IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., MWAMDAMBO, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 176 OF 2020

OMARY JUMA LWAMBO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kulita, J.)

dated the 10th day of April, 2019
in
Criminal Appeal No. 345 of 2017

.....

JUDGMENT OF THE COURT

4th & 14th July, 2022

NDIKA, J.A.:

The appellant, Omary Juma Lwambo, was convicted by the District Court of Temeke of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code ("the Penal Code") and sentenced to thirty years' imprisonment. Having vainly appealed to the High Court of Tanzania at Dar es Salaam against the said conviction and sentence, he now appeals to this Court.

At the trial, it was alleged that, between January and July, 2016 at Tandika Azimio area within Temeke District in Dar es Salaam Region,

the appellant had carnal knowledge against the order of nature of [name withheld], a boy aged twelve years. We shall henceforth refer to the said boy as "the victim" or PW1, the codename by which he testified.

The victim was a pupil at Mwangaza Primary School. According to one of his teachers, Hadija Makuru (PW2), he became at the material time frequently tardy to school as well as lazy and drowsy in class. As a result, his academic performance took a downward spiral. This worrying state of affairs raised eyebrows to his teachers and eventually the Vice Chairman of the School's Committee, PW2 Juma Salum Tetere. Upon being interrogated on the matter, the victim disclosed to them that, on more than ten occasions, the appellant intercepted him on his way to school and then took him to his home or a hideout where he sodomized him. He mentioned his classmate [name withheld] as another victim of the appellant.

The school's leadership called the victim's mother (PW4) to school and apprised her of the distressing revelation. Along with her son, PW2 and PW3, they went to Chang'ombe Police Station. They lodged a formal complaint against the appellant and had a request for medical examination (PF3) issued. On the following day, the victim was taken

to the Temeke District Hospital where PW5 Stanley Lwiza, an Assistant Medical Officer, examined him. According to the medic's findings documented in the PF3 (Exhibit P1), the victim exhibited enlarged rectal/sphincter muscles indicating that his anus had been repeatedly penetrated by a blunt object.

The appellant's defence was essentially a denial of the accusation against him, saying that the charge was a frame up. He admitted to have been frequenting the victim's school but only for overseeing the academic progress of his nephew, a certain Hussein, at the school. He also disclosed to have been following up the progress of the victim's classmate but only as a good Samaritan.

The trial court (Hon. Mwaikambo – RM) believed the prosecution's version of the events, rejected the defence evidence and held that the charged offence was sufficiently proved. Accordingly, he convicted and sentenced the appellant as alluded to earlier. As stated earlier, the appellant's first appeal went unrewarded as the High Court (Kulita, J.) upheld the conviction and sentence.

The appeal rests on four grounds of grievance as follows: **one**, that the alleged victim stated in the charge sheet did not testify at the trial. **Two**, that the conviction was predicated on conflicting provisions

of the Penal Code. **Three**, that there was a variance between the charge sheet and the evidence on record on the victim's age. **Finally**, that the prosecution case was not proven beyond peradventure.

We heard the appeal on 4th July, 2022. Before us, the appellant, who was self-represented, simply urged us to allow his appeal and rested his case.

Through the services of Mr. Genes Tesha and Ms. Rachel Balilemwa, learned Senior State Attorneys, the respondent sturdily opposed the appeal.

The appellant contends on the first ground of appeal that the alleged victim of the crime as stated in the charge sheet was not called to testify in support of the prosecution case. We hasten to say, as we must, that this complaint was fully answered by Mr. Tesha. That, while it is on record that the boy named as the victim in the original charge sheet dated 19th August, 2016 was not produced as a prosecution witness, the said charge sheet was substituted on 27th September, 2016 and replaced by a new one intended to correct the name of the victim. The said victim as stated in the new charge sheet appeared at the trial and testified as the first prosecution witness (PW1) on 9th March, 2017,

as shown at pages 12 and 13 of the record of appeal. In the premises, the first ground fails.

The complaint in the second ground of appeal is equally beside the point. As rightly argued by Mr. Tesha, it is evident that the charged offence was properly laid under section 154 (1) (a) and (2) of the Penal Code. While subsection (1) (a) of the above section is the proper provision for charging a person accused of having carnal knowledge of another person against the order of nature, subsection (2) enacts life imprisonment as the mandatory penalty where unnatural offence is committed to a child under the age of eighteen years as was alleged in the instant case.

Turning to the third ground of appeal, Mr. Tesha, at first, conceded that there was somewhat a variance between the charge sheet and the evidence on record on the victim's age. However, he hastened to submit that the variance was not prejudicial to the appellant because by all accounts the victim's age was below eighteen at the time of commission of the offence. Citing our decision in **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported), he contended further that the court could infer the existence of any fact

including the age of the victim on the authority of section 122 of the Evidence Act ("the Evidence Act"), which reads thus:

> *"A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

We agree with the appellant and the learned Senior State Counsel that while the charge sheet stated that the victim was a twelve year-old boy at the time the alleged offence was committed to him (between January and July, 2016), it is in the evidence that the victim mentioned his age as fifteen years when he testified on 9th March, 2017 and that his mother (PW4) testified later on 4th July, 2017 that he was fourteen years old. Moreover, whereas PW2 put the victim's age at twelve years, the medic (PW5) recorded on the PF3 (Exhibit P1) that he was thirteen years old on 28th July, 2016 when he attended him. However, whether the victim was aged twelve or thirteen or fourteen years at the material time, the variance complained of, as rightly argued by the Mr. Tesha, was not prejudicial to the appellant; the victim's age was certainly not an ingredient of the charged offence. It could not be fatal to the impugned conviction.

We are mindful, as hinted earlier, that the victim's age had to be proved, in terms of section 154 (2) of the Penal Code, for the purpose of levying the mandatory life imprisonment. Despite the apparent contradictions in the evidence on the age of the victim, we agree with Mr. Tesha that what was common in the testimonial and documentary evidence on record is that the victim was a boy aged below eighteen years. In the premises, the disparities in question had no deleterious effect to the sentence of life imprisonment that ought to have been imposed in the circumstances of this case because by all accounts the victim's age was below eighteen at the time of commission of the offence.

Next, we deal with the issue whether the prosecution case was proved beyond reasonable doubt.

We should, at first, state that the gravamen of the charged offence was that the appellant had carnal knowledge of the victim against the order of nature. In other words, the prosecution had to establish that the appellant caused his male member to penetrate the victim's anal orifice, however slight the penetration might have been.

It is on record that PW1 gave an explicit, spontaneous and coherent account of what the appellant did to him after he had

intercepted him on his way to school and taken him to his home or a hideout. He undressed and sodomized him, at least, on ten occasions. Tellingly, the victim described the appellant's manhood as long and thick. The appellant would then take him to school and plead with his teachers to excuse him for his tardiness. We find it significant that PW1's evidence was not materially challenged in cross-examination. Settled is the principle that the best proof of any other sexual offence must come from the complainant whose evidence, if credible, convincing and consistent with human nature as well as the ordinary course of things can be acted upon singly as the basis of conviction – see, for instance, **Selemani Makumba v. Republic** [2006] TLR 379; see also section 127 (6) of the Evidence Act. In the instant case, the courts below appraised the victim's evidence and gave him full weight and credence. There is no sign that the said courts misapprehended the evidence for us to interfere with their concurrent findings.

Moreover, the medical evidence, adduced by PW5 and supported by report (Exhibit P1), pertinently corroborated PW2's testimony. The finding that the victim's anus exhibited enlarged rectal or sphincter muscles indicating that his anus had been repeatedly penetrated by a blunt object was consistent with the victim's version that he was sodomized repeatedly by the appellant.

The appellant's defence of general denial of liability coupled with the claim that he was acting as a good Samaritan when he was escorting pupils to the school so as to superintend their academic progress could not introduce any doubt in the prosecution case. It was rightly rejected by the courts below. Accordingly, the fourth ground of appeal falls apart.

Finally, we turn to the legality of the sentence imposed on the appellant by the trial court. Addressing us on this issue, the appellant appeared resigned to the fate that the original punishment on him would be enhanced once his appeal failed. On his part, Mr. Tesha submitted that the sentence was illegal given the age of the victim. He thus urged us to correct the anomaly by invoking our revisional power accordingly.

As hinted earlier, the punishment that ought to have been imposed on the appellant, given the tender age of the victim, was life imprisonment in terms of section 154 (2) of the Penal Code. The sentence imposed by the trial court was manifestly illegal but it escaped the attention of the first appellate court. As urged by the learned Senior State Attorney, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act and proceed to set aside the thirty years'

imprisonment in lieu of which we impose the mandatory life imprisonment.

For the reasons we have given, we find no merit in the appeal, which we hereby dismiss.

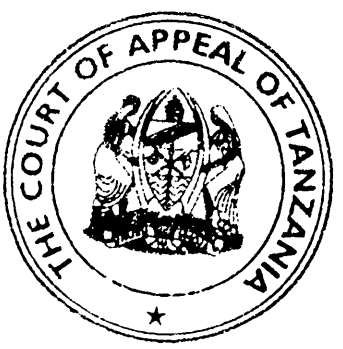
DATED at **DAR ES SALAAM** this 13th day of July, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 14th day of July, 2022 in the presence of appellant in person (via video from Ukonga Prison) and Ms. Cecy Mkonongo, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL