IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 563 OF 2020

ZUBERI MOHAMED @ MKAPA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated 30thday of September, 2020
in
DC. Criminal Appeal No. 2 of 2020

JUDGMENT OF THE COURT

6th& 9th May,2022

LEVIRA, J.A.:

In the District Court of Singida at Singida, the appellant Zuberi Mohamed @ Mkapa was charged with theunnatural offence contrary to section 154(1) (a) and (2) of the Penal Code Cap, 16 R.E. 2002 (the Penal Code). It was alleged that, on 29th August, 2018 at 17:00hours at Kimpungua Area, Misuna Ward, Mungumaji Division within the District and Region of Singida the appellant had carnal knowledge of the victim S. J., a child of four (4) years against the order of nature. The appellant denied the charge and therefore, the case proceeded to a full trial. In proving its case against the appellant, the prosecution relied on the

evidence of five witnesses and three exhibits. On defence side, the appellant and his mother testified as defence witnesses.

Salome Joseph (PW1) started running the ball on the part of prosecution case. She gave an account of how she discovered that her grandson (the victim) was abused. She testified that on 29th August, 2018 at 17:00 hours while at home the victim appeared crying, coming from unfinished house. Upon asking him what was the matter, he told her that Mkapa, whom she identified to be the appellant, had closed his (victim's) mouth andhit him in his anus. PW1 undressed the victim, checked his anus and she saw fluid like male sperms coming out and also there were bruises. Thereafter, she called the parents of the victim and the appellant's mother.They responded to the call and PW1 informed them what had happened. The incident was reported to the police where they were issued with a Police Form No. 3 (PF.3) and sent the victim to the hospital. At the hospital,the victim was attended by Fatuma Cosianga Mdoile (PW5),Clinical Officer who confirmed that the victim was penetrated as his anus was enlarged. During trial PW5 tendered the PF3 and it was admitted as Exhibit P3. On the following day PW1 called the appellant and asked him why did he sodomize her

grandson? The appellant replied that it was a devil who led him to do so. Therefore, she,in company with appellant's mother sent him to the police station. The victim (PW2) testified that the appellant is called Mkapa and his other name is Zuberi Mohamed; and, that the appellant inserted his male organ in his anus and caused him pain. On her part, Mariam Issa (PW3) who is the mother of the victim told the Court that the victim was born on 16th June, 2014 and she tendered his birth certificate which was admitted as Exhibit P1.

The appellant was interrogated at the police station and his statement was recorded in the presence of his mother by the police officer No. F. 7067 SGT. Kededy (PW4) who among other things, testifiedduring trial that, the appellant confessed to have committed the charged offence. The appellant and his mother signed the appellant's cautioned statement which was admitted during trial as Exhibit P2.

In his defence, the appellant (DW1) distanced himself from the commission of the alleged offence. According to him, he was at work on the material day and in the following morning, he received information concerning the offence with which he was charged from his mother who came to inquire from him as to where he was on the previous day.

Upon receiving such information, the appellant requested his mother to accompany him to the house where the victim was residing. They went and met a lady called Myasu who told him that he will take him to be sentenced. That lady took him and his mother to the police and narrated what had happened to the victim. The appellant was arrested and his statement was recorded, he signed it likewise his mother.

In her testimonial account DW2 stated that, on the fateful day she received information that the victim had been hit by a stick in his anus. She went to the house of PW1 and request her to undress him so that she could see if it was true. They undressed him but DW2 did not see anything. Thereafter, she accompanied PW1 and PW3 to the police and later to the hospital where the victim was examined by PW5. She stated further that, she witnessed while the victim was being examined. But at the end of the examination, PW5 said nothing, so they went back home.

At the end of the trial, the trial court was satisfied that the prosecution case was proved beyond reasonable doubt against the appellant. Therefore, the appellant was convicted and sentenced to serve thirty (30) years imprisonment. Aggrieved, he unsuccessfully

appealed to the High Court of Tanzania at Dodoma vide DC Criminal Appeal No. 2 of 2020 subject of the current appeal.

On 1st March, 2021 the appellant lodged a Memorandum of Appeal with the Court comprising six grounds. However, at the hearing of the appeal, Mr. Leonard Mwanamonga Haule, learned advocate who appeared for the appellant abandoned the appellant's grounds of appeal except the first ground which challenged the evidence of PW2 (the victim) to have been taken in contravention of section 127(2) of the Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act). He sought and granted leave to argue new grounds, to wit, that there was variance between the charge and the evidence adduced during the trial; and, that the appellant was improperly sentenced by the trial court. Therefore, three grounds were argued in this appeal. The respondent was represented by Ms. Phoibe Magili, learned State Attorney.

In his opening statement to the submission in support of the appeal, Mr. Haule contended that the case against the appellant was not proved beyond reasonable doubt. Expounding on this contention, he said, there was a variance between the charge and the prosecution evidence as regards the victim in this case. According to him, while the

charge sheet indicated that the victim was Shamsa Jumanne, the prosecution witnesses identifiedhim differently. He referred to page 12 of the record of appeal where PW1 named him as Shams Jumanne; PW3 at page 17 of the record of appeal named him as Shamsia Jumanne, the name which appeared in hisBirth Certificate (Exhibit P1) and also in the PF3 (Exhibit P3).He cited the case of **Thabit Bakari v. Republic**, Criminal Appeal No. 73 of 2019; **Mabula Limbe v. Republic**,Criminal Appeal No. 653 of 2015; and, **Noel Gurth a.k.a Bainth and Another v. Republic,** Criminal Appeal No. 339 of 2013 (all unreported), in which the Court stated that where there is variance of names as in the case at hand, the charge must be amended otherwise it will occasion injustice to the accused, but that did not happen in the current case. Since the same was not amended, acquittal of the appellant is a matter of right, he argued. Therefore, he urged the Court to find that the charge sheet was supposed to be amended so that it could have reflected the evidence and that the charge against the appellant was not proved beyond reasonable doubt.

In the alternative, he submitted in relation to the appellant's sentence. He stated that when the offence was committed, the appellant

was eighteen (18) years old. Therefore, he argued, it was wrong for him to be sentenced thirty (30) years imprisonment in contravention of section 160B of the Penal Code. He added that the appellant was supposed to be caned. However, he urged us not to order so under the circumstances of this case having considered the time which the appellant has so far spent in prison. Instead, we should order his immediate release from custody. He cited the case of **A. B. N @ A. A. v. Republic,** Criminal Appeal No. 462 of 2015 (unreported).

Regarding the noncompliance with section 127(2) of the Evidence Act, Mr. Haule submitted that the evidence of PW2 was recorded in contravention of the said provision of the law. According to him, PW2 who was a child of tender age neither was he sworn/affirmed nor promised to tell the truth as per the dictates of the cited law. Therefore, he prayed the evidence of PW2 to be expunged from the record. He cited the case of **Amour Mbaruck Aljeb v. Republic,** Criminal Appeal No. 226 of 2019.

Finally, he prayed for the appeal to be allowed, conviction quashed and the sentence set aside with an order of immediate release of the appellant from prison.

In reply, Ms. Magili conceded to the variance of the charge sheet and the evidence. She said, while the charge sheet indicated Shamsa Jumanne as a victim, PW3, PW4 and the PF3 identified the victim as Shamsia Jumanne. However, she submitted that the variation was very minor as it is only on oneletter of the name of the victim. She added that according to the trend of evidence, even the appellant when interrogated, he admitted before PW4that he committed the charged offence and the victim was Shamsia Jumanne. She also pointed out that the family name of the victim remained intact throughout as Jumanne. Thus, she urged us to find that the variation was minorand it did not go to the root of the case so as to prejudice the appellant.

Regarding the second ground which was argued in alternative, Ms. Magili readily conceded that the appellant was 18 years old at the time of commission of the offence. Therefore, she said, section 160B of the Penal Code ought to have been considered by the sentencing court; which was not the case. However, her concession was not without reservation. It was her argument that despite the fact that the sentence was not proper, this alone could not exonerate the appellant from liability. She added that the appellant was charged with unnatural

offence and thus the prosecution was supposed to prove penetration, of which they did.

She referred us to page 12 of the record of appeal where PW1 testified that upon physical examination of the victim, she saw fluid like sperms and bruises in the victim's anus. Also, at page 24 of the record of appeal PW5 upon medical examination of the victim she saw bruises and the anus was expanded. All these made PW5 to conclude that the victim was penetrated. In addition, she said, the appellant's confession in his cautioned statement which was admitted without objection (Exhibit P2) corroborates the prosecution case, that indeed, the appellant sodomized the victim. In support of her submission, she cited the case of **Charles Zuberi v. Republic,** Criminal Appeal No. 258 of 2020 (unreported). Ms. Magili concluded that the prosecution case was proved beyond reasonable doubt and urged us to make a finding that the appeal has no merit, save for the sentence.

Mr. Haule said that Ms. Magili did not distinguish the case of **Mabula Limbe** (supra) from the current one. Thus, the Court should consider the appellant's submission and hold that the prosecution case was not proved beyond reasonable doubt.He reiterated his prayer that,

the time spent by the appellant in prison should be considered and the Court set him free.

We have dispassionately considered submissions by the counsel for the parties, grounds of appeal argued before us and the entire record of appeal. We shall determine the grounds of appeal in the following order, beginning with the 1st, 3rd and 2nd grounds.

In the first ground, the main complaint is that the name of the victim appearing in the charge sheet varied from the one mentioned by prosecution witnesses and as such, the variation resulted into prosecution's failure to prove the charge against the appellant. This argument was partly opposed by the counsel for the respondent, who apart from conceding to the variation, she argued that it was a minor variation which did not go to the root of the case.

We wish to point out at the outset that, although the counsel for the parties were at one that the variation of the charge and evidence exists in this case, save for the extent of prejudice, with respect, we are not persuaded with Mr. Haule's line of argument that prosecution failed to amend the charge. We wish also to point out that the case of **Thabit Bakari** (supra) he cited is distinguishable from the circumstances of the

current case as in that case, the prosecution did not seek and obtain leave of the court to amend the charge while that was not the case in herein.

It is settled law that at any stage of the trial a defective charge, be it in substance or form can be amended, substituted or added as the case may be upon leave by the court except when such alteration causes injustice– see section 234(1) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA).

In the current case, when the prosecution discovered that there was variation of the victim's name between the charge and his real name as per the evidence gathered, they prayed before the trial court for leave to amend the same. The amendment was done and endorsed by the court before the prosecution witnesses started to testify, that was on 13th January, 2019. According to the record, prosecution case was opened on the same date the amendment was effected. The relevant part of the record of appeal at page 11 reads:

> *"**PP:** it is for hearing. I pray to amend **name of the victim** as it appears in the charge. His name is **Shamsi Jumanne** instead of*

Shamsa Jumanne. *Under section 234 of CPA and 394 CPA.*

Court: *Prayer granted amendment noted*

Sgd: *T. C. Tesha – RM*

15/1/2019."

[Emphasis added].

The excerpt above is clear evidence that the charge was amended in view of correcting the name of the victim. We note that all the prosecution witness except PW1, Exhibit P1 and P3 recognized the victim as Shamsia Jumanne. We think, and that is how it is supposed to be, that the name appearing in the Birth Certificate (Exhibit P2) is the correct name of the victim; which is, Shamsia Jumanne. Without prejudice, we as well think that the learned trial Magistrate made uncalculated omission when recording the amended name of the victim as **Shamsi** omitting the last letter, "a" which is appearing in the Birth Certificate.

In our considered opinion and as correctly in our view submitted by the learned State Attorney, the omission is very minor and it did not go to the root of the case. We consider it as a normal typographical error having considered circumstances of this case and for that matter, it did not prejudice the appellant. We say so because apart from urging

us to find that there was such variance and there was no amendment of the charge sheet, Mr. Haule did not state how the appellant was prejudiced. Furthermore, the appellant did not cross examine prosecution witnesses regarding the name of the victim or that she was not the actual victim. Instead, he entered his defence after prosecution case. The argument which Mr. Haule has raised in our considered opinion is nothing but an afterthought. Therefore, we decline Mr. Haule's invitation that we should find the charge against the appellant was not proved beyond reasonable doubt on account of variation between the charge and the evidence. Instead, we find that there was no material variation between the charge levelled against the appellant and the prosecution evidence as to who was the victim. Both parties were on the same page during trial and thus there was no prejudice occasioned to the appellant.

In the third ground of appeal the appellant challenged the trial court for failure to comply with section 127(2) of the Evidence Act while recording the evidence of the victim (PW2). Counsel for the parties were at one that indeed, there was noncompliance and thus they prayed for the evidence of PW2 to be expunged from the record.

It is settled law that every person is competent to testify before the court unless the court considers that he is incapable of understanding the questions put to him or giving rational answers to those questions due to various reasons. Therefore, in that view, a child of tender age as in the present case is a competent witness. However, the law provides for the procedure to be followed under section 127(2) of the Evidence Act before taking his /her evidence, thus:-

> *"(2) A child of tender age may give evidence without taking an oath of making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

As a general rule, evidence before the court is given upon oath or affirmation in terms of section 198 of the Criminal Procedure Act, Cap 20 RE 2019. The above quoted law provides for an exception to a child of tender age under the condition that, he or she has to promise to tell the truth to the court and not to tell any lies. This may mean that for the child of tender age to promise to tell the truth, the promise has to be preceded by preliminary questions on her position as a child witness.

In the current case, the victim who was a child of tender age testified as PW2 as reflected at pages 15 to 16 of the record of appeal. There is nothing on record indicating that he was led to promise to tell the truth as required by law. The little that can be gleaned from the record is that, the learned trial Magistrate at page 15 of the record indicatedthat "the child did not understand the meaning of truth, he does not understand the meaning of an oath."

We agree with the counsel for the parties that, the evidence of PW2 was un-procedurally recorded as he never promised to tell the truth. Failure to make such promise affected the validity and reliability of his testimony and it amounted to contravention of section 127(2) of the Evidence Act. We therefore, find merit in this ground of appeal and thus, expunge the evidence of PW2 from the record of appeal.

Having done so, we still have in mind Ms. Magili's reservation that, even after expunging PW2's evidence from the record, the remaining evidence is sufficient to sustain the appellant's conviction. Her argument was premised on the strength of the evidence of PW1, PW5 and PW4 together with exhibits P2 and P3.The offence with which the appellant

was charged required proof of penetration, which in our view was well proved even without the evidence of PW2. We shall explain.

We propose to start with the appellant's confession which he made as per Exhibit P2. It is on record that, having been arrested the appellant recorded his cautioned statement at the police station. The said statement was recorded by PW4 who testified to the effect that, the appellant admitted before him that he committed the offence he was charged with. He tendered the appellant's cautioned statement and the same was admitted without any objection from the appellant. Thereafter, it was read in court as a result, its voluntariness was not questionable.

Section 27(1) of the Evidence Act provides that:-

> *"(1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person."*

In his cautioned statement, the appellant confessed to have sodomized the victim in the following words:-

> *"... nilirudi pale nilipomuacha Shamsi s/o Jumanne, baada ya kufika pale nilimchukua na kumvua suruali na* ***nikaanza kumlawiti*** *ndipo*

Shamsi s/o Jumanne alianza kulia sana ndipo nilimuachia na niliondoka pale na kwenda kwenye chumba..... dada yangu aitwaye Bahati alinipigia simu ndipo aliniambia kuwa ***mbona nimemlawiti mtoto wa watu*** *na mimi* ***nilikumbuka kuwa nilimlawiti*** *SHAMSI S/O JUMANNE. Hayo ndiyo maelezo yangu sina zaidi. Sgd: ZUBERI MOHAMED 13:23 HRS."*

[Emphasis added].

Apart from appellant's confession, there was other evidence on record to corroborate what he said. PW1 at page 12 of the record of appeal testified that upon being informed by his grandson that the appellant closed his mouth and hit him in his anus, she checked his anus and saw fluid like male sperms coming out there. The victim was sent to Sokoine Health Centre and was examined by PW5 who found that there were bruises, the anus was expanded and appeared not normal. It was her conclusion that the victim was penetrated against the order of nature. She filled the PF3 which was tendered in court as Exhibit P3 explaining the outcome of the examination she did to the victim.

Looking at the confession of the appellant and the remaining prosecution evidence on record, we agree with the findings of the first appellate court that the confession of the appellant had evidential value

and it points to his guilt. Therefore, we find that the prosecution proved beyond reasonable doubt that the appellant sodomized the victim.

We now move to consider the second ground of appeal regarding noncompliance with section 160B of the Penal Code in sentencing the appellant. This ground need not detain us much. The record of appeal is very clear that the appellant was eighteen (18) years old at the time of commission of the offence. His age was stated in the particulars of the accused in the charge sheet, facts of the case and in his defence. The same was not disputed at any point in time during trial and thereafter.

Section 160B of the Penal Code states categorically that cruel sentences should not be imposed to persons of or below the age of eighteen as it provides: -

> *"For promotion and protection of the right of the child, nothing in chapter XV of this Code shall prevent the court from exercising-*
>
> *(a) revisionary powers to satisfy that cruel sentences are not imposed to persons of or below the age of eighteen years; or*

(b) discretionary powers in imposing sentences to persons of or below the age of eighteen years."

As we intimated earlier, the appellant was sentenced thirty (30) years imprisonment despite his age at the time of commission of the offence. We agree with the counsel for both sides that in terms of the above provision, since the appellant was of the age of 18 years at the time of commission of the offence, upon conviction he was supposed to be sentenced to corporal punishment, but that was not the case. Failure to observe the dictates of the law in our considered view, occasioned miscarriage of justice on the part the appellant as he was sentenced to more than what he deserved. The first appellate court ought to have corrected this mistake, but it overlooked and blessed the sentence imposed by the trial court at page 63 of the record of appeal. Thus, the 2nd ground is merited.

On account of what we have endeavoured to discuss above, we sustain the appellant's conviction. The appellant's sentence of thirty (30) years imprisonment is quashed and in lieu thereof, we pronounce that the appellant deserved corporal punishment in terms of section 160B of the Penal Code as he was of the age of 18 years at the time of

commission of the offence. However, having considered the time he spent in prison, we order his immediate release from the custody. Save for the revised sentence, the appeal stands dismissed.

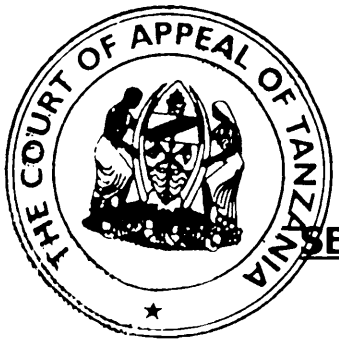
DATED at **DODOMA** this 9th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 9th day of May, 2022 in the presence of appellant in person, and Ms. Bernadetha Thomas, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL