IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 291 OF 2019

TUNGU NGASSA @ MWASHI TUNGU .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kibella, J.)

dated the 29th day of May, 2019
in
DC Criminal Appeal No. 22 of 2017

JUDGMENT OF THE COURT

26th October & 1st November, 2022

KENTE, J.A.:

The appellant Tungu Ngasa @ Mwashi Tungu was tried and convicted by the District Court of Shinyanga of an unnatural offence contrary to section 154(1)(a) of the Penal Code, Chapter 16 of the Laws of Tanzania. He was subsequently sentenced to the mandatory custodial sentence of life imprisonment. The alleged offence was committed on 8th February, 2016 at Magunguli area within the Municipality of Shinyanga. Dissatisfied with

both the conviction and sentence, the appellant vainly appealed to the High Court of Tanzania, (sitting at Shinyanga), which dismissed the appeal in its entirety. With untiring perseverance, he has now appealed to this Court to challenge the decision of the High Court.

Evidence led in support of the prosecution case tended to show that, on the fateful day, the appellant took a seven year old youngboy (whose name we shall hereinafter not disclose but simply refer to as either "the victim," or "PW2") to his farm on a bird hunting mission. While there, he went on to have carnal intercourse with him against the order of nature. The evidence of another youngboy Cosmas Kenneth (PW3) who happened to pass-by showed that, he saw the appellant in the course of sodomizing the victim and, having realized that the appellant had not see him, he quickly went to notify the victim's parents.

The first person to be informed was Helena Shija (PW1), the victim's mother. Agitated and emotionally confused by what she had been told by PW3, but without losing the gesture of motherly love, she promptly went to the scene of the crime only to find the appellant still in the act of sexually molesting, her son. On seeing her and knowing the obvious danger which

was imminent, the appellant is said to have released the victim presumably without saying a word, and gone away. However, unfortunately for him, not long afterwards, he was traced and arrested not far from the scene.

On being taken into custody, the appellant was handed over to the members of the traditional vigilante group popularly known as "sungusungu", who took him to the Central Police Station at Shinyanga thereby allowing the law enforcement process to take its course. Assistant Inspector Owen (PW5) recorded the appellant's cautioned statement (Exh. P2) which was however expunged from the record by the first appellate court for having been recorded out of the prescribed four hours period after the appellant was taken into restraint. Meanwhile, the victim was referred to Shinyanga Government Hospital where he was examined by one Doctor Hurbent George (PW4) whose oral testimony showed that his anus exhibited some bruises and watery substance with all signs of anal penetration. On the basis of all this evidence, the appellant was charged in court and subsequently convicted as hereinbefore alluded to.

The appellant's defence was that, on 7th February, 2016 he was at his farm hunting birds. He further testified that, in the course of the said

hunting, the victim's mother (PW1) whom he simply referred to as "Mama Charles" went to his farm and accused him of encroachment on her land, a thing which however, was not true. The appellant recounted that, after he denied the accusations levelled against him by the victim's mother, she vowed that she would show him who she was. He went on to tell the trial court that, PW1 must have kept her word as on the following day, he was arrested and whisked to the Police Station where he was detained and later on formally charged in court upon false accusations of having sodomised her son. He challenged the evidence of PW4 for allegedly contradicting the evidence given by the victim's mother on the question as to whether or not the victim was sodomized. All in all, he was emphatic that the charge against him was not proved to the required standard and that, he was a victim of a frame up merely because of the existing dispute between him and PW1.

Rejecting the appellant's story that the charge against him was a set-up, the two courts below were of the concurrent view that, there was overwhelming evidence leading to the conclusion that he was found in the midst of sodomizing the victim. For his part, the learned judge of the first appellate court was satisfied that, apart from the evidence given by the

victim himself, PW1 had eyewitnessed her son's molestation. Answering the question as to whether the complainant was carnally known against the order of nature, the learned judge of the first appellate court was satisfied by the oral testimony given by PW4 who told the trial court, amongst other things that, despite the absence of spermatozoa, there was a sign of penetration into the victim's anus.

Regarding the identity of the culprit, the learned judge was of the settled view that, if the evidence of the victim regarding the identity of his molester required any corroboration, then the evidence of his mother (PW1) who saw and identified the appellant in the act of sodomizing her son was forthcoming to render the required corroboration. Based on the evidence of PW1, PW2 and PW4, like the trial magistrate, the learned judge of the first appellate court was satisfied that the appellant's guilt was demonstrated beyond reasonable doubt and his conviction and sentence were well deserved as not to be faulted.

Upon dismissal of his appeal to the High Court, the appellant has appealed to this Court advancing the following grounds; that:

1. *The first appellate court had erred in law in upholding the appellant's conviction and sentence in the absence of sufficient evidence to prove penetration;*
2. *The first appellate court had erred in law in upholding the appellant's conviction by the trial court which was based on an unspecified provision of the Penal Code; and*
3. *The two courts below had misapprehended the nature and quality of the prosecution evidence which did not prove the charge beyond reasonable doubt;*

When we invited the appellant to expound on the above paraphrased three grounds of appeal, being a layman, fending for himself and apparently being illiterate, he had nothing meaningful to say. He only adopted the said grounds which he said were plausible and remained steadfast on his sole contention that the charge was a frame up. He urged that the appeal should be allowed so as to pave the way for him to be set free and go back home to take care of his senile mother and children who are right on their beam ends, frequently sick and starving.

On behalf of the respondent Republic, Ms. Wampumbulya Shani, who appeared along with Mr. Jukael Jairo both learned State Attorneys informed the Court at the very beginning that, she supported the

appellant's conviction and sentence by the trial court and the subsequent dismissal of his appeal by the first appellate court. Regarding the second ground of appeal, she conceded that indeed in his judgment, the trial magistrate did not specifically cite the particular subsections of section 154 of the Penal Code under which the appellant was found guilty and subsequently convicted as required under section 312 (2) of the Criminal Procedure Act, Chapter 20 of the Laws of Tanzania (the CPA). However, the learned State Attorney was quick to submit further that, in any way, the above-stated omission did not prejudice the appellant as the charge which was read to him from top to bottom, had already cited the relevant law and the appellant had gone ahead to defend himself after hearing the evidence led by the prosecution against him. Thus, according to Ms. Shani, the complaint by the appellant on that aspect had no basis as to invalidate the strongly grounded conviction and the sentence meted out on him.

We have followed on one hand the complaint by the appellant and on another hand, the argument by Ms. Shani. But for the reason that there needs to be absolute clarity in our decision, we could have not dwelt much on the second ground of complaint as it is based on a minor omission if not a *lapsus calami.*

It is worth noting at this stage that, whereas it is a legal requirement for the trial judge or magistrate in case of a conviction, to state the offence of which, and the section of the Penal Code or any other law under which the accused person is convicted as stipulated under section 312(2) of the CPA, it occurs to us that indeed the omission by the learned trial magistrate, to do so was not a fatal defect which would have vitiated the trial or the resultant conviction and sentence. On this point, we would quickly agree with Ms. Shani that, indeed, the omission was so minor as to be curable in terms of section 388(1) of the CPA. What is more in the instant case, is the undisputed fact that the provisions of the law under which the appellant stood charged and of which he was subsequently convicted were specified in the charge as correctly submitted by Ms. Shani. To recapitulate, when the charge was read over and explained to the appellant, he was duly notified that he was charged with unnatural offence contrary to section 154(1)(a) of the Penal Code. Therefore, it should be plain beyond argument that, in his judgment, having found the appellant guilty and subsequently convicted him under section 154 of the Penal Code as he put it, the learned trial magistrate did not lose sight and indeed he had in mind the fact that the appellant was all along alleged to have

particularly transgressed the provisions of section 154(1)(a) of the Penal Code.

Given the circumstances, our conclusion must be the same as it was in the case of **Ashiraka Namahala Milias V. Republic,** Criminal Appeal No. 582 OF 2019 (unreported) where we held in a somewhat similar situation that, this is one of the cases in which we are justified in holding that, a conviction against the appellant was entered for the offence he had been charged with and of which he was very much aware. This stance is further reinforced by yet another obvious fact that, even in sentencing the appellant to life imprisonment which was the appropriate sentence prescribed by the law in the circumstances of this case, the trial magistrate had taken into account the mandatory requirements of section 154(2) which he inadvertently cited as section 154(1) (a) of the Penal Code. In view of what we have said in respect of the second ground of appeal, we entirely agree with Ms. Shani that, indeed this ground was raised without any justification. That said, the second ground of appeal is dismissed for lack of merit.

In relation to the first and third grounds of appeal which respectively faulted the first appellate court for allegedly upholding the appellant's conviction and sentence while there was no evidence to prove penetration and for misapprehending the nature and quality of the prosecution evidence which did not prove the charge beyond reasonable doubt, the learned State Attorney submitted conjointly that, the oral testimony of PW4, a doctor who examined the victim, was sufficient to prove penetration and thus the complaint that penetration was not proved, was, without any basis. Notably, Ms. Shani had to resort to the oral testimony of PW4 after she invited us to expunge from the record, a medical examination report (Exh. P1) which was not read out in court after it was admitted in evidence contrary to the mandatory requirements of the law. Without demur, we accept that invitation and hereby expunge the said report from the record.

Regarding the fundamental question as to whether the offence charged was proved to the required standard as to warrant a conviction, the learned State Attorney supported the judgments of the two courts below arguing that, the victim had given direct evidence graphically

explaining how he was sodomised by the appellant at his (appellant's) farm. Ms. Shani strongly argued that, having found that PW2 was a credible and believable witness who was telling nothing but the truth, it was not necessary for his (PW2) evidence to be corroborated. To that end, the learned State Attorney submitted that, the issue of corroboration does not arise because the version of events narrated by the prosecution witnesses were consistent, the crime having been committed in broad daylight by the well-known appellant who was apprehended near the scene of crime. In aid of the foregoing submission, she referred the Court to the case of **Jacob Mayani v. Republic,** Criminal Appeal No. 558 of 2016 (unreported). Still relying on the same decision, the learned State Attorney submitted further that, should the need arise, the testimony of PW1 which was not challenged during cross-examination by the appellant would provide the required corroborating evidence. It is on the strength of the above arguments that, Ms. Shani urged us in the end, to uphold the appellant's conviction and sentence and dismiss this appeal.

We have paid great attention to the first and third grounds of appeal and the details of the submissions made by Ms. Shani. As it will be noted

at once, in arriving at the impugned concurrent decisions, each of the two courts below appears to have placed much reliance on the direct evidence of the victim and his mother who they believed to be credible and reliable witnesses. And when the question of credibility or otherwise of a witness arises, it is settled law that, it is the trial and not the appellate court that the final decision should solely rest with. Put in other words, a credible or not credible witness is the exclusive question for the trial court to determine, and not the appellate court. That is exactly what we amply stated in the case of **Augustino Kaganya & Two Others v. Republic,** [1994] T.L.R 16.

We know that in any case of the present nature, particularly where the identity of the culprit is at issue, the evidence of the victim is paramount. It is for this reason that section 127(6) of the Evidence Act Chapter 6 of the Laws of Tanzania (the Evidence Act), provides in very clear terms that:

> *"Notwithstanding the preceding provisions of this section, where in Criminal Proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the offence, the court*

shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

We have already observed that both the learned trial magistrate and the learned judge of the first appellate court took the same view that, though being a child of tender years, the victim was a credible witness whose evidence was nothing but the truth. So, as a matter of law, even if the evidence of PW2 were to stand alone, it would still support a conviction in terms of section 127(6) of the Evidence Act. That is the correct position of the law in Tanzania. What is more however, in the particular circumstances of the instant case, is the fact that, there was the unchallenged evidence of PW1 which the lower courts treated as being corroborative. We feel obliged to observe here that, during the trial, the appellant did not cross-examine PW1 neither on her evidence that she found him in the midst of molesting her son nor on his contention that the

charge was a frame up because of the existing land dispute between him and her. It must be recalled that, it is a settled principle of cross-examination popularly referred to as "the rule in **Browne v. Dunn**" in common law jurisdictions like ours that, failure to cross-examine a witness on a particular area of his evidence, is deemed to be an acceptance of that part of his evidence. Needless to say, the above-stated rule has been cited with approval by this Court in its various decisions (See **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported).

For our part, we are of the firm view that, once the evidence of the victim was believed to be true and there being the additional independent evidence of his mother which was not controverted, we can find no justification whatsoever to interfere with the concurrent findings of fact by the two lower courts that the victim was sexually molested and the molester was none other than the appellant. We can even push this argument further and find that, the appellant's defence version that the charge had been framed because of the land dispute between him and

PW1 was a fiction which was intended to create an illusion of vengeance. Like the two lower courts, we reject it. Taking all the circumstances into account, we are satisfied that the appellant was properly convicted and sentenced.

All said and done, we find no merit in this appeal which we hereby dismiss in its entirety.

DATED at **SHINYANGA** this 31st day of October, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 1st day of November, 2022 in the presence for the Appellant in person and Mr. Shaban Mwegole, learned Senior State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL