IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 53 OF 2018

JOHNSON CHARLES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mgaya, J.)

dated the 26th day of July, 2013
in
(DC) Criminal Appeal No. 62 of 2012

JUDGMENT OF THE COURT

22nd July, & 7th August, 2020

MWANDAMBO, J.A.:

The District Court of Temeke tried Johnson Charles, the appellant and found him guilty of unnatural offence contrary to section 154 (1) (a) and (c) of the Penal Code [Cap.16 R. E. 2002]. It convicted him and meted out a custodial sentence of thirty years imprisonment. The appellant was not amused by both conviction and sentence. He challenged both in an appeal to the High Court of Tanzania sitting at Dar es Salaam. However, the first appellate court found no merit in the appellant's appeal and dismissed it. In addition, the first appellate court exercised its revisional powers under section 372 of the Criminal Procedure Act, [Cap. 20 RE. 2002] (the CPA) and substituted a life

sentence for 30 years imprisonment which had been imposed by the trial court. It did do so upon being satisfied that the trial court had imposed a sentence which was contrary to the dictates of section 154 (1) (a) (2) of the Penal Code as amended by section 101 of the Sexual Offences Special Provisions Act, No. 4 of 1998 popularly known as SOSPA. Aggrieved, the appellant has preferred the instant appeal.

By way of background, the appellant was a tenant in a house owned by Mwanaidi Salum (PW1) somewhere in Temeke kwa Maganga. PW1 stayed with a grandson aged 4 years at the material time and a victim of the offence who testified as PW2 before the trial court. We shall be referring to him as AH or PW2 in this judgment to hide his identity. On 14th April, 2010, whilst on her way to a toilet located behind the main house, PW1 heard AH crying. Upon asking him, AH told PW1 that the appellant had sodomized him and that prompted PW1 inspecting her grandson out of which she found semen on his anus. A moment later, PW1 took AH to the appellant who is said to have had nothing in denial. Thereafter, PW1 and appellant left with AH to a local police post where a PF3 was obtained to facilitate AH's treatment. The appellant was locked up whilst PW1 took AH to Temeke Hospital where she found Dr. Erasmo Elias Kuwendwa (PW6) who examined AH and

posted his findings in a PF3 showing bruises on his anus with loose sphincter muscles. On those findings, PW6 did not hesitate to conclude that there was penis penetration on AH's anus. Armed with those findings, the prosecution preferred a charge against the appellant under section 154 (1) (a) (c) of the Penal Code.

To prove its case, the prosecution paraded six witnesses including AH who testified as PW2. The record shows that PW2 gave an unsworn testimony after the trial magistrate conducted a ***voir dire*** test and satisfied himself that AH could not testify under oath. In the course of the hearing, the trial court admitted two documentary exhibits namely; a PF3 tendered by PW1 (exh. A) and a cautioned statement extracted from the appellant tendered by E. 2940 D/CPL Mussa (PW3). In his defence, the appellant exonerated himself from the offence and told the trial court that the case against him was fabricated by his landlady; PW1 who had on the material date used abusive language against him whilst giving cash to a visiting relative who had come to break the news of the death of the appellant's grandmother.

After hearing the case, the trial Court found the case for the prosecution proved on the required standard and hence a finding of guilt followed by conviction and sentence. As highlighted earlier, the

appellant's appeal before the first appellate court was not successful. Indeed, it earned him a severe sentence of life imprisonment substituted for 30 years imprisonment imposed by the trial court, as shown.

The appellant's appeal is predicated on 11 grounds of appeal contained in three sets of memoranda; the original memorandum consisting of 6 grounds, first supplementary memorandum containing 1 ground and the second supplementary memorandum with 4 grounds. However, upon hearing the appellant and the learned State Attorney we are satisfied that the determination of the appeal turns on the grounds in the memorandum filed on 21st August 2019. Striped off the inherent grammatical errors, the appellant faults the first appellate court for sustaining conviction on the following grounds:

1. *Reliance on a cautioned statement (Exh. B) which was admitted un-procedurally;*
2. *Irregular admission of the PF3 (Exh. A);*
3. *Lack of evidence from a police officer testifying on the reason for his arrest;*
4. *Unfair trial on account of poor investigation and prosecution;*
5. *Conviction founded on uncorroborated evidence; and*

6. The case for the prosecution not proved beyond reasonable doubt.

At the hearing of appeal, the appellant who fended for himself was connected through video link from prison. The respondent Republic was ably represented by Ms. Anuciatha Leopold, learned State Attorney and Ms. Debora Mushi, learned State Attorney resisting the appeal. Being a layman as we earlier said, the appellant did not argue his appeal on all grounds of appeal. He only picked two issues on which he addressed us.

The first relates to a complaint on the validity of the charge sheet. The appellant complained that the charge sheet was defective for being predicated on section 154 (1) (a) and (c) which deal with two different offences. If we understood him correctly, the appellant appears to have meant that the defect in the charge had a bearing on the sentence imposed on him but he did not elaborate how it prejudiced him. The second aspect relates to the failure by the trial court to address the appellant on his right to defend the case and call witnesses. He also complained that the defence case was not closed. However, when the Court drew his attention to page 19 of the record of appeal indicating the contrary position, the appellant did not press that argument any

further. Otherwise, the appellant urged the Court to find the appeal meritorious and allow it.

Before the learned State Attorneys rose to submit in reply, we invited the appellant to comment on the effect (if any) of the substitution of the 30 years imprisonment imposed by the trial court with life imprisonment by the High Court without hearing the parties. Being a layman, the appellant had nothing useful to say. He left everything in the hands of the Court.

Ms. Debora Mushi expressed her position resisting the appeal fully convinced that the appellant's conviction and sentence substituted by the High Court were correct. The learned State Attorney did not make any specific response to the appellant's complaint against the charge sheet and so we do not have the benefit of her arguments. However, with or without substantive arguments we shall resolve the issue either way, for a defective charge goes to the root of jurisdiction of the trial court having a bearing on the judgment and the resultant appeals before both the first appellate court and this Court.

Our understanding of the appellants' complaint relates to citation of para (c) in section 154 (1) of the Penal Code which relates to a completely different offence from the one the appellant stood charged

with. We may add here that in so far as the offence was alleged to have been committed to a boy under the age of 10 years, it was incumbent for the charge sheet to have cited sub-section 2 as the appropriate penalty provision. We need not overemphasize the requirement under section 132 and 235(a) (i) (ii) of the CPA for a proper and valid charge. However, the issue is whether the citation of an irrelevant paragraph and non-citation of a relevant sentencing provision rendered the charge incurably defective. The answer to the issue can be found from the Court's decisions particularly **Jamal Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported) which referred to **Deus Kayola v. Republic,** Criminal Appeal No.142 of 2012 (unreported). Like in the instant appeal in **Jamal Ally's** case (supra) the omission involved failure to include sub-section (2) of section 154 of the Penal Code. The Court found the omission curable under section 388(1) of the CPA stating:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence we are prepared to conclude that the irregularities over non-citations and citations of*

inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA." [At page 18]

See also: **Ramadhani Mohamed Ally v. Republic**, Criminal Appeal No. 202 of 2016 (unreported).

The above being the case, just as non-citation of a sentencing provision is an inconsequential omission, the inclusion of an inapplicable provision in the charge sheet involving an offence which is completely unrelated to the particulars to which the appellant pleaded not guilty cannot be worse than the former. Apparently, the appellant did not tell the Court in which way he was prejudiced by the over citation. In the event, we find no substance in the appellant's complaint and we reject it. That takes us to the examination of the submission on the grounds in the memorandum of appeal.

Submitting in reply, Ms. Mushi was quick to concede to the irregular admission of the cautioned statement (exh.B) for several reasons. **One**, the contents of the cautioned statement were not read after its admission. **Two,** the appellant was not given an opportunity to express his position whether he had any objection to its admission. **Three**, the exhibit was tendered by a prosecutor rather than the

witness. **Four**, the cautioned statement was recorded outside the basic period of 4 hours from the time of the appellant's arrest. By reason of the improper admission of exh. B, the learned State Attorney implored us to expunge it from the record. Next, the learned State Attorney addressed us on ground 2 whose complaint is predicated on an irregular admission of the PF3 (exh. A) into evidence.

The learned State Attorney had similar arguments she made in ground one except for the recording of the cautioned statement. She likewise urged the Court to expunge the irregularly admitted PF3 placing reliance on **William Kasanga v. R**, Criminal Appeal No. 90 of 2017(unreported).

With respect we have no difficult in agreeing with the learned State Attorney on both grounds. Apparently, the appellant made similar complaints in his petition of appeal to the High Court but the learned first appellate Judge found the irregular admission of the PF3 (exh. A) and the cautioned statement (exh. B) not fatal and prejudicial to the appellant's conviction. We have no demur in stating that the learned first appellate Judge misapprehended the law and the consequence flowing from irregular admission of exhibits. We say so being alive to the settled legal position holding that failure to read the contents of an

exhibit after its clearance for admission is fatal. See for instance: **Robinson Mwanjisi and 3 Others v. R** [2003] T.L.R 2018. That was the position on 13th June, 2013 the date on which the first appellate Judge composed her judgment. We are surprised that the learned first appellate Judge had no regard to the authority binding on her. As a matter of emphasis we feel compelled to reiterate what we said in **Tanzania Breweries Ltd v. Anthony Nyingi, Civil** Appeal No. 119 of 2014 (unreported) thus:

> *"....Under the doctrine of stare decisis, or precedent, the decision of the Court of Appeal prevails as the correct interpretation of the laws relating to the civil jurisdiction of the High Court until such time that this Court may depart from it, or some relevant statute is amended. Whatever views to the contrary one may have about it, they are of no consequence. To that extent the decision of the High Court was made per incuriam. So it is null and void..." [At page 8]*

The first appellate Judge's decision on the treatment of irregularly admitted exhibits was made *per incuriam*; it was, to that extent, null and void. In consequence, the irregularly admitted exhibits 'A' and 'B'

are hereby expunged from the record as urged by the learned State Attorney.

The appellant's complaint in ground 3 relates to the cause of his arrest. The learned State Attorney submitted that contrary to the appellant the cause of his arrest was connected to the complaint by PW1 that he had sodomised PW2. The appellant was aware of that complaint and surrendered himself to the police. Like the learned State Attorney we have not seen any merit in this ground because the evidence through PW1 (at pages 6 and 7) shows that the appellant readily obliged to go to the police upon PW1 confronting him with the disturbing news on the sodomy of her grandson. Consequently, we dismiss this ground for being bereft of merit.

Next, Ms. Mushi combined her arguments in grounds 4, 5 and 6 in the original memorandum of appeal. The general complaint in the three grounds revolves around insufficient evidence to prove the case against the appellant on the required standard because, according to him, it was poorly investigated and prosecuted and the conviction was based on uncorroborated evidence. Ms. Mushi argued generally that the prosecution proved its case on the standard required in criminal cases. To start with, placing reliance on section 127 (2) of the Evidence Act

[Cap. 6 R.E 2019] (the Act), the learned State Attorney argued that the best evidence in sexual offences as it were must come from the victim and in this case, PW2 gave evidence on how he was sodomised by the appellant in sufficient details as shown at page 8 and 9 of the record of appeal.

To buttress her submission, the learned State Attorney referred us to our decision in **Mbaga Julius v. R**, Criminal Appeal No. 131 of 2015 (unreported) citing **Seleman Makumba v. R,** [R006] T.L.R 379 construing section 127(2) of the Act. Submitting further, the learned State Attorney invited us to accept that PW2's evidence was corroborated by PW1 and PW6 appearing at pages 6 and 14 respectively. However, the learned State Attorney was at great pains in explaining whether PW1's evidence was capable of corroborating PW2 that it was the appellant who sodomised him. All in all, she urged us to dismiss the three grounds.

After analyzing the submissions by the learned State Attorney in the light of the appellant's complaint, there is no dispute that the victim (PW2) gave unsworn evidence which required corroboration in line with previous decided cases including; **Deemay Daati & 2 Others v. R** [2005] T.L.R 132. The first appellate court had regard to that

decision and found itself satisfied that the evidence of PW2 was sufficiently corroborated by PW1, PW3, PW4 and PW6 as well as exhibits A and B. In so doing, the first appellate court concurred with the findings of the trial court that the case against the appellant had been proved on the strength of the evidence adduced by PW1, PW2 and PW4 as well as the medical report (exh. A) and a cautioned statement (exh. B). We are alive to the settled law that in a second appeal, the Court should not lightly interfere with the concurrent findings of the two courts below unless it is plain that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. See for instance: **Diskson s/o Joseph Luyana & Another v. R,** Criminal Appeal No. 1 of 2015, **Juma Mzee v. R,** Criminal Appeal No. 19 of 2017 and **Felix s/o Kichele & Emmanuel s/o Tienyi @ Marwa v. R,** Criminal Appeal No. 159 of 159 of 2005 (all unreported).

As seen above, the two courts below placed reliance on exhibit A the PF3 tendered by PW1 as well as the cautioned statement (exh. B) tendered by PW3. However, we have already held that the two exhibits were wrongly admitted and expunged them from the record. Under the circumstances, the two courts below made concurrent findings on the

evidence which was illegal so to speak. We are fully aware that despite the obliteration of the PF3, the oral evidence by PW6 could still be relied upon but that evidence would only be relevant to prove that PW2 sodomised. It could not corroborate PW2 that it is the appellant who sodomised him.

The other evidence on which the two courts found to be corroborative of PW2's testimony came from PW4. However, the record shows clearly at page 12 that this witness unequivocally told the trial court in cross- examination that she did not know what happened to PW2; she was just called to bring a T- Shirt for him by her sister (PW1). Accordingly, the first appellate court concurred with findings of the trial court on a clear misapprehension of the evidence from a witness who had not witnessed the appellant sodomising PW2.

Finally, there was evidence from PW1; the victim's grandmother. PW1's evidence shows that she only heard PW2 crying outside the house as she was proceeding to a toilet behind the main house. Apart from being told by PW2 that the appellant sodomised him, PW1 did not witness such an act neither did she tell the trial court having found PW2 in the appellant's room or explain in some details for how long was PW2 outside the house and whether the appellant was the only tenant or

occupant in that house present at the material time. In our view, such evidence was not free from doubts which could only be resolved in favour of the appellant. Such evidence was incapable of corroborating an unsworn evidence by PW2.

In the upshot, we have no hesitation in holding as we do that the case against the appellant was not proved on the required standard. It is against the above we did not think it necessary to discuss the grounds in the first and second supplementary memoranda of appeal which would have been merely academic. However, we only find compelled to say something in relation to the sentence substituted by the first appellate court.

The trial court passed a sentence of 30 years' imprisonment which it considered appropriate for the offence. However, the first appellate court found the sentence inadequate and contrary to section 101 of the Sexual Offences Special Provisions Act, which prescribes a sentence of life imprisonment where the offence is committed to a child under the age of 10 years. We think the learned Judge must have meant section 16 of Act No. 4 of 1998 which repealed section 154 of the Penal Code and replaced with a new section. Be it as it may, we have no hesitation in stating that the first appellate court was right to a certain extent in

substituting the sentence on the authority of **Marwa Mahenda v. R** [1998] T.L.R 249. We held in that decision that superior courts have a duty to ensure correct application of the law including substituting improper sentences with correct ones as it were. However, such duty must be performed subject to affording a party who will be adversely affected by severe sentence as is the case in the instant appeal with an opportunity to be heard.

It is plain in the judgment of the first appellate court (at p.51 of the record) that it exercised that power in revision without affording the appellant the right to be heard. That was contrary to the provisions of section 29 (b) (i) of the Magistrates' Courts Act [Cap. 11 R.E. 2019] (the MCA). It is for this reason we invited the appellant's views on the sentence imposed by the High Court. Under normal circumstances, had we sustained conviction, we could have invoked the provisions of section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] by setting aside that sentence. Whilst we commend the High Court for being alert in ensuring that convicts earn the deserving sentences, we hope that it does so with strict adherence to section 29(b) (i) of the MCA in enhancing sentences.

In conclusion, we find merit in the appeal having satisfied ourselves that the appellant's case was not proved on the required standard and so his appeal is hereby allowed. Having allowed the appeal, we quash the appellant's conviction and set aside the sentence and order his immediate release unless he is held therein for another lawful cause.

DATED at **DAR ES SALAAM** this 6th day of August, 2020.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered on 7th day of August, 2020 in the presence of the appellant in person-linked via video conference and Ms. Tully Helela, 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