IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 13 OF 2019

AMRANI HUSSEIN ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

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

(Luvanda, J.)

Dated the 21st day of November, 2018
in
Criminal Appeal No. 98 of 2018

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JUDGMENT OF THE COURT

24th March & 22nd April, 2021

KOROSSO, J.A.:

Before the District Court of Ilala at Samora Avenue, the appellant Amrani Hussein, was arraigned for the offence of Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap 16 Revised Edition, 2002 (the Penal Code). The particulars of the charges are that the appellant, on unknown date in December, 2016 at Kivule area within Ilala District in Dar es Salaam Region, did have carnal knowledge against the order of nature of "PW1" or the "victim", a boy of 16 years of age. The victim or PW1 is titled so, to disguise his identity.

The appellant denied the charges and at the end of the trial he was found guilty and convicted of committing a lesser offence, that is, attempt to commit unnatural offence against the order of nature contrary to section 155 of the Penal Code and sentenced to twenty (20) years imprisonment. His appeal to the High Court was dismissed in its entirety. Still dissatisfied, the appellant has filed the instant appeal predicated on five (5) grounds of appeal.

Before proceeding any further, it is apposite to reflect on the factual background. The prosecution story relied on five (5) witnesses, that is, the victim (PW1), Fatuma Yusuph Hamisi (PW2), Zuena Mussa (PW3), Omary Issa @Michael Issa (PW4) and D.9015 Fulgence (PW5). It was alleged that in the evening hours on the 27th November, 2016, PW1 was at a newspaper stand perusing the newspapers and met the appellant who was also there doing the same. The appellant discussed with PW1 on his interest in newspapers and then offered him an opportunity to visit his house to read more newspapers if he wanted to assuring PW1 that he may even pick some. Enticed, PW1 took up the offer and went to the appellant's home which was not very far from the newspaper stand. On arrival at the appellant's house, PW1 was shown the promised newspapers of which he took a few and left. That was the start of PW1 going to the appellant's house occasionally

to read newspapers. He enjoyed reading lifestyle-oriented newspapers such as *Ijumaa", "Sani"* and "Jumanne". In particular, he was interested in the jackpot promotions in the newspapers to keep his hope of winning a house alive.

On the 5th December, 2016, PW1 went to the appellant's house and found the appellant who opened the door and welcomed him inside. PW1 was then told to go to the appellant's room for more newspapers. When PW1 entered the appellant's bedroom, the appellant's attempt to close the door was resisted by PW1. The appellant tried to appease PW1 telling him that he just wanted to have sex with him. PW1 raised an alarm but this did not spread afar because the appellant increased the volume of the radio. The appellant then forcefully took hold of PW1 while threatening to kill him with a screw driver. The struggle between PW1 and the appellant ensued. Initially, the appellant overpowered PW1, forcefully undressed him and then when he tried to insert his penis into PW1's anus it was then that PW1 managed to push him aside, opened the door and ran out. PW3 who had heard voices that worried her from the appellant's room before the volume of the radio was increased, stood outside the room waiting and then subsequently saw PW1

running from the appellant's room but was unable to learn what had transpired in that room.

On the 6th December, 2016, while doing her chores at home, PW3 came by, she was following up on PW1 having traced where he lived. PW3 informed PW2 that PW1 used to visit the appellant, her cousin at their house and that she was concerned that there could be something wrong which happened the last time PW1 had visited the appellant at the house. PW3 alleged that she had observed that when PW1 entered the appellant's room, the appellant closed and locked the door to his room and then increased the volume of the radio. That she heard voices emanating from inside the appellant's room connoting some struggle or misunderstanding. In addition, she told PW2 that when PW1 came from the appellant's room, he was running and when the appellant came out from the room he was half dressed. PW3 thus suggested to PW2 to follow-up on the incident.

When PW1 was asked by PW2 and PW4 what had transpired in the appellant's bedroom, he informed them that he had been sodomized by the appellant. Thereafter, the incident was reported to the Police and PW1 was issued with a PF3 for medical examination. The appellant was subsequently arrested and arraigned to face

charges subject of this appeal. It is important to note that the said PF3 was not admitted as an exhibit during the trial since the doctor who issued it was unavailable to testify being outside the country at the time (see page 31 of record of appeal) and it was only admitted for identification (see page 22 of the record of appeal).

The appellant who gave an affirmed testimony, denied the charges. He conceded that he knew PW1 and narrated how they met at the newspaper stand and became friends. He also explained circumstances which led to his arrest by militiamen and thereafter being taken to Kitunda Police Station, and then arraigned in court facing charges he knew nothing about.

As stated earlier, after a full trial, the appellant was convicted of attempt to commit unnatural offence against PW1 and sentenced accordingly.

The grounds of appeal fronted by the appellant are as follows after paraphrasing them:

1. That the first appellate Judge erred in law by upholding the appellant's conviction and sentence in a case where the appellant did not take a plea to a new charge contrary to the mandatory provision of section 234(2)(a) of the Criminal Procedure Act, Cap 20 RE 2002.

2. That the first appellate Judge erred in law by sustaining the appellant's conviction on evidence based on suspicions while disregarding the principle of law that suspicions however grave, is not a basis for conviction.
3. That the first appellate Judge erred in law and fact by sustaining the appellant's conviction based on the evidence of PW3 without taking into account there was previous dispute between PW3 and the appellant.
4. That the first appellate Judge erred in law and fact by sustaining the appellant's conviction and sentence in a case which was not proved beyond reasonable doubt as: -
    i. The material witness, that is; the doctor, one Veronica and Police officer from Kitunda Police post where the offence was first reported did not testify on material facts.
    ii. The description of the appellant's room (scene of crime) was not given by PW1 (victim) and neither PW5 (the investigator) testified to the effect that he visited the room of the appellant to confirm if the same had a radio as alleged by PW1 and PW3.

iii. The version of the events narrated by PW3 in her testimony under oath varies with the narration she gave to PW5 when she was interrogated.

5. That, the learned first appellate Judge did not subject the evidence to any objective analysis as he was duty bound to do, the appeal before him being the first appeal thus arrived at erroneous decision.

At the hearing of the appeal, the appellant appeared fending for himself connected through a video link from Ukonga Prison. The respondent Republic enjoyed the services of Ms. Jenipher M. Masue, learned Senior State Attorney.

When provided an opportunity to elaborate on his appeal, the appellant adopted his grounds of appeal and written submissions he had filed earlier on. He then stated that he had nothing further to add but reserved his right to rejoin after hearing submissions by the counsel for the respondent Republic.

The appellant's written submission amplified only three grounds of appeal, that is, the 1st, 2nd and 5th grounds of appeal stating that the 3rd and 4th grounds of appeal are self-explanatory. On the 1st ground of appeal, he submitted that the charge was defective and thus the

trial court should have ordered for its alteration by way of substitution or amendment in line with the provisions of section 234(2) of the CPA and the holdings of this Court in **Mashala vs Njile vs Republic,** Criminal Appeal No. 179 of 2014 and **Abel Masikiti vs Republic,** Criminal Appeal No. 29 of 2015 (both unreported). He argued that failure to amend the same meant that the charge remained unproved and thus he was entitled to acquittal.

Ms. Masue on the other hand, informed the Court at the outset that she was supporting the appeal. Nevertheless, she challenged the appellant's assertions that the charge was substituted on the 13th February, 2017 and denied the opportunity to plead after the substitution of the charge, in contravention of section 234(2) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA). The learned Senior State Attorney argued that the record of appeal at page 5 reveals that the said charge was neither amended, altered or substituted. She contended that the conviction of the appellant by the trial court upheld by the first appellate court, was on the lesser offence of attempt to commit unnatural offence instead of the offence charged by virtue of section 301 of the CPA. It was her submission that the conviction of the appellant was not based on any alteration or

substitution of the charge against the appellant. She, thus, prayed for the Court to find the 1st ground of appeal devoid of merit.

In determination of the 1st ground of appeal, we are of the view that there are two issues for consideration. **First,** whether or not there was substitution or amendment of the charge sheet in compliance with section 234(2) and **second**, whether or not the charge was defective and the consequences thereto. In addressing the first issue, we find it pertinent to reproduce section 234(2)(a) which is the foundation of the appellant's complaint. It stipulates as follows: -

> *234.-(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and ail amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*

(2) Subject to subsection (1), where a charge is altered under that subsection-

(a) the court shall thereupon cali upon the accused person to plead to the altered charge.

(b) .....N/A....

(c) .....N/A..."

We have perused the record of appeal and we agree with the learned Senior State Attorney that there is nowhere in the proceedings of the trial court that shows that there was a new charge substituted with the offence of attempt to commit unnatural offence contrary to section 155 of the Penal Code to require the appellant to plead thereto. The appellant's conviction of a lesser offence was not borne out of substitution or alteration of the charge but based on a finding of the trial court and upheld by the first appellate court that the prosecution had not proved the offence charged but that of the offence of attempt. The trial court invoked the provisions of section 301 of the CPA, which allows conviction of a lesser offence to the one charged, including attempts to the offence charged. Therefore, this complaint by the appellant is misconceived.

Concerning the second issue, we wish to state it is equally baseless. It should be noted that section 154 of the Penal Code was

amended by the Law of the Child Act, 2009 vide section 185 which provides as follows:

> "*The Principal Act [the Penal Code] is amended by deleting the word 'ten' and substituting for it the word 'eighteen.*"

Thus, with the above amendment, section 154 of the Penal Code now reads as follows:

> "S. *154. -(1) Any person who*
> *(a) has carnai knowledge of any person against the order of nature; or*
> *(b) has carnal knowledge of an animal; or*
> *(c) permits a male person to have carnal knowledge of him or her against the order of nature,*
> *commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
> *(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."*

The cited provision clearly shows that section 154(2) of CPA extends to a child below the age of eighteen (18) years and not ten (10) years as it was before being amended by Act No. 21 of 2009. In

the instant case, the charge stated that the victim was 16 years old, therefore, the cited provision was proper and thus the complaint by the appellant is misconceived.

In any case the appellant fully understood the nature and seriousness of the offence as disclosed in the particulars of the offence and the evidence presented in court, especially that of PW1 and his own defence when he stated that he understood the charges against him. We also wish to point out that the cited cases by the appellant to bolster his arguments on this issue related to accused pleading to a defective charge, that is, **Deogratius Philip and Another vs Republic**, Criminal Appeal No. 326 of 2017 (unreported) and **Mashaka Njile vs Republic** (supra) are distinguishable. This is more so, the instant case does not relate to the appellant having pleaded to a defective charge as stated hereinabove.

The appellant's written submission did not amplify on the 3rd ground of appeal but on the alleged dispute between the appellant and PW3, the learned Senior State Attorney argued that this complaint by the appellant was misguided since both the trial and the first appellate court did not consider the evidence of PW3 in convicting

and upholding the conviction of the appellant. She thus prayed for the Court to find the 3rd ground lacking in merit.

A scrutiny of the record of appeal clearly shows that there was bad relations between PW3 and the appellant. When cross examined, PW3 stated that when the appellant came from his room rushing after PW1 on the fateful date, on seeing her, he sneered at her and from her testimony there was no doubt she disapproved the appellant's way of life. On the part of the appellant, in his testimony, he stated he had a serious dispute with PW3. The trial court, at page 44 stated:

> *"PW3 testifies that the accused had habit of sodomizing young boys and PW4 said he was told by ten ceil leader that the accused had bad habit of sodomizing young boys and they have fade up (sic) with that habit... However, as a general rule evidence of bad character cannot be used to convict the accused cannot prove penetration (sic). This is clearly addressed under section 56(1) of the Evidence Act [Cap 6 R.E 2002]."*

Apart from the above reference to PW3's evidence which in effect was a rejection of her evidence, the trial court did not rely on her evidence in convicting the appellant. For its part, the first appellate court discussed the evidence of PW3 in passing but did not

rely upon it to prove the ingredients of the offence for which the appellant was charged with and convicted. Thus, taking into account that the evidence of PW3 was not considered by the trial and the first appellate courts in convicting the appellant, the complaint in the 3rd ground lacks merit and is dismissed.

Regarding the 4th ground of appeal, Ms. Masue conceded to the complaint that the doctor who examined the victim and the investigator were not called to testify. She contended that under the circumstances there was a need for the doctor to testify so as to clarify some important matters related to the case. On the other hand, on the failure of the investigator to testify, she argued that the prosecution did not find the need to call him because it was in their discretion to determine who to call. She contended that even if he would have been called to testify, his testimony would not have proved the substance of the case. She thus prayed the Court to find that the ground was partially meritorious with respect to the doctor not testifying.

We are alive to the fact that the prosecution has the discretion of the number of witnesses to call to prove its case. In the case of **Aziz Abdallah vs Republic** [1991] T.L.R. 71, it was held:

> *"... the prosecution is under a prima facie duty to cali those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

Section 143 of the Evidence Act provides that there is no specific number of witnesses to prove a fact in issue (See also **Yohanis Msigwa vs Republic** [1990] TLR 148 and **William Kasanga vs Republic**, Criminal Appeal No. 90 of 2012 (unreported)). These decisions emphasize the fact that it is not the number of witnesses a party calls which is relevant, but the credibility of the evidence of the witnesses called to testify.

In the instant case, the prosecution failed to call the doctor who is alleged to have conducted a medical examination on PW1 after the incident and the investigating officer. In our view, while the evidence of the doctor would have been useful to prove whether or not there was penetration, since the appellant was convicted of attempt to commit unnatural offence on PW1 and penetration is not a requirement, the evidence of the doctor was not very crucial. The same for the evidence of the investigator, since in this case the

evidence of PW1, the victim, was the one mostly required. Therefore, while we agree with the learned Senior State Attorney that the evidence of the investigator was not very important, we disagree with her assertion that the doctor's evidence was important in the instant case and thus ground 4(i) and (ii) fail. On ground 4 (iii), since neither the evidence of PW3 nor that of PW5 was relied upon by the trial and the first appellate courts in conviction and sustaining the conviction of the appellant, we find this ground to be superfluous. For the foregoing reasons, grounds 4(i), (ii) and (iii) are devoid of merit and dismissed.

With respect to the 2nd and 5th grounds of appeal, the appellant in effect challenged the first appellate court's upholding his conviction arguing that it relied on rumours and suspicions instead of the evidence adduced in court. The other complaint relates to the failure of the first appellate court to subject the evidence adduced in the trial court to a proper analysis and to consider the defence evidence. The appellant contended that the trial court never considered the dispute between himself and PW3 and relied on rumours narrated by PW3 that the appellant used to bring several men at home without seeking for proof. To cement his argument, he relied on the holdings in **Mtinda vs Republic**, Criminal Appeal No. 17 of 1999 and **Mapunda vs Republic**, Criminal Appeal No. 23 of 1989 (both unreported).

The appellant invited the Court to be guided by the holding in **Leonard Mwanashoka vs Republic**, Criminal Appeal No. 226 of 2014 and **Shija Masawe vs Republic**, Criminal Appeal No. 184 of 2002 (both unreported) on the duty of courts to consider all the evidence before it and have a proper scrutiny or evaluation of evidence before disregarding any evidence before it. The appellant argued that when the record of appeal is perused, the first appellate court only summarized the evidence from both sides and did not undertake a holistic analysis of all the evidence. He thus concluded by praying that his appeal be allowed and he be set free.

With respect to these two grounds that were argued together, the learned Senior State Attorney contended that, the gist of the complaints was whether or not the prosecution proved the case against the appellant. She supported the appellant's contention that the prosecution failed to prove that the appellant attempted to commit unnatural offence on the victim. She contended that there was no evidence on record to prove what the appellant was convicted of and sentenced by the trial court and upheld by the first appellate court. She thus prayed that the appeal be allowed and the appellant be set free.

With regard to the complaint that the appellant's conviction relied on suspicions only, we need not spend too much time. This is so because when determining the 3rd ground of appeal, we have expounded how the trial court categorically refrained from relying on rumors and suspicions and thus decided not to consider the evidence of PW3 and PW4 which was based on rumours related to the character of the appellant. This position was also taken by the first appellate court. Therefore, the 2nd ground lacks merit.

Lastly, on the 5th ground of appeal challenging analysis of the evidence and contending that the defence was not considered. This Court had an opportunity to discuss the duty of courts in analysing evidence in **Leonard Mwanashoka vs Republic** (supra) and observed that:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain... Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The above excerpt was in effect amplifying on the requirements of section 312(1) of the CPA, on analysis and evaluation of all the relevant evidence or material necessary to resolve the issue that call for determination in a criminal case (See also **Shija Massawe vs Republic**, (supra). Our task, is to assess whether the first appellate court properly evaluated and analysed the evidence which led it to uphold the conviction. Having perused through the judgment of the first appellate court, we note that the analysis of evidence was done in response to each ground of appeal.

The record of appeal shows that the High Court relied on the evidence of PW1 on how he entered the appellant's room and the fact that the appellant then closed the door to that room, increased the volume of the radio to circumvent any shouting for help or struggle. There was also evidence on how PW1 resisted the appellant's moves but was threatened by the appellant using a screw driver. The first appellate court paid regard to PW1's evidence who testified that thereafter, the appellant took off his shirt and his own shirt and bent him at the same time taking out his male organ forcing it to enter his anus and then PW1 managed to struggle out of this predicament and ran out of the room. The mention of the evidence of PW3 was only to the extent of having heard voices from the room of people arguing

and hearing the increased volume of the radio from the appellant's room. There was also evidence of seeing PW1 fleeing from the room followed closely by a bare-chested appellant. The fact that he had got out of his bedroom with a bare chest was also acknowledged by the appellant in his testimony.

It is from this evidence that the first appellate court found that attempt to sodomize PW1 was effected and that penetration to PW1's anus was not proved relying on PW1's testimony that he managed to run away from the appellant. The High Court also found the conviction of attempt to commit unnatural offence contrary to section 155 of the Penal Code by the trial court was proper in terms of section 301 of the CPA.

We find it apposite to reproduce section 155 of the Penal Code which states:

> *"155. Any person who attempts to commit any of the offences specified under section 154 commits an offence and shall on conviction be sentenced to imprisonment for a term of not less than twenty years"*

To commit the offence under section 154 which has been reproduced hereinabove, a person must have; **one**, carnal knowledge of another person against the order of nature or, **two**, carnal

knowledge of an animal and, or **three,** permit a male person to have carnal knowledge of him or her against the order of nature.

Our research has failed to land on any decided case by the Court discussing ingredients of an attempt to commit an offence contrary to section 154 of the Penal Code in line with section 155 of the Penal Code. Nevertheless, our research led us to a High Court case, that is, **Mwanahamisi Abdallah and Another vs Republic** [1981] TLR 265 where Lugakingira J., (as he then was) elaborating on the attempt to commit an offence of unnatural offence in which he stated:

> *"In attempts there should be an act directed at the fulfilment of the offence. In this case, for instance, it would have made a whole of difference had the appellant undressed himself."*

Taking into account the ingredients of the offence of unnatural offence, we subscribe to the holding in the above cited High Court case, in that there must be explicit acts directed at facilitating commission of the offence. In the present case, PW1, whose evidence was found to be credible by both the trial and the first appellate courts, testified that though he willingly went to the appellants room, he thought he was being given newspapers, but on entering, on

declining the request to have sexual relations with the appellant, he was threatened, the appellant took off his shirt and bent PW1 on the verge of committing the offence, but PW1 managed to escape. DWI conceded to have come out of the room bare chested immediately after PW1 ran off.

Despite his complaint, we are satisfied that the first appellate court considered the appellant's evidence when analyzing the evidence by the trial court on claims of the charge being defective and also what transpired soon after the incident (see page 63 and 64 of the record of appeal). In any case, in his testimony, the appellant alluded to the fact that he knew the contents of the charges he faced and the fact that he knew PW1 and they met at the newspaper stand. He also stated that because PW1 liked reading newspapers, he had invited him to his house to read newspapers and given an open invitation for him. He then narrated circumstances pertaining to his arrest and being arraigned. In fact, his defence was a general denial of the incident and the contention that the prosecution failed to prove the case, matters which were dealt with and determined by the trial and the first appellate courts.

For the foregoing, there is no doubt that the offence charged was not proved since the prosecution failed to prove penetration. However, the offence of attempt to commit unnatural offence for which the appellant was convicted was proved to the standard required. In the event we find no merit in this ground as well.

In light of the foregoing, we find the appeal to be devoid of merit and dismiss it.

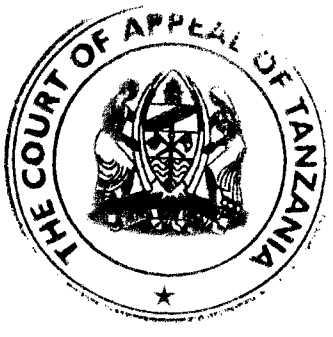
DATED at **DAR ES SALAAM** this 15th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 22nd day of April, 2021 in the presence of Appellant appeared in person and Ms. Neema Moshi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL