IN THE COUR1T OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 332 OF 2018

GEOFREY JAMES MAHALI.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from High Court of Tanzania at Mbeya)

(Dr. Levira, J

dated the 24th day of July, 2018

in

Criminal Appeal No. 43 of 2017

RULING OF THE COURT

17th & 21st September, 2021

MUGASHA, J.A.

In this second appeal, the appellant is challenging his conviction of unnatural offence contrary to section 154 (1) (a) of the Penal Code [CAP 16 R. E. 2002] which was a subject of his arraignment before the Resident Magistrates' Court of Mbeya at Mbeya. It was alleged by the prosecution that, on 3/2/2017 at Ilemi area within the City and Region of Mbeya, the appellant did have carnal knowledge of a girl aged 16 years against the

order of nature who we shall refer to her as E.D. or the victim for the purposes of concealing her identity.

When the charge was read over to him, he pleaded not guilty. Subsequently, in order to prove its case, the prosecution lined up eight (8) witnesses and produced to documentary exhibits namely the victim's TSM – 9 (a certificate to request training after completion of primary education) (P1) and the PF3 of the victim (P2). The defence had three witnesses including the appellant himself.

The prosecution account was briefly as follows: It was alleged that, on the fateful day, heeding to the appellant's call the victim went at his house and while there, he asked her about having an affair with Jose who was the appellant's tenant. Then, while the victim remained inside, the appellant went out claiming to be searching for Jose and upon his return, closed the door, pushed the victim on the coach, raised the volume of the television, took off his clothes, undressed the victim and proceeded to sodomise her. After the alleged sodomy, the victim left after she was permitted to do so by the appellant who previously had ensured that it was safe outside. On arrival at home, present was the victim's her young sister named Enda to whom the victim claimed to have narrated about the

sodomy incident and mentioned the appellant as the culprit. Enda was not paraded as a prosecution witness. Enda advised her to inform their grandmother on Lusia Selemani who testified as PW4 who was by then not around. It was further alleged that, after the victim's revelation on the episode to PW4, the appellant was summoned but he denied the accusation. It is said that he apologized after PW1 narrated about the fateful incident. Having heard about the alleged incident, the victim's sister Amina Donald (PW2) rushed at her grandmother's place and upon disclosing her intention to examine the victim, the victim was quick to reply that she had already taken bath. However, PW2 managed to examine the victim and found nothing on her anus. The matter was reported to the Police and the victim was taken to the hospital. Upon being examined by PW8 Adili Thomas Mziray an Assistant Medical Officer, he established that there were no indications that PW1 was sodomised. The doctor as well recounted to have examined the victim's underpants and no blood stains or sperms were found. It is against the said backdrop; the appellant was ultimately arraigned in court.

The appellant denied the accusations levelled against him by the prosecution. He told the trial court that on the fateful day the victim went

at his home, met his wife to whom she complained that one of their tenant's named Jose had a habit of knocking at her window which was denied by Jose. A similar account was given by Alesi Geofrey (DW2) the appellant's wife who added that the appellant was arrested and beaten.

After a full trial, the trial magistrate was satisfied that the offence of unnatural offence was not proved and instead, the prosecution managed to prove the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (a) of the Penal Code. As such the appellant was convicted and sentenced to jail term of 15 years.

Aggrieved, the appellant unsuccessfully appealed to the High Court which was satisfied that the charge of unnatural offence was proved to the hilt and set aside the conviction of grave sexual abuse and instead, convicted him with the offence of unnatural offence and sentenced him to a jail terms of 30 years. Still undaunted, the appellant has preferred this appeal fronting six grounds of appeal. However, due to what will be apparent in due course, we shall not reproduce the grounds of appeal.

At the hearing of the appeal the appellant appeared in person unrepresented whereas the respondent Director of Public Prosecutions had

the services of Rosemary Mgenyi, learned Senior State Attorney assisted by Ms. HannaRose Kasambala, learned State Attorney.

In the course of hearing we wanted to satisfy ourselves on the propriety or otherwise of the charge on account of omission to cite therein the age of the victim and a punishment or sentencing provision. On taking the floor, Ms. Kasambala besides conceding on the omission, contended that, the appellant was not prejudiced as the omission was remedied by the victim's account who testified to be 16 years and this was corroborated her teacher PW3 and TSM 9 form showing that the victim was 16 years being born on 13/9/2001. In this regard, it was Ms. Kasambala's argument that the appellant was aware of the age of the victim and placed in a position to answer charges and make his defence. In a nutshell the learned State Attorney contended that the omission is curable. However, the learned State Attorney did not make any submission in respect of the missing punishment or sentencing provisions which have a bearing as to whether the appellant was aware on the seriousness of the offence charged and the gravity of the sentence. This being a point of law, the appellant a lay person, had nothing useful to submit apart from leaving it to the Court to decide and set him at liberty.

Since it is settled law that a charge is a foundation of any trial, the mode of framing the charge is prescribed and regulated by the provisions of sections 132 and 135 (a) (ii) of the Criminal Procedure Act [CAP 20 R.E. 2019]. While the former provision requires the offence to be stated in the charge along with the specific particulars explaining the nature of the charged offence, the latter one stipulates as follows:

> *"135 (a) (ii) - the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;"*

Having stated the prescribed manner in which the charge must be framed and what it should contain, for clarity we deem it crucial to reproduce the charge which was laid at the appellant's door as reflected at page 1 of the record of appeal:

"STATEMENT OF OFFENCE

UNNATURAL OFFENCE: Contrary to section 154 (1) (a) of the Penal Code, Cap 16 R.E. 2002.

PARTICULARS OF THE OFFENCE

JAMES MAHALI on the 3rd February, 2017 at Ilemi area within the city and region of Mbeya did have carnal knowledge of one E.D. against the order of nature.

Dated at Mbeya this 24th February, 2017.

Sgd
BARAKA MGAYA
STATE ATTORNEY"

We have no qualms that from the prosecution account, it is evident that PW1 was 16 years which brings into play the essence to cite section 154 (2) of the Penal Code in the charge which provides for the punishment of life imprisonment for one convicted for such an offence to a child aged less than 18 years. The said provision stipulates as follows:

> *"154 (2) Where the offence under subsection (1) of this section is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."*

The importance of citing the provision which prescribes the sentence to the charged offence was underscored by the Court in the case of **SAID HUSSEIN VS REPUBLIC,** Criminal Appeal No. 110 of 2016 (unreported) where it was stated as follows:

"Also section 131 of the Code provides for punishment for those different categories of rape. This section too has subsections (1), (2) and (3), of which subsection (2) has paragraphs (a) to (c). In our view, this again, explains the reasons why it is often being emphasized by the Court that punishment of each category of the offence must be specifically indicated in the charge sheet."

In the case of **MUSSA NURU @ SAGUTI VS REPUBLIC,** Criminal Appeal No. 66 of 2017 (unreported) confronted with akin situation, the Court articulated the consequences of the omission to specify the punishment provision in the charge having stated:

"Even in this case, we think, the appellant was required to know clearly the offence he was charged with together with the proper punishment attached to it. We are of a settled mind that by failing to cite subsection (2) of section 154 which is a specific provision for punishment to a person who committed an offence of unnatural offence to a person below the age of [eighteen] might have led the appellant not to appreciate the seriousness of the offence which was laid at his door. On top of that, he might not have been in a position to prepare his defence. (See- Simba Nyangura's case). The end result of it is that he was prejudiced. "

For a charge to suffice as the foundation of a criminal trial, the punishment/sentencing must be specified in the charge so as to enable an accused person to understand the nature of the charged offence and the requisite punishment. In the present case, the omission to state the punishment provision prejudiced the appellant who was not made aware of the serious implications of the offence charged, the gravity of the impending sentence and thus, was not in a position to make an informed defence. See – **JOHN MARTIN MARWA VS REPUBLIC**, Criminal Appeal No. 20 of 2014 and **ABDALLA ALLY VS REPUBLIC,** Criminal Appeal No. 253 of 2013 (both unreported).

The omission could have been remedied by the prosecution before the conclusion of the trial if they had sought leave of the trial court to amend the charge in terms of section 234 of the CPA. In the event, this did not happen, it follows that, the omission which continued to remain in the charge throughout the pendency of the proceedings, rendered the charge defective and vitiated the trial. This adversely impacted on the proceedings and judgments of the courts below to be a nullity.

Ordinarily we would have ended here and should not have bothered ourselves to look into the evidential matters, but we shall do so in the light

of what will be unveiled in due course in the determination as to whether the charge was proved beyond reasonable doubt against the appellant. On this, in her submissions, the learned State Attorney placed reliance mainly on the victim's account arguing that besides, giving a credible account that it is the appellant who sodomised her, she initially disclosed the episode to Enda and later to her grandmother (PW4). Further, she contended, the proof of penetration is embedded in the victim's account who testified to have felt pain during the alleged sodomy arguing the same to be regardless of the evidence of the doctor whose examination revealed that no discharges or bruises were found on the victim's anus. In her well-reasoned judgment preceded by the evaluation and analysis of the evidence of both the prosecution and defence evidence, the trial magistrate observed as follows:

> " *In the present case the victim is a young girl of 16 years old. According to her, she was penetrated into her anus by the accused's penis by force. However, her sister (PW2) as well as the doctor (PW8), examined the victim's anus but they failed to observe anything like seminal fluid or bruises into her anus. The questions which may linger into any person of sound mind is whether a man of the age of the accused person could*

force penetration into the anus of a girl of the age if the victim and indeed succeeded to penetrate her but without causing any bruises into her anus. It is my considered view that this is impossible as under normal circumstances the anal muscles would have contracted as the accused was forcing penetration into the victim's anus. This view is supported by PW8 (Assistant Medical Officer) who told this court that if there was real penetration there would have been bruises into the anus of the victim.

Again if the victim was sodomized we could expect her to have cried immediately after she was released by the accused as she was leaving the accused premised because she had heard the accused calling Ayubu before she was sodomize. I am saying this because if the accused increased the volume of his television in order not to be heard then after the victim has been release she would have called the said Ayubu and informed him. It is very unfortunate that the victim did not do anything except to go at home. Surprisingly when she arrived at home she did not wait in order to show her anus to PW4 (Lucia Seleman) but she rushes to the toilet to wash herself The victim is a form three student who is able to understand that she was supposed to report the matter at the police station or at the hospital before

taking bath but to her it was not the case. All those raised doubt if the victim was sodomized...."

In the first appellate court, apart from the learned Judge acknowledging at page 123 of the record of appeal that, there were no bruises, no discharge and thus no clear evidence of penetration, however, at page 124 she stated as follows:

> *"It is on record through the evidence of PW4 that when PW1 was explaining what the appellant did to her, the appellant pleaded the matter to end amicably.* ***The appellant also admitted to PW4 that he called the victim to his house the fact which was corroborated by the victim's evidence that the appellant called him at his house.*** *The victim's evidence did prove that she was carnally known against the order of nature and therefore, I am satisfied that the elements of the offence of unnatural offence were proved taking into consideration that the victim was a girl of 16 years."*

Apparently, with respect, the bolded expression is not backed by the record because PW1's assertion that she was called by the appellant to go at his residence was not admitted by the appellant. Instead, he gave a

different account at page 53 of the record that it is the victim on her own volition went at his house, met his wife and registered complaints that one of his tenants had a habit of knocking the victim's window. Besides, this being supported by the appellant's wife and poking holes on the prosecution account, it was not seriously contradicted by the prosecution. Apart from the first appellate court not considering the crucial defence evidence, it did not consider the evidence of PW2 who had inspected the victim and found nothing which was strongly supported by the doctor's account as reflected at pages 35, 36 of the record of appeal as follows:

> *"In the anus area is surrounded by ghitals muscles, which is hip like structure. In between there is anal area. In order to reach the anus area, you have to separate the ....area.*
> *... if there is real penetration there must be bruises because of the nature of muscles surrounding the anal area.*

At page 36 of the record, upon being cross-examined, he stated as follows:

> *"If penetration is successful there must be bruises"*
> *He further stated that he was shown the victim's underpants which was in the hand bag and upon examining it in order to see if it had blood stains or sperms, he found nothing.*

Finally, responding to a question by the trial court he replied at page 37 as follows:

> *"In my opinion. After examining the victim, I failed to get evidence to prove that the victim was sodomised but according to her explanation she said she was sodomised....".*

In the PF3 which was tendered at the trial as exhibit P2 the doctor's remarks at page 74 of the record were as follows:

> *"The victim is suspected sexually assaulted / raped and physical examination revealed no bruises, no discharges...."*

Although the courts are not bound by expert evidence including those given by medical practitioners, however, it is not prudent to ignore such crucial account of the doctor which was cemented by PW2, the victim's sister who had opportunity to inspect the victim before she was taken to the hospital and no clue of sodomy was found. This clouded the prosecution case with a cloud of doubt and in this regard, we decline the learned State Attorney's suggestion who urged us to ignore the doctor's account and instead, rely only on the victim's account which in our considered view left a lot to be desired as we shall demonstrate in due

course. This takes us to discussing the propriety or otherwise of the victim's account.

We are aware that it is settled law that in sexual offences, the victim's evidence is the best, save where it is not credit worthy. (See- section 127 (7) of the Evidence Act and **SELEMANI MAKUMBA VS REPUBLIC** [2006] TLR 384). It is also settled law that assessing the demeanour of a witness is the domain of the trial court, the first and second appellate courts can assess the credibility of a witness in two ways namely: **One**, when assessing the coherence of the testimony of that witness, **two,** when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person. See: **SHABAN DAUDI VS REPUBLIC**, Criminal Appeal No. 28 of 2001 (Unreported) where the Court stated:

> *"The credibility of a witness can also be determined in other two ways, that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

Having stated the manner of assessing the credibility of a witness at the appellate stage, the follow up question is whether in the present matter

the victim was truthful and credible witness whose evidence is worth belief. We do not think so and shall give our reasons. **One,** the victim a 16 years old secondary school student who in our strong considered opinion was aware that whenever a sexual offence is committed, if the victim takes bath the likelihood of eroding the evidence is higher. **Two,** if at all she was sodomised, and as correctly observed by the trial magistrate what made her to hurriedly take a bath instead of reporting the matter to her grandmother (PW4) or even her sister (PW2). **Three,** When PW2 wanted to examine her fronted reluctance claiming that she had already taken bath which indicates that though aware that taking bath had adverse consequences in the preservation of evidence in the alleged sodomy but all the same she opted to utilise the bathing as shield so that the appellant is not let off the hook. Is such a witness entitled to credence? In the case of **GOODLUCK KYANDO VS REPUBLIC**, Criminal Appeal No. 118 of 2003 (unreported) that:

> *"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

The testimony of a witness will always be that it is true unless the witness's veracity has been assailed on his or her part to misrepresent the facts has been established or has given fundamentally contradictory or improbable evidence. As earlier stated, it cannot be safely vouched that the victim's account is credit worthy to entitle her any credence because it was fundamentally contradicted with the evidence of PW2 and PW8 which suffice as cogent reasons for nor believing the victim,

Finally, we have also gathered that Enda was a crucial prosecution witness but she was not paraded as a witness. It should be remembered that, after the alleged sodomy, the victim's first encounter was her sister one Enda to whom she revealed the incident and named the appellant to be the culprit. Then, upon Enda's advice the victim informed PW4. In the premises, the victim's encounter with Enda was the earliest opportune moment for PW1 to reveal what had befallen her and who was the culprit. It is thus our considered view that Enda was a material witness to give impetus to the victim's account as to who sodomised her. Thus, in the absence of any explanation that she could not be reached though one of the family members of the victim, failure to parade her entitles the Court to make as we hereby do adverse inference on the prosecution that if

paraded she would have given a contrary account on the prosecution case. See - **AZIZI ABDALAH v REPUBLIC** 1991 TLR 71. Thus, from the totality of the evidence adduced by the prosecution and that of the defence, the charge was not proved against the appellant to the hilt.

In view of the aforesaid, although the trial court made a proper evaluation and analysis of the trial evidence, it misdirected itself not to acquit the appellant having found that the offence charged was not proved beyond reasonable doubt. On the part of the first appellate court, as earlier stated, with respect there was indeed a misapprehension of the evidence resulting into reliance on incredible evidence of the victim to convict the appellant contrary to the dictates of section 127 (7) of the Evidence Act which cautions the courts not to rely on victim's evidence in sexual offences unless satisfied on the credibility of such evidence. This is what prompted the intervention of the Court.

All said and done, we are satisfied that the charge against the appellant was not proved to the hilt. Therefore, on account of the stated anomalies which rendered the charge defective, we invoke revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and nullify the proceedings and judgments of the courts below

and quash the conviction and set aside the sentence. As a result, we order the immediate release of the appellant unless he is held for some other lawful cause.

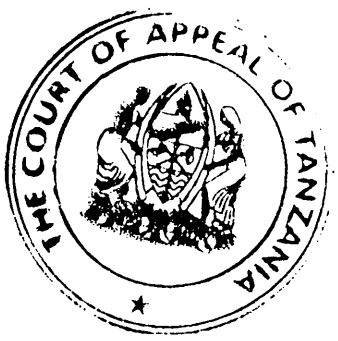
DATED at **MBEYA** this 20th day of September, 2021.

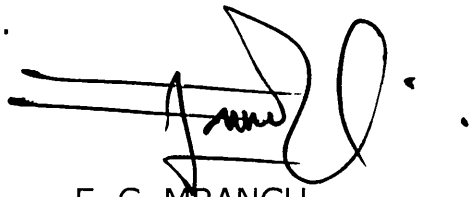
S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Ruling delivered this 21st day of September, 2021 in the presence of the Appellants in person unrepresented and Ms. Marietha Maguta, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.





E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL