IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 192 OF 2018

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

IDDY SALUM @ FREDY ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Luvanda, J.)

dated the 21st day of June, 2018
in
DC. Criminal Appeal No. 252 of 2018
.....

JUDGMENT OF THE COURT

14th September & 18th November, 2020

MWARIJA, J.A.:

The appellant, Iddy Salum @ Fredy was charged in the District Court of Kinondoni with unnatural offence contrary to section 154(1) (a) of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019) (the Penal Code). It was alleged that on 5/10/2012 at Mabibo area within Kinondoni District in Dar es Salaam Region, the appellant did have carnal knowledge of one "IA" (his true name withheld), a male child aged eleven years against the order of nature.

The appellant denied the charge. After a full trial at which the prosecution relied on the evidence of three witnesses while the appellant depended on his own evidence in defence, the trial court was satisfied

that the case had been proved beyond reasonable doubt. He was consequently convicted and sentenced to thirty years' imprisonment. He was also ordered to pay a compensation of TZS 2,000,000.00 to the victim. Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court hence this second appeal.

The facts giving rise to the appellant's arraignment and his subsequent conviction can be briefly stated as follows: The victim who testified as PW1, was at the material time, a standard six pupil at Mikumi Primary School in Magomeni area within Kinondoni District. Sometime in September, 2012 his father, Ally Rashid Abdallah (PW2) learnt that the said child had developed truancy behaviour and therefore, decided to go to school to inquire about his class attendance. The class teacher confirmed to PW2 that PW1's school attendance was poor.

When the class teacher called PW1 for questioning him about his truancy, he explained that during school hours he used to loiter with one of his friends at various places where certain persons sodomized and paid them some money. He also named the places to be Mabibo junction, Mwenge, Kimara and Manzese. He named the appellant as one of those persons who used to molest them stating that he used to do so

at Mabibo junction in a defective motor vehicle on payment of TZS 200.00

Following that information, PW2 reported the matter to the police and obtained a PF3 for the purpose of taking PW1 to hospital for medical examination. Having conducted examination on the victim, Dr. Hamad Ally Hembela (PW3) of Mwananyamala Hospital found that PW1's anus was not normal in that his anal sphincter muscles had become loose, an indication that he had been sexually assaulted.

On the basis of the complaint by PW1 and the medical report which was posted in the PF3, the police arranged for the arrest of the appellant. He was later arrested and charged as shown above.

In his evidence, PW1 testified that sometime in September, 2012 while in the company of his aunt, they met one of the pupils who was at the same school with him. That pupil asked PW1's aunt why had PW1 stopped from attending school, the question which alerted her that PW1 might have developed a truant behaviour. According to PW1's evidence, his aunt took him to school and when he was questioned by his class teacher, he admitted that he used to go with one of his friends to various places during school hours and associated themselves with persons who used to have carnal knowledge of them against the order

of nature on payment of TZS 200.00 whenever they did so. He mentioned the appellant who was known to them as brother Fredy as one of those persons adding that the said person had on four occasions, molested him at Mabibo junction in a defective motor vehicle.

The evidence of PW1 was supported by that of his father (PW2) who testified that, upon being questioned by the class teacher, PW1 admitted that he used to abscond from school and together with his friend, used to associate themselves with among others, the appellant who molested them on payment of TZS 200.00.

In his defence, the appellant (DW1) disputed the prosecution evidence that he committed the offence. He testified that in October, 2012 on a date which he could not remember, at 06.45 p.m while on duty, he was apprehended by four men and one woman on allegation that he had committed an offence. He was taken to Magomeni and latter to Urafiki police station where he was later charged with the present offence.

In its decision, the trial court was satisfied that the prosecution evidence had sufficiently established the case against the appellant. It found that the evidence of PW1, which was corroborated by that of PW3, was credible and therefore, proved beyond reasonable doubt that

the appellant did have carnal knowledge of the victim against the order of nature.

On appeal to the High Court, the learned first appellate Judge upheld the decision of the trial court. He was of the view that the appellant was well known by PW1 because the offence against him was committed on several occasions at the same place. The learned Judge reasoned further that, PW1 mentioned the appellant at the earliest opportunity. Relying also on *inter alia,* the case of **Selemani Makumba v. Republic,** [2006] T.L.R. 379, in which the Court emphasized that in sexual offences, the true evidence has to come from the victim, the learned first appellate Judge observed that, the evidence of PW1 is credible, and found therefore that the offence was proved beyond reasonable doubt. He therefore upheld both the conviction and sentence.

In his memorandum of appeal, the appellant raised eight grounds of appeal and later at the hearing, he raised one additional ground. All the grounds can however, be consolidated into the following four grounds:-

1. That the learned High Court Judged erred in law in upholding the decision of the trial court while the appellant's conviction was based on contradictory and insufficient prosecution evidence as

regards the allegation that the offence was committed on 5/10/2012

2. That the learned High Court Judge erred in law in upholding the trial court's decision while the appellant's conviction was wrongly based on the evidence of PW1 which was not only taken in contravention of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2002] (now R.E. 2019) but such evidence lacked corroboration.

3. That the learned High Court Judge erred in law in failing to find that the proceedings of the trial court were a nullity for the trial court's failure to afford the witnesses and the appellant the rights accorded to them by section 210 (1) (a), (3) and 231 (1) of the Criminal Procedure Act [Cap. 20 R. E. 2002] (now R. E. 2019 (the CPA).

4. That the learned High Court Judge erred in law in failing to find that the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal which was conducted through video conferencing, the appellant who was in Ukonga Central Prison fended for himself. On its part, the respondent Republic was represented by Ms.

Grace Mwanga assisted by Mr. Benson Mwaitenda, learned State Attorneys.

When he was called upon to argue his appeal, the appellant opted to let the learned State Attorney submit first in reply to the grounds of appeal and reserved his right to make a rejoinder submission if the need to do so would arise.

In her submission, Ms. Mwanga apposed the appeal. On the first ground, although she admitted that there is a contradiction as regards the date on which PW2 became aware that PW1 had the habit of absconding from school, she argued that the contradiction is not substantial. The contradiction complained of is that, whereas PW1 said that it was on 4/10/2012, PW2 testified that it was in September, 2012. It was Ms. Mwanga's submission that the contradiction is curable under s. 388 of the CPA. She cited the case of **Osward Mokiwa @ Sudi v. Republic,** Criminal Appeal No. 190 of 2014 to bolster her argument.

As for the appellant's contention that the name of the victim differs with that which was stated by the witnesses, Ms. Mwanga submitted, and correctly so in our view, that, since the names refer to the same victim, the contention is without merit.

With regard to the second ground of appeal, the learned State Attorney argued, first, that although after conducting *voir dire* test, the trial magistrate did not make a finding on whether or not PW1 understood the nature of oath, from his answers, it is clear that he was knowledgeable about it and therefore, the trial court rightly took his evidence under affirmation. Secondly, Ms. Mwanga submitted that the evidence of PW1 was corroborated by that of PW3 as regards penetration and that of PW2 on the circumstances under which the appellant was arrested.

On the third ground of appeal, Ms. Mwanga started by admitting that the trial magistrate did not comply with s. 210 (1) and (3) of the CPA. She admitted also that s. 231 (1) of the CPA was not complied with. The learned State Attorney argued however, that the irregularities did not occasion any injustice to the appellant. This is more so, she said, because the appellant did not complain that his evidence was not properly recorded. On the failure by the trial court to read over the substance of the charge before the appellant gave his defence, she argued that even if that would have been the case, the charge was read over during the preliminary hearing and the appellant pleaded thereto.

On the fourth ground, the learned State Attorney opposed the appellant's contention that the prosecution did not prove the case

beyond reasonable doubt. She argued that the evidence of PW1, PW2 and PW3 sufficiently established that the appellant committed the offence. When probed by the Court however, the learned State Attorney conceded that the appellant's defence was not considered. She argued however that despite that omission, the defence evidence did not raise any reasonable doubt in the prosecution case because his evidence was no more than a mere denial of the charge. On further probing, the learned State Attorney argued that the sentence of thirty years was illegal because the victim was below 18 years and in that respect, the offence is punishable with life imprisonment under s. 154 (2) of the Penal Code as amended by s.185 of the Law of the Child Act No. 21 of 2009 (now Cap. 13 R.E. 2019) (the Law of the Child Act).

In rejoinder, the appellant argued that, from the procedural defects conceded to by the learned State Attorney, the Court should consider to allow his appeal and set him free.

We have duly considered the contents of the grounds of appeal and the submission made by the learned State Attorney. In determining the appeal, we wish to begin with the third ground of appeal in which the appellant contends that the trial court's proceedings were a nullity for the trial magistrate's failure to comply with the provisions of ss. 210

(1)(a) (3) and 231 (1) of the CPA. Section 210 (1) (a) of the CPA provides as follows:

> *"210 – (1) in trials, other than trials under section 213, by or before a Magistrate, the evidence of the witness shall be recorded in the following manner-*
>
> *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and* ***shall be signed by him*** *and shall Form part of the record; and*
>
> *(b) .... N/A."*
>
> [Emphases added].

It is true, as admitted by the learned State Attorney, that the trial magistrate did not inscribe his signature immediately after finishing to record the evidence of some of the witnesses (PW1, PW2 and DW1). However, as can be gleaned from the relevant provision reproduced above, the same does not provide for a stage at which the trial magistrate has to sign after recording the evidence of a witness. The practice however, has been for the trial magistrate to sign after recording the evidence of a witness and after both cross-examination and re-examination. In this case, the magistrate signed after the witnesses had been re-examined by the prosecution. In our considered

view, because all that which a witness states in both cross-examination and re-examination constitute the witness' evidence, we agree with the learned State Attorney that even though the magistrate did not inscribe his signature after every stage of the witnesses' evidence, the omission did not render the proceedings a nullity.

With regard to the contention that s. 210 (3) of the CPA was not complied with, that contention is equally devoid of merit. The provision states that:

> *"210 – (1) .... N/A.*
>
> *(2) .... N/A.*
>
> *(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."*

In the first place, it is the witness, not the accused person to whom the right to require that the recorded evidence be read over to him is afforded. The appellant did not therefore, have the right to complain on behalf of the prosecution witnesses. – Se for example, the cases of **Abuu Kahaya Richael v. Republic**, Criminal Appeal No. 557 of 2017 and **Athuman Hassan v. Republic**, Criminal Appeal No.84 of 2013 (both unreported). In the latter case, the Court stated as follows:

"... we do not see substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and make a comment on their evidence."

Secondly, although in his capacity as a witness for the defence, the appellant should have been so informed, the omission by the trial court to inform him of that right did not prejudice him. We hold this view because in his grounds of appeal, the appellant has not complained about the authenticity of his recorded evidence. In such a situation, the omission is curable under s. 388 of the CPA. The Court has had occasion to consider similar complaint in the case of **Jumanne Shaban Mrondo v. Republic**, Criminal Appal No. 282 of 2010 (unreported). Having considered the nature of the omission, it held as follows:

"... in the present case the authenticity of the record is not in issue, at least, the appellant has not complained. In the circumstances of this case, we think that non-compliance with section 210(3) of the CPA is curable under section 388 of the CPA."

Concerning the complaint that s. 231 (1) of the CPA was not complied with in that the substance of the charge was not read over to the appellant before he gave his evidence in defence, we are unable to agree that there was such an omission. According to the record, after

the ruling on a case to answer, the following was recorded by the trial magistrate:

> *"Section 231 of the CPA Cap. 20. R.E. 2002 have (sic) been complied with.*
>
> ***Accused:***
>
> *I will adduce my evidence under oath without witness.*
>
> ***Order:***
>
> *Hearing date on 10/06/2015."*

It is clear that, from the record, the trial magistrate complied with the requirements of s. 231 (1) of the CPA including reading of the substance of the charge to the appellant. The contention by the appellant has the effect of challenging the contents of the record by way of an appeal. However, the principle as regards a court record is that the same is taken to reflect a true position of what took place during the conduct of the proceedings and cannot be lightly impeached. As held in the case of **Halfani Sudi v. Abieza Chichili** [1998] T.L.R 527:

> *"There is always a presumption that a court record accurately represents what happened... a court record is a serious document, it should not be lightly impeached."*

On the basis of the above stated reasons, we do not find merit in the third ground of appeal.

That said, we now turn to consider the first ground of appeal. The appellant challenges the prosecution evidence arguing that it is contradictory and insufficient to prove that he committed the offence on 5/10/2012 as shown in the charge. It is true that the charge indicates that the offence was committed on 5/10/2012, but in their evidence PW1 and PW2 talked of different dates. However, their respective evidence related to different events. Whereas PW1 talked of the day in September 2012 as the day on which his aunt discovered that he had been absconding from school, PW2 talked of the date on which he took PW1 to school to inquire about his truancy. In the circumstances, we do not find any contradictions in the evidence of PW1 and PW2 as regards the date on which the offence was committed.

With regard to the date of commission of the offence shown in the charge, the same is the date on which the victim was examined by a doctor. In his evidence however, the victim testified that he was repeatedly molested by the appellant on four different occasions but could not remember the dates. He testified that the appellant started that act way back before September 2012, the time when PW1's aunt learn that he had been absconding from School. The only anomaly here therefore, is the variance between the evidence and the charge as far as the date of commission of the offence is concerned. That irregularity is

however curable – See for instance, the case of **Osward Mokiwa @ Sudi v. Republic** (supra) cited by the learned Stated Attorney. In that case, after having considered previous decisions of the Court in *inter alia,* the cases of **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 and **Maneno Hamza v. Republic,** Criminal Appeal No. 388 of 2014 (both unreported) the Court held that the variance in dates is curable under s. 234 (3) of the CPA. The provision states that:

> "234. (1) .... N/A
>
> (2) .... N/A
>
> (3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."

Although the provision refers to the time at which the offence was committed, the import therein has been taken to include the date of commission of the offence. That is the position which was also taken in the persuasive decision of the Court of Appeal of Kenya in the case of **Oguyo v. Republic** [1986-1989] 1EA 430. Applying the provisions of s. 214 (2) of the Kenyan Criminal Procedure Code Cap. 75, which is in *pari*

material with s. 234 (3) of our CPA to the situation similar to the case at hand, the Court observed that:

> *"The variation between the date given in the charge and that which emerged in the evidence was covered by section 214 (2) of the Criminal Procedure Code and it was not therefore necessary to alter or amend the charge."*

As for the second ground of appeal, the same need not detain us much. Before he recorded the evidence of PW1, the trial magistrate conducted a *voir dire* test. Although at the end of the test, the trial magistrate did not record the finding as regards the witness' understanding, from his answers, the fact is that he understood the nature of oath. In his answers, he stated as follows at page 24 of the record of appeal:

> *"Ustaadh said Allah does prohibit people to be of bad behaviour like insulting others, not [to be liars] etc. A person having bad behaviour is committing sin. A person who commits sin will go to Jehanam (motoni). I am not of bad behaviour.* ***I don't say lies. I fear to commit sin .... If I commit sin Allah will send me to Jehanam (motoni)"***

[Emphasis added].

In the circumstances, the victim's evidence was properly taken on affirmation in terms of s. 127 (2) of the Evidence Act [Cap. 6 R.E. 2002] (now R. E. 2019).

On the issue of corroboration, the evidence to the effect that PW1 was carnally known against the order of nature was corroborated by the evidence of PW3. In fact, as stated earlier in this judgment, there was sufficient proof to that effect. After being medically examined by PW3, PW1's anal sphincter muscles were found to be loose, the proof that he had been molested.

In the fourth ground of appeal in which the appellant is challenging the finding by the two courts below that the case had been proved beyond reasonable doubt, we similarly do not find merit in that complaint. To start with the appellant's defence, both courts below did not consider it. It is however, settled principle that where the courts below have omitted to consider the defence of the appellant, the Court has the power to undertake that duty with a view to deciding whether or not such defence raises any reasonable doubt in the prosecution case – See the case of **Mzee Ally Mwinyimkuu @ Babu Seya v. Republic**, Criminal Appeal No. 499 of 2017 (unreported). In that case in which we

were faced with similar situation like in the present case, we relied on *inter alia*, the passage in the case of **Felix s/o Kichele & Another v. Republic**, Criminal Appeal No. 159 of 2005 (unreported) where the court had this to say as regards the failure by both the trial and the first appellate courts to consider the defence case:

> *"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."*

Relying on the above stated principle, we have stepped into the shoes of the first appellate court and appraised the defence case. Having done so, we agree with the learned State Attorney that the appellant's defence did not tilt the prosecution case. As submitted by Ms. Mwanga, in his defence, the appellant merely denied the charge. His evidence centred on the manner in which he was arrested. He did not challenge the substantive evidence tendered by the prosecution

witnesses, the evidence which, as stated above, was found to be credible. We find therefore, that even if his defence would have been considered by the lower courts, the same would not have been found to have raised any reasonable doubt against the prosecution case.

Both courts below found PW1 to be a credible witness. This being a second appeal, this Court cannot interfere with that concurrent finding unless there are pressing reasons to do so. We could not find any sound reason to find to the contrary on that aspect. In the circumstances, guided by the principle as stated in the case of **Selemani Makumba v. Republic** (supra) that in sexual offences, the crucial evidence as regards commission of such an offence is that of the victim, having found PW1 to be a credible witness, the courts below rightly held that the case against the appellant was proved beyond reasonable doubt. For these reasons, the fourth ground of appeal is also devoid of merit.

In the event, we find that the appeal has been brought without sufficient reasons. The appeal against conviction is thus hereby dismissed.

With regard to sentence, as conceded by he learned State Attorney, since the victim was below the age of 18 years, the sentence

of thirty years imprisonment is illegal. Following the amendment of s. 154 (2) of the Penal Code by s. 185 of the Law of the Child Act, the sentence for the offence is life imprisonment. In the circumstances, we enhance the punishment to statutory life imprisonment.

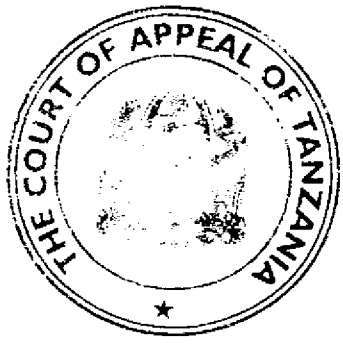
DATED at **DAR ES SALAAM** this 13th day of November, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 18th day of November, 2020 in the presence of appellant in person linked through Video Conference from Ukonga prison and respondent republic is absence is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL