IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: NDIKA, J.A., KITUSI, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 332 OF 2019

ELIBARIKI NAFTAL MCHOMVU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 2nd day of August, 2019

in

DC. Criminal Appeal No. 8 of 2019

JUDGMENT OF THE COURT

30th September & 5th October, 2022

NDIKA, J.A.:

The District Court of Mwanga at Mwanga convicted the appellant, Elibariki Naftal Mchomvu, of unnatural offence and sentenced him to thirty years' imprisonment. His appeal to the High Court of Tanzania at Moshi against the conviction and sentence brought no solace but misery. Apart from dismissing the appeal, Mkapa, J. enhanced the sentence to life imprisonment, hence this appeal.

The prosecution alleged that on 31st July, 2017 at or about 11:00 hours at Chomvu village within Mwanga in Kilimanjaro Region, the appellant had carnal knowledge of a boy against the order of nature. For

the sake of protecting the alleged victim's privacy we shall refer to him anonymously as "the complainant."

The prosecution case mainly rested on the complainant's testimony made on oath. The complainant was a nine-year-old standard three pupil at Chomvu Primary School in Chomvu village and the appellant was his Mathematics teacher. It was the complainant's testimony that when he was attending a call of nature in a toilet at the school around 11:00 hours on 31st July, 2017, the appellant got into the same toilet, clutched him and muffled his possible screams by covering his mouth by his hand. There and then, he removed the complainant's shorts, bent him over and poked him with his penis in his anus. The complainant suffered a rapture of his perineum during the repulsive act whereupon the appellant withdrew his penis and told the complainant to put on his shorts and go home. The complainant testified further that:

> *"I [walked] home slowly as I was in pain, and I was bleeding. The accused told me if I [say] that he had penetrated me with his penis he will kill me, and that I should only say that I had fallen. When the accused was penetrating me, I was bent [over], I was able to see him clearly."*

Fearing reprisal from the appellant, the complainant lied to his grandmother (PW1) and one of his friends that he got injured from a fall.

PW1 suspected foul play after she had examined her grandson's injury. She took him that day to Ndorwe Dispensary and later to Usangi District Hospital where he was admitted. A few days thereafter, while still in deep pain, the complainant revealed what he suffered at the hands of the appellant. The matter was then reported to the police at Mwanga and the school administration on 14th August, 2017.

Dr. Tumaini Ndibwire (PW3) examined the complainant at the hospital and posted his findings in a medical report dated 17th August, 2017 (Exhibit P1). He found a *"healing tear"* on the complainant's anus which was *"consistent with something which forcefully penetrated the anus."* According to the police investigator, WP.3299 Detective Corporal Fatuma (PW4), the appellant was swiftly arrested at the school after the medical findings were revealed to the police.

The appellant admitted that the complainant was one of his pupils but denied having sodomised him. He conjectured that the complainant lied against him due to his guardians' grudges against him.

The trial court (Hon. M.B. Lusewa – SRM) believed the complainant's version and found that he was, indeed, sodomised and his evidence on that aspect was corroborated by the medical evidence presented by PW3 and unveiled by Exhibit P1. Moreover, the court accepted and relied upon the complainant's evidence that the appellant was the perpetrator of the

crime. As hinted earlier, the High Court, on the first appeal, upheld the conviction but enhanced the sentence to life imprisonment in terms of section 154 (2) of the Penal Code ("the Code").

The appeal was predicated on twelve grounds of appeal lodged through an original memorandum of appeal and two supplementary memoranda of appeal, which we condensed into the following complaints: **one**, that the charge sheet was incurably defective. **Two**, that the trial was unfair for non-compliance with section 9 (3) of the Criminal Procedure Act ("the CPA"). **Three**, that the trial violated section 231 of the CPA. **Four**, that the complainant's evidence was received in violation of section 127 (2) and (3) of the Evidence Act ("the EA"). **Five**, that the prosecution case was founded on contradictory evidence, hence the charge was not proven beyond reasonable doubt. **Finally**, that the enhanced sentence was illegal.

At the hearing of the appeal, the appellant, who was self-represented, presented oral and written submissions amplifying his grounds of appeal. However, he abandoned the third ground of appeal.

Appearing for the respondent, Ms. Verediana Mlenza, learned Senior State Attorney, and Ms. Sabitina Mcharo, learned State Attorney, resolutely opposed the appeal.

We begin with the first ground, which has two limbs. In the first limb, it was the appellant's contention, based on **Godfrey Simon & Another v. Republic**, Criminal Appeal No. 296 of 2018 (unreported), that the charge was fatally deficient in the statement of the offence in that it was predicated on section 154 (1) (a) of the Code without explicitly citing section 154 (2) of the Code as the applicable punishment provision. We interpose to note that whereas subsection (1) of section 154 enacts the minimum penalty of thirty years' imprisonment and life imprisonment as the maximum punishment for unnatural offence, subsection (2) of that section imposes life imprisonment as the mandatory punishment if the offence is committed to a victim under the age of eighteen years.

As regards the second limb, the appellant argued that the charge was bad for not disclosing the age of the victim in the particulars of the offence. He bemoaned that the two defects prejudiced him in preparation of his defence and that they caused a miscarriage of justice because he did not fully appreciate the nature of the offence facing him. Reliance was also placed on **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387; **Shabani Masawila v. Republic**, Criminal Appeal No. 358 of 2008; **Frank Saul Mushi v. Republic**, Criminal Appeal No. 250 of 2016; **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017; **Peter Shangwea**

v. Republic, Criminal Appeal No. 282 of 2015; and **John Mkorongo James v. Republic**, Criminal Appeal No. 498 of 2020 (all unreported).

Responding, Ms. Mlenza conceded the two omissions but argued that they were not fatal because the particulars of the offence and the evidence adduced at the trial fully informed the appellant of the charged offence. To bolster her position, she cited **Kubezya John v. Republic**, Criminal Appeal No. 488 of 2015 (unreported) wherein the Court, following its earlier decision in **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 2017 (unreported), held that where a certain fact does not come out clearly in the charge, it can be deduced from the testimonies of witnesses. Relying on **Abdul Mohamed Namwanga @ Madodo v. Republic**, Criminal Appeal No. 257 of 2020 (unreported), the learned Senior State Attorney argued further that, in the first place, the citation of the punishment provision in the charge is not a statutory imperative but a matter of practice. Accordingly, she urged us to hold the defects curable under section 388 of the CPA.

We agree with Ms. Mlenza that the defects complained of are trifling and that they are curable under section 388 of the CPA. In **Abdul Mohamed Namwanga** (*supra*), where we dealt with a case involving wrong citation of the punishment provision, we concluded, after a review of various decisions on the applicable statutory provisions, that:

> *"... it is our view that the citation of wrong penalty provision In the statement of offence in the instant case was not a violation of any express provision of the governing law, that is the CPA, but a necessity born out of laudable practice and caselaw. Even if it were so, it would still be curable under section 388 of the CPA as we are unpersuaded that the appellant in the instant case was prejudiced or embarrassed in preparing and mounting his defence. Nor is it discernible that a failure of justice was occasioned because the punishment which was ultimately imposed on him was levied in terms of the law as the mandatory penalty."*

We entertain no doubt that the above holding would apply to appeals involving non-citation of punishment provisions in the charges.

In **Abdul Mohamed Namwanga** (*supra*) we cited our previous decisions in which we held that such an omission was inconsequential and curable: **Burton Mwipabilege v. Republic**, Criminal Appeal No. 200 of 2009; **Jafari Salum @ Kikoti v. Republic**, Criminal Appeal No. 370 of 2017; **Paul Juma Daniel v. Republic**, Criminal Appeal No. 200 of 2017; and **Juma Hassan v. Republic**, Criminal Appeal No. 458 of 2019 (all unreported). In **Burton Mwipabilege** (*supra*), for instance, we held that:

"... this is curable under section 388 of the CPA, because the irregularity has not, in our view, occasioned a failure of justice."

Similarly, in **Jafari Salum @ Kikoti** (*supra*), where we followed our position in **Burton Mwipabilege** (*supra*), we extracted from the decision of the erstwhile Court of Appeal for Eastern Africa in **R v. Ngidipe Bin Kapirama & Others** (1939) 6 EACA 118 and applied the following holding:

"An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has not otherwise been a failure of justice."

More recently in **Jamali Ally** (*supra*), the Court held that:

"... we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 of the CPA."

It bears restating, in the instant case, that non-citation or wrong citation of a punishment provision in the statement of the offence is not a violation of any express provision of the CPA. If anything, it is a deviation from the laudable practice and caselaw encouraging or indorsing the citation of applicable penalty provision in the statement of the offence. Even if the omission complained of were a contravention of the CPA, it

would still be curable under section 388 of the CPA as we are unpersuaded that the appellant was prejudiced or embarrassed in preparing and mounting his defence.

We also uphold Ms. Mlenza's submission on the omission to state the complainant's age in the particulars of the offence. This gap was equally innocuous. Following our decision in **Kubezya John** (*supra*), we are satisfied that the omitted detail came out clearly in the testimonies of the complainant, his grandmother (PW1) and the medic (PW3) and that it was also unveiled by Exhibit P1. We also cannot help but wonder why the appellant is making a mountain out of a molehill over the complainant's age. The boy was his pupil at the school. He must have known his age very well. More significantly, he did not dispute his age at the trial. We, therefore, find no merit in the first ground of appeal.

Next, we deal with the alleged violation of section 9 (3) of the CPA. We note that this issue was raised on the first appeal, but it was dismissed. The appellant's argument was that he was not served with a copy of the complainant's statement made to the police in violation of the aforesaid provision. He claimed that this violation resulted into a miscarriage of justice.

On her part, Ms. Mlenza conceded the omission but refuted that it caused any injustice. She argued that the appellant did not specifically

request for the statement and that he was present when the complainant gave evidence and had an opportunity to cross-examine him. She bolstered her stance by citing **Abdallah Seif v. Republic**, Criminal Appeal No. 122 of 2020 (unreported).

Admittedly, section 9 (3) of the CPA stipulates the requirement for the trial magistrate to cause the information given by a complainant to the police on the commission of the charged offence to be given to the accused if the said complainant is named as a witness. For clarity, we extract the said provisions:

> *"**9.**-(3) Where in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and of any statement made by him under subsection (3) of section 10, to be furnished to the accused forthwith."*

In the instant case, it has been conceded that the trial magistrate did not cause a copy of the information or statement to be given to the appellant. As we stated in **Abdallah Seif** (*supra*), the accused's entitlement to such information or statement enshrined in section 9 (3) of the CPA is one of the key tenets of fair trial. Nonetheless, in this case it

has not been demonstrated that the omission caused the appellant any injustice. We agree with Ms. Mlenza that he utilised fully the opportunity to cross-examine the complainant as well as other witnesses, which suggests that he was able to marshal a formidable defence despite not having been served with a copy of the complainant's statement. Accordingly, we hold that the error did not occasion any failure of justice justifying our interference. It is, therefore, curable under section 388 of the CPA. On that basis, the second ground of appeal is bereft of merit. We dismiss it.

We now turn to the complaint in the fourth ground; that the complainant's evidence was wrongly received.

The appellant protested that the testimony of the complainant, a child of tender age, was received in contravention of section 127 (2) of the EA as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016, Act No. 9 of 2016. The trial court, he argued, did not inquire into the intelligence of the witness and his understanding of the duty to speak the truth before he took the witness stand. Relying upon our decisions in **John Mkorongo James** (*supra*); **Mussa Ali Ramadhan v. Republic**, Criminal Appeal No. 426 of 2021; and **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (both

unreported), he claimed that the omission was fatal to the prosecution case and urged us to expunge the complainant's evidence.

Ms. Mlenza disagreed with the appellant. Citing **Issa Salum Nambaluka** (*supra*), she posited that a witness of tender age is permitted under section 127 (2) of the EA to give evidence on oath or affirmation or without oath or affirmation but that if evidence is given without oath or affirmation the witness must promise to tell the truth and undertake to tell no lies. Referring to page 9 of the record of appeal, she submitted that the trial court received the complainant's testimony on oath after it had satisfied itself that the said witness understood the nature of oath.

Section 127 (2) of the EA, as amended, is inevitably the focus of our attention. It enacts that:

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

We hasten to observe that the learned Senior State Attorney's exposition of the above provision is quite correct. In **Issa Salum Nambaluka** (*supra*), we interpreted that provision to the effect that it permits a child of tender age, that is, a child whose apparent age is not

more that fourteen years, to give evidence on oath or affirmation or to testify without oath or affirmation but upon promising to tell the truth, not lies. More importantly, we held thus:

> *"It is for this reason that in the case of* ***Godfrey Wilson v. Republic****, Criminal Appeal No. 168 of 2018 (unreported), we stated that, where a witness is a child of tender age, a trial court should at the foremost,* ***ask a few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness****. If such child does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not to tell lies."* [Emphasis added]

The record is loud and clear that the trial court inquired into the complainant's understanding of the nature of oath by putting to him a few incisive questions. From that inquiry, it concluded that the witness *"understands the nature of oath and the duty to speak the truth."* Unmistakably, the trial court applied the procedure correctly and that the

complainant's testimony was properly received on oath. Consequently, the fourth ground of appeal fails.

We are enjoined by the fifth ground to interrogate the contention that the charge was not proven beyond reasonable doubt.

The appellant's argument on the issue at hand was manifold. First, that the prosecution case was founded on contradictory and unreliable evidence. Secondly, that Exhibit P1 was wrongly relied upon contrary to the guidance in **Robinson Mwanjisi v. Republic** [2002] T.L.R. 218. Thirdly, that there was a material variance between charge sheet and the evidence on the location of the scene of the crime. That, while the charge sheet cited Chomvu village as the scene, Chomvu Primary School was unveiled in the evidence as the locale of the crime. The appellant referred to **Godfrey Simon** (*supra*) for the proposition that wherever there is a variation between the charge and the evidence on the location of the scene of the crime, the charge must be amended in accordance with section 234 (1) of the CPA to accommodate the prevailing circumstances of the case.

Ms. Mlenza had a different position. She submitted that the prosecution sufficiently established, upon the testimonies of the complainant and PW1 as well as the medical evidence adduced by PW3 and displayed by Exhibit P1, that the complainant was carnally known

against the order of nature and that the complainant named the appellant as the culprit. She also submitted that Exhibit P1 was rightly admitted and relied upon by the trial court and that it did not matter whether the scene of the crime was Chomvu village or Chomvu Primary School.

At the outset, we agree with the learned Senior State Attorney that Exhibit P1 was rightly admitted and acted upon. It is on record that the said document was properly admitted, and its contents unveiled in detail by PW3.

The complaint concerning the scene of the crime is equally beside the point. Both the complainant and PW1 clearly stated that they were living in Chomvu village but that the perveted act on the complainant was committed in a toilet at Chomvu Primary School. In our view, this is not a material variance that called for the alteration and perfection of the charge. The scenario in **Godfrey Simon** (*supra*) is different from the instant case. In that case, the places as mentioned in the charge sheet and revealed in the evidence appeared to be different locations while in the present case the crime scene at Chomvu Primary School was established to be lying within the precincts of Chomvu village.

As to whether the charged offence was proved to the required standard, we would, at first, underline that the prosecution had to

establish that there was penetration into the complainant's anus and that the perpetrator of that depraved act was the appellant.

Having examined the testimonies of the complainant, PW1 and PW3 as well as Exhibit P1 in the light of the concurrent findings of the courts below, we are satisfied that it was sufficiently proven that the complainant was sodomised on the material day. Apart from his evidence having not been controverted by the appellant in cross-examination, it was supported by the impeccable evidence of PW3 and reinforced by the medical report (Exhibit P1) that the complainant had a *"healing tear"* on his anus, which was *"consistent with something which forcefully penetrated the anus."*

The courts below found the complainant's evidence uncontroverted, credible, and reliable. They were both satisfied, upon that evidence, that the appellant was the ravisher who abused the complainant. On our part, we see no reason for the little boy lying against the appellant, who happened to be his mathematics teacher. Admittedly, the complainant delayed in reporting the incident for close to two weeks. But the delay is attributable to immaturity of the complainant and fear of reprisal from the appellant. As we held in **Selemani Hassani v. Republic**, Criminal Appeal No. 203 of 2021 (unreported), delay in reporting an incident of sexual offence due to fear of reprisal or shame does not affect the credibility of the complainant. The charge of a sexual offence is not

undermined by the silence of the complainant if such silence is fully explained.

As indicated earlier, the appellant interjected the defence of general denial and suggested that the charge might have been a result of the grudges the complainant's guardians had against him. Apart from this line of defence being generally self-serving and weak, the claim that the charge was fabricated was not raised in cross-examination of the complainant and PW1. The claim was plainly an afterthought. The courts below rightly rejected the defence upon due consideration. Consequently, we find the fifth ground of appeal unjustified as we are satisfied that the charged offence was proven beyond reasonable doubt.

Turning to the final issue on the legality and propriety of the enhanced sentence, we note that the appellant's grievance against the sentence was premised on the alleged invalidity of the charge for non-citation of the punishment provision and non-disclosure of the victim's age. On that basis, he argued that it was not open to the first appellate court to enhance the sentence. This argument is plainly misconceived, and we reject it. We have already held that the charge was proper, and that the appellant was rightly convicted on it.

Given that it is in the evidence that complainant was a nine-year-old boy at the material time, hence a child under the age of eighteen

years, the first appellate court rightly intervened and enhanced the sentence to mandatory life imprisonment in consonance with the dictates of section 154 (2) of the Code. We find no merit in the complaint and proceed to uphold the enhanced sentence.

The upshot of the matter is that we hold that the appeal is unmerited. We dismiss it in its entirety.

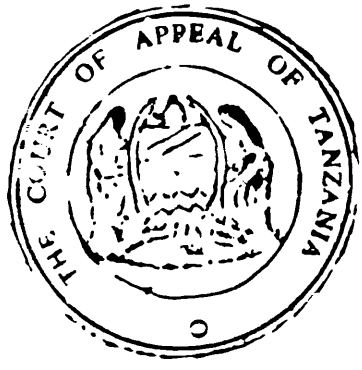
DATED at **MOSHI** this 4th day of October, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 5th day of October, 2022 in the presence of the Appellant in person and Ms. Sabitina Mcharo, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
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