IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KITUSI, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 459 OF 2019

GOODLUCK ALOYCE .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Masabo, J.)

dated the 9th day of October, 2019
in
Criminal Appeal No 09 of 2019

JUDGMENT OF THE COURT

17th September & 4th October 2021

KITUSI, J.A.:

The District Court of Ilala tried and convicted the appellant on two sexual offences allegedly committed against a victim whose name we shall withhold. The first was rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E. 2002, and the second was unnatural offence contrary to section 154 (1) (a) and (2) also of the Penal Code.

The prosecution led evidence to establish that the appellant Goodluck Aloyce was cohabiting with one Najawa Shaban (PW2), his paramour with whom he had a child. The victim (PW1) who happened

to be PW2's younger sister was also staying with them in that rented room and apparently they were all sharing one bed. PW2 who worked at a bar for a living, would normally return home late at night. These night duties by PW2 allegedly provided the appellant with time to indulge in escapades with PW1 who testified that he would have both vaginal and anal sex with her. She said she never disclosed the ordeal to her sister for fear of the appellant who had threatened her life.

It took another person to take the cat out of the bag, so to speak. Tallis Mkude (PW3) was the owner of the house in which the appellant and PW2 lived, and he also lived in the same house. On 23/5/2015 he noticed that PW1 was having difficulty in walking, so he probed her, in the course of which she disclosed the fact that her in-law, the appellant, was having sex with her during PW2's absence. PW3 had one William Tongola (PW4) called to listen to PW1's story.

The matter was reported to the police who issued PW1 with a PF3. The examination conducted by Nelly Steven Mrangu (PW6) confirmed that PW1 who was eleven years old had been ravished.

In defence, the appellant alleged that PW2 had cooked up the case and he suspected she was impelled by desire to take possession of his property; a bed and mattress, Television set, radio, fan and clothes.

The trial court convicted the appellant with both counts and sentenced him to a jail term of 30 years for each, but ordered the sentences to run consecutively. The first appeal to the High Court against the convictions and sentences was unsuccessful. This is a second appeal raising 9 grounds.

The appellant appeared and argued the appeal in person although he did no more than simply adopting the written arguments he had earlier filed in terms of rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The respondent Republic was represented by Ms. Deborah Mushi, learned State Attorney who immediately cited the case of **Njile Samwel @ John vs. Republic**, Criminal Appeal No. 31 of 2018 (unreported), to argue that the grounds of appeal that did not feature for determination at the High Court should not be entertained unless they raise points of law.

We agree with Ms. Mushi on that settled position of the law because we have consistently held so. See also **Galus Kitaya vs. Republic**, Criminal Appeal No. 196 of 2015, **Hassan Bundala @ Swaga vs. Republic**, Criminal Appeal No. 416 of 2013 (both unreported).

On the basis of that principle, we agree with Ms. Mushi that ground 3 is new. It raises a complaint that the evidence of PW2, PW3, PW4 and PW6 was contradictory and unable to corroborate that of PW1. This ground was not raised by the appellant before the High Court, so we shall not address it.

Grounds 4 and 6 though also new, qualify to be entertained because they raise points of law. Ground 4 for instance, raises a point that the PF3 which was tendered and admitted as exhibit P1 was not read over in court after the admission. In the written arguments on this, the appellant cited the case of **Robinson Mwanjisi & Others vs. Republic** [2003] T.L.R 218 and **Saganda Saganda Kasunzu vs. Republic,** Criminal Appeal No. 53 of 2019 (unreported). Ms. Mushi conceded to this point because, she submitted, the law requires documentary exhibits to be read over for the accused to be aware of the contents. She cited the case of **Makende Simon vs. Republic,** Criminal Appeal No. 412 of 2017 (unreported) and prayed that we should expunge the PF3.

We agree with the appellant and Ms. Mushi on the principle as expressed in the cases cited by the appellant and the learned State Attorney. Other cases include **Song Lei vs. Republic**, Criminal Appeal

No. 16A of 2016 and **Evarist Nyamtemba vs. Republic**, Criminal Appeal No. 196 of 2020 (both unreported). Thus, we expunge the PF3 from the record.

Ground 6 is a complaint that PW6 should not have testified because she was not listed as a would - be witness. In the written arguments, the appellant cited section 289 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002] (the CPA). This provision requires statements of persons intended to be used by the prosecution as witnesses, to be read over during committal proceedings. Ms. Mushi submitted that section 289 (1) of the CPA does not apply to trials before subordinate courts.

With respect, we agree with Ms. Mushi and we think ground 6 is based on a misconception, because that procedure is relevant to trials before the High Court or before a Resident Magistrate with extended jurisdiction, and not otherwise. Section 192 of the CPA which governs the procedure for Preliminary Hearing does not bar the Republic from calling to the witness box, persons not listed as witnesses. This ground of appeal has no merit.

Related to ground 6, is grounds 5 which raises the issue of PW6's credentials as a medical practitioner. The written arguments do not

cover this area but Ms. Mushi dealt with this ground with ease. She cited the cases of **Makende Simon vs. Republic** (*supra*) and **Charles Bode vs Republic,** Criminal Appeal No. 46 of 2016 (unreported), then submitted that in East and Central Africa, a clinical officer as PW6, is competent to testify on medical findings. We readily agree with the learned State Attorney and dismiss ground 5 for want of merit.

We now turn to ground 1 that alleges that the provisions of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2002] were violated. These provisions make reception of evidence of a witness whose age is below 14 years, conditional upon holding a *viore dire* test to satisfy the court that the witness is competent. In the written arguments, the appellant cited the case of **Nyasani Bichana vs. Republic**, [1958] EA 94 to buttress his position as to what a *voire dire* is intended to achieve. But he went on to submit that the trial court should have made PW1 promise to tell the truth as opposed to lies. For this he cited the unreported cases of **Issa Salum Nambaruka vs. Republic**, Criminal Appeal No. 272 of 2018 and **Godfrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018.

Ms. Mushi agreed with the appellant on the principle requiring a *voire dire* examination but she was initially of the view that that

requirement was complied with. She cited the case of **Sudi Seif vs. Republic**, Criminal Appeal No. 521 of 2016 (unreported), and submitted that the trial court was satisfied that PW1 had the requisite intelligence to testify. The learned State Attorney conceded however that since PW1's testimony was taken without oath, it required corroboration.

Our starting point in addressing ground 1 of appeal is to agree with the learned High Court Judge that although the questions that were put to PW1 during *voire dire* examination were not recorded, they can be deduced from the answers she gave. The *voire dire* examination in this case is not what one may call meticulous, but it served the purpose, in our view, especially when PW1 stated that;

"I will not speak false even if I am taught."

There cannot be a better expression of a witness's knowledge of her duty to tell the truth. We need to observe however, that the positions of the law as it stood before the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 required a *voire dire* examination to be conducted. But following that amendment, a witness whose apparent age is not above 14 years, only needs to promise to tell the truth and not lies. The appellant should not mix between the old position and the new one.

According to the learned Judge, and we respectfully agree with her again, even if the *voire dire* examination were to be considered faulty, that would not change matters in favour of the appellant. The reasons for this position are discussed immediately in dealing with ground 2. Therefore ground 1 stands dismissed for want of merit.

Ground 2 reads thus: -

> *"2. That the learned first appellate judge erred in law and fact by upholding the appellant's conviction for the offence of rape and unnatural offence counts whereas there was no sufficient evidence given by PW6 nor PW1 to establish the commission of any of the offences."*

In the written arguments, the appellant cited **Seleman Makumba vs. Republic** [2006] T.L.R. 379 and **Weston Haule vs. Republic**, Criminal Appeal No. 501 of 2017 (unreported), to make a point that the best evidence in sexual offences comes from the victim. He submitted that there is none in this case. On the other hand, Ms. Mushi submitted that PW1's testimony was corroborated by PW6 who established that she detected penetration into the victim's private parts.

We shall treat PW1's testimony as unsworn and proceed from there. It is trite that an unsworn evidence requires corroboration, and case law on this is replete. A few of them are; **Shozi Andrew vs.**

Republic [1987] T.L.R. 68, **Said Salum vs. Republic**, Criminal Appeal No. 499 of 2016 and; **Shaban Ng'ombe @ Kenyeka vs. Republic**, Criminal Appeal No. 454 of 2016 (both unreported). So, the question is whether there is evidence to corroborate PW1's testimony that the appellant raped and sodomized her serially.

The learned High Court Judge was of the view that PW1's detailed account of the matter was corroborated by PW3 who questioned her suspicious manner of walking before she divulged to him and PW4 that her sister's concubine had taken to ravishing her during the sister's night duty. We agree with the learned Judge and we must add that there was also the evidence of PW6 whose oral testimony on what she examined on PW1 deserves consideration. We have previously held that where documentary exhibit is expunged from the record for omission to read out its contents in court, oral evidence that explains the details in the document may be considered. See the cases of **Chrizant John vs. Republic**, Criminal Appeal No. 313 of 2015; **Anania Clavery Betela vs. Republic**, Criminal Appeal No. 335 of 2017 **Huang Qin & Another vs. Republic**, Criminal Appeal No. 173 of 2018 and; **Ruben Lazaro Mafuta @ Mbunde & 3 Others vs. Republic**, Consolidated Criminal Appeal No. 403 of 2018, 240 of 2020 & 242 of 2020 (all unreported).

On the basis of that position, the evidence of PW6 that explains the details of her findings when she examined PW1, is sufficient to cure the omission in reading the PF3, and when her evidence is considered along with that of PW3, it corroborates PW1's evidence that she was raped and sodomized. Accordingly, it is our finding that ground 2 has no merit, and stands dismissed.

Next, we turn to grounds 7, 8 and 9 which Ms. Mushi sought to argue together. In a nutshell, these grounds fault the High Court for sustaining the appellant's conviction in a case that was not proved against him and in which the defence case was not considered. The appellant began his submissions on these points by criticizing the prosecution's failure to lead evidence of visual identification and evidence of his description. He then attacked the credibility of PW1, PW2 and PW4. Ms. Mushi submitted that there was nothing wrong with the two courts' evaluation of the evidence except for their failure to consider the defence case.

We must say at once, that the issue of visual identification and description of the culprit in this case is totally a misconception. There is evidence of PW1, which the appellant never challenged, that he was sharing a bed with her. What evidence of visual identification and

description would there be in such a situation? So, all this is irrelevant, in our view. We shall only address the alleged failure by the two courts below to consider the defence.

Admittedly, the two courts below did not indicate that they considered the defence case. We are aware that this is not the first time the Court is confronted with a similar scenario. We are also aware that in some cases when confronted with a similar situation, the Court has considered it necessary to remit the case to the High Court for it to perform its duty or ordered a retrial, like in the case of **Kaimu Said vs. Republic,** Criminal Appeal No. 391 of 2019 (unreported). And in other cases, the Court has taken that omission as a denial of fair trial on the part of the appellant, rendering the trial a nullity. For this, see the cases of **Moshi Hamisi Kapwacha vs. Republic**, Criminal Appeal No. 143 of 2015 and **Yusuph amani vs Republic**, Criminal Appeal No. 255 of 2014 (both unreported).

We think the decision as to what should be done, will entirely depend on the peculiar circumstances of each case because in yet other situations, the Court has tended to step into the shoes of the High Court to do what ought to have been done. We did that in a number of our previous decisions such as in **Joseph Leonard Manyota vs. Republic,**

Criminal Appeal No. 485 of 2015 cited in **Karimu Jamary @ Kesi vs. Republic**, Criminal Appeal No. 412 of 2018 and; **Julius Josephat vs. Republic**, Criminal Appeal No 03 of 2017 (all unreported). Perhaps we should add, that this position is not all too new. Well before the decisions in the above cited cases, in **Hassan Mzee Mfaume vs. Republic** [1981] T.L.R 167, the Court observed that it could step into the shoes of the High Court, acting under section 3 (2) of the Appellate Jurisdiction Act, 1979. That provision is somehow similar to section 4 (2) of the present Appellate Jurisdiction Act Cap 141 R.E 2002, (the Act). The Court then went on to state: -

> *"It is apparent that acting on this provision this court may properly exercise the powers of the High Court to re-evaluate the evidence in the instant case. Indeed,* ***in the circumstances of this particular case, this is the most appropriate course to adopt*** *in order to avoid any further delay in this appeal which has been pending since 1977.* ***But this does not mean that this court wili step into the shoes of the High Court in every case where the High Court faiis to perform its duty. It will all depend on the circumstances of each case, and there may well be cases where it will be considered more appropriate to***

remit the case back to the High Court to be dealt with there".

In our considered view, the justice of this case requires us to step into the shoes of the High Court and consider the defence. In his defence, the appellant alleged that the case had been fabricated by his concubine allegedly because she might have had an eye on his assets, earlier listed. In criticizing the appellant on this, Ms. Mushi appeared to say that the appellant's possessions were too modest to attract any such intention on PW2. With respect, we need not venture into that very relative territory. Instead, we are satisfied that that line of defence was an afterthought because the appellant never raised it when he had the opportunity to cross - examine PW2, and it renders the story very hollow. Besides, we now understand that if not for PW3 suspecting PW1's awkward manner of walking and bringing up the matter, PW2 may never have known about what was taking place in her bedroom during her night duties. It is therefore our conclusion, that the defence case did not topple the case for the prosecution, built on the evidence of PW1, PW3 and PW6. Thus, grounds 7, 8 and 9 have no merits and are dismissed.

In the end we dismiss the appeal against the conviction. We are lastly going to consider whether the High Court was right in upholding

the sentence of 30 years imposed on the appellant for each count, and whether it was correct to order the said sentences to run consecutively. Ms. Mushi supported the order for the two sentences to run consecutively because, she submitted, the offences committed were grave. On whether or not the sentence of 30 years for unnatural offence involving an eleven-year old victim was correct, Ms. Mushi left it to the Court, and so did the appellant when invited to submit on the sentence.

The issue of sentence was raised by the Court because, as we said in **Julius Josephat vs. Republic** (supra), citing **Marwa Mahende vs. Republic** [1998] T.L.R 249 and other cases, it is our duty to ensure that the courts apply the law correctly. Section 185 of the Law of the Child Act No. 21 of 2009 amended section 154 of the Penal code. In Julius **Josephat vs. Republic** (supra) while discussing a situation similar to this, we stated: -

> *"After the said amendment however, in case of a victim below the age of 18 years, the sentence was enhanced to life imprisonment. In the circumstances, the 30 years' imprisonment term which was meted out against the appellant was ipso facto an illegal sentence".*

In this case the victim was not more than 11 years according to herself, PW2 and PW6, therefore the appropriate sentence to the

appellant ought to have been life imprisonment for the offence of unnatural offence. We thus, invoke our revisional powers under section 4 (2) of the Act, and substitute the sentence of 30 years imprisonment for unnatural offence, with life imprisonment.

As we indicated earlier, the appeal is entirely dismissed, with the variation of sentence enhanced as shown. The sentences shall run concurrently.

DATED at **DAR ES SALAAM** this 1st day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered on this 4th day October, 2021, in the presence of appellant in person linked via video conference at Ukonga prison and Ms. Dhamiri Masinde linked via video conference at DPPs office State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL