IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. AND KAIRO, J.A.)

CRIMINAL APPEAL NO. 88 OF 2018

SHABANI RULABISA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Shinyanga)

(Makani, J.)

Dated the 13th day of October, 2016
in
DC Criminal Appeal No. 147 of 2015

.....

JUDGMENT OF THE COURT

9th & 17th August, 2021

WAMBALI, J.A.:

The District Court of Shinyanga (the trial court) sitting at Shinyanga convicted Shaban Rulabisa, the appellant of the unnatural offence contrary to the provisions of section 154 (1) (a) of the Penal Code, [Cap. 16 R.E. 2016] (now R.E. 2019) (the Penal Code). Ultimately, he was sentenced to life imprisonment in terms of subsection (2) of section 154 of the Penal Code.

The particulars in charge sheet that was placed before the trial court alleged that on divers dates between January and February, 2013 at Ngokolo Mitumbani area within Shinyanga Municipality and Region,

the appellant had carnal knowledge of a boy aged 8 years against the order of nature. For the purpose of this judgment we will refer to the boy as a "victim" or "PW2" to disguise his identity.

The appellant pleaded not guilty to the charge, and thus to substantiate its case, the prosecution relied on the following witnesses, namely; Prisca Massawe (PW1), the victim (PW2), D.E. 9477 D/CPL Tegemea (PW3) and Dr. Richard Mwikwibe Okwachi (PW4) who also tendered the Police Form No. 3 (PF3) on the condition of the victim after he examined him. The PF3 was admitted as exhibit PE1. In short, the substance of the prosecution evidence was to the effect that the victim was sexually abused against the order of nature and that the appellant was fully responsible for the allegation of committing the offence.

On the other hand, the appellant who testified as DW1 summoned two other witnesses, namely; Benjamin Joseph (DW2) and Jackson Said Kimemba (DW3) to defend the allegation levelled against him by the prosecution. Notably, he spiritedly disassociated himself against the allegation of committing the unnatural offence and contended that the prosecution failed to established the allegation to the required standard. He thus urged the trial court to acquit him of the offence.

Nevertheless, at the height of the trial, the trial court was of the settled finding that the case against the appellant was proved beyond reasonable doubt, hence it convicted and sentence him as alluded to above.

Aggrieved, he appealed to the High Court in Criminal Appeal No. 114 of 2015, which was unfortunately dismissed as it was found that it lacked merit, hence the instant appeal.

Initially, to express his dissatisfaction with the decision of the High Court, the appellant lodged a memorandum of appeal comprising six grounds of appeal. However, before the hearing of the appeal, the appellant engaged an advocate who, in terms of Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 lodged a supplementary memorandum of appeal predicated into three grounds of appeal. Noteworthy, at the hearing of the appeal, the learned advocate abandoned the memorandum of appeal lodged by the appellant and urged us to consider the grounds of appeal contained in the supplementary memorandum of appeal which we take liberty to reproduce hereunder: -

> *(1) That the appellant was denied fair trial to the extent that: -*

(i) His defence was not considered by both the trial and first appellate courts;

(ii) The trial court visited a scene of crime contrary to the procedure and/or the law.

(Notably, the learned advocate abandoned paragraphs (iii) and (iv) previously listed in ground one).

(2) That trial court and first appellate court erred in law for relying on the PF3, Exhibit PE1 which was tendered and admitted in evidence contrary to the law.

(3) That voire dire test to PW2, a victim of crime having been conducted contrary to the law; both the trial court and first appellate court erred in law when they relied on evidence of such PW2."

When the appeal was called on for hearing on 9th August, 2021, the appellant who was in Court enjoyed the services of Mr. Audax Theonest Constantine learned advocate, whereas Ms. Salome Mbughuni and Ms. Caroline Mushi, learned Senior State Attorney and State Attorney, respectively, represented the respondent Republic.

Submitting in support of the first ground in respect of the failure of both the trial and first appellate courts to consider the appellant's

defence, Mr. Constantine contended that in the judgments of both courts there is no indication that sufficient consideration was given to the defence of the appellant against the prosecution evidence. He argued that, the trial court simply summarized the appellant defence without analyzing it thoroughly against the evidence of the prosecution. Unfortunately, he submitted, the first appellate court in its judgment did not consider at all the defence of the appellant before it concurred with the trial court's finding concerning the conviction of the appellant while it was based on weak evidence of the prosecution.

In the premises, relying on the decision of the Court in **Sospeter Charles v. The Republic,** Criminal Appeal No. 555 of 2016 and **Simon Aron v. The Republic,** Criminal Appeal No. 583 of 2015 (both unreported) which are to the effect that failure to consider the defence case is fatal, he urged us to nullify the proceedings of both the trial and first appellate courts.

Regarding the visit to the scene of crime by the trial court, the learned advocate submitted that though the place where the court visited was unknown as per the record, there is no indication that the appellant was present and that, in general it was not known why the proceedings were moved to that place. Indeed, he argued that

generally, the procedure for visiting the scene of crime was not followed. To support his contention, he made reference to the decision of the Court in **Nizar M. H. Audax v. Gulamali Fazal Jan Mohamed [1980] T.L.R. 29** at pages 31 and 32 and pressed us to be persuaded by it though it was in respect of a civil matter.

In response, Ms. Mbughuni submitted that the appellant was not denied fair trial by the trial court as his defence was adequately considered by the trial court. In this regard, he drew the attention of the Court to page 67 of the record of appeal and contended that a close look of that part of the trial court's judgment indicates that, the appellant's defence and that of his two witnesses was considered against the prosecution evidence before a finding that the appellant was guilty of the offence charged was reached in the end. To this end, she argued that though it is settled that failure to consider the defence case is fatal, the above decisions of the Court relied upon by the counsel for the appellant are not applicable in the circumstances of this appeal. Ultimately, the learned Senior State Attorney implored us to dismiss the complaint as the appellant's defence was considered.

Moreover, Ms. Mbughuni acknowledged the fact that it was not necessary for the trial court to have visited the scene of crime. In her

submission, the irregularity however, did not cause injustice to the appellant as nothing substantial was stated by the victim (PW2) at the scene of crime. Indeed, she refuted the contention of the appellant's counsel that the appellant was not present during the said proceedings. On the contrary, she stated, according to the coram of the trial court on that day, the appellant was present and cross-examined the victim after his evidence in chief. She thus submitted that even if the said particular proceedings at the scene of crime are expunged no injustice will be caused. In the end, she prayed that the first ground of appeal be dismissed for lacking in merit.

We have carefully scanned the record of appeal with regard to the complaint that the appellant's defence was not considered by both the trial and first appellate courts. In this regard, we respectfully disagree with the learned advocate for the appellant contention that the defence case was not considered at all. On the contrary, we are in agreement with the learned Senior State Attorney for the respondent Republic that the trial court adequately considered the appellant's defence.

Admittedly, in its judgment the trial court summarized, analysed and considered the evidence of both sides of the case, and finally it found that the defence of the appellant was not capable of dislodging

the evidence of the prosecution. For purpose of clarity, we deem it appropriate to reproduce the relevant part of the judgment as reflected at page 67 of the record of appeal thus: -

> *"However, the defence side just based on its evidence on how the accused person (sic) arrested and the business while there is no dispute that the accused person (sic) working at Ngokolo Mitumbani area he also confessed on it even though the defence witness denied to be at Ngokolo Mitumbani every day. Muchless the defence witnesses were not with a person every time as they said and also the accused person did not deny to know the victim and the victim insisted more than one time in his defence while badly crying that it was the accused person who did sodomise him and thereafter gave him money to buy pipi."*

We are settled that the above excerpt of the judgment of the trial court leaves no doubt that the appellant's defence and his witnesses was adequately considered in the circumstances of the case at hand. It is noted that in his defence the appellant and his witnesses (DW2 and DW3) did not raise serious doubt to the prosecution evidence as it was simply a general denial on his involvement in the commission of the crime.

On the other hand, it is acknowledged that the first appellate court did not deal with the defence of the appellant in its judgment. However, we note that the complaint on the failure of the trial court to consider his defence was not part of the grounds of appeal placed before the first appellate court for determination. Indeed, the complaint has been raised before this Court for the first time, and we decided to entertain it as it is a point of law. Therefore, we find that the complaints of the appellant against the first appellate court is unjustified.

Ultimately, we agree with the learned Senior State Attorney that the decisions of the Court in **Sospeter Charles and Simon Aron** (supra) are not applicable in the circumstances of this appeal. Consequently, we reject the complaints in the first limb of the first ground of appeal.

With regard to the second limb of the first ground, there is no dispute that according to the record of appeal, it was not necessary for the trial court to visit the scene of the crime for purpose of determining the case. Moreover, we note that though there is indication as per the record of appeal that the appellant was present during the visit to a scene of the crime as clearly indicated in the coram of that particular day, the procedure adopted by the trial court was irregular. Notably, the

trial court was moved by the prosecutor to shift to the scene of crime after cross-examination and that prayer was sustained and immediately thereafter it shows that PW2 testified at the scene. Admittedly, according to the record of appeal there is no indication that the appellant was given opportunity to say anything concerning the prosecution prayer to shift to the scene of the crime.

Nevertheless, as argued by Ms. Mbughuni the irregularity did not occasion any injustice to the appellant as when the proceeding resumed in the court room, he cross-examined the victim on the substance of his evidence before the trial court moved to the scene of crime. Consequently, save for what we have stated with regard to the second limb of the first ground of appeal, we dismiss it.

However, in the circumstances, we expunge from the record the proceedings of that particular day when the trial court moved to the scene of crime.

As for the second ground of appeal, we note that counsel for the parties were in agreement that the PF3 (exhibit PE1) was not read over after it was admitted in evidence and thus it was wrongly relied by the trial court to ground the conviction of the appellant. They therefore pressed us to expunge it from the record.

It is settled that the omission to read over or explain the document properly tendered and admitted in evidence disables the accused to understand the contents and the purpose for which it is desired to achieve. Thus, the omission is fatal as it violates the right to fair trial of an accused person. For this position see for instance the decision of the Court in **Rashid Amir Jaba and Another v. The Republic,** Criminal Appeal No. 204 of 2008 and **Issa Hassani Uki,** Criminal Appeal No. 129 of 2017 **Kalimilo Mabula @ Kutiga and Masunga Saanane @ Lamadi v. The Republic,** Criminal Appeal No. 565 pf 2016 (all unreported). Ultimately, we expunge exhibit PE1.

In the circumstances, having expunged exhibit PE1, we do not find it is appropriate to deal with the appellant's complaint in this ground that the said exhibit was tendered by the prosecutor instead of the witness (PW4). In the result, we allow the second ground of appeal.

Lastly, in support of the third ground of appeal, Mr. Constantine submitted that the *voire dire* examination of PW2 (the victim) was improperly conducted as it was done by both the trial Resident Magistrate and the prosecutor, before it was concluded that the witness did not know the nature of an oath and thus, he was not sworn. He argued that the procedure adopted by the trial court greatly prejudiced

the appellant. In this regard, he submitted that in view of the improper *voire dire* examination the proceedings with regard to the evidence of PW2 were vitiated and should be expunged. To support his stance, he relied on the decision of the Court in **Semu Jacob v. The Republic**, Criminal Appeal No. 99 of 2009 (unreported).

On the other hand, when prompted by the Court, Mr. Constantine argued that if the Court expunges part of the proceedings conducted by the prosecutor and finds that the *voire dire* examination was properly conducted by the trial Resident Magistrate who allowed PW2 to testify while not on oath, we should find that his evidence required corroboration. Indeed, he contended that PW2 evidence was weak and thus it cannot be corroborated by the evidence from other witnesses.

In his submission, as the PF3 was wrongly relied by the trial court, the remaining evidence of PW1, PW3 and PW4 cannot sustain the appellant's conviction. In the premises, he urged us to allow the third ground of appeal and acquit the appellant for the alleged prosecution failure to prove the case beyond reasonable doubt.

In reply, Ms. Mbughuni firstly, admitted that according to the record of appeal, the prosecutor participated during the *voire dire* examination of PW2. However, she argued that the irregularity is not

fatal to the extent of prejudicing the appellant as, in the end it was the trial Resident Magistrate who ruled that though PW2 was possessed of sufficient intelligence and knew the nature of the truth, he did not know the meaning of an oath. She thus implored us to expunge the particular proceedings conducted by the prosecutor.

Nevertheless, she maintained that even if the said proceedings are expunged the remaining part conducted by the trial Resident Magistrate is proper and thus no corroboration will be required in view of the provisions of section 127 (7) of the Evidence Act, [Cap. 6 R.E.2002]. In her submission, conviction can still be grounded as PW2 was found by the trial court to be a credible witness. To support her contention, she submitted that in **Kazimili Samwel v. The Republic**, Criminal Appeal No.570 of 2016 and **Hassan Kamunyu v. The Republic,** Criminal Appeal, No. 277 of 2016 (both unreported), it was held that the evidence of the victims required corroboration because the *voire dire* examination was partially and inelegantly conducted by the trial court, which is not the case in the present matter. She thus argued that the decision in **Semu Jacob v. The Republic** (supra) relied by the appellant's counsel to support his submission on the validity of evidence of PW2 is inapplicable in the circumstances of the instant case.

On the other hand, Ms. Mbughuni submitted that the evidence of PW2 was credible and not weak as submitted by the appellant's counsel. She contended that PW2 testified in detail on what the appellant did to him and was firm that he knew well the appellant and as a result he even sent him to his place of business at Ngokolo Mitumbani area. It was in this regard, she argued, that PW2 managed to lead PW3 to the place and touched the appellant who was ultimately arrested and sent to the police station. She emphasized that even during cross-examination PW2 remained firm and the appellant did not shake his evidence in chief.

Moreover, Ms. Mbughuni submitted that even if corroboration is needed the same is found in the evidence of PW4, a doctor whose evidence is to the effect that after he examined PW2, he found that the anal sphincter had been damaged which made the victim to pass stool without control and that it was a result of being sodomized. The other evidence, she submitted, is that of PW1, the mother of PW2 who testified on how she initially noted that the anus of the victim had enlarged and she thus sent him to hospital for further examination after obtaining a PF3. In her submission, the alleged contradiction in the evidence of PW1 that she previously examined PW2 before 28th

February, 2013 and found that he had no any problem is immaterial as it did not go to the root of the case as found by the first appellate judge.

In conclusion, she prayed that the third ground of appeal be dismissed for lacking merit.

On our part, firstly, we have no hesitation to state that it was wrong for the learned trial Resident Magistrate to have allowed the prosecutor to participate in conducting *voire dire* examination. According to the provisions of section 127 (2) of the Evidence Act, as it was before the amendment by Act No. 4 of 2016, the duty to conduct *voire dire* examination had to be solely performed by the trial magistrate. It is thus regrettable that the learned trial Resident Magistrate adopted a procedure not consistent with the requirement of the law. We, therefore, expunge the proceedings conducted by the prosecutor on *voire dire* examination. Secondly, there is no dispute that the purpose of conducting *voire dire* was to find out whether a child of tender years; possess sufficient intelligence to testify, understands the duty to tell the truth and knows the nature of an oath or affirmation (see the decisions of Court in **Mohamed Sainyenye v. The Republic**, Criminal Appeal No.57 of 2010, **Hamis Angola v. The Republic**,

Criminal Appeal No. 422 of 2007 (both *unreported*) and **Semu Jacob** (*supra*) to mention a few, among others).

It is indeed instructive at this juncture to make reference to the decision of the erstwhile Eastern Africa Court of Appeal where it was stated that: -

> *"... It is clearly the duty of the court under that section to ascertain, first whether the child tendered as a witnesses understands the nature or the oath, and, if the finding on this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understand the duty to speaking the truth ... this is a condition precedent and it should appear upon the face of the record that there has been due compliance with the section..."*

Applying the above observation to the instant case, we are satisfied that the proceedings conducted by the trial Resident Magistrate in respect of *voire dire* examination leaves no doubt that the requirement of the law was compiled as all the three essential matters were recorded after the finding of the trial court. Even without considering the part of the proceedings which was conducted by the prosecutor, the trial Resident Magistrate was satisfied that though PW2

was possessed of sufficient intelligence to testify and understood the duty to speak the truth, he did not understand the nature of the oath. The trial court therefore properly complied with the requirement of section 127 (2) of the Evidence Act, which before the amendment provided as follows: -

> *"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*

Moreover, we have closely examined the testimony of PW2 and indeed, like the trial and first appellate courts, we are satisfied that his credibility is not doubted.

It must be appreciated that the assessment of the credibility of PW2 was properly within the monopoly of the trial court (see **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2001 (unreported). In the instant appeal, the record speaks volume that PW2 explained sufficiently what happened during the sexual encounters and withstood

the cross-examination by the appellant. In this regard, as in sexual offences the best evidence is that of the victim, even without considering the evidence of PW1, PW3 and PW4, conviction of the appellant could be properly grounded on PW2's evidence as provided under section 127 (7) of the Evidence Act. For avoidance of doubt, the said sub section (7) which after amendment is currently subsection (6) provided that: -

> *"(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of 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 sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for the reason to be recorded in the proceedings, the court is satisfied that the child of the tender years or the victim of the sexual offence is telling nothing but the truth."*

Noteworthy, in **Nguza Vickings @ Babu Seya and 4 others v. The Republic,** Criminal Appeal No. 56 of 2005 (unreported) the Court

observed among others, that if the child understands the duty to speak the truth his evidence can be relied to ground conviction.

Nonetheless, in the instant appeal, we are also settled that the evidence of PW2 was amply corroborated by the evidence of PW1 who inspected the anus of PW2 (the victim) and found that it had unusually enlarged and took initiative to send him for medical examination, which was done by PW4 who concluded that he had been sodomized. We are however alive to the submission of the appellant's counsel that PW1's evidence was contradictory.

On our part, like the first appellate court, we entirely agree with the learned Senior State Attorney that the said minor contradiction in the evidence of PW1 is inconsequential as it did not prejudice the appellant. We say so because basically, PW1 proved that regardless of the exact date of the commission of the offence, it was found that on 28th February, 2013 PW2 had been sodomised. Besides, the particulars in the charge sheet alleged that the victim was sodomized on diverse dates between January and February 2013. Thus, PW1 testimony that before 28th February, 2013 she examined PW2 and did not see anything is immaterial as she did not specify the exact date before that day when she examined and found that the anus had enlarged.

More importantly, her testimony in respect of her inspection on 28th February, 2013 was confirmed by PW4. In this regard, it is settled that though a document or exhibit tendered by a witness may be expunged from the record, the evidence of that particular witness concerning the explanation of what he witnessed prior to the authoring of the document remain intact. In the instant case, we are satisfied that despite expunging exhibit PE1, the evidence of PW4 states sufficiently his findings when he examined PW2 and came to the conclusion that his anal sphincter had enlarged and that it was a sign of being sodomised.

Furthermore, the evidence of PW3, a police officer who accompanied PW2 to Ngokolo Mitumbani area to arrest the appellant confirmed the victim's testimony that he knew the appellant before and had been to his place of business.

It is noteworthy that according to PW3, despite the presence of many people at Ngokolo Mitumbani area, PW2 went straight and touched the appellant and consequently he was arrested in connection of the offence.

In the circumstances, we find that the third ground of appeal lacks merit and we dismiss it.

From the forgoing, save for what we have stated with regard to the irregularities pointed in the first and second ground, which we are settled did not prejudice the appellant, we dismiss the appeal.

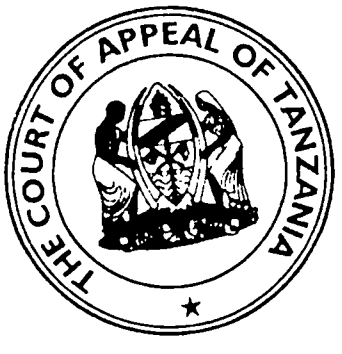
DATED at **SHINYANGA** this 14th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 17th day of August, 2021 in the presence of Mr. Audax Constantine, learned counsel for the appellant and Ms. Salome Mbughuni, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL