IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 327 OF 2019

ALLEN FRANCIS .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Mwenempazi, J.)

dated the 14th day of May, 2019

in

Criminal Appeal No. 54 of 2018

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JUDGMENT OF THE COURT

3rd & 26th October, 2022

MWANDAMBO, J.A.:

Before the Resident Magistrate's Court of Arusha at Arusha, the appellant, Allen Francis stood charged with unnatural offence involving a boy of tender age. The particulars of the offence preferred under section 154 (1) (b) of the Penal Code alleged that on 13/01/2015, at Esso Area within the city and Region of Arusha, the appellant had carnal knowledge of a nine - year boy old against the order of nature. We shall henceforth be referring to him as the victim or PW2 to conceal his true identity. The appellant pleaded not guilty despite which, the trial court found him guilty at the conclusion of the trial upon being satisfied that

the evidence of the prosecution proved the case against him, on the required standard followed by a conviction and the appropriate sentence; life imprisonment. His appeal to the High Court was dismissed resulting in the instant appeal before the Court.

The tale behind the appellant's arraignment and his ultimate conviction is told by two witnesses for the prosecution; Sauda Ramadhani, the victim's mother and the victim respectively testifying as PW1 and PW2. It was common ground that PW2 was a school boy in Standard IV at Unga Limited Primary School which happened to be close to the appellant's place of work and residence. It was equally common ground that the appellant was known to PW2 as a carpenter working around the school.

The appellant's arrest and arraignment was triggered by information relayed to PW1 by a school chairman who intercepted the appellant sticking around the street during school hours in suspicious circumstances. PW1 reported the matter to the police who arrested the appellant at his home where the victim had claimed that he was sodomised for three consecutive days.

PW2 gave unsworn testimony after the trial court had satisfied itself that although he possessed sufficient intelligence and knew the duty to speak the truth, the victim did not know the meaning of oath. It did so after conducting a *voir dire* test in accordance with section 127 (2) of the Evidence Act prior to its amendment vide Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 which came into force on 08/07/2016. PW2 had it that, on 13/01/2015 during lunch time, the appellant spotted him around the school and requested him to buy some doughnuts and oil from a nearby kiosk. Moments later, the appellant summoned PW2 to his house in a bedroom where he peeled off the victim's clothes and smeared oil on his anus and later did alike with the oil on his penis after he had undressed himself and soon had carnal knowledge of the victim. After he had finished, he gave the victim TZS 500/= before he left. The appellant was said to have repeated the act for two more days before his arrest in connection with the offence.

The appellant denied any involvement in the offence attributing his arrest with malice by one of his neighbours who had grudges with him. Besides, the appellant had it that he could not have done the act to the victim as he had a broken hand covered by a P.O.P. Nevertheless, the trial court treated this defence as an afterthought which did not shake

the prosecution case. It believed PW2's version that, notwithstanding the appellant's broken hand covered with a P.O.P, he was able to put PW2 in his control and covered his mouth with a huge blanket to prevent him from making noise.

In the aftermath, the appellant was found guilty, convicted and sentenced to life imprisonment. His first appeal was premised on four grievances all boiling down to the general complaint that the trial court wrongly convicted him on insufficient evidence which did not prove the charge beyond reasonable doubt.

The instant appeal is predicated upon four grounds in a memorandum of appeal lodged on 22/10/2019 and seven grounds in a supplementary memorandum lodged on 28/09/2022. Upon closer examination, the grounds boil down to three clusters of complaints faulting the first appellate court for; one, sustaining conviction and sentence predicated upon a defective charge which did not disclose the place where the charged offence was committed; two, failing to re-evaluate evidence on record and failure to consider defence evidence; and three, grounding conviction upon weak and insufficient evidence which did not prove the charge beyond reasonable doubt.

The appellant appeared in person, unrepresented at the hearing of the appeal. His complaint on the ground regarding defect in the charge sheet, subject of ground one in the memorandum of appeal and five in the supplementary memorandum was that, as the statement of offence cited section 154 (1) (b) of the Penal Code which relates to carnal knowledge of animals, the charge grounding his conviction could not stand without it being amended under section 234 of the Criminal Procedure Act (the CPA). To reinforce his argument, the appellant called to his aid our unreported decision in **Godfrey Simon v. Republic**, Criminal Appeal No. 296 of 2018 for the proposition that the omission to cite a punishment provision in a charge sheet is fatal to the trial unless amended in the course of the hearing in terms of section 234 (1) of the CPA. On the other hand, the appellant contended that in so far as there are three places linked to Esso Area specified in the charge sheet, the charge was irregular for not disclosing the specific area out of the three places where the offence was committed.

Ms. Agnes Hyera, learned Senior State Attorney appeared for the respondent Republic resisting the appeal. She was assisted by Ms. Adelaide Kassala, learned Senior State Attorney together with Ms. Naomi Mollel, learned State Attorney. Ms. Hyera readily conceded the defect in

the charge sheet citing section 154 (1) (a) and (b) of the Penal Code. She attributed the defect to a slip of the pen which went undetected all the way to the time of conviction contrary to the particulars in the charge sheet and the evidence showing that the unnatural offence was committed against a human being rather than an animal which is what is all about with section 154 (1) (b) of the Penal Code. Nonetheless, the learned Senior State Attorney argued that, as there is no legal requirement to insert a punishment section in a charge sheet, neither the insertion of a wrong section nor the omission to cite the correct one was fatal to the charge and the trial. Ms. Hyera brought to her aid our decision in **Abdul Mohamed Namwanga @ Madodo v. Republic**, Criminal Appeal No. 257 of 2020 (unreported) underscoring the key requirements for framing charges in terms of section 132 and 135 of the CPA.

Having considered the competing arguments in line with the authorities placed before us, we agree with the appellant that, the insertion of para (b) in section 154 (1) of the Penal Code was patently wrong because it relates to an offence quite unrelated to the particulars of the offence the appellant was charged with. All the same, we do not agree with the appellant that the insertion of para (b) rendered the

charge defective. As rightly submitted by Ms. Hyera, the insertion was inconsequential. In our view, it would have been a different thing altogether had para (a) in that section not been cited creating unnatural offence in line with the particulars of the offence. The insertion of para (b) intended to be the punishment provision instead of subsection (2) of Section 154 of the Penal Code was not only uncalled for but also innocuous in line with the Court's decision in **Abdul Mohamed Namwanga** (supra) in which the application of **Godfrey Simon** (supra) was distinguished to the extent it held that it was a legal requirement to insert a punishment section in a charge sheet which is not one of the statutory requirements under section 132 and 135 of the CPA.

Regarding the omission to give particulars of the place where the offence was committed, we have seen nothing amiss in the charge sheet to render it defective. This is so because the place was conspicuously shown in the charge sheet as Esso Area and that was sufficient compliance with section 135 (1) of the CPA. The different places associated with Esso Area brought about by the appellant in his submissions are not part of the evidence on record neither was there any legal requirement to do so over and above inserting the place as

shown in the charge sheet. At any rate, from the evidence, there was no dispute as to the place where the offence was allegedly committed neither did the appellant state how he was prejudiced by the alleged failure to specify which Esso area the offence was committed. On the whole, we have found no merit in the appellant's complaint in the first cluster of his complaints touching on the validity of the charge sheet and dismiss the first ground in the memorandum of appeal as well as ground five in the supplementary memorandum.

The second cluster in the appellant's challenge relates to the alleged failure to re-evaluate the evidence on record and failure to consider his defence, subject of ground three in the memorandum of appeal. As of necessity, the complaint touches also ground two in the memorandum of appeal and grounds four and six in the supplementary memorandum. The appellant's arguments on these grounds centred on; **one**, failure to call the medic who examined PW2 at Mount Meru hospital, the police investigator, Derick and school chairman considered to be material witnesses; **two** failure to produce a PF3 to prove penetration; **three**, the trial court's reliance on the evidence of the mother of the victim and PW2 who are family members; **four,** reliance on the evidence of PW2 who was not a credible witness.

On the other hand, the appellant contended that the trial court ignored to consider his defence as to his broken hand covered by a P.O.P which would have raised reasonable doubt on his guilt considering that he could not have managed to use one hand and undress the victim before sodomising him in such a state. Likewise, the appellant argued that he had told the trial court that his arrest was triggered by a grudge of his neighbours which had nothing to do with the offence he was eventually charged with. To reinforce his argument, he cited to us our unreported decision in **Ramadhani Abdallah @ Namtule v. Republic**, Criminal Appeal No. 341 of 2019 stressing the need for the trial court to consider defence case and subject it to the prosecution evidence before making a finding of guilty.

Replying, Ms. Hyera pointed out that the nature of the offence necessitated the prosecution to prove three ingredients to sustain the charge namely; penetration, age of the victim for purpose of sentence and the person behind it. She implored us to hold that all ingredients were sufficiently proved as held by the trial court and sustained by the first appellate court. We shall consider further arguments in response to these grounds in the course of our discussion.

To start with, it is common ground that the case for the prosecution was wholly dependent on the evidence of PW2; the victim of the offence who gave an unsworn testimony after conducting a *voir dire* test from which the trial court made a finding that the tender age witness understood the duty to speak the truth and possessed sufficient intelligence. In the course of the trial, the trial Resident Magistrate remarked PW2's demeanour and noted that he was confident when testifying which earned him a finding of a credible and truthful witness. It is settled law that credibility is the domain of the trial court as regards demeanour which has the benefit of seeing the witnesses as they testify which cannot be interfered with by appellate courts which examine the evidence through records.

The first appellate court addressed itself on the sufficiency of unsworn testimony of PW2 in the light of section 127 (3) of the Evidence Act (the Act) and; like the trial court, it arrived at a firm conclusion that his evidence was nothing but the truth on the basis of which, the appellant was found guilty and convicted. After all, as we held in **Goodluck Kyando v. Republic** [2006] T.L.R 363, every witness is entitled to credence and his evidence believed unless there are cogent reasons to the contrary. The trial court was entitled to believe PW2 as it

did having been satisfied that there was nothing suggesting that such evidence was implausible or contradictory in material respects in line with the Court's decisions in **Aloyce Maridadi v. Republic**, Criminal Appeal No. 208 of 2018 cited in **Majaliwa Ihemo v. Republic**, Criminal Appeal No. 197 of 2020 (both unreported). Consequently, the appellant's complaint in ground two in the memorandum of appeal and ground six in the supplementary memorandum attacking the first appellate court for holding that the prosecution case was proved beyond reasonable doubt based on PW2's credibility can only be sustained if and only if we are satisfied that such evidence was implausible or materially contradictory.

We shall now deal with the appellant's concerns on the failure to evaluate evidence against the appellant's evidence. It will be recalled that, the appellant listed several issues which, according to him were sufficient to shake the case for the prosecution. The first relates to failure to call a medic to prove penetration or, at least a PF3. This complaint presupposes that PW2's evidence required corroboration to be acted upon. However, as correctly held by the first appellate court relying on section 127 (3) of the Act and some of the Court's decisions on the issue, there is no basis in the appellant's complaint against the

finding that the case for the prosecution was not proved merely because a medical doctor who examined PW2 did not testify to corroborate PW2's evidence on penetration. Neither was the absence of a PF3 material to the prosecution case.

On the other hand, alive to the dictates of section 143 of the Act we do not see any substance in this complaint. We have underscored this in many of our decisions amongst others, **Yohanis Msigwa v. Republic** [1990] T.L.R 148 and **William Kasanga v. Republic**, Criminal Appeal No. 90 of 2012 (unreported) for the proposition that it is not the number of witnesses a party calls which is relevant, but the credibility of the evidence of the witnesses called to testify. Accordingly, as rightly submitted by Ms. Hyera, neither the school chairman nor Derick were material witnesses in the prosecution whose absence would have shaken its case particularly as regards penetration. This is so considering that there was no suggestion that any of the mentioned persons witnessed the appellant sodomising PW2. Besides, consistent with our decision in **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported), by analogy, a sexual offence need not be proved by medical evidence.

Equally baseless is the appellant's complaint that the trial court relied on the evidence of PW1 and PW2 who were relatives. In the first place, there is no rule which prohibits relatives from testifying in a case, what matters is their credibility unless it is established that the relative witnesses hatched up a plan to promote an untruthful story in line with our decision in **Mustapha Ramadhani Kihiyo v. Republic** [2006] T.L.R. 232 and **Festo Mgimwa v. Republic**, Criminal Appeal No. 378 of 2016 (unreported). There was no suggestion that was the case. In any case, the trial court did not rely on PW1's evidence in convicting the appellant because it was largely hearsay.

Next is the complaint against failure to consider defence evidence. For a start, we wish to reiterate that it is the duty of the trial court to subject the entire evidence on record to scrutiny, which entails considering the defence evidence before making any finding of guilty. Where the trial court fails to do so, the first appellate court is enjoined to do so in its role to re-evaluate the whole evidence on record with a view to making its own findings of fact either concurring with the trial court or otherwise where both courts below fail to do so. The Court has power to step into the shoes of the first appellate court and do what that court omitted to do. See for instance; **Director of Public**

Prosecutions v. Jaffari Mfaume Kawawa [1981] TLR 149, **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported) cited recently in the Court's recent unreported decision in **Yustus Aidan v. Republic**, Criminal Appeal No. 454 of 2019.

It is evident that ground three before the High Court complained against the trial court's failure to consider defence evidence despite which, the High Court did not address itself to that complaint which justifies our consideration in this appeal. Despite Ms. Hyera's suggestion, we are far from being persuaded that since the first appellate court concurred with the trial court on the guilt of the appellant, it must have taken into account the appellant's defence.

The appellant's defence was two-fold; his inability to commit the offence given his broken hand covered by a P.O.P and that, his arrest was triggered by malice. The trial court rejected both defences treating the latter as an afterthought. Be it as it may, upon our own examination of the appellant's defence, we are not satisfied that either of the defences raised any doubt in the prosecution case. Firstly, from our examination of the record, it is plain that the trial court considered the fact that the appellant had a broken arm covered with a P.O.P. at the material time but rejected it having been satisfied with PW2's testimony

that the appellant used his single hand to undress his underwear before sodomising him taking into account the age of the victim. That may have been a possibility but too remote in our view to raise any reasonable doubt in the prosecution's case. On the other hand, like the trial court, we are satisfied that the alleged malice did not relate to the mother of the victim (PW1) who reported the matter to the police culminating into the appellant's arrest and arraignment. It had no bearing on the prosecution case the more so because, her testimony was largely hearsay. The trial court relied on the evidence of PW2 who had nothing to do with the alleged malice to ground conviction.

We shall now turn our attention to the complaint on the alleged failure to evaluate the evidence which will be taken conjointly with the complaint in the third cluster faulting the two courts for convicting the appellant on weak evidence. By this complaint the appellant meant to suggest that the trial court did not take into account matters it ought to have taken into account or took into account matters which it should not have taken thereby arriving at wrong or erroneous findings. Put it differently, the appellant appears to suggest that the finding of guilt made by the trial court was not supported by the evidence on record.

We have discussed several aspects constituting the appellant's complaint in the preceding paragraphs. The first appellate court concurred with the trial court and, rightly so in our view. As submitted by Ms. Hyera, proof of the offence under section 154 (1) (a) of the Penal Code entailed proof of three ingredients namely; the penetration, age of the victim and identity of the culprit. Having examined the record of appeal, we have no slightest hesitation endorsing the submissions by the learned Senior State Attorney that contrary to the appellant, the two courts rightly concurred that the prosecution established all the ingredients necessary to prove the charged offence to the required standard. Apparently, the evidence came from no other than PW2 who the trial court found credible and a witness of truth. The record of proceedings before the trial court shows clearly and, indeed in graphic details at page 14 of the record of appeal how the appellant lured the victim to his house where he undressed him, applied the oil the victim had bought for him to smear not only his anus but also his (the culprit's) penis before inserting it into PW2's anus and, after the act, the appellant gave the victim TZS 500.00 for the first day, TZS 1,000.00 on the second day and nothing on the third day. During cross examination, PW2 stated categorically that although he felt pain as the appellant was

pumping his manhood into his anus he was prevented from shouting for help because the appellant pressed him with a huge blanket.

Regarding the victim's age, admittedly, PW1 did not state it as expected of her. Nonetheless, it was not disputed that the victim was a standard IV primary school pupil under the age of 18 years. And finally, there was sufficient proof that the culprit was no other than the appellant well known to the victim as a carpenter near the school. PW2's evidence left no doubt about the fact that it is the appellant who did the awful act to him. Consequently, as all ingredients necessary to establish unnatural offence were proved, the appellant's attack that the two courts below failed to evaluate evidence lacks merit. It is accordingly dismissed so is the complaint that the case against the appellant was not proved to the required standard; proof beyond reasonable doubt.

Finally, we shall revert to the issue regarding the appellant's conviction on a wrong provision. We have already held when dealing with the first ground of appeal that the insertion of para (b) in sub-sub-section 154 of the Penal Code was wrong because that paragraph relates to an offence against an animal. Apparently, the trial court convicted and sentenced the appellant under section 154 (1) (a) (b) of the Penal Code believing, mistakenly though, that para (b) was a

punishment provision instead of sub-section (2) which was the correct provision prescribing sentence against a person found guilty of unnatural offence to a victim under the age of 18 years as it were. Be it as may, it is our firm view that the insertion of para (b) was inconsequential to the appellant's conviction and sentence.

For the foregoing reasons, we find no merit in the appeal and dismiss it.

DATED at **DAR ES SALAAM** this 24th day of October, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 26th day of October, 2022 in the presence of the Appellant in person and Ms. Upendo Shemkole, State Attorney for the Respondent/Republic, both appeared through Video Link from Arusha ICJ is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL