**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MWAMBEGELE, J.A., KITUSI J.A. And KAIRO, J.A.)**

**CRIMINAL APPEAL NO. 457 OF 2019**

**SHABANI GERVAS .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)**

**(Mutungi, J.)**

**dated the 25th day of September, 2019**

**in**

**HC. Criminal Appeal No. 19 of 2019**

---

## JUDGMENT OF THE COURT

14th July, 2021 & 4th March, 2022

**KITUSI, J.A.:**

This is a second appeal by Shaban Gervas, the appellant. He was convicted by the District Court of Ilala with indecent assault of a boy under fourteen years, contrary to section 156(1) (2) of the Penal Code, [Cap 16 R.E 2019], and was sentenced to life imprisonment. The first appeal was dismissed by the High Court for want of merit.

At the trial, it was alleged that on 9th November, 2016 at Buguruni Madenge area within Ilala District, with intent to cause sexual annoyance, the appellant touched and put his finger in the anus of Mathias Lucia Stephano @ Ramadhani, a boy aged 11 years.

The star witness was the alleged victim (PW1) who gave an account of how the appellant used to lure him into a video show house,

where he and him would take back seats away from others, during which the appellant would insert his finger into the boy's anus. According to PW1, this happened twice, that is on 9/11/2016 and subsequent to that. He said that he had to disclose to his mother (PW2) about what had been taking place because she noticed that he was discharging faeces without control and wanted an explanation for that.

PW1 led PW2 to a place where the appellant was found. PW2 reported the matter to the police and obtained a PF3 for her son's medical examination. The PF3 was issued by WP Jesca (PW3) who said she interrogated PW1 who told her that the appellant inserted his finger as well as his penis in his anus.

The appellant made a very brief account in defence, denying the allegations. He said that he works as a "bodaboda" rider and that he was arrested by a fellow "bodaboda" rider who had his own axe to grind with him.

The trial court found PW1 a truthful witness on whose testimony it convicted the appellant, and so did the High Court which, even after expunging the PF3 for lacking evidential value, it found proof of the case on PW1's testimony.

The appellant raised six initial grounds of appeal and four supplementary grounds to challenge the decision of the High Court. Ms.

Anna Chimpaye, learned Senior State Attorney who prosecuted the respondent Republic's case, supported the conviction and sentence. The appellant had also filed written arguments which he adopted as forming part of his address to us.

We shall address the complaints in grounds 1 and 3 first. In ground 1 the appellant challenges the two courts below for convicting and sentencing him in a case whose charge sheet omitted the word "unlawful". In both his written and brief oral submission, the appellant did not canvass this ground. On the other hand, Ms. Chimpaye submitted that, that is not a defect, and to support her argument, she cited the case of **Paul Dioniz V. Republic,** Criminal Appeal No. 171 of 2018 (unreported).

We are certain that the complaint is misconceived because as we stated in the case of **Paul Dioniz** (supra), mention of the word,"unlawful" would not have added anything to the charge, and likewise its omission did not render the charge defective. After all, there is no way what the appellant is alleged to have done could have been lawful. This ground is dismissed.

As for the contention in ground 3 that the prosecution evidence was recorded without complying with section 210(3) of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA), Ms. Chimpaye's argument

is that the appellant should not be heard to complain on that because he could not be affected by it. There was, again, no submission by the appellant on this ground of appeal.

The provisions of section 210 (3) of the CPA require a presiding magistrate to inform each witness that he is entitled to have the substance of the testimony read over. In this case, as correctly argued by the appellant, there is no indication that the provision was complied with. However, as we held in **Paul Dioniz** (supra), the appellant's general complaint cannot hold water without specifying pieces of evidence that render the testimony incorrect. This ground is equally devoid of merit because the appellant is not impeaching the record of proceedings. We dismiss it.

We turn to ground 2 in the main memorandum of appeal and ground 2 in the supplementary memorandum of appeal. These grounds raise issue with the recording of PW1's testimony after conducting a voire dire test. In the written arguments, the appellant correctly addressed the current law that came in force on 8/7/2016 and cited the case of **Godfrey Wilson V. Republic,** Criminal Appeal No. 165 of 2018 (unreported).

Ms. Chimpaye conceded to the point that it was wrong for the trial magistrate to conduct a voire dire test, because in 2017 when PW1's

testimony was recorded, section 127 of the Evidence Act, [Cap 6 R.E 2019], had been amended with the effect of doing away with voire dire. She however went on to submit that the appellant was not prejudiced because PW1 must be taken to have promised to tell the truth in the course of taking oath. She cited the case of **Ally Ngozi V. Republic** Criminal Appeal No. 216 of 2018 (unreported).

The appellant is correct that through the written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016, section 127 of the Evidence Act was amended to do away with voire dire examination. All a trial magistrate needs to do now is to cause a witness of tender age to promise to tell the truth and not lies. In the case of **Godfrey Wilson** (supra) cited by the appellant, we prescribed some procedure on how that promise may be extracted from such a witness.

The question for our determination is whether the holding of a voire dire test as it was done in this case, invalidates the testimony of PW1.

We shall take clue from our previous decision in **Ally Ngozi** (supra) to decide whether the appellant was prejudiced by the holding of the voire dire before PW1's testimony was recorded. To determine this aspect, we shall take a look at what actually transpired. Some of

the questions that were put to PW1 in the course of the voire dire are relevant and we reproduce them and the answers below: -

*"Question: Do you know about God?*

*Answer: God is great because of his acts.*

*Question: Do you know about (sic) sworn*

*Answer: Yes, is to say (sic) are true*

*Question: Do you know about oath?*

*Answer: Yes, is to state on a truth.*

*Question: Are you ready for an oath?*

*Answer: Yes, I am".*

We have no doubt that the above excerpt represents PW1's submission to God and its attendant duty for him to tell the truth. Our answer to the question we raised in relation to ground 2 is that PW1 promised to tell the truth and the appellant was not prejudiced by the conduct of the voire dire. Grounds 2 in the main memorandum and 2 in the supplementary memorandum have thus no merits, they are dismissed.

The decisive issue will ultimately be whether PW1 did indeed live up to his promise to tell the truth, which we shall reserve for last. Thus, for a moment, we shall skip ground 4 which questions PW1's credibility and deal with ground 5.

Ground 5 raises issue with the quality of investigation and the prosecution of the case in eight areas styled as 5 (a)-(h)). Some of the areas are new and do not raise issues of law, and therefore we being a second appellate court, are precluded from discussing them. See our many earlier decisions on this, such as: **Omary Saimon V. Republic,** Criminal Appeal No. 358 of 2016, and; **Dickson Anyosisye V. Republic,** Criminal Appeal No. 155 of 2017 (both unreported).

The above settled principle disqualifies grounds 5(a) (c) (f) which lament about failure to call material witnesses. Ground 5 (h) which raises issue with the PF3 is redundant because the High Court expunged it from the record, so it is no longer part of it. Then ground 5(g) which is a complaint that the charge was not read over and explained to the appellant before he mounted his defence, is equally misconceived because section 228(1) of the CPA which is about taking of the accused's plea, does not envisage any duty on the court to read over the charge to that accused every other time, subsequently.

Having disqualified the above grounds, we will discuss grounds 5(b) (d) & (e) which relate to the contradictions between PW1 and PW3. In essence this is the same as ground 4 which we had earlier skipped. We shall now address the main complaint on the quality of PW1's testimony.

The appellant's written arguments are rich on this aspect. He has argued, and we agree with him, that the best evidence in sexual offences comes from the victim. We also agree with him that for the court to take the victim's word, such victim must be truthful. The appellant has sought to shoot down PW1's credibility by raising some contradictions in his testimony.

He submitted that PW3, stated that he was told by PW1 that the name of the culprits was Doto and that Doto not only inserted his finger into the victim's anus but his penis as well. The appellant calls PW1 a liar and cites his delay in naming the suspect as pointing to his questionable credibility.

He has argued rather interestingly that; *"On the contrary, PW1 was such an incredible and unreliable witness who could only attract anxiety rather than confidence".* On her part, Ms. Chimpaye submitted that the contradictions are not material and that, if anything, PW2 and PW3 gave hearsay accounts. She urged us to concentrate on PW1"s testimony.

We understand that credibility of a witness is the preserve of the trial court, but that this only applies to his demeanour. See our decision in **Silas Sendaiyebuye Msagabago V. The DPP**, Criminal Appeal No. 184 of 2017 (unreported). We agree with Ms. Chimpaye that only

contradictions that go to the root of the matter would affect the prosecution case. [**Silas Sendaiyebuye Msagabago** and; **Dickson Anyosisye** (supra)]. However, we do not accept Ms. Chimpaye's submission suggesting that we should ignore what PW2 and PW3 stated under oath. We shall consider their testimonies and gauge them against that of PW1, to determine the latter's credibility.

The appellant submitted in writing that; *'Such evidence by PW1, PW2 and PW3 as PW3 contradicted about the nature of the offence committed by the appellant, cannot be taken lightly".* Then he went on to submit that; *'As I have found that PW1 named the offender as DOTO, but the investigator made no efforts to find the named one and no plausible explanation was given if the appellant was commonly or alias known as DOTO".* These complaints are worth our consideration.

It is settled law that credibility of a witness may be determined by assessing the coherence of his own testimony or by comparing his testimony along with evidence of other witnesses. See **Shaban Daud V. Republic,** Criminal Appeal No. 28 of 2001 (unreported) followed in **Alex Ndendya V. Republic,** Criminal Appeal No. 340 of 2017 and **Nyakuboga Boniface V. Republic,** Criminal Appeal No. 434 of 2017 (all unreported), among our many decisions.

Two things strike us as odd here. According to PW3, she was told by PW1 that the perpetrator of the abuse inserted his penis into his anus, in addition to the finger. He initially named the culprit as Doto. This means that under oath, PW1 did not tell the whole truth by omitting to mention the penis, and by naming a person other than the appellant as the culprit. Secondly, we wonder how uncontrollable discharge of faeces, which PW2 observed, would result from insertion of a finger in PW1's anus on two occasions. Applying our common sense to these facts, and in the absence of medical evidence to explain this otherwise improbable consequence, the prosecution case is rendered weak. The above entitle us to take PW1's word with a pinch of salt and such a witness may not be believed in other points, as we stated in **Bahati Makeja V. Republic**, Criminal Appeal No. 118 of 2006 cited in **Mohamed Said V. Republic**, Criminal Appeal No 145 of 2017 (both unreported).

In the end, we find merit in grounds 4, 5 (b) (d) and (e), all of which attack the prosecution case for being fraught with contradictions. We find the contradictions as to the nature of the offence committed and the identity of the perpetrator as being too grave to just ignore. As the evidence of the victim is also not much to go by, we having doubted

his credibility, there remains nothing on which the conviction of the appellant could be said to have been justified.

Accordingly, on the basis of the contradictions in the prosecution case raised in grounds 4, 5 (b) (d) and (e), we allow the appeal. We quash the conviction and set aside the sentence. We order the appellant's immediate release from prison, if his continued incarceration is not for any other lawful cause.

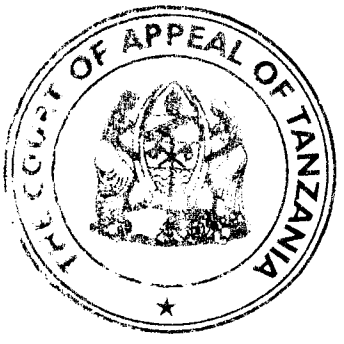
**DATED** at **DAR ES SALAAM** this 9th day of January 2022.

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. G. KAIRO
**JUSTICE OF APPEAL**

The Judgment delivered this 4th day of March, 2022 in the presence of appellant, represented in person and Ms. Jackline Werema, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**