IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 415 OF 2017

TWAHA HUSSEIN.. APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

Dated the 21st day of June, 2017
in
Criminal Appeal No. 256 of 2017

JUDGMENT OF THE COURT

10th & 18th February, 2021.

MUGASHA, J.A.:

In the Resident Magistrate's Court of Mara at Musoma, the appellant was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E.2002]. It was alleged by the prosecution that on 13/4/2015 at Bwai Paris within Butiama District in Mara region, the appellant had carnal knowledge of a six years old boy against the order of nature. For the purposes of concealing his identify we shall refer him as BSM or victim.

The appellant denied the charge and in order to prove its case, the prosecution paraded four witnesses and relied on two

documentary exhibits. A brief prosecution account from a total of four witnesses and two documentary exhibits was to the effect that: On the material date that is, on the 13th day of April, 2015 Nyageta Paulo (PW2) the victim's mother directed the victim (PW1) and her daughter namely Zena to go and take bath at the lake side and they obliged. Shortly thereafter, PW2 made a follow up to the lake but she was surprised to find only her daughter. As he inquired on the whereabouts of the victim, her daughter told her that he was taken by a certain man. Then, they went home and PW2 began to trace her son. As she was close to a certain house, heard a child raising an alarm and upon entry, she found in the house BSM close to the window together with one Charles and the appellant who attempted to escape through the window but he was chased and apprehended by those who had responded to an alarm. He was arrested and taken to Butiama Police Station whereas the victim was issued with a PF3 and taken to the hospital. Upon examination, Dr. Ndela s/o Ndaki (PW3) established that the victim was sodomised and he was given medication.

On the part of the victim, besides testifying that he had gone to take bath at the lake side together with his sister, he recalled to have been at the scene of crime after being led thereto by the appellant. Upon reaching there, he was undressed by the appellant who also

undressed, smeared oil on his penis and proceeded to sodomise him. According to the victim, the alarm he raised was short lived because the appellant blocked his mouth. He added that, after a while a certain tenant and his mother surfaced at the scene and the appellant attempted in vain to run away as he was chased and apprehended by those who had responded to an alarm. Following the investigation of the incident, the appellant was arraigned in court. In his defence, the appellant denied each and every detail of the prosecution account. After a full trial, the appellant was convicted and sentenced to imprisonment to a term of thirty (30) years.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed. Still undaunted, the appellant has preferred an appeal to the Court. In the memorandum of appeal, he has fronted six grounds of appeal: -

1. **THAT,** the trial and first appellate court erred in law and facts by relying on PW1-Victim's evidence a child of below 14 years old, whose *VOIRE DIRE* examination was improperly tested and thus his sworn evidence was illegally taken/admitted by the trial court and upheld by the first appellate court.

2. **THAT,** the first appellate court erred in law and facts by unreasonably failure to call for and examined the record in

criminal case No. 26 of 2015 in which the appellant was acquitted by District Court of Musoma the same District Court which convicted the appellant in the present case under appeal.

3. **THAT,** the first appellate court had wrongly shifted the burden to the appellant to provide to that the High Court the record in c/c No. 26 of 2015.

4. **THAT,** the preamble to the autopsy report exh. P1 victims PF3 was absorbed from the ingredients on the first information report at police i.e KUJARIBU KULAWITI, which contradict the conduction prosecution evidence.

5. **THAT,** first appellate court erred to regard PW2, evidence as a direct evidence whereas her evidence was rather an exaggerated circumstantial however unfairly tending to exonerate the would be material and compellable witness i.e CHARLES either as accused or PW.

6. **THAT,** the first Appellate Court erred by failure to evaluate the whole evidence in judicial objectivity when rejected the appellant's strong and probative grounds of appeal basing on flimsy reasoning.

At the hearing of the appeal, the appellant was represented by Mr. Anthony Nasimire, learned counsel. The respondent Republic had the services of Mr. Emmanuel Luvinga, learned Senior State Attorney.

In the 2nd and 3rd grounds, the appellant is basically faulting the learned High Court Judge for not calling the record in RM's Court in Criminal Case No. 26 of 2015 in which he claims to have been acquitted but all the same, the Republic commenced another Criminal Case No. 125 of 2015 based on the same facts and for the same offence. Since we were not seized with the record of Criminal Case No. 26 of 2015, we had to adjourn the hearing of the case in order to satisfy ourselves if the appellant was actually acquitted as he alleges. Having been seized with the record and gone through it, we gathered that Criminal Case No. 26 of 2015 was on 3/12/2015 dismissed for want of prosecution and subsequently, Criminal Case No. 125 of 2015 based on same facts for the same offence case was commenced against the appellant. In the premises, we required learned counsel to address the Court on the propriety or otherwise of RM Criminal Case No. 125 of 2015 which is a subject of this appeal.

On taking the floor, Mr. Nasimire submitted that, since Criminal Case No. 26 of 2015 was dismissed for want of prosecution and the prosecution opted not appeal against the order, it was barred from

instituting a fresh and the same charge against the appellant. In this regard, he argued that in the wake of existing order dismissing Criminal Case No. 26 of 2015, what transpired thereafter in Criminal Case No. 125 of 2015 and the subsequent appeal before the High Court are a nullity. On that account, he urged the Court to nullify the proceedings and judgments of the courts below, quash the conviction, set aside the sentence and order the immediate release of the appellant.

On the other hand, after brief dialogue with the Court, Mr. Luvinga conceded to the 2nd and 3rd grounds of appeal and the submission put forth by the appellant counsel.

After a careful consideration of the submission of the learned counsel and the record before us, the issue for consideration is the regularity or otherwise of Criminal Case No. 125 of 2015 which is a subject of the appeal.

It is not in dispute that, before the RM's Court of Mara in Criminal Case No. 26 of 2015 the appellant was charged with unnatural offence accused of having sodomised the victim herein. Having denied the charge, on 17/8/2015 the prosecution intimated that at the trial, they would line up and parade four prosecution witnesses. Then, two witnesses including the victim herein gave their

testimonial account on 31/8/2015 and the hearing was adjourned on several occasions up to 3/12/2015 when the following ensued:

> **"Prosecutor**: *The case is for hearing no witness."*

The Court made a following:

> *"Court: Case is hereby dismissed for want of prosecution. Section 225(5) of CPA.*

Following the dismissal, ten days later, the prosecution lodged fresh charges against the appellant vide Criminal Case 125 of 2015 which is a subject of the present appeal. The subsequent offence charged was unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code on allegation that the appellant on 13/4/2015 had sodomised the same victim. As earlier stated, he was ultimately convicted and sentenced to a jail term of thirty years. In the wake of the existing dismissal order in Criminal Case No. 26 of 2015 which has neither been reversed nor set aside, the question to be answered is what is the effect of the subsequent proceedings which are a subject of this appeal.

The law regulating the modality of dealing with previous conviction or acquittal is governed by section 137 of the CPA which stipulates as follows:

> *"A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence".*

The cited provision bars the prosecution against a person who has been previously acquitted or convicted by a court of competent jurisdiction, again, on the same facts and for the same offence, unless the said previous conviction or acquittal, has been reversed, or set aside. In addition, the provision frowns against double jeopardy of an accused person to be tried on the same offence which he was previously acquitted or convicted. This brings into play the principle of *autrefois acquit* which is defined in Black's Law Dictionary, Eighth Edition, 2004 at page 411 as follows:

> "A *piea in bar of arraignment that the defendant has been acquitted of the offense – Also termed as former acquittal..."*

Granville Williams further explains the principle in the following terms:

> *"Suppose that a transgressor is charged and acquitted for lack of evidence, and evidence has now come to light showing beyond doubt that he committed the crime. Even so, he cannot be tried a second time. He has what is*

termed, in legal Frenglish, the defence of autrefois acquit. Similarly, if he is convicted, even though he is let off very lightly, he cannot afterwards be charged on fresh evidence, because he will have the defence of autrefois convict. These uncouth phrases have never been superseded, though they might well be called the defence of 'previous acquittal' and 'previous conviction'; and 'double jeopardy' makes an acceptable generic name for both." ***[Glanville Williams, Textbook of Criminal Law 24 (1978).]***

This principle of *autrefois acquit* was considered by the High Court in the case of **MADUHU MASELE VS REPUBLIC** [1991] TLR 143 (HC). Having established that the appellant was initially acquitted in a previous case with similar facts in the matter which was a subject of the appeal, relying on section 137 of the CPA, the High Court among other things said:

> *".... that a person cannot be tried again for the crime in respect of which he has previously been acquitted or convicted, by a court of competent jurisdiction, unless such acquittal or conviction, has been reversed or set aside...".*

We fully subscribe with the said decision. Moreover, in the case of **YASIN S/O SELEMANI VS REPUBLIC** [1969] H.C.D 262, the

appellant earlier was acquitted of burglary by the Primary Court due the non-appearance of the complainant. Subsequently, the appellant was charged with the same offence and he advanced a defence of *autre fois* acquit. In allowing the appeal, Georges, CJ relied on among others the case of **HAYNES VS DAVIS** [1915] 1 KB 332 where the Court held:

> *"no matter what way the person obtains acquittal he is entitled to protection from further proceedings."*

In the present case, although the dismissal order did not expressly acquit the appellant, however, it had the effect of dismissing the charge in Criminal Case No. 26 of 2015 and as such, there was nothing pending to warrant the prosecution to institute against the appellant, another case based on same facts for the same offence. We say so because the dismissal order has not been reversed or set aside by any competent court.

Before the High Court the appellant raised a similar complaint in the first ground of appeal as reflected at page 38 of the record of appeal and it reads as follows:

> *"1. THAT, after the charge in criminal case No. 26 of 2015 being dismissed by the trial court*

(D/court Musoma – KILIMI DRM) the present charge under appeal [was] wrongly prosecuted, in so far as it violated the CPA Cap 20 RE. 2002."

The complaint did not get the attention it deserved because though the appellant insisted that he was acquitted in that case, Ms. Kileo, learned Senior State Attorney informed that Criminal Case 26 of 2015 was non-existent which was untrue. Then, the learned High Court Judge concluded that there was no such record. We found such conclusion wanting because it was incumbent on the learned High Court Judge to call the record of Criminal Case No. 26 of 2015 in order to satisfy herself on what actually transpired therein. Had she done so, she would have invoked the provisions of section 59 (1) (a) of the Evidence Act Cap 6 R.E 2002, to take judicial notice on the existence of the dismissal order in RM Criminal Case No. 26 of 2015 and proceed to make necessary orders on the propriety or otherwise of the trial.

In the circumstances of this particular case, in the wake of the dismissal order which has not been reversed or set aside by a competent court, prosecution was barred from instituting another criminal case charging the appellant with unnatural offence on accusation that he sodomised the victim. The resultant effect is that, the trial in Criminal Case No 125 of 2015 is a nullity and so are the

proceedings and judgment of the High Court in Criminal Appeal No. 256 of 2015. Thus, we have no option but to nullify the entire charge, trial proceedings and judgment in Criminal Case No. 125 of 2015 and High Court Criminal Appeal No. 256 of 2017 which stem on null proceedings.

In view of what we have endeavored to discuss, we find the 2nd and 3rd grounds merited and sufficient to dispose of the appeal. As such, we shall not determine the remaining grounds. We thus, quash the conviction and set aside the sentence meted on the appellant and order his immediate release unless if he is otherwise held for another lawful cause.

DATED at **MWANZA** this 17th day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 18th day of February, 2021 in the presence of Mr. Patrick Suluba Kinyerero, learned counsel holding brief for Mr. Anthony Karaba Nasimire, learned counsel for the Appellant and Ms. Lilian Meli, 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