IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 122 OF 2020

ABDALLAH SEIF ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam, at Kisutu)

(Mrangu, SRM-Ext. Juris.)

dated the 4th day of February, 2020
in
Extended (DC) Criminal Appeal No. 99 of 2019

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JUDGMENT OF THE COURT

8th February & 14th April, 2022

MWANDAMBO, J.A.:

The appellant Abdallah Seif was tried and convicted of unnatural offence before the District Court of Kigamboni and thereafter sentenced to serve life imprisonment. What triggered the arraignment and ultimately the appellant's conviction and sentence was an allegation by the prosecution that on unknown dates and month in 2017, the appellant had carnal knowledge of a girl aged nine years against the order of nature contrary to section 154 (1) (a) of the Penal Code, Cap. 16 R.E. 2002. The appellant's first appeal against conviction and sentence was dismissed by Mrangu, SRM-extended jurisdiction sitting at

the Resident Magistrate Court of Dar es Salaam at Kisutu. He is now before the Court in a second and final appeal in a bid vindicate his innocence.

The tale behind the commission of the charged offence is somewhat awkward. The appellant and the victim PW1 stayed in a house at a place called Maduka Mawili, Gezaulole, Kigamboni District, Dar es Salaam region. The victim's father, stayed in the said house with his family which included his wife (PW2), PW1 and her siblings; Ali and Mwanu. The appellant occupied one of the rooms in the house at the invitation of his uncle; the victim's father. There was no dispute too that occasionally, for some undisclosed reason, PW1's father chased the victim and her siblings to spend nights in the same room the appellant occupied. The prosecution's accusations were that the appellant seized the moment when PW1 was forced to spend nights in that room to sodomise her and thereafter warned the victim not to disclose the ordeal to anybody lest she risked death. According to the prosecution evidence through PW1, the appellant ravished her at least twice in 2017 but she could not disclose it to her mother (PW2) or her father for fear of death as warned by the appellant. According to PW2, it was not until 20/02/2018 when PW1 broke the awful news to her and her husband as

the culprit had gone away to Mbagala. It is common ground that PW1's father did not testify during the trial. According to PW1, the disclosure of the ordeal was prompted by an itching on her anus which she could not keep to herself anymore. Subsequently, an unsuccessful family meeting involving the appellant was held but it ended in acrimony resulting into the appellant lodging a complaint with the local Ward Executive Officer (WEO) alleging that he was defamed by his uncle accusing him of sodomising his cousin. However, that report had no avail to him, for he was subsequently arrested and arraigned in court for the charged offence to which he pleaded not guilty.

Prior to the appellant's arraignment, PW2 had taken PW1 to Kigamboni Health Centre for medical examination after obtaining a PF3 from the local Police post. Dr. Francisco Elias (PW3) who examined PW1, made his findings which he posted in the PF3 (exhibit P1) revealing relaxed sphincter muscles which suggested penetration. PW3 testified as such during the trial.

In his defence, the appellant did not dispute the fact that PW1 and her siblings slept in the same room with him but denied having sodomised her. He associated his arrest and arraignment with grudges

PW2 had against him only to change his story during cross -examination alleging that he had issues with Talik; one of his relatives.

The trial court found the prosecution evidence proved the case on the required standard. It did so on the basis of the testimony of the victim which it found to be sufficient to prove the case relying on the principle in **Selemani Makumba v. R**. [2006] T.L.R 379. Besides, the trial court found that even though PW1's evidence was self-sufficient, PW3's evidence corroborated the victim with regard to penetration; an essential ingredient in sexual offences. At the end of it all, the trial court convicted the appellant as charged followed by the mandatory life imprisonment sentence.

The appellant's appeal before the first appellate court presided over by E. G. Mrangu, SRM with extended jurisdiction did not succeed. It was dismissed for lack of merit. He is now before the Court on a second appeal. The record shows that the appellant had preferred 13 grounds of appeal before the first appellate court punching holes in the trial court's judgment on various areas of complaints ranging from procedural errors to evidential ones but none of them found purchase with the first appellate court resulting into the impugned judgment. The first appellate court concurred with the trial court on findings of fact on both proof of

penetration and the fact that the appellant was responsible for the awful act, hence this appeal.

The appellant seeks to impugn the decision of the first appellate court on 11 grounds of appeal in both the memorandum of appeal lodged earlier on and the supplementary one he lodged subsequently.

At the hearing of the appeal, the appellant appeared in person, unrepresented. He stood by his grounds of appeal which he urged the Court to find meritorious enough to allow the appeal. He had nothing in elaboration reserving the right to rejoin after hearing submissions from the respondent Republic should that be necessary. On behalf of the respondent Republic, Ms. Christine Joas learned Senior State Attorney assisted by Ms. Jacqueline Werema learned State Attorney, appeared resisting the appeal. It was Ms. Werema who took the floor presenting her submissions in reply for the respondent.

Essentially, out of the grounds raised before the Court, only five of them featured before the first appellate court and determined as such. The rest are new, which can only be considered if they are on points of law in terms of section 6 (7) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA). It is for this reason, Ms. Werema urged the Court to refrain from entertaining some of the grounds. The learned

State Attorney singled out ground five in the memorandum of appeal and ground two in the supplementary memorandum for failure to meet the threshold of grounds worth the Court's consideration and determination. We respectfully agree with the learned State Attorney guided by various Court's previous decisions, notably; **Galus Kitaya v. R**, Criminal Appeal No. 196 of 2015 and **Mathias Bundala @ Swaga v. R**, Criminal Appeal No. 386 of 2015 (both unreported).

Consequently, we are constrained to reject ground five in the memorandum of appeal in relation to the complaint on the failure to call key witnesses during the trial. Although this ground featured before the first appellate court and determined as such, the Court is prohibited from determining it because is not based on any point of law. We shall likewise decline entertaining ground two in the supplementary memorandum complaining against the failure by PW3 to specify the object which penetrated the victim. Both complaints do not meet the threshold of grounds to be determined by the Court on a second appeal as it were. We thus endorse the submissions by Ms. Werema and reject the two grounds. We propose to begin our discussion with grounds touching on procedural errors in the conduct of the trial before the trial court.

The first of such errors relates to the prosecution's failure to supply the appellant with a copy of the complainant's statement contrary to section 9 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2019], (the CPA). This was the appellant's complaint in ground one. Ms. Werema conceded and we think rightly so that despite the appellant's request to be supplied with the complainant's statement and an order of the trial court to that effect, the prosecution did not comply. Nonetheless, the learned State Attorney contended that the non-compliance was innocuous to the appellant's trial and the ultimate conviction because he was not prejudiced in any manner whatsoever. She urged us to treat the non-compliance as curable under section 388 of the CPA.

Considering that there is no dispute on the prosecution's failure to furnish the appellant with the statement of the complainant made to the police on the basis of which the appellant was arrested and arraigned in court, the only issue for our determination is whether such non compliance was fatal to the trial. The appellant's complaint is that the non-compliance amounted to unfair trial but he could not say anything on the extent to which it prejudiced his trial. Ms. Werema submitted that it was not fatal and if so, it did not go to the root of the trial.

There is no dispute that a fair trial entails several aspects amongst others, the accused's entitlement to complainant's statement to be able to stand trial which is the rationale behind section 9 (3) of the CPA. Mindful with our decision in **Alex John v. R**, Criminal Appeal No. 129 of 2006 (unreported), there is hardly any doubt that the supply of a complainant's statement before trial is such a guarantee to a fair trial. However, the appellant's complaint is not that the failure prevented him from marshalling his defence or asking questions in cross examination. His complaint is against the failure to supply him with the statement without more. Be it as it may, the record shows clearly that notwithstanding the failure to avail him with a copy of the relevant statement, the appellant was not deterred from asking questions in cross examination to all prosecution witnesses as reflected at pages 14, 16 and 19 of the record of appeal. Besides, the appellant marshalled his defence against the charge as evidenced by Page 21 and 22 of the record of appeal. That being the case, we cannot, but agree with the learned State Attorney that the failure to supply the appellant with a copy of the relevant statement was not prejudicial to his defence. As submitted by Ms. Werema, the failure did not occasion any failure of justice warranting interference by this Court and making an order reversing the appellant's conviction and sentence. We are in agreement

with Ms. Werema that the error was curable under section 388 of the CPA. Accordingly, save to the extent indicated, ground one has no merit and we dismiss it, which takes us to ground three in the supplementary memorandum of appeal.

The appellant's complaint in this ground is directed against non-compliance with section 231(1) of the CPA, that is, failure by the trial magistrate to explain to the appellant the substance of the charge upon making a ruling that he had a case to answer. Like in ground one, Ms. Werema conceded as such that the trial court did not explain to the appellant the substance of the charge thereby offending section 231(1) of the CPA. All the same, the learned State Attorney implored us to hold that such failure did not prejudice the appellant considering that his defence was in line with the charge. We once again agree with the learned State Attorney. Upon examination of the appellant's defence (at page 22 of the record), there is no doubt that the appellant knew and understood the nature of the case he was facing against which he made his defence. Accordingly, we see no prejudice which could have occasioned a failure of justice from which the Court can interfere by reversing the conviction and sentence. We are, yet again satisfied that

the error is curable under section 388 of the CPA. Ground three is accordingly dismissed.

Next in the procedural errors relates to the irregular admission of the PF3 (exhibit P1) the subject of the appellant's complaint in ground seven. Ms. Werema invited us to expunge the PF3 because its contents were not read out upon its clearance for admission. However, she was emphatic that notwithstanding the expungement of exhibit P1, the oral evidence by PW3 who examined the victim will still be intact. We agree with the learned State Attorney and hereby expunge exhibit P1 from the record of appeal as we are satisfied that its admission offended the principle reflected in so many of our previous decisions, notably **Robinson Mwanjisi & 3 Others v. R** [2003] T.L.R 218.

The foregoing notwithstanding, it is now settled law that the oral evidence by a medical doctor does not go with the expungement of the documentary exhibit particularly medical reports. It remains intact and may be relied upon in determining the appellant's guilt or otherwise – See for instance **The Director of Public Prosecutions v. Erasto Kibwana & 2 Others**, Criminal Appeal No. 576 of 2016 (unreported). In the upshot, save to the extent indicated, we allow ground seven.

We shall now turn our attention to ground one in the memorandum of appeal in which the appellant faults the two courts below for concurring in finding that the prosecution proved its case to the required standard relying on PW1's evidence allegedly received in contravention of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019]. Ms. Werema urged us to dismiss this ground arguing that section 127 (2) of Cap. 6 was fully complied with. The substance of her submission was that all what was required of PW1, a tender age witness, was to make a promise to tell the truth and not lies before her evidence was received on oath or affirmation. It was submitted thus that PW1 promised to tell the truth and not lies and afterwards she gave her evidence on affirmation as required by section 127 (2) of Cap. 6 in line with our decision in **Godfrey Wilson v. R**, Criminal Appeal No. 168 of 2018 (unreported).

We respectfully agree with the learned State Attorney being satisfied that the record of appeal clearly shows that before PW1 gave her evidence as shown at pages 12- 14 of the record of appeal, the trial court had addressed itself on requirements under section 127 (2) of Cap. 6. We shall have the record speak for itself:

"Court: PW1: - Sara Yusuf Ismail is a child of 9 years old, she is thus addressed c/s 127 (2) of TEA R.E. 2002 as amended by Misc. Amendment Act No. 4 of 2016.

PW1: -

My name is Sara Ismail, I am nine years old, I am a student, I am in grade three, I am a Muslim, I have gone like three times to the Mosque. I know the meaning of an oath; I normally affirm before the lord; I have never stated lies. I promise the court I will tell the truth.

Court: PW1, seems to be understanding the nature of an oath, ***and she has promised to state the truth, she is thus affirmed and states as follows:"*** [emphasis added- at page 12].

We wish to point out that in terms of section 127(2) of Cap. 6, evidence of a tender age witness who does not know the meaning of oath can be received provided such witness promises to tell the truth and not lies. What happened here is that the trial court affirmed PW1 upon being satisfied the she know the meaning of the oath and that should have been the end. However, the trial indulged itself into asking PW1 to promise to tell the truth which was a legal requirement. Needless to say, we have no doubt that the overindulgence was inconsequential the trial; it occasioned no injustice to the appellant.

In view of the above, we see no semblance of merit in the appellant's complaint and dismiss it.

The appellant's complaints in grounds two and three in the memorandum of appeal argued conjointly by Ms. Werema are directed against the alleged failure to consider his defence and analyse it properly rendering the judgment defective for non-compliance with section 312 (1) of the CPA. Ms. Werema was candid that the judgment of the trial court was not up to the mark us it fell short of the qualities of a proper judgment as required by section 312 (1) of the CPA. The learned State Attorney argued that the problem was compounded by the fact that the first appellate court abdicated its role of evaluating the evidence on record afresh and making its own findings of fact. All the same, the learned State Attorney invited the Court to step into the shoes of the first appellate court in line with our decision in **Kaimu Saidi v. R**, Criminal Appeal No. 391 of 2019 (unreported). We think the learned State Attorney's reference to the above case was a mistake because the Court did not take the route, she invited us to take in that decision. Instead, upon being satisfied that the appellant defence was not considered neither by the trial court nor the first appellate court, the Court ordered a retrial based on the peculiar facts in that appeal. That decision cannot be of any avail to the respondent.

Essentially, two interrelated issues arise in the two grounds. **One**, failure to consider the accused's defence and consequences thereof. **Two**, whether the impugned judgment is defective and if so, to what extent. Our starting point will be section 312 (1) of the CPA which sets out contents of a judgment to include; points for determination, decision thereon and reason for the decision. The Court has pronounced itself in many of its decisions on what would be considered as a quality judgment. One of such decisions is **Mkulima Mbagala v. R**, Criminal Appeal No. 267 of 2006 (unreported) in which the Court stated:

> *"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it.* ***This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case .... is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at".*** *[emphasis supplied]*

Referring to the above decision, in **Asajile Henry Katule & Another v. R**, Criminal Appeal No. 30 of 2019 (unreported), the Court

observed that for all intents and purposes, a finding that the case against the accused was proved beyond reasonable doubt presupposes that the trial court subjected the prosecution evidence to scrutiny against that of the defence.

Apparently, the complaint on the failure to consider defence evidence featured before the first appellate court but the learned Senior Resident Magistrate with extended jurisdiction dismissed it having taken the view that the appellant's defence was considered. The defence which the first appellate court satisfied itself that it was considered was that despite appellant's admission that the victim and her siblings slept with him in the same room some of the nights, he denied having committed the offence. His defence was that the case against him was fabricated by his aunt out of grudges by reason of his neglect to take care of the family. Similarly, the appellant claimed that he had issues with Taliki; one of his relatives. In its judgment, the trial court reasoned that the appellant's identification was sufficiently proved considering that the victim was related to him. Besides, the trial court reasoned that since the appellant admitted that PW1 slept with him in the same room sometime in 2017, there was circumstantial evidence that he sodomised her.

Despite the foregoing, the first appellate court took the view that the appellant's defence was duly considered reasoning that the complaint related more with the style of composing judgment than failure to evaluate evidence for both the prosecution and defence. Adverting to our decision in **Mkulima Mbagala v. R** (supra), can it be said with certitude that the trial court considered the defence evidence as held by the first appellate court? Our answer to this question is, undoubtedly, no. We say so considering that the trial court strayed into an error in discussing identification as the appellant's defence which was not.

It is plain from the record that nowhere in his evidence did the appellant raise any issue of mistaken identity thereby constituting his defence. This is so because there was no dispute that the victim and her siblings slept in the same room with him on 15/07/2017 and so the issue of mistaken identity could not have arisen. The admission aside, the appellant's defence to the charge related to a family misunderstanding; grudges with PW2 who was his aunt cum PW1's mother. The trial court said nothing on that defence before concluding that since the victim slept in the same room with the appellant, there was circumstantial evidence of him sodomising the victim. This explains

why we do not share the same view with the first appellate court that the appellant's defence was considered in the trial court's judgment. There can be no doubt that the failure to consider defence evidence was a result of failure to evaluate the evidence for both the prosecution and defence before making a finding of guilt against the appellant.

Having so held, the next issue for our consideration and determination is the consequences arising from the error. Not unsurprisingly, the appellant would have us nullify the judgment. That prayer was resisted by the learned State Attorney who invited the Court to step into the shoes of the High Court by doing what it omitted to do. We are inclined to accept the learned State Attorney's invitation being satisfied that the infraction did not vitiate the judgment. The approach we have taken is reinforced by the Court's previous decisions including; **Joseph Leonard Manyota v. R**, Criminal Appeal No. 485 of 2015 (unreported) followed in **Julius Josephat v. R,** Criminal Appeal No. 3 of 2017, **Karimu Jamary v. R,** Criminal Appeal No. 412 of 2018, **Idrisa Omary v.R,** Criminal Appeal No. 554 of 2020 (all unreported). See also; **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149. We shall revert later on to a discussion on whether had the appellant's defence been considered, it raised any reasonable doubt

in the case for the prosecution? In the meantime, we shall turn our attention to grounds four, six and eight argued conjointly by the learned State Attorney.

Grounds four and six raise issues of credibility of PW1, PW2 and PW3 particularly in delaying to report the commission of the charged offence. Ground eight raises a general complaint that the case for the prosecution was not proved to the required standard.

Ms. Werema urged the Court to dismiss these grounds for being baseless. As to the delayed reporting of the offence, the learned State Attorney argued that it was due to the appellant's threat exerted on PW1 that she ran the risk of death if she disclosed the incident to anyone. We endorse the learned State Attorney's submission because that was indeed PW1's uncontroverted evidence at page 13 and 14 of the record of appeal. PW1's evidence shows that it was not until 20/02/2018 when she disclosed the ordeal having been prompted by itching on her anus. According to PW2, the victim PW1 disclosed the incident at the time when the appellant had gone to a place called Mbagala. Afterwards, the matter was reported to the police resulting into the appellant's arrest and arraignment. Under the circumstances, we are not prepared to go along with the appellant that the delayed reporting dented PW1's and

PW2's credibility as contended by him in ground four. At any rate, mindful of the Court's decision in **Goodluck Kyando v. R** [2006] TLR 363 each witness is entitled to his credence and his evidence believed unless there are cogent reasons to the contrary. We have seen none in this appeal warranting disbelieving PW1 and PW2.

With regard to ground six, Ms. Werema argued that since the charge involved unnatural offence the prosecution was bound to prove penetration into the victim's anus, her age and the culprit who was responsible for it. According to the learned State Attorney, the prosecution proved all to the required standard through the evidence of PW1 and PW3. Both the trial and first appellate court concurred in their finding of fact that the ingredients necessary to prove penetration were proved against the appellant. In doing so, the two courts below relied on the evidence of PW1 the victim of the offence whom they found to be truthful guided by **Selemani Makumba v. R** (supra). Besides, the two courts below concurred in finding that penetration was proved through the evidence of PW3; a clinical officer who examined PW1 and found her sphincter muscles relaxed suggesting penetration into PW1's anus. As to the person responsible, there was no dispute that it was the appellant

who sodomised the victim in one of the nights he slept with her in the same room.

It is now opportune to revert to where we ended our discussion on the failure to evaluate the entire evidence properly to be able to determine the issue whether the two courts below were right in holding that the appellant's case was proved on the required standard.

Admittedly, as discussed earlier, the trial court did not consider the appellant's defence as it should have done. Neither did the first appellate court play its role as a first appellate court by evaluating the evidence on record afresh and arriving at its own conclusions. Under the circumstances, we shall step into the shoes of the first appellate court and do what it omitted to do in the manner prayed by Ms. Werema guided by our decisions **DPP v. Jaffari Mfaume Kawawa** and **Leonard Joseph Manyota v. R** (supra).

Ms. Werema invited us to hold that the appellant's defence did not raise any reasonable doubt in the prosecution case. We respectfully agree. All that he said in defence related to the alleged grudges with PW2 and one Taliki. Upon our own evaluation of the evidence on record, we are of the view that, granted, there were any grudges as claimed, the prosecution's case was not shaken in any manner. At best,

the appellant raised remote and fanciful possibilities which were incapable of raising any doubt. We are fortified in this view by a statement of Lord Denning in **Miller v. Minister of Pension** [1974] 2 All ER 372 from where the Court drew inspiration in **Chadrankant Joshubhai Patel v. Republic,** Criminal Appeal No. 13 of 1998 (unreported). The Court frowned upon permitting limitless fanciful and remote possibilities in favour of the accused displacing solid evidence or dislodge irresistible inference as doing so would be disastrous for the administration of criminal justice.

At any rate, by the appellant's own evidence, the misunderstanding between him and PW2 began after his marriage some time in April, 2018 after the disclosure of the ordeal by the victim in February 2018. It is hard to link the alleged misunderstanding and the disclosure of the incident resulting into the appellant's arrest. It follows thus that, had the first appellate court evaluated the evidence on record properly, it would have arrived at the same conclusion sustaining the trial court's finding of guilt against the appellant.

The upshot of the foregoing is that save for the misdirections and non-directions by the two courts below in making concurrent findings of fact on the appellant's guilt, we are satisfied that such misdirections and non-directions did not occasion any miscarriage of justice warranting our

interference with the said findings. Like the two courts below, we are satisfied that the case against the appellant was proved to the required standard; proof beyond reasonable doubt which disposes of ground eight against the appellant.

In conclusion, we find no merit in the appeal and dismiss it as we hereby do.

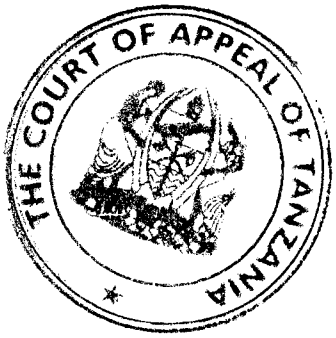
DATED at **DAR ES SALAAM** this 12th day of April, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered on this 14th day of April, 2022 in the presence of appellant in person linked via video conference from Ukonga prison and Ms. Christine Joas, learned Senior State Attorney for the respondent, is hereby certified as a true copy of the original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL