IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 144 OF 2018

HUGO GEORGE JIMSON ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Levira, J.)

Dated the 13th day of March, 2018
in
Criminal Appeal No. 154 of 2016

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JUDGMENT OF THE COURT

16th February & 17th March, 2021

KOROSSO, J.A.:

This is a second appeal. The appellant was arraigned in the Resident Magistrate's Court of Mbeya at Mbeya (the trial court) charged with the offence of unnatural offence contrary to section 154 (1)(a) and (2) of the Penal Code, Chapter 16 Revised Edition, 2002 (the Penal Code).

The allegations against the appellant were that on the 3rd January, 2016 at Itogo-Mwakibete area in the District and Region of Mbeya, he did have carnal knowledge against the order of nature with one who we shall henceforth refer to as "CA" or "PW3" to disguise his identity. The appellant who testified on oath denied the charge against him. The case

proceeded to full trial with the prosecution fronting ten (10) witnesses and three (3) exhibits, while on the defence paraded two (2) witnesses including the appellant. At the end, the trial court being satisfied that the prosecution proved the charge to the standard required, convicted the appellant and sentenced him to thirty (30) years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court where the sentence was enhanced to life imprisonment. Still dissatisfied, he has appealed to this Court.

The background of the matter, albeit in brief is that, CA aged about six (6) years, a standard one pupil at Ikulu Primary School was at the time living with the family of Amon Gerald Mwampenyanga (PW2) and Rehema Amon (PW5), his grandparents. On the 3rd January, 2016 evening hours, CA was playing with his friend one Zinda around the area he lived, when the appellant arrived and took him by the hand holding it and up to an unfinished house "*pagala*" where on arrival there, the appellant removed CA's trousers, undressed himself and then sodomized him. This act inflicted pain and caused some bleeding to his anus but "CA" was prevented from shouting for help by the appellant who had covered PW3's mouth with his hand. Afterwards, CA was handed Tshs. 1,000/- by the appellant and then he ran from there crying while holding his trousers and met James Job Kyando (PW4).

Prior to the incident, the appellant was at first seen by PW4 moving around asking for a girl and then sometime later holding CA's hand and then continued walking with him out of sight. After twenty minutes PW4 saw CA again but this time he was crying while holding his trousers saying that he had been spiked and injected in the buttocks. CA also showed Tshs. 1000/- which he said he had been given by the perpetrator. PW4 assisted CA to put back his trousers and then escorted him home. When they arrived there, CA informed his grandmother (PW5) he was injected/spiked in the buttocks and upon inspecting him, PW5 saw what she believed to be sperms and some blood in his buttocks.

CA was taken to the police station and the incident reported there. Subsequently, he was taken to the hospital where he was attended to by Dr. Osmunda Mwanyika (PW10). PW2 and Thobias William (PW8) through information from PW4 managed to trace the appellant and apprehended him. The police came in later to arrest the appellant who was already restrained by the community members.

In his sworn evidence, the appellant protested his innocence. He testified that upon being arrested, he was severely beaten by a group of people. He raised the defence of *alibi* stating that he was at home with friends during the day and later they went drinking in a club and later

apprehended by people he did not know. That the police came and arrested him and he was then arraigned in court charged and convicted with an offence charged. The appellant's appeal to the High Court did not succeed, that court found no merit in any of his complaints and dismissed the appeal and hence the current appeal.

The appellant has lodged a memorandum of appeal containing four (4) grounds of appeal as follows:

1. *Having expunged the evidence of the victim (PW3) the High Court Judge erred to hold that there is other circumstantial evidence that corroborated the prosecution case to prove that the victim had ben carnally known penetration and that the perpetrator was the Appellant which alleged evidence was deficient and contradictory and fell short of the standard of circumstantial evidence.*
2. *Like the trial magistrate, the appellate judge erred to close her eyes and act on the evidence of identification parade which did not measure to the known procedures.*
3. *The appellate judge erred also not to impugne the trial magistrate who had not adequately considered the defence case.*
4. *The appellate judge erred to increase the sentence without inviting the appellant to show cause.*

On the date the appeal came for hearing, the appellant who was linked through video conferencing facility from Ruanda Prison was

represented by Mr. Mushokorwa, learned Advocate whereas, on the part of the respondent, the Director of Public Prosecutions, Ms. Rosemary Mgenyi assisted by Ms. Sarah Anesius, both learned State Attorneys entered appearance.

Mr. Mushokorwa commenced his submissions by abandoning the 4th ground of appeal with the leave of the Court and then adopted the grounds of appeal as found in the memorandum of appeal and the written submissions filed on 17th July, 2018.

With regard to the 1st ground of appeal, the learned counsel for the appellant faulted the first appellate court and argued that after it had expunged the testimony of the victim (PW3) the prosecution evidence was drastically weakened having been largely built on the said evidence and the remaining evidence from PW9 cannot sustain the appellant's conviction. He argued that there was no evidence to prove who had sodomized the victim since the evidence related to identification of the appellant was not watertight.

The learned counsel contended further that the evidence related to penetration which was relied upon by the trial court and upheld by the first appellate court and sourced from PW2, PW5 and PW10 was weak. He argued that the evidence by PW2 was that he examined the

anus of the victim when he arrived home crying and saw blood and mucus. Having examined the victim and tendered the PF3 (Exhibit P3), PW10 stated that his examination revealed bruises around the anus which showed there being anal penetration. The learned counsel challenged this evidence stating that the evidence of PW2 and PW5 should not be relied upon because, despite the two being adults and may not have been strangers to sperms, it was not safe to rely on their evidence on what they observed on the victim since it was not necessarily correct assertion or conclusion.

The learned counsel also challenged the evidence of PW10 saying that her introduction that she was a doctor was not adequate in itself since nothing was expounded with regard to her experience in conducting such examinations and that in any case such evidence cannot be conclusive citing the case of **Makame Janebi Mwinyi vs SMZ** [2003] TLR 455 to bolster his argument. He argued that despite PW10 stating that she saw evidence of penetration from the anus of the victim, there was no clarity on whether the alleged penetration was from a penis, and whether the mucus said to have been seen in the victim's anus by PW2 and PW5 and also PW10 was analyzed and found to be semen in the absence of any evidence that there were laboratory tests conducted. The learned counsel thus contended that there being no

such evidence it raised doubts on whether there was penetration and if so, who was the culprit.

Ms. Sarah Anesius, commenced her submissions stating that the respondent DPP was not resisting the appeal and refraining to support the conviction and sentence meted against the appellant. Responding to the 1st ground of appeal, she argued that the conviction of the appellant was based purely on circumstantial evidence because the trial and first appellate court relied heavily on the evidence of PW4 and PW9 who were not eye witnesses to the commission of the offence charged. She argued that the said evidence was not watertight since though the witnesses stated to have seen the appellant with the victim prior to the incident, there was no evidence to show whether they saw the appellant and the victim to have entered the alleged unfinished house; the crime scene.

The learned State Attorney argued further that although there is evidence that the victim was seen leaving with the appellant, and there is evidence that PW3 came back twenty minutes later crying, there is no evidence to show that the appellant was seen anywhere close to the victim in those twenty minutes. She argued that in the absence of such evidence, there is a possibility that the victim may have been taken and sodomized by someone else apart from the appellant. According to the

learned State Attorney, this was further complicated by the fact that PW3 testified in court that he did not see the perpetrator anywhere in court, while the appellant (the accused then) was sitting in court. To Ms. Anesius, PW4's and PW9's evidence was weak and insufficient to prove the case against the appellant and at the same time fails to lead to an irresistible conclusion that it is only the appellant who could have sodomized the victim (PW3). The case of **Crospery Ntagalinda @Koro vs Republic**, Criminal Appeal No. 312 of 2015 (unreported) was cited to cement this argument.

Having gone through the written and oral submissions and supporting references from both sides, there is no doubt as also conceded by the learned State Attorney that the conviction of the appellant was to a large extent founded on circumstantial evidence and the evidence of PW3, the victim. During the first appeal, the High Court expunged the evidence of PW3 having found that the *voire dire* test was conducted improperly, and thus what was relied upon by the first appellate court to uphold the conviction of the appellant was circumstantial evidence which is now being challenged by the appellant in the 1st ground of appeal. The appellant's complaint is that the circumstantial evidence relied upon by both lower courts to convict him is weak and contradictory and falls short of the standard required.

vs Republic, Criminal Appeal No. 39 of 2017 (unreported) where basic principles for consideration were outlined as follows:-

> " i. *That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See* ***Justine Julius and Others vs Republic,*** *Criminal Appeal No. 155 of 2005 (unreported)).*
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> *ii. That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no co-existing circumstances which would weaken or destroy the inference [See,* ***Simon Msoke vs Republic,*** *(1958) EA 715A and* ***John Magula Ndongo vs Republic,*** *Criminal Appeal No. 18 of 2004 (unreported)].*

Having regard to the said arguments, we find that the issue for our consideration in determining this ground is whether the circumstantial evidence available met the standard required to prove the offence charged against the appellant.

In the instant case, the fact that PW3 was sodomized is not challenged. This can be discerned from the evidence of PW10, a doctor who examined PW3 and testified that PW3 had shown him where he felt pain at the anus after someone had inserted his "*mdudu*" and that he saw some mucus stained with blood and bruises which led him to conclude that PW3 was sodomized. PW10's observations are supported by the evidence of PW2 and PW5 who inspected PW3 soon after he came home complaining that he had been injected and spiked in the anus. PW2 and PW5 testified that they observed sperms and some blood in PW3's anus. With the said evidence, we concur with the trial and first appellate courts that there is ample evidence related to the fact that the victim was sodomised.

The issue for consideration is whether or not it was the appellant who had carnal knowledge of PW3 against the order of nature. The available evidence is circumstantial as already stated above. The quality of circumstantial evidence required to prove the charge has been discussed in numerous decisions of this Court such as **Mark Kasimiri**

iii. That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. [See- ***Mathayo Mwalimu and Masai Rengwa vs Republic*** *Criminal Appeal No. 147 of 2008 (unreported)].*

iv. That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected, [see ***Samson Daniel vs Republic****, (1934) E.A.C.A. 154].*

v. That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person, [See ***Shaban Mpunzu @Elisha Mpunzu vs Republic****, Criminal Appeal No 12 of 2002(unreported)].*

vi. That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See ***Ally Bakari vs Republic*** *(1992) TLR 10 and* ***Aneth Kapazya vs Republic****, Criminal Appeal No. 69 of 2012 (unreported)."*

Applying the above principles to the instant case, it is clear that the evidence available against the appellant, connecting him to the offence charge is that of PW4 and PW9 that, they saw the appellant walking with PW3 before the incidence occurred that is between 16.00 hours-17.00 hours on the fateful day. The evidence raises doubts on two aspects. **One,** whether it is the appellant who was seen by PW4 and PW9 holding PW3's hands before the incident and **two**, if so, whether he is the one who sodomized PW3. Both witnesses were not clear on the direction they saw the appellant and PW3 were going, or whether it was in the direction of the unfinished house; the alleged crime scene. The evidence from PW4 is that after about 20 minutes after having seen the appellant with the victim, CA came running holding his trousers crying that he has been spiked in the anus in an unfinished house. From the evidence of PW4 it is clear that the young man he saw with PW3 that day was not well known to him. When cross examined, PW4 stated that the distance to the said unfinished house was about 30 meters, did not hear PW3 shouting and that there are other houses surrounding the said unfinished house.

On the other hand, PW9 testified that on the fateful day and time he met a running PW3 and when he asked him why the rush, he replied that someone was chasing him. PW9 stated that he saw the person

chasing PW3 and thereafter saw PW3 with his friend and the appellant following them. He stated:

> *"On 03.1.2016 I was from one Mama Cathe I meet with Krishna running and I asked her why in hurry and he replied that there is someone who is chasing her and I was able to see the person, who was chasing her. Then he asked "do you know this girl" And I replied "Yes". He then asked where does she stay and he informed me that I debt her my sweater during New Year he then continued with his journey. I saw him later with two children, one of them being Krishna. I was not able to know where they were heading to..."*

According to PW9's testimony, he had seen the appellant in the afternoon and stated that he knows the face of the young man he saw but didn't know where he resides but remembered he wore American boots and it was the first time to see him. The first appellate court concurred with the findings of the trial court that penetration was proved by the presence of sperms on the victim was proved by the evidence found in the PF3 (Exhibit P3) and corroborated by the evidence of PW2, PW5 and PW10. On whether it was the appellant who committed the offence charged the learned High Court Judge stated (at page 110 of the record of appeal):-

> *"At the outset leaving aside the evidence of PW3 which is already expunged, none of the remaining witnesses did see the appellant committing the act. The only evidence available is circumstantial evidence testified by PW4 and PW9".*

The first appellate court found the evidence of PW4 on having seen PW3 with the appellant and that of PW9 as incriminating the appellant, together with the Identification parade register. What emerges is that the High Court concurred with the findings of the trial court that the offence charged against the appellant was proved relying primarily on circumstantial evidence of PW2, PW4, PW5 and PW9 supported by Exhibits P2 and P3.

When the PW4 and PW9's testimonies are carefully examined, we agree with the contentions of the learned State Attorney and the learned counsel for the appellant that it will be unsafe to conclude that it is the appellant who was last seen with PW3 and the only one who could have taken PW3 to the unfinished house. PW4's and PW9's evidence was only on the fact that they had seen the appellant walking with PW3 and holding his hand and according to PW4, when he asked PW3 where he was going, he stated that he was escorting the appellant. The fact that PW3 failed to recognize the appellant in court and there being no

evidence that the appellant was identified by PW3 elsewhere, or mentioned or described to PW2 and PW5 does not lead to only one conclusion that under the circumstances it could only have been the appellant who sodomized PW3. There is clearly a possibility of another person apart from the appellant to have taken PW3 and sodomized him within the said 20 minutes from the last time PW3 was seen with the appellant to the time he was seen crying and assisted by PW4.

We are guided in the above view by the holding in **Taper vs Republic** [1952] A.C 480 which was referred to by this Court in the case of **Crospery Ntagalinda @ Koro vs Republic** (supra) thus:-

> *"It is necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".*

Applying the above to the instant appeal, we find that the evidence referred to above clearly leaves doubts for other inferences to be drawn. The possibility of another person apart from the appellant to have been the one who sodomized PW3 is eminent. We are aware that the High Court Judge based her finding relying on the evidence of PW4 and PW9 finding them to be credible witnesses. Consequently, taking all

the above factors into consideration, the doubts we have highlighted should benefit the appellant. We thus hold the first ground has merit.

On the the 2nd ground of appeal, the appellant faults the first appellate court for relying on the identification parade which did not measure up to the known procedure. The appellant's learned Advocate argued that the procedure used in the conduct of the identification parade failed to adhere to laid down procedure underscored in **Republic vs Mwango Manaa** [1936] 3 EACA 39 and adopted in **Simone Musoke vs Republic** (supra). The learned counsel argued that even if the identification parade Register (Exhibit P2) was not objected to when it was tendered for admission, the errors of the counsel for defence then should not penalize the appellant when the procedure for conduct of the parade was clearly not followed.

The learned counsel for the appellant argued that the evidence of PW4 and PW9 that he saw the appellant walking with PW3 was unreliable. This is because despite the fact that it was not dark, the appellant was not someone who was very well known to them and the two witnesses did not even reveal the duration of observing the appellant and which direction he went with PW3; whether or not it was in the direction of the crime scene (unfinished house).

In addition, the learned counsel maintained that for such identification to have been devoid of possibility of mistaken identity, PW9 should also have participated in the identification parade and it was not enough to only have PW4. The learned counsel thus invited the Court to disregard the evidence related to the identification parade and at the same time find that the identification of the appellant by PW4 and PW9 did not measure up to the settled position on identification of perpetrators of crime especially in the absence of the evidence of the victim, which was expunged by the first appellate court. Thus, he prayed that for reasons stated, this ground be found to be meritorious.

The learned State Attorney supported the appellant's dissatisfaction with the identification of the appellant and the conduct of the identification parade as found in the 2nd ground of appeal. She argued that the identification parade was not conducted properly, evidenced by the fact that the selected participants who took part with the appellant had different features, some being tall some short as testified by Jeremiah Obeid (PW6). That this clearly shows that the laid down procedures on the conduct of identification parade were not followed.

From the submissions of both counsel on this 2nd ground of appeal, it is common ground that the evidence related to identification

of the appellant relied upon by the trial and the first appellate courts to prove that the appellant was properly identified, especially the evidence of PW4 and PW9 was below the threshold.

The conduct of the identification parade and value to be accorded to such evidence was amply discussed by the High Court during the first appeal which considered the laid down procedure outlined in **Republic vs Mwango Manaa** [1936] 3 EACA 39 approved in **Simone Musoke vs Republic** (supra). One of the procedures requires that the accused should be placed among at least 8 persons of similar age, height, general appearance and class of life as him or her as possible. With due respect, the High Court did not proceed to critically assess whether the said procedure was complied with on the ground that the Identification Parade Register was not objected to by the appellant's side. The fact that PW6 was not cross-examined on the issue of physical appearance of the persons who took part in the parade or on any injuries the appellant had at the time was also considered by the learned High Court judge, and subsequently made a finding that the complaints against the identification parade were unwarranted.

With due respect, we think that the High Court Judge erred for failing to appreciate the well settled position that admissibility of an exhibit is just the first stage and thereafter the court is expected to

assess the weight to accord to the admitted exhibit. Had the assessment of the value of the exhibit been done properly, the High Court would have then also considered whether the established procedures for the conduct of the Identification parades were complied with.

We agree with the learned State Attorney and the counsel for the appellant that one of the fundamental procedures in conducting identification parades were not complied with. Jeremiah Obeid (PW7), one of those persons who took part in the parade stated that among the eight persons who took part, four were apparently taller than the others and that the appellant was the only one with a wound on his head and without a bandage while another person had a scar on his face. That evidence showed that the participants were different in appearance and thus contravening one of the procedure for the conduct of identification parade, which rendered the identification parade flawed. Consequently, the identification parade as well as exhibit P2 were of no evidential value to support a finding that the appellant was properly identified as the culprit. We thus find merit in the 2nd ground.

For the above reasons, we find that our determination of the above two grounds of appeal is sufficient to determine this appeal and find no need to proceed to consider and determine the 3rd ground challenging, the failure of the lower courts to consider defence evidence.

It should be noted that the 4th ground of appeal was abandoned by the learned counsel for the appellant in his oral submissions.

In the end, having found that the conviction was unsafe under the circumstances, we therefore allow the appeal. We thus quash the conviction and set aside the sentence and order the immediate release of the appellant from custody unless, he is otherwise lawfully held for some other lawful purposes.

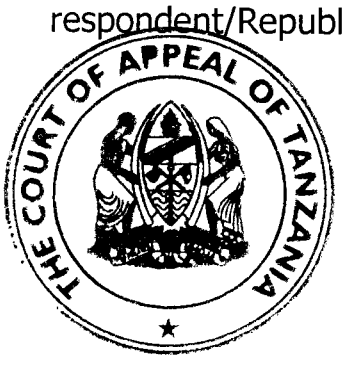
DATED at **DAR ES SALAAM** this 12th day of March, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 17th day of March, 2021 in the presence of Mr. Justinian Mushokorwa, learned counsel for the appellant through video conferencing linked to the Court from High Court of Mbeya and Ms. Dhamiri Masinde, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL