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. 372 OF 2019

AMANI BWIRE KILUNGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Masabo, J.)

dated 31st day of July, 2019
in
Criminal Appeal No. 118 of 2017

JUDGMENT OF THE COURT

2nd July & 6th September, 2021.

KAIRO, J.A.:

In the District Court of Kinondoni at Kinondoni, the appellant, Amani Bwire Kilunga was charged, tried and convicted of grave sexual abuse contrary to section 138C (1) (a) and 2 (b) of the Penal Code, Cap 16 R.E 2002 as amended by Act No. 3 of 2011 (the Penal Code) and was sentenced to serve fifteen (15) years imprisonment with six (6) strokes of the cane. Being dissatisfied, he decided to lodge an appeal to the High Court vide Criminal Appeal No. 118 of 2017 but to no avail, hence this current second appeal.

Briefly, the background of the case is that, it was alleged that on 14th day of June, 2014 around 6.00 pm at Mbezi Juu within the District of Kinondoni, the appellant was seen by PW4 in the act of forcing a tongue-kiss on a girl child aged six (6) years old when the offence was allegedly committed. We shall refer to the girl as PW2 to conceal her true identity. On the material date, the appellant arrived at the house where PW2 resided with her parents. The appellant was a family friend as well as a frequent visitor of the house and the children used to call him uncle.

On arrival he found PW3, one Tulizo Angelus Lunga a wife of PW1 and a mother to PW2. PW3 welcomed him and the duo sat outside talking for some time while PW2 and other children were playing. Later on, PW3 went inside briefly and when she got out, she neither found the appellant nor PW2. PW3 was not worried and continued with her tasks considering that the appellant was regarded as part of the family.

It was further the prosecution's testimony that the appellant took PW2 inside a parked vehicle, sat her on his lap and started to tongue-kiss her. As fate would have it, PW4, one John Ringa happened to be passing near the parked car and saw the incidence. He raised an alarm calling PW3 while describing what he saw. PW3 also shouted for help which shouts

were responded by PW1, her husband and PW2's father together with other people. The appellant tried to escape but was later apprehended. He was taken to Kawe Police Station for interrogation. The incidence was investigated by WP 3246 D/Cpl Joyce who testified as PW5. The appellant was later taken to court to answer the charges earlier stated. In his defence, the appellant did not dispute being at PW1's house on the date of the incident but denied to have committed the alleged offence.

Upon full trial, the appellant was convicted and sentenced as earlier indicated. Dissatisfied, he unsuccessfully appealed to the High Court. The Learned first appellate Judge was firm that, the trial court analyzed the prosecution evidence logically and rightly arrived at athe conclusion that the appellant committed the charged offence. She thus dismissed the appeal and sustained the appellant's conviction as well as the sentence. Still aggrieved, the appellant lodged the appeal before us raising three grounds of appeal as follows: -

1. *That the learned first appellate Judge erred in law by sustaining the appellant's conviction by relying on other oral evidence of the prosecution and defence witnesses which were recorded unprocedurally contrary to section 210 (3) of*

the Criminal Procedure Act, [Cap 20 RE 2002], hence rendering the trial court's proceedings a nullity.

2. *That, the learned 1st appellate Judge erred in law by sustaining the appellant's conviction in a case marred with fatal irregularities as: -*

    i) The substance of the charge was not explained to the appellant before entering his defence contrary to procedure.

    ii) The defence case was not closed contrary to procedural law.

3. That the learned 1st appellate Judge erred in law and in fact by sustaining the appellant's conviction in a case that was not proved beyond reasonable doubt as: -

    i) There was material contradiction between the witnesses (PW3 and PW4) both present at locus in quo regarding the make of vehicle (Eskudo/Suzuki Vitara) that the appellant was allegedly seen in.

    ii) There was material contradiction between the prosecution witnesses as to how the appellant was arrested

    iii) PW4 did not describe the type/manner of kiss, its duration before the court in order for

the court to decide whether the same constituted a criminal offence.

iv) *PW4 did not state the position of the appellant and victim in the car (ie were they sitting in the front/rear seats)*

v) *None of the prosecution witnesses explained how the appellant allegedly found his way into a car that did not belong to him and neither did he have control over the same.*

vi) *The case was poorly investigated and prosecuted.*

When the appeal was called for hearing, the appellant appeared in person whereas the respondent Republic had the services of Ms. Yasinta Peter, learned State Attorney.

Upon inviting the appellant to argue his appeal, he simply adopted the grounds in the memorandum of appeal and sought leave of the Court to let the learned State Attorney respond and reserved his right to make a rejoinder, if need would arise.

In her reply, Ms. Peter expressed her stance at the very outset opposing the appeal. She further submitted that all of the sub grounds under ground No. 3 except ground No. 3(ii) were not raised nor

determined by the first appellate court, as such they are new grounds which legally the Court is not supposed to look at. She beseeched us to disregard them.

The appellant's complaint in the 1st ground is to the effect that, the first appellate court erred in law for sustaining his conviction relying on the oral evidence recorded in contravention of section 210(3) of the Criminal Procedure Act (supra), hence rendering the trial court's proceedings a nullity. It was submitted by Ms. Peter that no witness prayed to have his testimony read over to him and denied that opportunity.

In his second ground, the appellant faults the 1st appellate court for sustaining his conviction despite the procedural irregularities in the proceedings during the trial of the case. He pointed out the said irregularities to be; **one,** that the charge was not explained to him by the trial court. Ms. Peter refuted that complaint and submitted that on 26th June, 2014 the appellant appeared before the court for the first time when the charge was read over, explained to him and a plea of not guilty entered. The learned counsel referred us to page 4 of the record of appeal as proof of what transpired. **Two;** the appellant is complaining that the defence case was not closed as required by law. Ms. Peter concedes that

the record does not expressly indicate that the court closed the defence case before proceeding to schedule a date for the delivery of judgement. She however clarified that, when the trial court delivered its ruling under section 230 of the CPA to the effect that the appellant had a case to answer requiring him to chose the manner of defending himself, the appellant replied that he had neither witness nor exhibit. She thus argued that the omission to close the defence case expressly after the completion of the appellant's testimony was not prejudicial to the appellant.

With regard to ground No. 3(ii) whereby the appellant complains of what he called 'material' contradiction between the prosecution witnesses with regards to how he was arrested, Ms. Peter argued that there are no material irregularities as alleged. She referred us to pages 19 -20 and 21 – 22 wherein PW3 and PW4 testified respectively. Ms. Peter concluded that the appeal has no merit and that the conviction and sentence were proper.

When invited for her comments with regards to the imposed sentence, Ms. Peter responded that the minimum sentence for the offence the appellant was charged with is 20 years imprisonment and not 15 years meted to him. She implored the Court to enhance it to the proper sentence prescribed by the law.

In his rejoinder, the appellant came up with irrelevant issues and when reminded him, he told us that he leaves the appeal into the wisdom of the Court. We asked him about the sentence in line with what the learned State Attorney submitted and the appellant pleaded with us to allow him to proceed with his sentence in the event the appeal will not succeed.

Before we delve into the merit of the appeal, we find it apposite to start with the issue raised by the learned State Attorney in relation to the sub grounds under ground No.3 being new save for ground No. 3(ii) and thus this Court should not consider them. We totally agree with Ms. Peter. It is trite law that the Court is precluded in terms of section 4(1) of the Appellate Jurisdiction Act, Cap 141 RE 2019(AJA) from entertaining them unless they are on issues of law. Having observed that the new issues in the matter at hand do not involve matters of law, we agree with the learned State Attorney argument that we cannot entertain those grounds of appeal which were not initially brought before the High Court for determination. There is a plethora of decisions to this effect amongst others, **Mathias Robert V. Republic,** Criminal Appeal No. 328 of 2016, **Ally Ngozi V. The Republic,** Criminal Appeal No. 216 of 2018 and

Godfrey Wilson V. Republic, Criminal Appeal No. 168 of 2018 all unreported) to mention but a few. In line with the stance in the cited cases we shall only determine ground No. 3(ii) together with grounds number 1 and 2.

Having carefully considered the grounds of complaint, the submissions of the learned counsel and the record before us, we are of the view that, the complaints boil down to two main issues wherein the first issue is divided into three sub issues:-

(1) Whether there are procedural irregularities in the proceedings whereby the appellant's complaints hinged on the followings: -

a) That the witnesses' evidence was recorded in contravention of section 210 (3) of the CPA Cap 20 (supra)

b) That the substance of the charge sheet was not explained to the appellant

c) That the defence case was not closed

(2) Whether there were material contradictions between PW3, and PW4 with regards to how the appellant was arrested.

We shall start with complaints which concerns procedure: the appellant has faulted the trial court for not following the procedure under section 210 (3) of the CPA when recording evidence. Indeed, the trial record does not indicate compliance with the requirement under the section at issue after recording the testimonies of PW1 through PW5 and DW1. However, the begging question for our determination is whether the said irregularity has occasioned failure of justice. In the case of **Richard Mebolokini V. Republic** [2000] T.L.R 90, the High Court was faced with similar complaint and stated as hereunder: -

> *"when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal."*

We respectfully agree with the observation by the High Court. But in the present case the authenticity of the record is not in issue, at least the appellant has not so complained. In the circumstances of the case, we think that non-compliance with section 210(3) of the CPA is curable under section 388 of the CPA.

We again had a chance to restate the said stance in the case of **Athumani Hassan V. Republic;** Criminal Appeal No. 84 of 2013 (unreported) wherein we relied on our previous decision in **Jumanne**

Shaban Mrondo V. Republic, Criminal Appeal No. 282 of 2010 (Unreported) and held:-

> *"The record of proceedings of the trial court shows that there was no compliance with section 210(3) in the process of recording the evidence of the witnesses.* ***However, we do not see the substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and make a comment on their evidence. We do not even think that the omission occasioned a miscarriage of justice to the appellant".*** *[Emphasis added]*

In the matter at hand, neither the appellant nor other witnesses requested their evidence to be read over to them. Neither did the appellant state how the omission prejudiced him. Basing on the principle of sanctity of the record and there being no complaint against its authenticity, we hold that the complaint is misplaced and reject it.

The appellant has also complained that the substance of the charge was not explained to him. It is on record that the appellant was taken to the trial court on 26/6/2014 for the first time to answer the charge. The trial court recorded as hereunder at *Page* 4 of the record of appeal: -

"Court: CROAE to the accused who pleads thereto
on being so asked as hereunder records
Accused: "siyo kweli".
Court: EPNG accordingly."

The trial court used the acronyms CROAE which is normally used in court proceedings as the short form of the words "Charge Read Over and Explained" and from that explanation, the accused denied the same. The court again used another acronym "EPNG" which is normally used in court proceedings as the short form of the words "Entered a Plea of Not Guilty". However, in our view, it is a good practice to record in full sentences instead of abbreviations. Nevertheless, we agree with Ms. Peter that the charge was read over to the appellant. In this regard therefore, we join hands with the learned State Attorney that, the charge was read over and accordingly explained to the appellant and that is why he was able to enter his plea of not guilty. We therefore find this ground unmerited.

The appellant has further faulted the trial court for failing to close the defence case as the law requires. Admittedly, the record does not show expressive closure of the defence case after the appellant's testimony. We have however noted from the record at page 27 that after delivering a

ruling under section 230 CPA and requiring the appellant to state the manner he would give his defence, the accused answered, and we wish to quote for ease of reference: -

> *"I will make my defence by stating my case on oath. I have no witness or exhibit".*

The answer shows that the appellant was a sole defence witness with no exhibit to tender. After he finished testifying, that was the end of defence evidence. It goes therefore that, though the trial court was to so indicate, the omission in our view was not fatal in those circumstances. Besides, the appellant did not state whether he was prejudiced and if so, how. For us, we are of the firm view that the appellant was not prejudiced as rightly argued by Ms. Peter. In the strength of the foregoing reason, we find this ground wanting in merit.

In ground No. 3(ii), the appellant faults the first appellate court for sustaining his conviction despite material contradictions between the prosecution witnesses on his arrest. The contention is disputed by Ms. Peter to which we agree with. Though PW4 and PW3 had a different account concerning the arrest of the appellant, the difference is not material as alleged by the appellant. The record shows that PW3's version

is that, the appellant ran away after the incidence and was arrested by people (page 20 of the record) whilst PW4 stated that after the incidence, the appellant ran away and was arrested with the help of the neighbours at the gate of his house (page 22 of the record). To say the least, we do not find any alleged 'material' inconsistencies in the testimonies of PW3 and PW4. If any, the same are minor which did not go to the root of the matter as rightly argued by Ms. Peter. We got fortification in this stance in the case of **Bahati Makeja V. Republic,** Criminal Appeal No. 118 of 2006 (unreported) wherein the full bench of the Court stated: -

> *"Another observation worth making here is that while normal discrepancies do not corrode the credibility of the witness, material discrepancies do. Normal discrepancies are those which are due to normal errors of disposition such as shock horror at the time of occurrence of the event. Material ones are those going to the root of the matter or not expected of a normal person."*

See also- **Dickson Elia Nsamba Shapwata and another V. Republic**, Criminal Appeal No. 92 of 2007 (Unreported).

Having resolved that the inconsistencies are minor which do not go to the root of the matter, this ground flops as well.

The learned State Attorney further implored us to enhance the sentence imposed on the appellant from fifteen (15) years to a minimum of twenty (20) years together with payment of compensation which we right away agree with. The appellant is charged under section 138C (1) (a) and 2 (b) of the Penal Code, Cap 16 R.E 2002 which provides: -

> *"138C (1) Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act, which does not amount to rape under section 130, commits the offence of grave sexual abuse if he does so in circumstances falling under any of the following descriptions, that is to say-*
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(2) Any person who-*
>
> *(a) N/A*
>
> *(b) commits grave sexual abuse on any person under eighteen years of age,*
>
> ***is liable on conviction to imprisonment for a term of not less than twenty years and not exceeding thirty years, and shall also be ordered to pay***

compensation of an amount determined by the court to any person in respect of whom the offence was committed for injuries caused to that person."
(emphasis ours)

It is not in dispute that the sentence imposed on the appellant is below the minimum stated by law. The Court therefore being a final Court has a duty to ensure correct application of the law. The appellant did not say anything in mitigation despite being invited to do so by the trial court. We also noted that he is a first offender. The provision has further imposed compensation in addition to imprisonment penalty. We are alive that, the issue was not canvassed at the trial court nor was it submitted on during the first appeal. We think it would have been desirable for the parties to comment on it at those stages. Nevertheless, we are of a firm view that imposing an appropriate and mandatory sentence is in the best interest of justice and it will not in any way prejudice the appellant. We took a similar stance in the case of **Simon Kanoni @ Semen V. Republic** which relied in the case the case of **Marwa Mahende V. Rebublic** [1998] T.L.R 249 wherein we stated: -

> *"We think, however, that there is nothing improper about this. The duty o f the courts is to apply and interpret the laws of the country.* ***The superior courts have the additional duty of ensuring proper application of the laws by the Courts below****. In the instant case this Court is pointing out that the correct procedure as sanctioned by law i.e. Section 226(2), as construed hereinbefore, was not followed, and that this should be put right. We think that it was not only proper for this Court to adopt such a course, but that the Court had a duty to do so, provided that in carrying out that duty it affords adequate opportunity to both parties or their counsel to be heard on the matter as indeed was done in this case."* (emphasis ours).

On the basis of the foregoing, we are constrained to enhance the imposed imprisonment sentence from fifteen (15) years to twenty (20) years being a minimum sentence. In addition to that we order a compensation of Tshs. 500,000/= to PW2, the victim by the appellant upon completion of his custodial sentence.

We are further aware that the High Court sustained the imposed punishment of six strokes of the cane which is not provided under the provision above quoted. In the circumstances, we set it aside forthwith.

All said and done, we find that this appeal is without merit and dismiss it except for the punishment of the strokes of the cane.

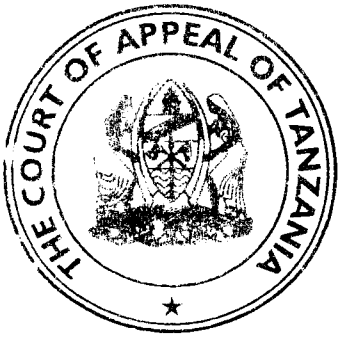
DATED at **DAR ES SALAAM** this 1st September, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgement delivered this 6th day of September, 2021 in the presence of the appellant in person and Ms. Esta Ky'araa, 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