IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 458 OF 2019

JUMA HASSAN .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salam)
(Mutungi, J.)

dated the 25th day of September, 2019
in
HC. Criminal Appeal No. 36 of 2019

.....

JUDGMENT OF THE COURT

13th July & 14th September, 2021

LILA, JA:

The District Court of Ilala convicted Juma Hassan, the appellant herein, of unnatural offence contrary to section 154 (1) (a) and (c) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now R. E. 2019). That was consequent upon that court being satisfied that he had carnal knowledge of a five (5) years old boy against the order of nature of order. We shall refer the boy as the victim or PW3 so as to disguise his identity. The High Court did not find merit in his first appeal. He has, now, nocked the Court's door on second appeal.

The prosecution relied on the evidence by seven (7) witnesses and one documentary exhibit to prove the charge. On the other side, the appellant stood as the sole defence witness. Briefly, the evidence by both sides was that; on the material date, PW3 and his friends were watching a certain game on the video. He claimed that the appellant called him to his room where there was also a TV, deck, bed and mosquito net and a chair. Therein he was forced to undress. So as to overcome his resistance, the appellant slapped and beat him. He succumbed and undressed his school short. The appellant then inserted his male organ into PW3's anus. After quenching his sexual desire, the appellant washed PW3's anal part. While being penetrated, PW3 felt pains and cried for help but when people turned up the appellant pretended to be busy with the TV. Among those who responded were one Juma and Alfa who took him to one Fatuma Hamad famously known as Mama Juma (PW5) who checked him and found faeces on his anus. PW5 claimed that PW3 named Mkaanga Chips as being his ravisher. Lucy Mligo (PW4), the Victim's mother, returned home from her business at 18.00hrs and found several persons at her residence including PW3 who was under PW1's care and was informed that her son (PW3) had been carnally known against the order of nature. She informed her husband who was then at work so that they could meet at

Amana Hospital where PW3 was taken by PW4 and PW1 for medical examination. Thereat, PW3 was medically examined by Thobias Nyamboto (PW7), a doctor who made a finding that there were bruises and blood both on his short and anus which suggested that he was penetrated. The finding was posted on a Police Form No. 3 (PF3) which was tendered and received as exhibit P1.

Those allegations were vehemently refuted by the appellant (PW1) in his affirmed defence. While the prosecution witnesses stated that he stayed and did chips business at Vingunguti Faru, he claimed that he was residing at Tabata Shule and was conducting his business at Mwenge area whereat PW3 had earlier on approached him for a space to do business. That he looked for one but later a misunderstanding between them arose because the latter never wanted him to do business. Due to that he was one day at 14:00hrs arrested by police and taken to Mnyamani Police Station and later to Buguruni Police Station before he was arraigned in court to answer these accusations which he claimed to have been fabricated against him.

After a full trial, the trial court found the prosecution evidence to have sufficiently proved the charge. Relying in the Court's decision in **Selemani Makumba v. R** [2006] TLR 379, the trial court found PW3 credible and his detailed account of the incident established the offence.

The trial court also considered PW3's competence to testify in terms of the import of section 127(2) and (7) of the Evidence Act, Cap. 6 R. E. 2002 (the TEA) but unfortunately no finding was made. All in all, it found PW3's evidence substantially true and proved the charge beyond reasonable doubt. In discounting the appellant's defence, the learned trial magistrate, in the first place, doubted his demeanour in court and was not convinced that a person residing at Tabata Shule and doing business at Mwenge could be known as Juma Mkaanga Chips at Vingunguti, that he was arrested at Vingunguti and there was no possibility for a quarrel to arise between him and PW2 and how that could be linked with PW3. The trial court found the misunderstanding not sufficiently proved for want of more elaboration. Further, apart from appreciating that Vingunguti and Tabata areas are quite distant places, the trial magistrate found the appellant's defence that he was residing at Tabata Shule unproved for not telling how long he had been there and whether he rented a place or the house belonged to him. Ultimately, the appellant was found guilty, convicted and sentenced to serve the statutorily prescribed life imprisonment.

The learned first appellate judge found the appellant's appeal unmerited. Before her, the appellant had raised substantially three grounds of complaints. **One**; the charge was defective on account of

being grounded on a non-existent provision of the law, **two**; his conviction was based on incredible and inconsistent evidence and **three**; his conviction was based on the weakness of his defence evidence. Consequently, the appellant claimed that the case was not proved beyond reasonable doubt.

In her determination of the grounds of appeal, the learned judge agreed with the learned State Attorney's submission that it was the learned trial magistrate who occasioned the infraction by not properly citing the offence section when he was composing the judgment. That is, instead of writing section 154(1)(a) and (c) as shown in the charge sheet, it was recorded as section 154(a) and (c). Accordingly, she held the view that the anomaly did not go to the root of matter.

As for the complaint that the prosecution evidence was incredible and inconsistent, the learned judge observed that: -

> *"The appellant has also challenged the evidence adduced on the basis that it was inconsistent and incredible. I would like to commend the prosecution side in this matter in the way the case was prosecuted. The victim (PW3) did give evidence as to how he was sodomized by the appellant and identified him by his name and the type of business. This is why the father PW2, the*

uncle PW1, PW3 (the mother) and the neighbour (PW5) were able to identify the appellant. PW5, PW1, the doctor (PW7) did witness the way PW1 (victim) was indeed sodomized and the PF3 supported what they had observed. To cap it all PW6 (investigator) found the investigation very simple with such given leading evidence."

Subsequent to the above observation, relying on the Court's decision in **Selemani Makumba v. R** (supra), she was convinced that PW3's evidence was impeccable and she sustained the conviction and sentence.

The foregoing learned judge's findings are now subject of the appellant's attack in this appeal. Two sets of memoranda of appeal were preferred by the appellant the substance of which may be condenced into these areas of complaints: -

1. *That, the victim's (PW3) evidence was procured contrary to section 127(2) of the EA as the court record is silent if he promised to tell the truth.*
2. *That, the provisions of section 210 (3) of CPA were not complied with hence rendering the proceedings a nullity.*
3. *That, Exhibit P1 (PF3) was tendered and admitted twice by PW4 and PW7 hence raising doubt as to its*

authenticity and it was not read aloud in court after being admitted.

4. *That, PW7's (Doctor) evidence was incredible for want of qualification and explanation on the causes of bruises.*
5. *That, the appellant's conviction was based on incredible and inconsistent evidence of the prosecution.*
6. *That, the charge was defective.*
7. *That, the case was not proved beyond reasonable doubt.*

Besides lodging the grounds of appeal, the appellant also lodged written submission in terms of Rule 74 (1) of the Tanzania Court of Appeal Rules, 2019 elaborating his grounds of appeal.

Before us for hearing of the appeal, the appellant appeared in person and was unrepresented whereas the respondent Republic had the services of Ms. Joyce Nyumayo and Ms. Ellen Masululi, both learned State Attorneys.

Having been given the right to elaborate his grounds of appeal and the submission thereof, the appellant simply adopted them and sought assistance of the Court to be let free so as to join his family.

Ms. Nyumayo, in no uncertain words, supported the appeal. She did not mind to argue on each ground of appeal. Instead, she opted to

argue it generally. Her arguments centred on three major points. **First**; there was non-compliance with section 127(2) of TEA in recording PW3'evidence, **second**; the prosecution witnesses were unreliable and **three**; the charge was not proved beyond doubt.

Addressing the Court on the violation of section 127(2) of the TEA, the learned State Attorney argued that following the amendment of section 127 of EA by Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act no. 4 of 2016) which became operational on 8/7/2016, PW3 being a six years' old boy when he gave his testimony, he was mandatorily required to promise to the trial court that he would tell only the truth and not lies before his evidence was recorded. She pointed out that the record is deadly silent and his evidence was taken straight away. This was irregular, she insisted, and urged the Court to expunge his evidence from the record of appeal for having no evidential value. To cement her assertion, she referred us to our decision in **Mwalimu Jumanne v. Republic**, Criminal Appeal No. 18 of 2019 and **Ibrahim Haule v. Republic**, Criminal Appeal No. 398 of 2018 (both unreported).

In the absence of the victim's evidence from whom true evidence was expected to come in terms of the Court's decisions, Ms. Nyumayo argued that the remaining evidence by PW1, PW2, PW4, PW5 and PW7, standing alone was insufficient to prove the charge. Elaborating on that

argument, she submitted that PW5 and PW7 who gave direct evidence established only that PW3 was penetrated against the order of nature but was of no assistance as to who was the responsible person. She also expressed her doubt on the reliability of PW2's evidence for being self-contradictory. While he first during examination in chief told the trial court that he never knew the appellant, he later changed goal post when he was examined by the court by saying that he knew him and was doing business just close to his house. PW1 who, like PW2, claimed that PW3 told him that it was Juma Mkaanga Chips who had sodomized him, had his evidence discredited by the learned State Attorney for not having witnessed the incident and also for condemning the appellant even before he was asked to identify the appellant. That conduct, according to the learned State Attorney, casted doubts that he might have been trained to tell the trial court what he was telling. Besides, she submitted that the learned judge, on first appeal, wrongly shifted the burden of proof to the appellant for requiring him to have had furnished enough evidence that he was not residing at Vingunguti Faru but at Tabata Shule. In sum, she argued that the doubts should be resolved in favour of the appellant.

In re-joining, the appellant pleaded with the court for assistance and discharge from the prison.

We have seriously examined the record, given due consideration to the grounds of appeal, the written submission by the appellant and the oral submission by the learned State Attorney. We shall consider the grounds of appeal seriatim.

In ground one of appeal, the appellant is challenging the trial court for recording the testimony of PW3 (victim) without following the procedure laid down under section 127 (1) and (2) TEA. The record bears out clearly that the offence was committed on the 29th day of September, 2017. PW3's evidence was taken on the 9/10/2018. The law governing reception of evidence of a child of tender age was amended in 2016 vide the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act no. 4 of 2016) and came into force on 8/7/2016. The legal requirement to conduct *voire dire* test in terms of the former section 127(2) of EA before a child of the apparent age of 14 years could testify so as to determine whether or not he understands the nature of an oath or not and the duty to tell the truth and if he is possessed of sufficient intelligence to justify the reception of his evidence, was done away with and replaced with the requirement to promise to the court that he will tell the truth and not lies. That is the substance of our decision in **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported). We did not end there. In **Yusufu Molo v. Republic**, Criminal Appeal No. 343

of 2017 we clarified the current position in these categorical words which, to clear out the confusion that might have arisen out of that amendment, we find ourselves compelled to recite the relevant part in extensor: -

> *"Prior to the amendment of section 127(2) of the Evidence Act, it was a requirement of the law for a trial magistrate or judge who conducts a voire dire test to indicate whether or not the child of a tender age understands the nature of an oath and the duty of telling the truth; and if she is possessed of sufficient intelligence to justify the reception of her evidence. The 2016 amendments through Act No. 4 of 2016 changed the position. The amendment deleted sub section (2) and (3) and substituted with subsection (2) as follows:*
>
> *"(2) A child of tender age may give evidence without taking oath or making an affirmation* ***but shall, before giving evidence, promise to tell the truth to the court and not to tell lies.*** *" [emphasis supplied]*
>
> *Under the above amendment, the requirement to conduct a voire dire test has been removed. What is paramount in the new amendment is for the child before giving evidence to promise to tell the truth to the court and not to tell lies. That is all what is required. It is mandatory that such a*

promise must be reflected in the record of the trial court."

As to what are the obtaining consequences of failure to comply with current position, the Court went on to state: -

"If such a promise is not reflected in the record then it is a big blow in the prosecution case.

In the instant case, since the record does not show that such a promise was made by the victim child, the necessary inference we draw is that there was no such undertaking made. If there was no such undertaking, obviously the provisions of section 127(2) of the Evidence Act (as amended) were faulted. This procedural irregularity, in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value. It is as if she never testified to the rape allegation against her. It was wrong for the evidence of PW1 to form the basis of conviction as stated in the second ground of appeal."

These elaborate and unambiguous statements constitute the true and proper exposition of the current position of the law to which we fully subscribe. Applying the same to the present case, it is crystal clear that PW3 who presented himself as a child of six (6) years, his evidence was

recorded right away without any indication on the record by the trial court that he promised that he will tell the truth not lies. That omission was fatal and rendered his evidence valueless. We therefore agree with the learned State Attorney and we find this ground meritorious and we allow it.

In ground two of appeal, the trial court is being faulted for failure to observe the requirement of section 201 (3) of CPA. We agree with the appellant that his complaint is well founded. That section imperatively requires, after recording the whole evidence, the trial court to read over to the witness such evidence and record his comments, if any. The rationale of this requirement is to ensure that every testimony is properly recorded hence guarantee against distortion, perversion and suppression of evidence. (See **The Director of Public Prosecutions v. Hans Aingaya Macha,** Criminal Appeal No. 449 of 2016 (unreported), cited with approval in **Flano Alphonce Masalu @ Singu and 4 Others v. R,** Criminal Appeal No. 366 OF 2018 1 (unreported), **Paul Dioniz v. R**, Criminal Appeal No. 171 of 2018 (unreported). All the same, in terms of the section 210(3) of the CPA, it is the witness who has the exclusive right to question the authenticity of the record. The record reveals that the appellant is one of those whose evidence was not read over to him. Being one of the witnesses, he did not raise such

complaint before the trial court. In the absence of such complaint such anomaly is not fatal [See **Republic v. Hans Aingaya Macha**, Criminal Appeal No. 449 of 2016 (unreported) in which the case of **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 and **Athumani Hassan v. Republic**, Criminal Appeal No. 84 of 2013 (both unreported) were cited. We, hold therefore that no miscarriage of justice was thereby occasioned. The infraction is curable under section 388 of the CPA.

Reliance on exhibit P.1 (PF3) in convicting the appellant forms the crux of the appellant's complaint in ground three of appeal. The complaint is twofold. First, it is true that the record shows that Exhibit P1 was tendered first by PW4 and marked as exhibit P1 at page 14 and was later tendered by PW7 at page 28 and it was again marked as exhibit P1. As it was already admitted as exhibit by PW4, PW7 being the author of it could only identify it and where necessary respond to questions by the appellant and the trial court on its contents only. Moreover, we think, it was a mere oversight on the part of the court to admit it twice. There is, however, no indication, and the appellant did not suggest that they were two different documents. In our view, the anomaly was not fatal hence inconsequential.

Second, as was rightly conceded by the learned State Attorney, the PF3 (Exhibit P. 1) was not read out after it was admitted as exhibit so as to enable the appellant know the contents thereof hence deserves to be expunged from the record. We entirely agree with her. That is in line with the legal position stated by the Court in the case of **Robinson Mwanjisi and Three Others v. Republic** [2003] TLR 218 at page 226 and **Misango Shantiel v. Republic**, Criminal Appeal No. 250 of 2007 (Unreported). The PF3 is therefore discounted.

The appellant's grievance in ground four (4) of appeal need not hold us much. Although the learned State Attorney did not address us on that ground, the record bears out plainly that PW7 introduced himself as a "human doctor" with a two year experience. Literally, that meant he was a doctor dealing with treatment of human beings. We therefore take it that he meant he was a medical doctor. We leave it just as that and dismiss the appellant's contention that PW7's qualifications were not exposed.

Both the trial court and the first appellate courts are, in ground five of appeal, being challenged for, respectively, grounding and sustaining the appellant's conviction by placing much reliance on inconsistent and incredible evidence by the prosecution. We shall consider this complaint together with ground six in which the grievance

is that the case was not proved at the required standard. We, in the first place appreciate that the victim's evidence being discounted, the only remaining highly incriminating evidence is that of PW5 and that of PW7. Luckily, the learned State Attorney conceded, and in our view rightly so, that the two witnesses were not reliable. PW5 whom the victim was said to have been taken while weeping said she examined his buttocks and found faeces. She also said one Mkaanga Chips was named by the victim as the ravisher. PW7, similarly, medically examined PW3 and came up with a finding that his anal part was penetrated. These pieces of evidence establish being penetrated only not the perpetrator. Even PW2 who claimed that PW3 named Juma Mkaanga Chips as the ravisher, at first he said he did not know the appellant but later, on being examined by the trial court, he turned around and said he knew him as being the one who was working near his home just about fifty meters away. The change of position is an irreconcilable inconsistence hence a clear indication of his unreliability. More so, PW1 claimed that his friend by the name Juma informed him that PW3 had been sodomised and later PW3 appeared weeping and complaining that the appellant had carnally known him against the order of nature. He also identified the appellant by the name of Juma Mkaanga Chips. However, this piece of evidence is not free from doubts. It appears there were

other people with the name Juma in that area. Amongst them are PW1's friend and PW5's son who caused her to be referred to as Mama Jumaa. In the absence of PW3's (Victim's) evidence which would have specifically indicated that it was Juma, the appellant, who is the one he was referring to when he met other people whom he narrated the occurrence, the appellant's involvement cannot be ascertained for there could be another Juma dealing with chips business.

Lastly we shall consider the validity of the charge as complained in ground 6 of appeal. It is claimed that it was defective for wrong citation of the charging provisions. For clarity we think we should reproduce the relevant provision as under: -

> *"154-(1) Any person who–*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b) has carnal knowledge of an animal; or*
>
> *(c) permits a male person to have carnal knowledge of him or her against the order of nature,*
>
> *commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(2)-Where the offence under subsection (1) of this section is committed to a child of under the age of ten*

years the offender shall be sentenced to life imprisonment."

The charge, in the present case, discloses that the appellant was charged with unnatural offence contrary to section 154(1)(a) and (c) of the Penal Code. That was improper. As the particulars of the offence were to the effect that the appellant had carnal knowledge of PW3, the offence section was supposed to include subsection (2) which is the sentencing provision instead of subsection (c). That is to say, the offence section should read 154 (1) (a) and (2) of the Penal Code. However, as the particulars of the offence clearly explained the offence charged, the defect is curable under section 388 of the CPA, (see **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 and **Omary Abdallah @ Mbwangwa v. Republic**, Criminal Appeal No. 127 Of 2017, (both unreported). That said, this ground is baseless and is dismissed.

The cumulative effects of our findings in grounds 1, 3 and 5 is that there was no sufficient evidence on which the appellant's conviction could be grounded. The charge was not proved. Ground 6 of appeal is meritorious and we allow it.

In fine, we allow the appeal, quash the conviction and set aside the sentence. The appellant has to be released forthwith unless held behind bars for another lawful cause.

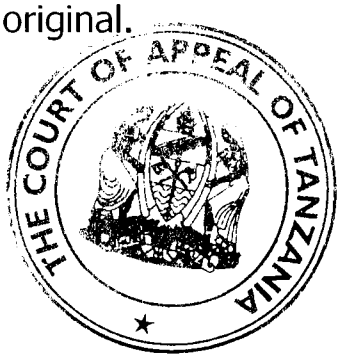
DATED at **DAR ES SALAAM** this 7th day of July, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 14th day of September 2021, in the presence of the Appellant in person and Mr. Edith Mauya, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL