IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 222 OF 2019

REHANI SAID NYAMILA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkapa, J.)

Dated the 23rd day of May, 2019
in
Criminal Appeal No. 214 of 2018
.....

JUDGMENT OF THE COURT

29th June, & 13th July, 2021.

MAIGE, J.A.:

At the District Court of Mkuranga (the trial Court), the appellant herein was charged with unnatural offence c/s 154 (1) (a) and (2) of the Penal Code, [Cap. 16, R.E., 2019]. It was alleged that, on 19th day of December 2017 at about 12:45 hours, at Chatembo village within Mkuranga District in Coast Region, the appellant had carnal knowledge of PW1, a child aged 7 years (name withheld) against the order of nature. He was, upon full trial, convicted and sentenced to 30 years imprisonment. The position remained the same despite his first

appeal to the High Court. Once again aggrieved, the appellant is attempting a second appeal to the Court.

Before we direct our minds on the grounds of appeal, it may be desirable to expose, albeit briefly, the substances of evidence relied upon by the trial court in convicting the appellant. Four witnesses were produced to build the prosecution case with the victim testifying as PW1. In his brief testimony, PW1 informed the trial court that, on the material date and time, while on his way from the shop, he came across with the appellant, a person, though not known to him by name, was not stranger as he used to see him at the village. All of a sudden, the appellant pushed him down and inserted his penis (*kidudu*) into his anus. He could not raise an alarm as the appellant had covered his mouth. Thereafter, the appellant ran away. Upon arrival at home, PW1 informed his mother (PW2) of all what happened. The matter was reported to police and victim was thereafter sent to hospital. On examination, it was established that, he had been sodomised.

Sakina Haulelino Mdemu (PW2), the mother of the victim, told the trial court that, she detected the problem when she observed abnormality on the part of the victim who could not sit properly when doing his homework. Upon interrogation, he disclosed that he had

been sodomized. As it was late in the evening and her husband was not around, she could not report the incident on the same day. On the next day, together with her husband, they took the victim to the police station and thereafter to the hospital where he was examined and found to have been sodomized. Subsequently, the victim took them to the scene of the crime and found the appellant sitting in a spare parts shop nearby and he identified him. The appellant was eventually arrested.

Dr. Magrath Munise (PW4) testified that, on 23rd December 2017, the victim was brought to the hospital by his mother on suspicion that he had been sodomized. Having examined him, she found some fresh bruises on the anus and the same was tender. She concluded, therefore, that, the victim had been sodomized by an adult. She tendered the medical report which was admitted into evidence as P-1. The incident was investigated by WP 5336D/HADIJA (PW4).

In his testimony in defence, the appellant vehemently denied the charge against him. He accused the mother of the victim (PW2) to have framed up the charge after he declined to have a relationship with her. Besides, the appellant informed the trial court that, it was highly improbable for him to commit the offence on the fateful day

because between 17/12/2017 and 20/12/2017, he was in Tegeta attending the funeral ceremony of his elder brother. The claim is also supported by his neighbor, George Christopher Matibwa (DW2) and his elder brother, Hashim Said Nyamila (DW3).

The trial magistrate was impressed by the testimony of the victim (PW1) having found that it was corroborated by the expert evidence in exhibit P1 and the oral account of PW2 and PW4. In his view, the appellant was properly identified as the victim appeared to be familiar with him as a resident of the same village though he did not know his name. At the age of 7 years, it was the opinion of the trial magistrate, he could not fabricate a case against the appellant considering the difference of age. The trial magistrate rejected the defense of *alibi* for the reason that, the appellant neither issued the statutory notice nor furnished the particulars of *alibi* as the law requires.

In its judgment, the High Court fully subscribed to both the conviction and sentence by the trial court. It henceforth confirmed the same and dismissed the appeal and as earlier on stated, before the Court the appellant is seeking to demonstrate his innocence.

In the memorandum of appeal, the appellant enumerated seven grounds which were subsequently supplemented by further nine

grounds of appeal thus making a total of 16 grounds. In our careful reading, the same can be conveniently condensed into six main complaints. **First**, the evidence of PW1 was admitted without complying with the conditions stipulated in section 127 (1) of the Evidence Act. **Two**, the substitution of the charge sheet was irregular. **Three**, there was irregular succession of trial magistrates. **Four**, the appellant was not reminded of his charge before making his defence. **Five**, the admission of PF3 into evidence was unprocedural. **Six,** the appellant was incorrectly convicted basing on visual identification evidence of PW1 without the same being assessed in line with the defense evidence.

When the appeal came up for hearing, the appellant appeared in person and was not represented. He adopted the grounds of appeal indicated in both the memoranda and asked the Court to let the the Learned State Attorney submit first subject to his right to rejoin where necessary.

On the other hand, the respondent/ Republic was represented by Joyce Nyumayo and Ellen Masululi, both learned State Attorneys.

It may perhaps be imperative to state right from the outset that, this being a second appeal, we are not, as a general rule, expected to

interfere with the concurrent factual findings of the lower courts, unless there are misdirections or non-directions on the evidence or violation of some principles of law. There are many judicial pronouncements in support of this proposition. See, for instance, the case of **the Director of Public Prosecution vs. Jaffar Mfaume Kawawa,** [1981] TLR 149.

With the above exposition of the nature of the contention, it is now appropriate to consider the merit or otherwise of the appeal. For convenience, we wish to start first with the issues of procedural irregularities raised in the first five grounds of appeal.

The complaint in the first ground is that, the evidence of PW1, a child of tender age, was admitted and relied upon without observing the mandatory procedure set out in section 127(2) of the Evidence Act, [Cap. 6, R.E., 2019], (the Act). In her brief remarks on this issue, Miss. Nyumayo submitted that, the evidence of PW1 was admitted in due compliance with the law. In her understanding of the law, which we entirely subscribe to, the requirement of the respective provision is complied with when a child gives promise to tell the truth and not to lie. In accordance with the record, she clarified, PW1 expressly promised to tell the truth before giving his testimony. On our part, we

have gone through the record and more particularly page 7 of the record and satisfied ourselves that, before giving his testimony, PW1 promised to tell the truth and not lies. We thus agree with the learned counsel that, there was substantial compliance of the provision just referred. We are guided by the previous decision of the Court in **Godfrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018, (unreported) where it was held that, section 127(2) is complied with when a child of tender age promises, before giving testimony, to tell the truth and not lies. In our view therefore, the first ground is devoid of any merit and it is accordingly overruled.

The claim in the second ground is that, there was irregularity in substitution of the charge sheet as the appellant was not afforded an opportunity to recall the prosecution witnesses who had already testified as the law requires. In rebuttal, the learned State Attorney submitted that, section 234 (2) (b) of the Criminal Procedure Act, [Cap. 20, R.E., 2019, ("the CPA], was complied with as the substituted charge sheet was read over and explained to the appellant who entered a plea of not guilty thereto. On whether the appellant was denied to recall the prosecution witnesses who had already testified, it was her contention that, the appellant cannot complain as such, while

he never demanded for the same as the law requires. For a proper appreciation of the contention, we find it important, as we hereunder do, to reproduce the relevant provision. Thus;-

> *"234-(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for alteration of a charge either by way of amendment of the charge or substitution or addition of a new charge as the court courts thinks necessary to meet the circumstances of the case unless having regard to the merits of the case, the required amendment cannot be made without injustice; and all 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 call upon the accused person to plead to the altered charge.*
>
> *(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-*

examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination."

The above provisions in our view, gives two rights to the accused person when amendment or substitution of a charge is made in the course of actual trial. First, he is entitled to have the amended or substituted charge read over to him so as to enable him to enter a plea thereto. Second, he is entitled, upon demand, to have the prosecution witnesses who have already testified or any of them, recalled for either re-examination in chief or re-cross examination.

Express in the record of the trial court is the fact that, on 19th March, 2018, when the substitution of the charge was made, the same was read over and explained to the appellant who entered a plea of not guilty. In our opinion therefore, the first condition was met. On the second condition, while we are in agreement with the learned State Attorney that, the right on the part of the accused person to recall a witness or witnesses for further examination in chief or further cross examination is upon demand, it is our considered view that, for the

purpose of affording the accused a fair trial, the trial court is duty bound to inform him or her of such right. The record does not suggest that the appellant was informed of such right by the Court. This, we subscribe to the appellant, was an irregularity. Nevertheless, considering the fact that the alteration in the charge sheet was with a view to reflecting the correct time of the commission of the offence and no more, we do not think that it occasioned any miscarriage of justice as to affect the substantial validity of the judgment and proceedings of the trial court. Therefore, in **Samwel Paul vs. Republic,** Criminal Appeal No. 312 of 2018 (unreported), just as in the instant case, the trial court omitted to inform the appellant of his right to recall witnesses who had already testified upon a charge sheet being substituted to reflect the correct date of the commission of the offence. The Court held that, given the nature of the substitution, the omission was too trivial to affect the substantial validity of the evidence adduced as to cause failure of justice. In particular the Court observed as follows:-

> *"Under the circumstances, we find that failure to recall witnesses is curable since the substitution of the charge sheet did not in any way affect the substance of the evidence given*

by PW1 and PW2 and thus did not occasion any injustice on the part of the appellant. We are fortified in this position by the fact that the date of the commission of the crime was not an issue and there was no reliance on exactness of the date in the charge sheet. (See: ***Osward Mokiwa @ Sudi Vs. Republic****, Criminal Appeal No. 190 of 2014)"*

It is on the foregoing account that, we find the second ground of appeal meritless. It is accordingly dismissed.

This now takes us to the third ground of appeal as to the alleged improper succession of trial magistrates. The contention is that, though the trial was conducted by two different magistrates, the reason for succession was not assigned as mandatorily required by section 214(1) of the CPA. While the position of the law in that respect was not doubted, it was the opinion of the learned State Attorney that, the claim is unworthy of being considered. The reason being that, contrary to the expression by the appellant, there was no succession of trial magistrates as to render the requirement under the provision under discussion relevant. The requirement under the respective provision, she submitted, applies where the succession is made during

trial and not pretrial stages as in the instant one. We have read the provision between lines and we agree with the learned State Attorney that, the same is not relevant where the succession of the magistrate is in pretrial stages. We also agree with her that, in accordance with the record, the trial was in its entirety conducted by Hon. Y.C. Myombo. It is the same magistrate who composed and pronounced the judgment. The record bears out that Hon. Boneko, RM, participated only in plea taking and determined an application for bail, which do not, in our view, fall within the domain of section 214(1) of the CPA. In the circumstances, the third ground of appeal is without merit and it stands dismissed.

We proceed with the fourth ground. In here, the complaint is that, the appellant was not, before giving his testimony in defense, reminded of the charge. On this, the learned State Attorney informed the Court that, the practice of reminding the accused persons of their charges before commencement of their defense is not a legal requirement. She places reliance on the case of **Ally Njoka vs. Republic,** Criminal Appeal No. 353 of 2019 where this Court took the following view that:-

"Admittedly, we are aware of a practice, mostly among magistracy, for reminding accused persons of the charges against them before they take the witness stand but we hasten to stress that it is not a legal requirement."

In view of the authority just referred and without much ado, we are in agreement with the learned State Attorney that, the fourth ground of appeal has no legal basis as the practice complained of does not, as we held in **Ally Njoka** *(supra)*, constitute a legal requirement. The ground is thus dismissed.

We shall wind up on the issue of procedural irregularities with the fifth ground which relates to improper admission of exhibit P1. It is in two aspects. First, it was produced without the right to the appellant to have the doctor called for cross examination being explained. On this, the learned State Attorney correctly submitted that, the provision was complied with since the doctor testified on the exhibit as PW4 and was cross examined accordingly. In the second aspect, the trial magistrate is faulted in receiving and placing reliance on the document without the substance of the same being read out in the court. On this, the learned State Attorney admitted existence of such a fatal irregularity and advised the Court to expunge the exhibit from

the record. That apart, the learned State Attorney further submitted that, the Court is still entitled to make use of the oral account of the doctor who conducted the medical examination. Her submission is pegged on our decision in **Huan Quin and Another vs. the Republic,** Criminal Appeal No. 173 of 2018 (unreported), wherein dealing with a similar issue, we considered the oral accounts of the witnesses despite the exhibited documents being expunged from the record for non-compliance of the respective provision.

In **Huang Quin case** *(supra),* just as in the instant case, the trial court relied on documentary exhibits which were not read out in court upon being admitted. On appeal, this Court was of the opinion that, the omission was fatal as the appellants were convicted on the basis of the evidence they were not aware of despite their presence at the trial. Applying the above principle therefore, we agree with both the appellant and learned State Attorney that, the admission of P1 in evidence was fatally irregular. The same is hereby expunged from the record of appeal. The expunging of exhibit P1 from the record notwithstanding, and in view of the authority just referred, we shall, where necessary, consider the oral account of PW4, in the course of determining the last ground of appeal.

In the last ground, the trial court is in essence faulted in believing the testimony of PW1 on visual identification of the appellant without assessing the credibility and probity of the same in line with the defense evidence. In our view, the allegation, if established raises an issue of serious misdirection on the principle of law which would justify departure from the rule as to non- interference of the concurrent findings of the lower courts on points of fact. We say so because, in its decision, which was confirmed by the first appellate court, the trial court believed the evidence of PW1 on visual identification of the appellant on the main ground that, at the age of 7 years, PW1 could not tell lies against the appellant. The opinion of the trial magistrate was probably based on his understanding of section 127(7) of the Evidence Act which provides as follows:-

> *"Notwithstanding the preceding provisions of this section, wherein criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of the sexual offence on its merits,*

notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

Our understanding of the above provision is that, for the Court to rely solely on the testimony of a child of the tender age or the victim of the crime to sustain conviction in respect to sexual offences, it must satisfy itself, upon assessment of credibility of such evidence, that, the witness in question is telling nothing but the truth. In this respect, the following observations in the case of **Mohamed Said vs. the Republic,** Criminal Appeal No. 145 of 2017 are pertinent:

"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127(7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases.

It is also worthy of note that, as a matter of principle, the Court cannot rely on the evidence on visual identification without satisfying itself upon assessment of such evidence that, there is no reasonable possibility of mistaken identity. In **Waziri Aman vs. Republic**, [1980] TLR 250, it was held that,

> *"No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight."*

The issue which we have to address therefore is whether, in convicting the appellant basing on the visual identification of PW1, the trial court satisfied itself that the evidence was credible and probable enough to eliminate any reasonable possibility of incorrect or mistaken identification of the appellant. For the reasons which we are going to demonstrate as we go along, we are prepared to answer the question negatively.

In the issue at hand, the testimony PW1 on the identity of the appellant was such that, the appellant though neither his neighbor nor known to him by name, was known to him by face. Quite unusual, he

did not, throughout his testimony, explain how did he come to know the appellant. Neither did he give any graphic description on the basis of which he identified or recognized the appellant. In normal circumstances, the identity of a person whose name is not known can be portrayed by such descriptions as facial or morphological appearance, coloring or physique and attire. Thus, in **Anuary Nangu and Another vs. the Republic,** ,Criminal Appeal No. 109 of 2006 (unreported), it was stated that:

> *"The conditions for identification in this case, as gathered from evidence were favorable. The complainant knew the appellants before, they were staying in the same village and there was moonlight. He was able also to identify the type of clothes the appellants wore, and also their colour and the voice of the appellants. It took time before the offence was committed, as the attach was preceded by a conversation. PW2 corroborated the evidence of PW1 on identification of the first appellant. Under these circumstances, we also agree that there was no room for mistaken identity. We also agree that the appellants were not convicted on the identity of voice only, but on combination of all elements above mentioned."*

The importance of the witness who purports to identify the suspect and the one to whom the description of such a suspect was given in determining the weight of the evidence of visual identification, was stressed by the defunct East African Court of Appeal in the old case of **Republic vs. Mohamed Bin Allui** (1942) 9 EACA 72, in the following words:-

> *"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of highest importance of which evidence ought always to be given. First of all, of course by persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given".*

PW2 who appears to be the first person to be informed of the commission of the crime, did not, in her evidence, assist the trial court to know how was the appellant identified or recognized by the victim. The person who arrested the appellant would have been of assistance in establishing how the appellant was identified. For the reason better known to the prosecution, he was not called as a witness. As a result,

the Court is in dark as to who arrested the appellant and on what basis. It is also not clear as to whom between PW2 and the uncle of the victim was the first person to be given the description of the appellant. We think, the person who arrested the appellant was a very material witness in linking the gaps in the visual identification evidence of PW1. It is very unfortunate that, these very pertinent particular issues were not considered by both the lower courts.

We shall, therefore, draw a adverse inference for unreasonable failure of the prosecution to summon such a material witness. This is in line with the authority in **Boniface Kundakira Tarimo vs. Republic**, Criminal Appeal No. 350 of 2008 where it was held that:

> *"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, mis not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."*

There is yet another fact which raises a reasonable doubt on the probity of the prosecution case. According to the charge sheet, the offence was committed on 19th December 2017. The evidence from

the prosecution suggests that, the appellant was not arrested on the same day. Neither on the next day. There is a suggestion from the testimony of PW1 and PW2 that, the arrest was after PW1 had undergone medical examination. In accordance with the oral testimony of PW4, the medical examination was made on 25/12/2017. This is hardly six days from the date of the incident. The prosecution evidence suggests that, he was arrested at the scene of the crime upon being identified by the victim. Considering the seriousness of the offence, it was highly improbable for the appellant to be arrested after expiry of such a long period while the proposition in the prosecution evidence was that he was a known person living in the same village with the victim. It was equally improbable for **PW2** to await until expiry of six days to take the victim to hospital for examination. This cast a shadow of doubt on the prosecution case.

In view of the foregoing, we have no doubt that, the evidence of **PW1** on visual identification of the appellant was not credible and probable enough to eliminate reasonable possibility of mistaken identity and or recognition. Consequently, the case against the appellant at the trial court was not proved beyond reasonable doubt as to justify the conviction of the appellant.

We have also considered that, the trial court outrightly rejected the appellant's defense of *alibi* for being neither preceded by a notice to rely on it nor particulars of the same. In our view, this was wrong. We have repeatedly stated that, unless the probability of such a defense to raise reasonable doubt is considered, the same cannot be outrightly rejected on account of absence of notice or particulars of *alibi*. For instance, in **Shafii Abdallahaman Mbonja vs. the Republic,** Criminal Appeal No. 104 of 2017, we made the following pronouncements which we still stand on:-

> *"In the appeal at hand, although the trial court decided to accord no weight to the appellant's defence of alibi, it did not consider whether the defence case raised any doubt on prosecution evidence. Likewise the High Court when upholding the trial court's decision. In* ***Marwa Wangiti Mwita and Another v. Republic*** *[2002] TLR 39, the Court held that the absence of notice required by section 194 of the CPA does not mandate or authorize the outright rejection of an alibi, though it may affect the weight to be placed. (See also* ***Charles Samson V. Republic*** *[1990] TLR 39 and* ***Rashid Seba V. Republic****, Criminal Appeal*

No. 95 of 2005 (unreported). Basing on the above decisions, we find that the trial court was not justified to reject the appellant's defence of alibi outright without considering and giving it weight it deserved. Therefore, the High Court also misdirected itself by upholding the decision of the trial court in that respect."

It is also a settled position of law that, the trial court cannot sustain conviction on prosecution testimony without, on due consideration of the defense evidence, satisfies itself that, the same does not shake the prosecution case as to raise a reasonable doubt. There are many decisions supporting this position. See for instance, **Hussein Iddi and Another vs. Republic** [1986] TL; RE 166 where it was held that;

"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."

In our view, the gaps in the visual identification evidence of PW1 herein portrayed coupled with the ignored uncontested appellant's

defense of *alibi* cast a reasonable doubt on the prosecution case which out to have been used in favour of the appellant.

In the final result and for the foregoing reasons, therefore, the appeal is allowed. The judgments of both the lower courts are set aside. The conviction is set aside and the sentence thereof quashed. We accordingly order for immediate release of the appellant from prison unless he is withheld for some other lawful causes.

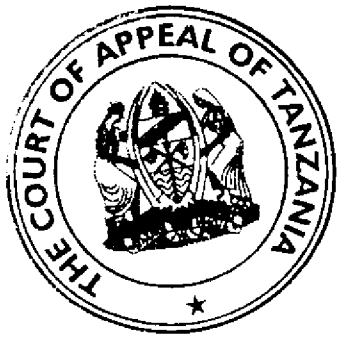
DATED at **DAR ES SALAAM** this 12th day of July, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 13th day of July, 2021 in the presence of the appellant linked to the Court from Ukonga prison by video facility and Ms. Ester Kyara, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL