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. 267 OF 2019

FILBERT GADSON @ PASCO ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of Resident Magistrate Court of Dar es Salaam, At Kisutu)

(Kamuzora, SRM Extended Jurisdiction)

dated the 27th day of June, 2019

in

Criminal Appeal No. 31 of 2019

JUDGMENT OF THE COURT

29th June & 5th August, 2021

KAIRO, J.A.:

This is a second appeal by Filbert Gadson @ Pasco (the appellant) following his dissatisfaction with the decision of the Resident Magistrate Court of Dar es Salam at Kisutu by Kamuzora, SRM with Extended Jurisdiction. She upheld the decision of the District Court of Kigamboni at Kigamboni which convicted the appellant of a charge of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 RE 2002]. Upon conviction, the appellant was sentenced to life imprisonment.

It was alleged at the trial that, on diverse dates in the year 2018 at Vijibweni area within Kigamboni District in Dar es Salaam Region, the appellant did have carnal knowledge of a boy aged eight years against the order of the nature. To conceal his identity, we shall henceforth refer to him as the victim or simply PW1 as he so testified before the trial court. The appellant denied the charges against him. To prove its case, the prosecution side paraded five witnesses and tendered one exhibit (PF3) while the defence side called three witnesses, the appellant inclusive.

The prosecution evidence was to the effect that the victim who was in grade I when the offence was committed used to visit the appellant at his shop situated in the neighborhood. The appellant used to take the victim to his bedroom at night, take off his clothes and sodomize him while covering his mouth with a shirt to prevent him from shouting. After finishing, the appellant would give him some money with threats to slaughter him if he would reveal the ordeal to anybody. As he was scared, PW1 kept mum.

Later, a family member; one Joyce Mwalami (PW4), became suspicious of the victim's late arrivals at home. Upon questioning him,

he narrated the story to PW4, Tatu Ndete (PW5) and Rose Simon (PW2) mentioning the appellant to be the culprit.

The trio physically examined PW1 and found that his anal sphincter muscles were loose. The incident was reported to the police and PW1 was thereafter taken to Kigamboni Health Centre for medical examination. He was examined by Samota Philip Mputa (PW3), a clinical officer who confirmed that PW1 was penetrated in his anus and tendered a PF3 which was admitted in evidence as exhibit P1. The appellant was arraigned in connection with the offence.

In his defence, the appellant denied to have committed the alleged offence. He however admitted to be familiar with PW1 as he used to go to his shop with other children. The appellant also added that he used to send PW1 for his errands at Maduka Mawili.

At the end of the trial as earlier stated, the appellant was convicted and sentenced to life imprisonment. The trial court based its conviction mainly on the victim's evidence which was found credible and reliable as was corroborated with evidence adduced by other prosecution witnesses. The appellant unsuccessfully appealed to the High Court which through the Resident Magistrate with Extended

Jurisdiction, sustained the verdict of the trial court. Still determined to demonstrate his innocence, the appellant has come to this Court armed with seven grounds in the memorandum of appeal lodged on 7th day of January, 2020 and six grounds in the supplementary memorandum of appeal lodged on 21st day of February, 2020.

At the hearing of the appeal, the appellant appeared in person. The respondent Republic, on the other hand, enjoyed the services of Ms. Mossie W. Kaima; learned Senior State Attorney. When invited to address us in amplification of the grounds of appeal in the Memorandum of Appeal and Supplementary Memorandum of Appeal, the appellant had nothing useful to add apart from urging us to adopt the memoranda of appeal together with the list of authorities he referred to. He finally prayed the Court to allow the appeal and set him free.

Upon taking the floor, Ms. Kaima expressed the respondent's stance to oppose the appeal and responded to the grounds of appeal in both memoranda after clustering them. We shall discuss her responses when addressing the merit of the appeal.

In the course of hearing, we noted new grounds amongst the ones she responded to and when we asked her comments, the learned

State Attorney implored us to disregard them though she did not specifically point them out. As a general rule, the Court has no mandate to look at issues which were not determined by the courts below as was aptly decided in the case of **Hassan Bundala @ Swaga V. Republic,** Criminal Appeal No. 416 of 2013 (unreported) wherein the Court stated:

> *"it is now settled as a matter of general principle this Court will only look into the matters which came upon the lower courts and were decided, and not on new matters which were not raised nor decided by either the trial Court or the High Court on appeal"*

However, as an exception to the stated general rule, new grounds of appeal which raise matters of law are bound to be determined. In **Godfrey Wilson V. Republic** Criminal Appeal No. 168 of 2018 quoted with approval in the case of **Nasibu Ramadhani V. Republic;** Criminal Appeal No. 310 of 2017, the Court stated as follows when faced with a similar issue:

> *"...On our part, we subscribe to the above decisions. After having looked at the record critically we find that, as the learned State Attorney submitted grounds Nos 1, 2, 3, 5, 6, 7 and 8 are new.* ***With an exception of the 6th ground of appeal which raises a point of law;*** *as was said in* ***Galus Kitaya V. Republic.,*** *Criminal*

Appeal No. 196 of 2015 and ***Hassan Bundala @ Swaga, V. Republic,*** *Criminal Appeal No. 386 of 2015 (both unreported) cases, we think that those grounds being new grounds for having not been raised and decided by the first appellate court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate court went wrong or right. Hence, we refrain from considering them."*

According to our observation, the new grounds are Nos. 2,3,4 and 5 of the Memorandum of Appeal together with ground Nos. 4, 5 (i)-(iii) and 6 (ii) and (iii) of the Supplementary Memorandum of Appeal. In line with **Nasibu Ramadhani V. Republic** (supra), we reject grounds No. 2 and 4 of the Memorandum of Appeal and ground No. 6 (ii) & (iii) in the Supplementary Memorandum of Appeal and proceed to determine the rest of the new grounds since they include the ones which raise matters of law.

Having considered the remaining grounds in the memoranda of appeal together with parties' submissions for and against them, we are of the view that they all boil down to four issues which shall be the center of our determination in this appeal as follows. **One**, whether the

charge sheet was defective which is in relation to 1st ground in the memorandum of appeal together with the 3rd and 4th in the supplementary memorandum of appeal. **Two,** whether the age of PW1 was proved which is in relation to the 3rd ground in the memorandum of appeal. **Three,** whether exhibit P1 (PF3) was tendered in accordance with the required procedure which is in relation to ground No. 5(iii) in the supplementary memorandum of appeal and No. 5 in the memorandum of appeal and, **Four,** whether the prosecution proved the case to the required standard; that is beyond reasonable doubt which is in relation to the 6th and 7th grounds in the memorandum of appeal and ground No. 5(i) and (ii) of the supplementary memorandum of appeal.

Starting with the first issue, the appellant faulted the trial court and the first appellate court for grounding his conviction on a defective charge sheet. He clarified that the said charge did not state the number of times he allegedly sexually abused the victim. He also contended that the substance of the charge was not explained to him before entering his defence arguing that the omission is a procedural irregularity. The appellant also added that the first appellate court wrongly sustained his

conviction because the word "unlawful" in the particulars of the offence before the words "carnal knowledge" was omitted.

In response, Ms. Kaima submitted that, the appellant's arguments are without merit as PW1's testimony was to the effect that he was sodomized several times. Whilst conceding that the substance of the charge was not explained to the appellant before entering his defence, she argued that the same was read over to him when he made his first appearance in court and his plea taken. In this regard, it was Ms. Kaima's argument that, since he ably defended himself, the appellant was not prejudiced in any way. Besides, apart from conceding that the word "unlawful" was not in the particulars of offence, she charged that there is nothing lawful when it comes to unnatural offence. She added that, the appellant was not prejudiced.

The issue which stands for our deliberation in the light of what has been submitted by the parties is whether the charge is defective for not mentioning the number of times the offence charged with was committed. Section 132 of the Criminal Procedure Act, Cap 20 RE 2019 (the CPA) can be of assistance in so determining. The section provides as quoted below: -

"every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

In our view, the charge cannot be rendered defective merely for failure to state the number of times the offence was committed. What is required from the charge is for it to provide sufficient information with regards to the nature and particulars of the offence to enable the accused person prepare his defence. The number of times the accused committed the charged offence is immaterial since a single act is enough to ground conviction if proved. According to our assessment, the particulars of the offence laid at the appellant's door were enough to enable him prepare his defence to which he ably did.

With regards to non-inclusion of the word "unlawful", we are of the view that it matters not when it comes to the charge of unnatural offence. After all, there is no lawful sodomy as rightly argued by Ms. Kaima. Further to that, the appellant did not state how the pointed-out flaws caused failure of justice to him. In our view, the omission to include the word "unlawful" did not cause any injustice to him as it was

emphasized in the case of **R. V. Ngidipe Bin Kapirama & others** (1939) 6 EACA 118 cited with approval in the case of **Jafari Salum @ Kikoti V. Republic,** Criminal Appeal No. 370 of 2017 it was stated:

> *"An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has been otherwise a failure of justice"*

In view of the above discussion, the first issue is answered negatively.

The second issue is on the failure to prove the age of the victim which is the complaint in ground No. 3 of the Memorandum of Appeal. Ms. Kaima opposed the contention. We totally agree with her that the victim stated his age when testifying in chief at page 9 of the record. It is the stance of the law that age of a victim can be proved by a victim, relative, parent, medical practitioner or where available, by the production of a birth certificate [see **Essaya Renatus V. Republic,** Criminal Appeal No. 542 of 2015] (unreported). In the circumstances we find the appellant's 3rd ground unfounded. We thus dispose the 2nd issue in the affirmative; that is, the age of the victim was proved.

The third issue is on the alleged un-procedural admission of exhibit P1 (PF3). The appellant's contention is twofold; first that it was

tendered by the State Attorney instead of the doctor who examined the victim (PW3); secondly that the trial court admitted exhibit P1 without first resolving the objection raised by the appellant. Ms. Kaima conceded to the pointed-out defects asserting that, the remedy is to have it expunged from the record. To buttress her argument, she cited the case of **Juma Adam V. Republic;** Criminal Appeal No. 79 of 2011 (unreported). We are inclined to agree with the learned State Attorney with regard to the consequence of unprocedural tendering of exhibit P1. Having resolved that the exhibit P1 was un-procedurally admitted, we are constrained to expunge it from the Court record as we hereby do. In this respect grounds No. 5 of the memorandum of appeal and No. 5(iii) of the supplementary memorandum of appeal are merited. Consequently, the third issue is answered in the negative. We shall discuss whether the finding has weakened the prosecution case or not when addressing the fourth and last issue as to whether the prosecution has proved the case beyond reasonable doubt.

The appellant has raised four points under which he bases his complaint that the case has not been proved beyond reasonable doubt. These are; **one**: incompetency of the doctor (PW3), **two**; that

penetration was not proved, **three**: inconsistencies of the evidence of PW2, PW3 and PW4 and **Four**: variance of the names of the victim.

The appellant submitted that PW3 was an incompetent witness to testify in court about the medical examination of PW1 asserting that his credentials were not established as per legal requirement. However, the record of appeal at page 12 reveals that PW3 introduced himself and told the trial court that he was a Clinical Officer working at Kigamboni Health Centre. Regarding the definition of a clinical officer, we sought reliance from our previous decision in the case of **Charles Bode V. Republic;** Criminal Appeal No. 46 of 2016 (CAT) (unreported) referred by the learned State Attorney which at page 16 gives the following definition quoting Wikipedia:

> *"a gazetted officer who is qualified and authorized to practice medicine. A clinical officer observes, interviews and examines sick and health individuals in all specialties to document their healthy status and applies pathological, radiological, psychiatric and community health techniques...."*

The Court went further at page 17 of the judgment and quoted the link of *https://ipfs/* where the phrase clinical officer was defined to mean: -

> *"A licensed practitioner of medicine in East Africa and parts of Southern Africa, who is trained and authorized to perform general or specialized medical duties such as diagnosis and treatment of disease and injury, ordering and interpreting medical tests, performing routine medical practice...."*

In the light of the said definitions of a clinical officer, PW3 gave his credentials and looking at them, we are convinced that he was competent to examine PW1 and testify as a doctor as he did. The complaint therefore holds no water and we reject it.

Regarding the complaint that penetration was not proved, the appellant contends that PW3 did not mention the organ which penetrated PW1's anus and thus PW3 was unreliable and it was not proper for the first appellate court to sustain conviction acting on PW3's evidence. The contention was dismissed by Ms. Kaima for being baseless. We have gathered that, PW3 told the trial court that upon examining PW1, he found that his anal muscles were loose, which

according to him, suggested that he was penetrated but did not state by what. It was PW1 who stated with certainty as to what penetrated his anus. Though he used the term *'mdudu'*, he showed to trial court where the said *'mdudu'* is located and according to the trial court, PW1 meant penis. In the case of **Simon Erro V. Republic;** Criminal appeal No.85 of 2012 (CAT) the victim, like here, referred to the penis as "dudu" and the Court held that to be sufficient. [See also in **Haruna Mtasiwa V. Republic;** Criminal Appeal No. 206 of 2018 CAT (both unreported)]. That said, we wish to reiterate the settled law that the true and reliable evidence in sexual offences is that of the victim who is required to prove penetration being one of the essential ingredients. [See the case of **Selemani Makumba V. Republic** [2006] T.L.R 379]. PW1 testified to have been feeling pains when the said *'mdudu'* was placed in his buttocks. We are of the view that, just placing it in the buttocks could not have caused pains to PW1 unless inserted. That aside, there is no other opening at the buttocks apart from the anus where PW3 found the sphincter muscles were loose upon examining him. We are satisfied that the totality of the evidence on this aspect confirms that PW1 was penetrated by the penis and the perpetrator was the appellant. As such, the appellant's complaint flops. Besides, the appellant's assertion that

the first appellate court sustained conviction basing on PW3's evidence is not correct as PW3's evidence corroborated that of the victim.

The appellant also complained about inconsistencies in the evidence of PW2, PW3 and PW4 with regards to the dates the alleged incidence was discovered. Indeed, the inconsistencies exist as the dates were testified to be 15/9/2018, 17/9/2018 and 16/9/2018 by PW2, PW3 and PW4 respectively. However, the inconsistencies were considered by the first appellate court at page 58 of the record and resolved to be minor as they did not go to the root of the matter. We join hands with the said finding for the reason that human recollection is not infallible thus not expected to remember exact details of what transpired considering that the witnesses gave evidence more than a year from the date of the fateful incident. [See **Alex Ndendya V. Republic;** Criminal Appeal No. 207 of 2018] (unreported). Besides, the referred date relates to the time when the offence was discovered and not when the offence was committed. The inconsistencies being minor, they could not be resolved in the appellant's favour. We again found the argument wanting since the alleged inconsistencies did not affect the credibility of PW2, PW3 and PW4. At any rate and without prejudice, even if their

evidence is discounted, we are still convinced that the evidence of PW1 can stand alone to ground a conviction. We are fortified in this stance by the provisions of section 127(6) of the Evidence Act, Cap 6 R.E. 2019 which provides as hereunder: -

> *"Notwithstanding the preceding provisions of the section, where in criminal proceedings involving sexual offence, the 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 age, as the case may be the victim of sexual offence on its own 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."*

The above provision was echoed in various cases including the case of **Selemani Makumba V. Republic** (supra)].

The appellant has also complained against the variance of the names of PW1 as reflected in the charge sheet and when he introduced himself before the trial court whereby the names read as "Doto Yohana Simon" and "Doto Simon" respectively. Ms. Kaima resisted that

complaint for being baseless. She argued that both names belonged to PW1 and no failure of justice was occasioned to the appellant. She added that the appellant's complaint is an irregularity curable under section 388 of the Criminal Procedure Act [Cap 20 R.E. 2019]. We fully agree with the learned State Attorney in this aspect. We are satisfied that the said names belonged to PW1 considering that he introduced himself using his first and last names while the charge sheet used his first, middle and last names. Further to that, the victim identified the appellant in court when testifying. On top of that even the appellant admitted to know PW1. In the circumstances, the argument has no merit. In the end result we are satisfied that the prosecution case against the appellant was proved beyond reasonable doubt.

We are aware of the cherished principle that the Court being the second appellate court is not required to interfere with the concurrent findings of facts of the two courts below except in circumstances where the Court is of the opinion that there was either misapprehension or misdirection of evidence occasioning injustice in line with our previous decision, amongst others; **Ludovic Sebastian V. Republic:** Criminal Appeal No. 318 of 2009 (unreported).

Having considered the appeal holistically, we are satisfied that there is neither misapprehension nor misdirection of evidence in the present appeal. As such there is no justification to interfere with the concurrent findings of the two courts below. Accordingly, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

DATED at **DAR ES SALAAM** this 30th August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgement delivered this 5th day of August, 2021 in the presence of the appellant in person through Video facility from Ukonga Prison and Ms. Imelda Mushi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL