dismissed and his sentence was enhanced to mandatory life imprisonment term on account that the offence was committed against victims whose age were below 10 years. Still aggrieved, the appellant has brought this second appeal to this Court.

The brief facts of the case as can be gleaned from the record of appeal are as follows: PW1 and PW5 were playing football at Mwembe Yanga pitch. According to PW1, the appellant asked them to go and buy cigarettes for him. They agreed but strangely enough he followed them to the shop. After buying the cigarette, the appellant convinced them to go and see his house. They heeded to his request. At the house, outside they saw two people smoking bhangi. The two people were Abuu and Bony. PW1, PW5 and the appellant entered into the house, Abuu and Bony also followed them in. The appellant closed the door and gagged them with a piece of a cloth, laid PW1 down, undressed and sodomised him. While the

appellant was sodomizing PW1 Abuu did the same thing to PW5. They were then given TZS 100.

The account given by PW5 differs in some few details with the one narrated by PW1. It goes like this, PW5 was at the football pitch playing football with PW1, Abuu and the appellant called them and asked them to go and buy cigarettes. They went to buy the cigarettes. On their way back Abuu forcefully took them to his house where they found the appellant and Bony at the door smoking cigarettes. They were forced inside, the appellant and Bony also went inside. Abuu ordered them to take off their trousers of which they did. He gagged their mouth with a cloth, ordered them to bend down and then Abuu had carnal knowledge against the order of nature of PW5 while the appellant had carnal knowledge against the order of nature of PW1. Bony took his turn after the appellant and Abuu finished. Thereafter, they were each given TZS 500 and were warned not to disclose to anybody otherwise they will be stubbed with a knife.

From that day, it became a habit whereby sometimes PW1 used to go alone or in company with PW5 and vice versa.

The aunty of PW1, Sharifa Hassan (PW2) realized that the performance of PW1 was not good at school. She decided to go to school

and inquired from the teachers. At the school, she was told that PW1 was not writing notes and rarely attended school. Having heard the news, she administered punishment on PW1 by slapping him. It was from that punishment that made PW1 to reveal the reason for his poor performance that he together with PW5 used to meet with the uncles at Mwembe Yanga regularly and they took them to their house where they were sodomised.

Having heard that tragic story, PW2 went to inform Tuli Hassan (PW4), the mother of PW5. They both decided to go to Mwembe Yanga and managed to arrest the appellant.

A report was made to the police. The victims were issued with the PF3s and taken to hospital for medical examination.

Deogratius Mathew Kallanga (PW3), a doctor who examined PW1 and PW5 told the trial court that on 17th March, 2016 he received a child (PW1) who came with his aunt and upon examination he found that the muscles of the child's anus were very loose but there was no blood or bruises.

Further, on 18th March, 2016 PW3 received another child (PW5) aged about 10 years and upon examination he found that the muscles of the child's anus were also very loose due to penetration caused by a hard

object. The results for PW1 and PW5 were filled in PF3 which were tendered and admitted as Exhibits P2 and P1, respectively.

There was some further prosecution evidence from an investigative officer, WP 6046 DC Nuni (PW6) to the effect that whilst she was at Chang'ombe police post on 21st March, 2016 she received a case file for investigation. She began her investigation by compiling evidence from the victims and witnesses. It was also her evidence that she issued PF3 to the victims.

The appellant, in his sworn evidence, denied the charges but accepted that he was arrested at Mwembe Yanga on 23rd March, 2016. His reason as to why he was at Mwembe Yanga was that he went to attend a witch doctor and thereby came a man and a boy of about 8 years. He said, that man, pointed at him and he asked the boy whether he was the one and the boy replied yes. That man then asked the appellant, thrice, as to whether he knew the boy. He lied to him that he did not know him and it was his first time to have seen him. He said, the man did not believe him hence he took him to a group of people where he was beaten and taken to Mwembe Yanga police post and then to Chang'ombe police station. At the police, he was asked if his name was Abuu. He replied that he was Afla Salum but still he was charged and taken to court.

The trial court was satisfied that the prosecution proved its case to the required standard thus it convicted the appellant on a charge of unnatural offence on the strength of the evidence of PW1, PW2, PW3, PW4, PW5 and PW6. We should point out here that the trial court's conviction was not specific as to which count the appellant was convicted. The conviction was not clear as whether it was for two counts or a single count of unnatural offence. Nonetheless, the appellant was convicted as follows:

> *"Hence, this court is satisfied that the prosecution side has indeed proved the matter in the required standards through the evidence provided by witnesses PW1, PW2, PW3, PW4, PW5 and PW6, hence this court finds the accused person guilty of the offence of unnatural offence contrary to sections 54 (1) and (2) of the Penal Code and he is hereby convicted accordingly."*

Having convicted the appellant and heard the mitigation, the trial court sentenced the appellant to thirty five (35) years imprisonment.

As alluded herein, the appellant unsuccessfully appealed to the first appellate court where his appeal was dismissed but the sentence was enhanced to life imprisonment. Still aggrieved, the appellant has preferred this second appeal. In the Memorandum of appeal filed to this Court on 15th February, 2018 the appellant raised the following seven grounds:

1. That the learned first appellate Judge grossly erred by failing to discern PW1's veracity as he gave vivid credible account of the sequence of events where he was blind folded hence could not be able to identify who and who abused (sodomised) him.
2. That, the learned first appellate Judge erred where he did not comprehend to the fact that it wouldn't have been possible for PW2 to seek for a PF3 since she seemed not to know what actually befell PW1 at the appellant's domicile.
3. That, the learned first appellate Judge grossly erred by holding to huge contradictions between PW1 and PW5 as to various fundamental aspects that allegedly transpired before and during occurrence of the offence.
4. That, the learned first appellate Judge erred where he failed to note discrepancy between PW6 and PW3 as to when a PF3 was

issued out by the former and subsequent examination of the victim by the later.

5. That, the learned first appellate Judge erred by sustaining the appellant's conviction where the prosecution failed to establish his re-apprehension in connection with the offence.
6. That, the learned first appellate Judge grossly erred where he did not analyse objectively the prosecution evidence before relying on it as basis for his conviction.
7. That, the learned first appellate Judge erred by holding that the prosecution proved the case against the appellant beyond reasonable doubt as charged.

The appellant later on 13th July, 2010 filed a supplementary memorandum of appeal comprised of the following two grounds:

1. That, the first appellate court erred in both law and fact by upholding to the appellant conviction and sentence without noting that it was not clear as to which count he was convicted of.
2. That, the first appellate court erred in both law and fact by upholding the appellant's conviction and sentence with a case where the age of the victim was not proved.

Prior to the date of hearing, the appellant filed a written submission in support of his grounds of appeal of which he adopted in full at the hearing of the appeal with nothing more to add.

At the remote hearing of the appeal via video link from Ukonga Prison, the appellant appeared in person, unrepresented whereas the respondent/Republic was represented by Ms. Aziza Mhina, learned State Attorney assisted by Ms. Nancy Mushumbusi, learned State Attorney.

From the outset, the learned State Attorney supported both the conviction and sentence meted against the appellant and thereafter made her response to each and every ground of appeal. She began her submission by addressing us on the two grounds contained in the supplementary memorandum of appeal. Her submission regarding the seven grounds of appeal contained in the memorandum of appeal was structured as follows, the first, third and fourth grounds were argued separately whereas the second ground was conjoined with the fifth ground and the sixth ground was conjoined with the seventh ground.

Submitting on the first ground in the supplementary memorandum of appeal that there was a general conviction, Ms. Mhina appreciated that the conviction was generally entered by the trial court without specifying

as to which count the appellant was found guilty and convicted. That apart, it was submitted, the omission did not prejudice the appellant since the trial court analyzed and considered the evidence in respect of both counts and ultimately it was convinced that the two offences were committed by the appellant. She referred us at page 39 of the record of appeal to where the trial court made its analysis and came to its conclusion. She thus urged us to dismiss this ground of appeal.

For the second ground on the supplementary memorandum of appeal where it was complained that the ages of the victims were not proved, the learned State Attorney strongly submitted that the ages of the victims were positively established by the doctor and the appellant himself. She referred us to Exhibit P1 which indicates the age of PW5 to be 10 years old and Exhibit P2 which indicates the age of PW1 to be 8 years old. She argued, the two exhibits were admitted without objection and they were read out in court after they were admitted as evidence.

Ms. Mhina also adverted us to the evidence of PW3 and that of the appellant where PW3 told the trial court, on 18th March, 2016 he received a child whose age was about 10 years, for examination and the appellant in his evidence appreciated that a man who arrested him was accompanied by a child whose age was about 8 years old. To bolster her

position that the evidence of a medical practitioner suffices to prove the age of the victim, she referred us to the case of **Issaya Renatus v. The Republic**, Criminal Appeal No. 542 of 2015 (unreported). With that submission, Ms. Mhina contended that the ground of appeal has no merit.

With regard to the first ground in the memorandum of appeal that there was no proper identification, Ms. Mhina contended that the ground is baseless as the record of appeal shows that PW1 and PW5 met the appellant at the football pitch during the day, when they were playing football and the appellant asked the children to go and buy cigarette for him. She contended that it was from that encounter when the act of unnatural offence started and it continued on several occasions until when it was discovered by PW2. According to her, given the circumstances of the encounter, there was no mistaken identity.

As regards to the second and fifth complaints in the memorandum of appeal that relate to the evidence of PW2 that she did not state as to why she went to the police to collect PF3 and there was no evidence establishing the reason for his apprehension, Ms. Mhina admitted to it. She, however, argued that the prosecution evidence must be looked as a whole and not in isolation. She said, PW1 explained in detail in his evidence as to how PW1 came to disclose to her about the sodomy that it

was that information which led PW2 to go to the police to collect PF3 and ultimately the appellant was arrested and charged with the offence of unnatural offence as testified by PW4 and PW6. She therefore urged us to find the grounds of appeal are devoid of merit.

As to the third complaint in the memorandum of appeal relating to contradiction between the evidence of PW1 and PW5, Ms. Mhina admitted that there were contradictions. Elaborating on it, she said there are contradictions in respect of who called PW1 and PW5 while they were at the football pitch playing football; who first entered in the room and closed the door; how they were undressed whether they were asked to undress or the appellant undressed PW1 and the amount of money they were paid whether it was TZS 100 or 500. All these contradictions, according to Ms. Mhina were minor contradictions as they did not go to the root of the matter on the very fact that the victims were carnally known by the appellant. She urged us to find this ground baseless.

With regard to the fourth ground of the memorandum of appeal that PF3s were issued before the date the investigator said she issued them, Ms. Mhina argued that the date of 21st March, 2016 stated by PW6 in his evidence was to the extent of showing the date she received the case file for investigation. It did not relate to the date of the issuance of the PF3s.

She added the PF3s were admitted in the trial court as Exhibits and they each show the dates they were issued and filled. For instance, she said, Exhibit P1 was issued on 18th March, 2016 and filled on 31st March, 2016 and Exhibit P2 was issued on 17th March, 2016 and filled on that date. She thus urged us to dismiss the ground for lacking merit.

Lastly, in her response to the 6th and 7th grounds of the memorandum of appeal that the prosecution has failed to prove their case beyond reasonable doubt, Ms. Mhina submitted that for the prosecution to establish unnatural offence, two key ingredients ought to be proved which are penetration and the age of the victim. She said, the evidence of PW1 and PW5 who were the victims sufficiently proved penetration which evidence was corroborated by PW3 and Exhibits P1 and P2. On the issue of age, Ms. Mhina contended the age was also proved beyond reason doubt by Exhibits P1 and P2 and by the evidence of PW3 and the appellant himself. She, therefore, urged us to find that the prosecution has proved its case beyond reasonable doubt and finally prayed for the appeal to be dismissed as it lacks merit.

In rejoinder, the appellant invited us to consider his written submission and prayed for his conviction to be quashed, sentence be set

aside and appeal to be allowed by setting him free from the prison custody.

Having duly considered the contents of the appellant's written submission, grounds of appeal and the submission made by the learned State Attorney, we shall proceed to determine the contentious issues in the manner submitted by the learned State Attorney except with the 2nd and 5th grounds which we will combine them with the 3rd and 4th grounds because they all boil down to the complaint regarding contradictions.

Starting with the complaint that there was no proper conviction, on this we are in total agreement with the learned State Attorney that the trial court entered a general conviction. It did not specify as to which offence(s) the appellant was found guilty and convicted with. As stated earlier, the appellant was charged with two separate counts of unnatural offences. Further, the evidence led by the prosecution was in respect of the two counts. However, at the end the trial court entered a general conviction. That apart, we do not think the general conviction prejudiced the appellant. We say so because after we have carefully gone through the judgment of the trial court we gathered that the trial magistrate adequately considered and analysed the evidence in respect of the two

separate counts. Here we shall let the record speaks for itself. At page 39 of the record of appeal, the trial court stated:-

*"**Also the victim PW1 together with his friend (PW5)** as have said before this court that **they were sodomized by the accused person as they were the victlms of the offence** and evidence is credible as they undergone the voire dire examination as per the requirements of section 127 (2) of the Law of Evidence Act, also with the corroboration of the evidence given by PW2 (PW1's aunt) PW3 (the Human Doctor), PW4 (mother of the second victim) and PW6 (the police officer) whereby both allege that **the victims were sodomized** together with Exhibits P1 and P2 which indeed shows the court that there is a high possibility that **the victims were really sodomized.**"* (Emphasis is added)

It is evident from the above excerpts, the trial court made analysis in respect of both counts of unnatural offences by summarizing the accounts of PW1 and PW5 on how they were sodomised by the appellant and ultimately concluded as follows:

*"Hence, from the strength of evidence provided by the prosecution witnesses, it is therefore affirmative that **the offence was really committed to the victims.**"* (Emphasis is added)

It follows then that the trial magistrate after analyzing the evidence was convinced that the appellant committed the offence to both victims, PW1 and PW5. We are therefore satisfied that when the trial magistrate was entering the conviction had in mind the two counts of unnatural offences. As such, the general conviction entered by the trial court did not occasion any failure of justice to the appellant.

In the case of **Mussa Mohamed v. The Republic**, Criminal Appeal No. 216 of 2005 (unreported) there was no conviction entered by the trial court against the accused person. In that case, the appellant was charged in the Resident Magistrates Court at Lindi in Lindi with the offence of rape contrary to section 130 and 131(1) of the Penal Code, Cap 16 R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to thirty (30) years imprisonment, nine (9) strokes of the cane, and ordered to pay TZS. 20,000 compensation to the victim but there was no a conviction. The Court having observed that the Resident magistrate went at length to review the evidence before him and thereafter sentenced the accused person then it took that the appellant was convicted. It said:

> *"....It is abundantly clear to us that the learned magistrate had made up his mind to convict the accused person but for some oversight he did not*

write that down, instead he rushed to sentencing. This Court being the final court of justice of the land, apart from rendering justice according to law also administers justice according to equity. We are of the considered opinion that we have to resort to equity to render justice, but at the same time making sure that the Court records are in order.

One of the Maxims of Equity is that "Equity treats as done that which ought to have been done". Here as already said, the learned Resident Magistrate for all intents and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done that which ought to have been done. That is, we take it that the Resident Magistrate convicted the appellant."

In this appeal, considering what we have observed earlier, we are settled in our mind that the trial court when convicting the appellant had in mind the two counts of unnatural offences and not one. We therefore find no merit in the first ground contained in the supplementary memorandum of the appeal.

We now turn to the second ground in the supplementary memorandum of appeal on whether the ages of the victims were proved. With respect, there is tangible evidence disclosing the victims age. In the

record of appeal there are Exhibits P1 and P2. Exhibit P1 shows that the estimate age of PW5 was about 10 years old whereas Exhibit P2 shows that the estimate age of PW1 was about 8 years old. More so, PW3 told the trial court that on 18th March, 2016 he received a child (PW5) aged about 10 years. Even, the appellant himself acknowledged, in his sworn evidence, that a man who arrested him was accompanied by a boy who was about 8 years old.

In the case of **Issaya Renatus v. The Republic** (supra) it was held:

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence."*
>
> *5x*

With the evidence coming from the medical practitioner (PW3) coupled with Exhibits P1 and P2 together with the acknowledgment from the appellant, we see no merit on this ground of appeal.

We agree with the learned State Attorney that the complaint in the first ground of memorandum of appeal is anchored on the positive identification of the appellant. The appellant argued that he could not have been positively identified by PW1 who said he was blind folded. On our part this argument is baseless because the first encounter between the appellant and the two victims was during the day while they were playing football at the pitch and thereafter it became a habit such that the unlawful act of carnal knowledge took place more than once, on several occasions. Hence, there could not have been a possibility of mistaken identity. Secondly, on that very first day, the appellant had conversations with the two victims. He asked them to go and buy cigarette for him and he also followed them to the shop. Thus, they had ample time to observe the appellant. More so, the appellant invited them to his home which they frequently visited. Given the facts and the set of factors, the time spent by the victims and the conditions in which the appellant was under observation we are settled in our mind that the appellant was positively

identified by PW1 and PW5. We also do not find merit in this ground of appeal.

On the alleged inconsistencies and self-contradictions of PW6's evidence, we note that the trial court and the first appellate court addressed the issues with sufficient details. We, like the two courts below, find that the inconsistencies in PW1's and PW5's evidence are minor. Indeed, PW1's account differs with that of PW5 as to who called them at the football pitch, who first entered in the room and closed the door, how they were undressed and the money they were paid. Nonetheless, these discrepancies do not and could not vitiate the fact that the victims were carnally known by the appellant. In other words, the discrepancies do not go to the root of the matter.

It is settled law that not every contradiction or discrepancy on witness's account is fatal to the case. Minor discrepancies on details due to normal errors of observations, lapse of memory on account of passages of time, or due to mental disposition such as shock and horror at the time of occurrence of the event could be disregarded whereas fundamental discrepancies that are not expected of a normal person counts in discrediting a witness. (See the cases of **Ogawa Butunga & Another v. Republic**, Criminal Appeal No. 121 of 2005, **Dickson Elia Nsamba**

Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007, and **Luziro Sichone and Another v. The Republic**, Criminal Appeal No. 131 of 2010, and **Rasul Hemed v. The Republic**, Criminal Appeal No. 202 of 2012 (all unreported). In the light of the position of the law, we find the inconsistencies did not corrode the evidence of PW1 and PW5.

Regarding the date of issuance of PF3s, we agree with the learned State Attorney that the date of 21st March, 2016 mentioned by PW6 was to the effect of showing the date the file was assigned to PW6. That date does not relate to the issuance of PF3s. As such there is no contradiction on the evidence of PW6 and the PF3s. In any case, the PF3s were tendered and admitted as Exhibits P1 and P2 by PW3 without any objection. They both indicate the dates they were issued and filled. Exhibit P1 was issued on 18th March, 2016 and filled on 31st March, 2016 while Exhibit P2 was issued on 17th March, 2016 and filled on the same date, the 17th March, 2016. Hence, this complaint is equally without merit.

With regard to the last ground, we are firm that the prosecution proved the case to the required standard; that is, beyond reasonable doubt. The victims, PW1 and PW5 were of tender aged. This fact was proved by Exhibits P1 and P2, PW3 and the appellant himself. Also, the fact that the victims were carnally known was sufficiently proved by PW1

and PW5 when they told the trial court on how they were sodomized by the appellant and his two friends. The evidence of PW1 and PW5 is corroborated by PW3 and the tendered exhibits P1 and P2. In that regard, like the two lower courts, we find that the prosecution proved its case beyond reasonable doubt against the appellant.

In the end, we find the appeal lacks merit and dismiss it entirely.

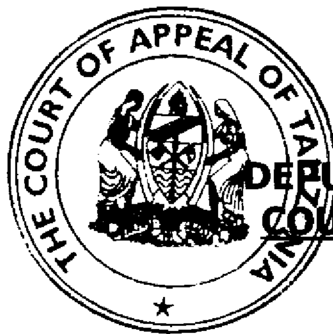
DATED at **DAR ES SALAAM** this 30th day of September, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2020 in the presence of the Appellant linked through video conference from Ukonga prison and Mr. Adolf Kisima, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL