IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 226 OF 2019

AMOUR MBARUCK @ ALJEB.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Magutu, PRM Extended Jurisdiction.)

dated the 17th day of June, 2019
in
Criminal Appeal No. 17 of 2019

JUDGMENT OF THE COURT

29th June, & 19th July, 2021

KITUSI, J.A.:

This is a second appeal by Amour Mbaruck @ Aljeb, hereafter the appellant. Originally, the District Court of Kigamboni tried and convicted him of unnatural offence under section 154 (1) (a) of the Penal Code and sentenced him to life imprisonment. His first appeal before a Principal Resident Magistrate with Extended Jurisdiction was unsuccessful.

At the trial it was alleged, and the two courts below accepted the fact, that against the order of nature, the appellant had carnal

knowledge of a boy whose name we shall withhold and only refer to as PW2. He testified for the prosecution as such.

According to PW2 a scholar, the appellant was a cattle keeper who used to graze his flock in the bush. On his way to or from school, PW2 would meet the appellant in that bush and he would have anal sex with him. PW2 stated that this happened about five times in 2017, and he never disclosed the fact to anyone for fear of the appellant's threats and the possibility of his mother beating him. And it seems the unpleasant secret would never have been disclosed if not for one Mr. Maziku, the Ward Executive Officer (WEO) of the area who called Mariam Shaban Kindande (PW1) and tipped him about it.

PW1 was a teacher at the school where PW2 was attending. She recalled to have received a call from Mr. Maziku using number 116, special for whistle blowing on issues of child abuse. The caller told PW1 that three pupils of her school including PW2 were victims of sodomy, a fact they later admitted upon being interrogated, PW2 naming the appellant as the man who had had anal sex with him.

PW1 took the pupils to the gender and children desk at Kigamboni Police Station from where they were referred to a doctor for medical

examination. Mecky Charles Rugalamila (PW4) who examined PW2 on 20th August, 2018 detected bruises and loose anal sphincter. The PF3 in which PW4 recorded his findings was admitted in evidence as Exhibit P1.

In defence, the appellant confirmed the fact that he is a cattle keeper but maintained that he grazes his animals around his residence, challenging PW2's contention that they used to meet in the bush. He therefore denied committing the alleged anal sex with PW2, whom he identified as his neighbor's child.

The trial court found the appellant guilty on the basis that he did not deny the fact that PW2 knew him and the learned magistrate considered the cumulative facts of the case as pointing to none other than him as the perpetrator of the alleged offence. Even the fact that PW2 was examined a year after the alleged sodomy mattered less to the learned trial magistrate. Rather, she considered the loose anal muscles observed a year later as being proof of the gravity of the sodomy that made it impossible for the muscles go back to normal.

As shown earlier, the first appeal was dismissed. The learned PRM with extended jurisdiction took the view that the contradictions which had been pointed out in relation to PW2's testimony were neither here

nor there. First, citing **Chukwudi Denis Okechukwu and 3 Others v. Republic,** Criminal Appeal No. 507 of 2015 and **Said Ally v. Republic,** Criminal Appeal No. 249 of 2008 (both unreported), the learned magistrate considered it wrong to pick out sentences in isolation when resolving contradictions. Secondly, the learned PRM was of the view that when the testifying victim of sexual offence turns out to be a child, contradictions in his testimony may always be rationalized. On this, she relied on foreign cases including **Mocumi v. The State** (323/2015) [2015] ZASCA 201 (2 December, 2015).

Before us the appellant raised 17 grounds of appeal in the memorandum of Appeal and 4 grounds in the supplementary memorandum of Appeal. We note however, that quite a good number of them are new. Therefore, although Mr. Kalinga supported the appeal, he called upon us not to consider grounds 2, 3, 6, 7, 10, 11, 12, 15, 16 and 17 of the memorandum of appeal and grounds 2, 3 and 4 in the supplementary memorandum of appeal, as they are new and do not raise issues of law.

Certainly, matters not raised and determined first by the High Court or Court of Resident Magistrate with extended jurisdiction should not be raised before the Court unless they raise

points of law. The position on this is very settled from many of our decisions, including **Damiano Qadwe v. Republic**, Criminal Appeal No. 317 of 2017 cited in **Abdalah Ahamadi Likunja v. Republic**, Criminal Appeal No. 120 of 2018 (both unreported). See also our unreported decisions in **Karim Seif @ Slim v. Republic**, Criminal Appeal No. 161 of 2017 and **Pius Matei @ Kiguta v. Republic**, Criminal Appeal No. 98 of 2017

The appellant who appeared in person had earlier filed written arguments. He had no further input especially on an issue so technical as the present. He just invited us to consider all grounds of appeal and the written arguments he had lodged, and allow his appeal.

Applying that principle to the facts of the instant appeal, we find it easy to agree with Mr. Kalinga that most of the grounds are new because in the first appeal before Magutu PRM with extended jurisdiction, the appellant raised only two grounds in the petition of appeal, while he has now placed a total of 21 grounds of appeal for our consideration. We will therefore not consider the ten grounds in the memorandum of appeal, that is, ground 2, 3, 6, 7, 10, 11, 12, 15, 16 and 17 as well as ground 2, 3, and 4 in the supplementary memorandum of appeal, as they are new and do not raise points of law.

As of duty, we shall now deal with grounds 1, 4, 5, 8, 9 and 14 in the memorandum of appeal and ground 1 in the supplementary memorandum of appeal. Incidentally, ground 1 in the supplementary memorandum of appeal, raises issue with the admissibility of the PF3, mainly because it was tendered by the prosecutor and that it was not read over after admission. The learned State Attorney conceded to this complaint and we agree with him because a document tendered as an exhibit must be read over for the accused to know its contents. See the case of **Geophrey Jonathan Kitomari v. Republic**, Criminal Appeal No. 237 of 2017 (unreported) in which the case of **Robinson Mwanjisi & 3 Others** [2003] T.L.R 218 was cited. We therefore find merit in that ground of appeal and expunge the PF3 from the record.

Grounds 1 and 5 though seemingly raising legal points in relation to the charge, are all the same misconceived, in our view. This is because, in ground 1 the charge is challenged for not specifying the dates of the alleged offence, and also for not showing the word "unlawful". In ground 5, the criticism is on the omission to specify the age of the victim, whether it was 5 or 8 years.

The appellant's written arguments did not address the issue of defects in the charge. Mr. Kalinga submitted that the particulars of the offence sufficiently disclosed the allegations laid at the appellant's door to enable him prepare his defence. Responding to our prompting on the complaint that it was wrong not to cite the word "unlawful" Mr. Kalinga submitted that there could never be a lawful unnatural offence. Similarly, on the alleged confusion in citing the age of the victim, Mr. Kalinga submitted that the appellant was not prejudiced.

We agree with the learned State Attorney as we see nothing wrong in the charge sheet. The charge alleging that the commission of the offence was on diverse dates is in harmony with the evidence alleging that PW2 was sodomized five times during the year 2017. Likewise, the said charge need not state that the unnatural offence was unlawful when, as submitted by Mr. Kalinga, there can never be a lawful sodomy under our laws. On the issue of the age of the victim, we would simply observe that whether the boy victim of sodomy is 5 or 8 years makes no difference, because following the amendment of the law effected through section 185 of the Law of the Child Act, 2009 which amended section 154 (2) of the Penal Code, sentence for unnatural offence committed against a boy under the age of 18 years is life

imprisonment. Since 5 or 8 years, as the case may be, are well below 18 years, the complaint is inconsequential.

Next for our consideration is ground 4 in which the complaint is that the appellant was not supplied with a copy of the statement of PW2. Submitting on this, the learned State Attorney conceded that failure to observe that requirement is fatal. Again, the appellant's written arguments did not elaborate on this. In our deliberations, we agree with the appellant and Mr. Kalinga that section 9 (3) of the CPA requires the trial magistrate to cause a copy of the complainant's statement to be supplied to the accused. We wonder however, whether the victim is always the complainant even in cases such as sexual offences involving victims of very tender age who cannot be expected to properly narrate what took place. Nonetheless, in view of the position we are going to ultimately take in relation to the testimony of PW2, we find it unnecessary to deliberate on this ground.

In ground 9, the appellant complains of violation of section 210 (3) of the CPA in relation to the testimony of PW2. As it is the case with the previous grounds of appeal, the written arguments do not offer anything to go by on this ground. Mr. Kalinga conceded to this ground. However, the learned State Attorney should be reminded that we have stated in

many of our previous decisions that non compliance with section 210 (3) of the CPA may only be raised by the witness whose evidence is under scrutiny. This is because that provision requires the trial court upon being requested, to read over the substance of the testimony to a witness for him to know if the court recorded what he actually said. At any rate where the appellant does not show how the omission prejudiced him, we have tended to treat it as curable under section 388 of the CPA. See **Yuda John v. Republic**, Criminal Appeal No. 238 of 2017 citing **Paul Dioniz v. Republic**, Criminal Appeal No. 171 of 2018 (both unreported).

Lastly, we shall consider grounds 8 and 14 together as they both relate to the quality of the evidence of PW2. In ground 14, the appellant faults the trial court for not conducting a *voire dire* examination on PW2, thereby violating section 127 (2) of the Evidence Act, [Cap 6 R.E 2002]. The first appellate court is being faulted for going along with the trial court. Mr. Kalinga submitted that the law as regards reception of evidence of witnesses of tender age was observed. With respect, we agree with the learned State Attorney because the law following the Written Laws (Miscellaneous Amendments) Act No 4 of 2016 that came into force in July 2016, only requires a child witness to promise to tell

the truth and not lies. We have made this pronouncement in many other decisions such as **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported). Therefore, this ground of appeal has no merit because the record bears out that the trial court was so informed of the current law and observed it to the letter.

Ground 8 questions the quality of the evidence of PW2 on the basis that it is fraught with contradictions. We think the appeal turns on this ground. This ground was raised before the first appellate court but, as earlier indicated, Magutu, PRM with extended jurisdiction was of the view that the contradictions did not affect the quality of PW2's testimony, mainly because at his age, such contradictions should be understandable. The learned PRM supported her position with two decisions as earlier shown, the first being **Mocumi v. the State** (supra) from which she picked the following passage: -

> *"Contradictions in the evidence of child complainants in sexual offence cases are not necessarily fatal to State case. That evidence must be considered carefully and the court must be satisfied that despite the contradictions, the evidence constitutes proof beyond reasonable doubt of commission of the offence and*

identification of the perpetrator and that the relevant considerations include the age and capacity of the child".

Then she cited another case of **P.C v. D.P.P** [1999] 21.R.25 from Ireland and reproduced the following passage: -

"Feelings of guilt and shame experienced by the child because of his or her participation, albeit unwillingly, in what he or she sees as wrongdoing would also explain a failure to complain sooner. In addition, the use of threats, actual or implied, of punishment if the alleged offences are reported, would also be enough to convince the court that the lapse of time was reasonable."

We find that reasoning to be as interesting as it is thought provoking. We will revert to that position later.

To begin with, we are alive to the principle that we have no automatic mandate to interfere with the concurrent findings of the two courts on the veracity of PW2. However, we are satisfied that the two courts below applied a wrong principle by resolving contradictions in PW2's testimony in isolation from testimonies of other witnesses. Therefore, on the basis of our decisions in **Jaffari Mfaume Kawawa v.**

Republic [1981] T.L.R 149, **Jafari Mohamed v. Republic**, Criminal Appeal No.112 of 2006 (unreported) and others, we shall take another look at the evidence of PW2, this time evaluating it against testimonies of other witnesses. First of all, the omission to call Mr. Maziku to the witness box without any explanation leaves certain matters to speculation. This is because only this witness would tell the court if in 2018 when he called to alert PW1 about PW2's unknown behaviour, he had seen the appellant or anyone else ravish the boy. In the absence of testimony from that witness, we take PW2's testimony that he was last sodomized in August 2017 to be the basis of our decision. While PW2 was uncertain as to whether his ravisher inserted his male member in his anus or not, PW4 could still detect bruises in it when he examined him a year later in August 2018. The appellant's written arguments emphatically attacked the truthfulness of PW2's evidence and went on to submit that it cannot be repaired by any other evidence.

The trial court resolved this discrepancy by stating that the bruises seen in PW2's anus a year after the sodomy, were proof of the gravity of the penetration. With respect, PW2 did not allude to any such fact, so the learned trial magistrate had no justification for making that conjecture. The first appellate court resolved the discrepancy in favour

of the prosecution because of the reasoning in the two cited cases giving guidance on how to treat evidence of child victims of sexual offences. This is the point we had earlier promised to come back to. While we agree with the first appellate court on that approach, and that in resolving contradictions courts should focus on the context, we do not think it justifies us supplementing the evidence of the child witnesses where it leaves doubts. We wish to emphasize that always the prosecution has a duty to prove cases beyond reasonable doubt, even where the victims happen to be children. In **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 (unreported) we emphasized on the need for trial courts to subject testimonies of victims of sexual offences to careful scrutiny.

We have no reason to disbelieve PW4, the medical doctor who examined PW2 in August 2018, that he detected bruises and loose anal sphincter. In view of that, can the evidence of PW2 that he was last sodomized in August 2017 be true? These facts hardly make sense in our view, therefore PW2 did not tell the whole truth. In our finding we do not think the discrepancies can be ignored simply by associating them with the victim's age, rather they affect the quality of PW2's evidence.

Our conclusion is that PW2 did not live up to his promise to tell the truth, which renders the conviction entered on the basis of his evidence faulty. For those reasons we find merit in ground 8 of appeal and consequently allow the appeal. We quash the conviction, set aside the sentence and order the appellant's immediate release if he is not being held for some other lawful cause.

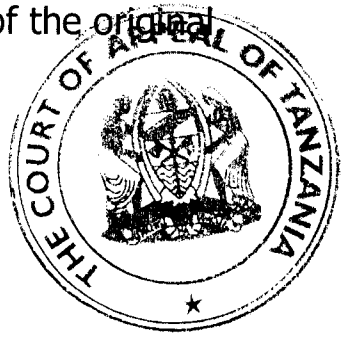
DATED at **DAR ES SALAAM** this 9th day of July, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 19th day of July, 2021 in the presence of the appellant in person and Ms. Lilian Rwetabule, 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