THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 404 OF 2019

JUMANNE O. MANOZA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

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

(Mlyambina, J.)

dated the 29th day of August, 2019
in
Criminal Appeal No. 346 of 2018

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JUDGMENT OF THE COURT

6th July, & 9th September, 2021

KOROSSO, J.A.:

Jumanne Manoza, the appellant, was convicted by the District Court of Kinondoni, at Kinondoni Dar es Salaam of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap 16 R.E 2002 (the Penal Code) and was sentenced to thirty years imprisonment. The particulars of the charge were that, on the 15 and 16/8/2015 at Kigogo Mkwajuni within Kinondoni District, Dar es Salaam Region, the appellant had carnal knowledge against the order of nature of a male child aged thirteen years old whose name we shall disguise and henceforth refer him as "the victim" or PW1.

The appellant who gave an affirmed testimony denied the charge stating that they were fabricated by Salma Mwenjigo (PW2), his estranged wife.

To prove the allegations found in the charge sheet, the prosecution presented four witnesses and one exhibit. The fact that the appellant and PW2 had been married and produced four issues including PW1 was not disputed. Similarly, it is undisputed that when the marriage between PW2 and the appellant became sour, the appellant left where he stayed with PW2 and went to live at his mother's house with the children (including PW1) at Kigogo Mkwajuni area, Kinondoni District, Dar es Salaam Region. According to PW1, on the fateful day, he was raped by the appellant. PW1 testified that while sleeping, the appellant undressed him, put some oil and then the appellant's finger "kidole" entered his anus and he felt pain when this took place. PW1 also felt the appellant urinate on his buttocks. Upon hearing PW2 trying to enter the room, he went to meet her while the appellant also left the room. PW1 stated that he had been previously raped by the appellant on several occasions.

The evidence of PW2 was that on the fateful day, at around 7.00 hours in the morning, before making *sambusas* she decided to wake up

her children. However, she could not enter the house because the door was locked. PW2 called the name of the victim and there was no response. This led her to go to the back of the house and peeped through the windows but no one came to open the door. She then saw one of the children (Abdul) and told him to open the door, when the door was opened, as she entered the room, she witnessed a naked appellant trying to dress a naked PW1. According to PW2, PW1 told her that the appellant had carnal knowledge of him against the order of nature. PW2 called her brother-in-law who took PW1 to the police and she later joined them at Mwananyamala hospital where PW1 had gone for medical examination and treatment. According to E26308 Cpl. Justine Christian (PW3), the appellant was arrested by community members on the night of 16/08/2015 and subsequently arraigned in court as stated herein above.

On the part of the defence, there was only one witness the appellant himself who categorically denied to have committed the offence charged. Similarly, he stated that the victim had a bad habit of stealing and was also sodomised by other children in the area.

After a full trial, the trial court, being satisfied that the prosecution proved their case, convicted the appellant and sentenced him to thirty

years imprisonment. His appeal to the High Court was unsuccessful and undaunted, he has preferred the second appeal to this Court. His appeal is predicated on nine grounds of appeal, of which, six grounds are found in the memorandum of appeal filed on 28/1/2020 and three additional grounds were presented orally upon being granted leave to present them on the date the appeal came for hearing.

The substantive and the supplementary memoranda of appeal in essence raise the following six grievances: **One**, that the charge was defective for the reason that the prosecution evidence was at variance with the provisions stated to have been contravened; **Two,** non-compliance of section 210(1) and (3) of CPA in recording evidence of prosecution witnesses PW1, PW2, PW3 and PW4; **Three**, penetration of the victim, an important ingredient to prove the offence charged was not established; **Four,** PW2, PW3 and PW4's evidence is unreliable and did not corroborate PW1's evidence; **Five**, prosecution case not proved beyond reasonable doubt; and **Six,** PW1's evidence was procured in contravention of section 127(2) of the Tanzania Evidence Act, Cap 6 R.E 2002 (the TEA).

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, Mr. Adolf Kissima and Ms. Neema Moshi both

learned State Attorneys entered appearance for the respondent Republic.

When hearing commenced the appellant urged the Court to consider all the grounds of appeal presented. He implored the Court to find that the appeal was merited, allow the appeal and set him free.

Mr. Kissima on the other hand, hastened to inform the Court that the appeal was supported having considered the grounds of appeal filed. His submissions targeted the complaint related to propriety of the conduct of the *voire dire* test prior to taking the evidence of PW1. The learned State Attorney contended that since the offence was committed prior to the amendment to section 127(2) of the Tanzania Evidence Act, Cap 6 R.E 2002 (TEA), it was incumbent for the trial court to determine whether PW1, a witness of tender age had the knowledge and understanding of the nature of what an oath is and its responsibility. He argued that the record of appeal (the record) does not show that the court did consider or determine this issue. He thus prayed that since PW1 evidence was taken un-procedurally, it meant that it was no longer credible evidence and should be expunged from the record.

Mr. Kissima stated that in the present case, the questions and answers expected to be part of the *voire dire* examination were not

illustrated. Another concern the respondent Republic side had, related to the credibility of PW2 finding a lot of holes and doubts in her evidence and thus urged that PW2's evidence should not be considered when determining the appeal. He also urged the Court to expunge the PF3 (exhibit P1) because it was not read over aloud in court after it was tendered and admitted. He therefore argued that in the absence of PW1 and PW2's evidence, there is no evidence remaining to prove the prosecution case against the appellant. The learned State Attorney urged us to allow the appeal, quash the conviction and set aside the sentence imposed against the appellant.

The appellant had nothing substantive to add in his rejoinder apart from supporting the learned State Attorney's submission and praying that he be released from custody to enable him join his family.

Both sides having been heard and having considered the oral submissions and the cited references, we have decided to first deliberate and determine the appellant's grievances which challenge procedural infractions linked to the conduct of the trial.

Our starting point is the challenge on contravention of section 127(2) of the TEA as found in complaint number six and then we will move to address grievance number five on whether or not the prosecution

proved their case beyond reasonable doubt. The fact that PW1's evidence was recorded on 19/1/2016 which was prior to the amendments to the provision ushered in by Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016, in essence meant that the complaint was that, the *voire dire* was not properly conducted. This is because at that time section 127(2) read:

> "(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 an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall bee 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.*"

In **Kimbute Otiniel vs Republic**, Criminal Appeal No. 300 of 2011 (unreported), the Full Bench of the Court underscored that the provision requires the trial Judge or Magistrate to determine through a *voire dire* test whether the child witness of tender age understands the nature of oath and the duty of speaking the truth before such child's evidence could be taken on oath or affirmation. If not, the court then was

required to determine if the child possessed sufficient intelligence to justify recording the evidence of the said child without oath or affirmation. (Also see, **Kilaga Daniel vs Republic**, Criminal Appeal No. 425 of 2017 (unreported)).

In the present case, the first appellate Judge found that the trial court conducted a proper *voire dire test* and that the victim, who was 13 years old at the time stated he knew the meaning of telling the truth and that he was telling the truth, and he found that to be adequate to enable the trial magistrate to determine the competence of PW1 and his intelligence. We find it pertinent to reproduce some areas of what transpired in court during recording of PW1's evidence.

> *"Court:*
> *Prosecution case marked open.*
> *PW1 Kassimu Jumanne 13 years old standard 111 student at Kawawa Primar School Mkwajuni.*
> *-I'm the second born my mother is Salma Mwingi*
> *- I know the meaning of telling the truth.*
> *The witness after voire dire test, he knows the meaning of telling the truth and he is telling the truth."*

Thereafter the trial court proceeded to record PW1's evidence. As held in **Kilaga Daniel vs Republic** (supra) when summarizing the

holding of this Court in **Kimbute Otiniel vs Republic**, (supra) in terms of the requirement of section 127(2) of TEA stated:

> *"The provision required the trial judge or Magistrate to determine by voire dire test whether a child witness of tender age understands the nature of oath and the duty of speaking the truth before such child's evidence could be taken on oath or affirmation. If not, the court then was required to determine if the child possessed sufficient intelligence to justify the reception of such child's evidence without oath of affirmation."*

Applying the above to the present case, taking into consideration what transpired in court, can it be said that the trial court complied with the requirement of section 127(2) of TEA? The excerpt above clearly shows that the questions PW1 was asked related to whether or not she knows the meaning of telling the truth, and some of general nature on the witness's personal particulars only. There is nothing to show that the trial court inquired on the witness's understanding of the nature of an oath or affirmation. This can also be discerned from the finding of the trial court which also focused only on the witness's understanding of the meaning of telling the truth. With due respect, this is not what was supposed to be done. This being the case, we have to agree with the

learned State Attorney that the *voire dire* was not conducted properly, and the omission is fatal. Consequential to this, we shall henceforth disregard PW1's evidence in our deliberation and determination of this appeal. We thus find complaint number six to have merit.

In view of the foregoing finding above, PW1 being the victim and understanding the well settled position that in sexual offences the evidence of the victim is very crucial to prove such offences as expounded in **Selemani Makumba vs Republic** [1992] TLR 379 and **Joseph Leko vs Republic**, Criminal Appeal No. 124 of 2013 (unreported), the obtaining question is whether there is evidence from the remaining prosecution witnesses to prove the charge against the appellant.

As also advanced by the learned State Attorney, to prove the offence charged against the appellant, the prosecution had to prove; **One**, that the victim was under the age of 18 years; **Two**, that a male person had carnal knowledge of the victim against the order of nature; and **three**, that there was penetration. The fact that the victim was under the age of 18 has not been challenged. PW4 testified that the victim he examined on the fateful day was 13 years old. Although PW4 did not disclose where he got the said information, the fact that before taking

his testimony the court made a finding alluding to having conducted a *voire dire* test, which according to section 127(2) of TEA as it then was, such a test is to be conducted on a child of tender years and section 127(5) of TEA states that, a child of tender years is one whose apparent age is not more than fourteen years. Thus, under the circumstances, the victim, being a child of tender age was under 18 years of age.

With regard to whether there was penetration, there was the oral evidence of PW4 and the PF3 (exhibit P1). As alluded to by the learned State Attorney and discerned from the record, clearly, upon being admitted into evidence, exhibit P1 was not read over aloud in court to provide an opportunity for the appellant to understand the substance of the said evidence. There are numerous decisions of this Court pronouncing the fatality of not reading a document admitted in evidence (See **Sijali Shaban vs Republic**, Criminal Appeal No. 538 of 2017, **Sunni Aman Awenda vs Republic**, Criminal Appeal No. 393 of 2013, and **Abdallah Nguchika vs Republic**, Criminal Appeal No. 182 of 2018 (all unreported)). The consequences in case where an admitted exhibit is not read are also found in the cited decisions. We thus agree with the learned State Attorney and find that exhibit P1 was improperly admitted and hereafter, exhibit P1 shall be disregarded in the determination of this appeal.

Despite the above finding, we are of the view that the oral testimony of PW4 suffices to prove that there was penetration. He stated that the victim's anus had bruises and was loose and "*it was open abnormally*" suggesting that "*the child was sexed unnaturally several times*". We therefore find that PW4's evidence by itself proves that there was penetration in the victim's anus.

Therefore, having found that the age of the victim being under 18 years and penetration proved, what is left to be proved is whether it was the appellant who had carnal knowledge with the victim against the order of nature. PW4 categorically testified that he did not know who committed the atrocious act on the victim. The relevance of the evidence of the other witness, a police officer (PW3) is only to the effect that he interrogated the appellant on 16/08/2015 and that the appellant denied having committed the offence. This being the available evidence undoubtedly, PW3 and PW4's evidence cannot assist in proving this fact as also conceded by the learned State Attorney.

Essentially, PW2 is the only witness left to prove the responsible person who committed the atrocious act on the victim. Her testimony was that on the fateful day, at around 7.00 hours, she was outside the house at Kigogo preparing herself to cook *sambusas*, when she decided

to wake up her children. That she tried to call the victim but there was no response and the door was locked and the curtains were also unopened. She stated that after the door was opened, on entering the room, she found the appellant naked and dressing a naked victim. PW2 stated that the victim told her that the appellant sexed him against the order of nature and thereafter, she initiated the process for the matter to be reported at the police station and the victim to go to the hospital.

To rely on such evidence of a single witness to prove such a fact, determining the credibility of such witness is very important. We are alive to the well-established practice that when sitting in a second appeal, the Court rarely disturbs concurrent findings of facts by the trial and first appellate courts unless they are perceived, demonstrably wrong or clearly unreasonable or are a result of a misapprehension of substance, nature and quality of evidence; misdirection or non-directions on evidence; violation of some principle of law or procedure or have occasioned a miscarriage of justice (See, **Mohamed Musero vs Republic** (1993) T.L.R. 290; **Wankuru Mwita vs Republic**, Criminal Appeal No. 219 of 2012 and **Majaliwa Ihemo vs Republic**, Criminal Appeal No. 197 of 2020 (both unreported)).

In the instant appeal, with regard to the evidence of PW2, the learned State Attorney, contended that her evidence was unreliable, contradictory and inconsistent. He argued that, had the trial and first appellate courts carefully analyzed the said evidence, they would not have arrived at the conclusion that she was a credible witness and thus urged us not to consider PW2's evidence when determining the appeal.

When deliberating on the evidence of PW2, the trial court believed her testimony that on the fateful date she saw the appellant and the victim naked when she entered the room, the fact that PW2 had stated that the victim had told her that the appellant had sex with him against the order of nature and her testimony that the appellant had admitted to have done the awful act.

On the part of the first appellate court, its findings on reliability of the evidence of PW2 was recorded in a very brief statement stating that PW2's evidence was incriminating and thus credible. The learned Judge stated: "*...As such, the evidence of PW1 and PW2 was as incriminating as against the accused...*"

When the above excerpt is scrutinized, with due respect, it is clear that the finding by both the trial and the first appellate judge on whether or not PW2 was a credible witness was not based on analysis of

her evidence but was a general statement. We have revisited the record, and we find it pertinent to reproduce the same, she stated:

> *"We were living at Kigogo. On 15/08/2015 this man sexed a child (the victim) unnaturally. We were living together at Kigogo we quarreled. I went home. Later I went there to take of my children. On that material date it was 7.00 hours in the morning. I was out about starting to make sambusa. I went inside to work up my children. Their door was closed. I called him (the victim), he did not reply I went back to the window I did not see him (victim) I did see only Abdul. I did tell him to open the door. I did tell why he is closing the doors this man closed the window "pazia" I went back on the door. I find this man naked and Kassim was dressing himself I called his mother and his young brother. I did see him accused naked and the victim also was naked his father was dressing him.... The victim said his father was sexual him unnaturally..."*

When cross-examined by the appellant she stated:

> *"Yourself said that you have done that out several times. I left him about five years, the children are living with your mother. I was sleeping with the children. I do not know when that act started. I have not stayed with those*

children for a long time. I am no longer your wife. All the children are with your mother"

Having gone through PW2's evidence we do not agree with the concurrent findings of the trial and the first appellate courts on the veracity of the evidence of PW2, based on the following; **First**, the evidence of PW2 did not bring clarity on where she was staying at the time of the incident. Although, at some point she stated she did not live with the children and the appellant, there are occasions especially in the cross examination where she stated she lived with the children and then that she had not been living with them for a long time. The inconsistencies in her testimony on this brings doubts on whether she was a truthful witness. **Second**, PW2's testimony on finding the appellant and the victim naked is not supported by other evidence. This is discerned even when the disregarded evidence of PW1 is reviewed. PW1's testimony was that when he heard his mother (PW2) calling, he went to open the door. Since no one testified on who opened the door, PW2's testimony that when she entered the room, PW1 and the appellant were naked is not supported by any other evidence. **Third**, even if PW2's evidence is to be believed, the evidence against the appellant regarding commission of the offence will remain circumstantial, because, PW2 never testified that he found PW1 and the

appellant *in fragrante delicto*, so the issue is whether the obtaining circumstances irresistibly lead to only one conclusion that the appellant did have carnal knowledge of PW1 against the order of nature. **Fourth**, when PW4's evidence is critically examined, there is nothing to show that penetration occurred on the fateful day as what he stated was that the anus had bruises and was unusually open suggesting it had been penetrated several times. He did not testify on finding sperms in the anus on the day the victim was examined.

We find, for reasons stated above that the evidence of PW2 cannot by itself prove to the required standard the fact that the appellant is the one who had carnal knowledge of the appellant without other evidence to corroborate it, as conceded by the learned State Attorney, the prosecution failed to prove the case beyond reasonable doubt to the standard required. Consequently, complaints number three, four and five are merited.

In the premises, having deliberated and determined complaints number three, four, five and six, we are of the view that determination of the above complaints is enough to dispose of this appeal. We thus find no compelling need to dwell on the two remaining grievances.

In the end, we allow the appeal, quash the conviction of the appellant and set aside the sentence imposed. We order for the appellant to be immediately released from prison unless held for any other lawful cause.

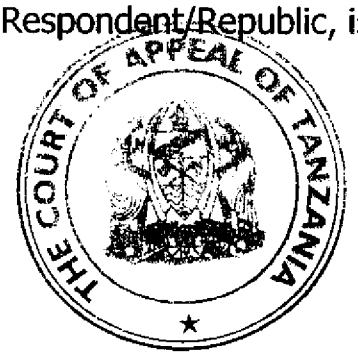
DATED at **DAR ES SALAAM** this 8th day of September, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 9th day of September, 2021, in the Presence of appellant in person through Video Link Ukonga Prison and Ms. Ester Kyara, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL