IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 249 OF 2019

YANKAMI IDD OR ALFAN IDD @ NYANZABARA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Siyani, J.)

dated the 10th day of May, 2019
in
Criminal Appeal No. 387 of 2016

JUDGMENT OF THE COURT

7th & 14th February 2023

GALEBA, J.A.:

The appellant in this appeal, one Yankami Idd or Alfan Idd @ Nyanzabara, was charged before the District Court of Bunda in Criminal Case No. 52 of 2016, on a single count of unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap 16 R.E. 2002] [now R.E. 2022], (the Penal Code). He was found guilty, convicted and was consequently sentenced to thirty years imprisonment. In addition to the imprisonment, the appellant was ordered to pay Tshs. 200,000/= as compensation to the victim of the sexual abuse.

According to the charge, around 2:00 o'clock in the afternoon on 31st May 2015 at Bukama Village within Bunda District in Mara Region, the appellant had sex against the order of nature of a boy aged ten years, whose identity, we shall conceal and refer to him as S. H., the victim or PW1.

According to the evidence at the trial, at the time and date above, the appellant found PW1 grazing cattle in the company of Hamis Ramadhani, PW3, another boy aged fourteen years. Both boys were grazing cattle at Malambeka Village grazing ground. The appellant ordered PW3 to go to the nearby water well to find out whether there were people drawing water from the well. Upon PW3's departure, the appellant slapped PW1 in the face, fell him on the ground, undressed himself and his victim and started to have sex of PW1 against the order of nature. To PW1, the experience was deadly painful, and amidst the obnoxious act, the appellant released his male seed in the victim's anal opening. Upon his return to the scene of crime, according to PW1, PW3 found the appellant sodomizing him. According to Mwajuma Mramba, PW2, who was also PW1's aunt and owner of the cattle that the victim was grazing, she was informed by Shaban Adam that the appellant had sodomized PW1 nearby the water well. PW2 rushed to the scene of crime and found only the embattled PW1. Upon observation, she noted

that the victim's under pant was wet. When she inquired as to what had befallen him, the latter told her that the appellant had sodomized him a few moments earlier and had fled from the scene. PW1 was then taken by PW2 to Nyamuswa Police Station, where they were given a PF3, later to Nyamuswa Hospital, from where they were referred to Bunda Designated District Hospital (Bunda DDH) for appropriate medical attention. At Bunda DDH, Deogratias Elias Nyanza, PW4 a medical doctor examined PW1, and found fresh bruises and lacerations around PW3's anal opening. He concluded that the boy had suffered forced penetration of that part of his body.

As for the appellant, his account of what transpired on that day, was that while at Malambeka Village, in a company of his young brother called Mussa Hamza, they met PW1 and PW3 on the way to the water well. Then Mussa Hamza interrogated the boys on issues concerning grazing their herds of cattle in Hamis Masenza's (Mussa's uncle) farm of cassava. According to him, PW1 and PW3 apologized as the cattle had stepped in the farm by mistake. Thereafter, the duo, that is, the appellant and the said Mussa Hamza proceeded to the well and later they went home. At home, the appellant's brother called Yankami told them (the appellant and Mussa Hamza) to go and draw water from the well, but they refused. Then their mother, one Pili Masenza asked

Ramadhani why he was late, and the latter responded that he had been eating some mangoes from a mango tree growing near the water well. A few minutes later an alarm was raised, and upon being interrogated, he denied to have committed the crime.

The trial court believed the evidence of the prosecution, and punished the appellant as indicated above. The appellant was however, aggrieved. He lodged Civil Appeal No. 387 of 2016, but that appeal was dismissed by the High Court on 10th May 2019, thereby upholding the decision of the trial court, although it expunged the PF3 and the entire evidence of PW3. This appeal, which is challenging the decision of the High Court, is predicated on eight grounds. However, for the reasons to be disclosed in a moment, we will not reproduce grounds 6 and 7 in this judgment. The remaining grounds of appeal that are subject of our decision in this judgment, may be paraphrased as follows: -

> *"1. That, the charge against the appellant was doubtful for failure to call key prosecution witnesses who could explain the processes that led to framing the charge.*
> *2. That the prosecution did not call a police investigator who would draw a sketch map and testify as to the actual place where the crime was committed.*
> *3. That the person who arrested the appellant did not come to court to testify as to how he arrested the*

appellant and give an account for the appellant's delayed arrest.

4. That the charge sheet indicated that the offence was committed at Bukama Village in Bunda District, whereas the evidence of PW2 was to the effect that the offence was committed at Malambeka Village in Bunda District.

5. That, ***voire dire*** *test conducted to PW1 was unprocedural, thus the evidence of PW1 was not credible.*

6. and 7. N/A

8. That, no local leader was called to testify on whether the appellant disappeared from the village to justify his delayed arrest."

At the hearing, the appellant appeared in person, whereas the respondent Republic had the services of Ms. Lilian Erasto Meli, learned State Attorney.

To start off, the appellant prayed that we adopt his grounds of appeal and determine the matter based on those grounds. He added that the learned State Attorney may reply on his grounds, so that he would rejoin later, if need would arise. Thus, we permitted the learned State Attorney to react to the grounds of appeal. Before she could do it however, Ms. Meli, informed us that the 6th and 7th grounds of appeal were new factual and had not been subject of complaint at the High Court. Relying on the case of **Karim Seif @ Slim v. R,** Criminal Appeal

No. 161 of 2017 (unreported), she moved us to strike out the grounds of appeal and deal with the rest. On this aspect the appellant had nothing to say.

On our part, we have reviewed both the substantive petition and the supplementary petition that were presented before the High Court, and we are in agreement with the learned State Attorney, that the complaints in grounds 6 and 7, which are that the appellant excessively stayed in the police custody and his trial was prejudicial, were not part of the grounds of appeal in the said petitions before the High Court. We have also critically studied the judgment of the High Court, and we are satisfied that the court did not decide on any matter touching on the complaints raised in the two contested grounds of appeal. Thus, this Court has no jurisdiction to entertain those grounds, whose substance was not discussed by the High Court. This Court has consistently held that as the position of the law - see **Hassan Bundala @ Swaga v. R,** Criminal Appeal No. 416 of 2013 and **Omary Saimon v. R,** Criminal Appeal No. 358 of 2016 (both unreported). In the circumstances, we shall refrain from entertaining the said 6th and 7th grounds of appeal.

As for the remaining grounds of appeal, Ms. Meli clustered grounds 1, 2, 3 and 8 and argued them as one, and the 4th and 5th

grounds were argued separately. In determining this appeal, for reasons of convenience and logic, we will start with the 5th ground.

The appellant's complaint in that ground of appeal, is that the evidence of PW1 who was ten years at the time of testifying, was not supposed to be relied upon, because *voire dire* examination that was carried out, was not properly conducted. Ms. Meli's submission was that the test was properly conducted and the trial court found out that PW1, possessed sufficient intelligence for purposes of giving evidence. The omission by the trial court to record questions, she argued, was minor and inconsequential. Thus, the learned State Attorney implored the court to dismiss that ground of appeal.

We have reviewed the complaint of the appellant in this ground of appeal, and it appears to us that the only error, is an omission by the trial court to record the questions that the trial magistrate put to PW1 during the *voire dire* test. We must state however that, the sole purposes of conducting *voire dire* examination (at the time when it was mandatory under the law), was to enable the trial court to assess the intelligence of the child witness before he or she could give evidence. That was its sole objective. As to whether that objective was achieved in

this case or not, we will let the record speak for itself at page 5 of the record of appeal: -

> *"**PW1**: ABC, Ikizu, 10 years, Pupil of Busore Primary School.*
>
> ***Court:** The witness is of tender age hence we have to conduct voire dire examination and hereunder is the voire dire examination.*
>
> ***S. H**: Mwikizu, nina miaka kumi, nasoma darasa la nne shule ya msingi Busore, dini yangu muislam, waislam wanasali msikitini na siyo kanisani, kiongozi wa waislam ni Shekhe, Shekhe haruhusu watu kusema uongo, mimi ni mtoto wa mwisho kwa baba yangu na mtoto mkubwa ni Farda, naye ni mtoto wa kike. Kama Farda ataenda nyumbani na kumwambia baba kuwa nimeiba embe sokoni wakati sijaiba Farda atakuwa amemwambia baba uongo. Uongo siyo kitu kizuri kwani mwongo akifa ataenda motoni nami sitaki kusema uongo naogopa moto.*
>
> ***Court**: Having made the voire dire examination as hereinabove, we are satisfied that he possesses sufficient intelligence to justify receipt of his evidence and understands the duty of speaking the truth u/s 127 (2) of the Tanzania Evidence Act (TEA) No. 6 of 1967, Cap. 6 (R.E. 2002)."*

After making the above conclusion that PW1 had sufficient level of intelligence, the trial court further affirmed the witness and recorded his evidence. It is that evidence which is challenged in the 5th ground of appeal. The issue in this ground therefore, is whether the objective of *voire dire* was attained.

In our view, the Kiswahili text quoted above, contains sufficient material that enabled the trial court, to make an informed finding that indeed, the child had sufficient intelligence to give evidence before the court. In this case, the trial court did not end there, it received the evidence of PW1 after affirming him. Thus, an omission to record the questions that were put to the witness during *voire dire* test, was in our view; **first**, not prejudicial to the appellant in any manner imaginable, and; **second**, it did not affect the quality of the evidence of PW1, particularly because the evidence was received after the witness was affirmed. In the circumstances, the 5th ground of appeal has no merit and we dismiss it.

The common thread of complaint running through grounds 1, 2, 3 and 8, was that there were witnesses that the prosecution did not call. In reply, the learned State Attorney submitted that the complaint had no substance, because the absence of the witnesses did not affect the

weight and credibility of the evidence which was tendered. She argued that, according to section 143 of the Law of Evidence Act, [Cap 6 R.E. 2022] (the Evidence Act), there is no specific number of witnesses that a party is duty bound to call. She concluded that, as the case was proved by the witnesses who were called, failure to call the witnesses mentioned in those grounds of appeal had no effect to the prosecution case. She thus implored the Court to dismiss the four grounds of appeal.

We will first capture the character of each witness that the appellant wanted to be called in each ground. In ground one, the appellant's complaint was that the prosecution was supposed to call a witness who had facts that led to drawing the charge. In ground two, he complained that, a police officer who investigated the case was supposed to be called. In ground three, his complaint was that the person who arrested him was supposed to testify and explain his delayed arrest and in ground eight, that no local leader was called to give evidence on whether in the aftermath of committing the offence, he disappeared from the village.

We must state, at this point that, it is a well-known principle of law in this jurisdiction, that in sexual related cases, the best evidence is that of the victim. That is the position in many decisions of this Court

including **Selemani Makumba v. R**, [2006] T.L.R. 379. That principle reflects the statutory position of section 127 (6) of the Evidence Act. In this case we do not agree with the appellant because; **first**, there is no maximum or minimum number of witnesses needed for the prosecution to prove a case. **Second**, the decision of which witnesses to call, is within the domain of a party seeking to prove a particular fact. **Third,** the person against whom a case is to be proved has no mandate to determine which witnesses should be called. Thus, the appellant has no mandate to dictate to the respondent as to which witnesses were supposed to be called. Similarly, the prosecution had no powers to dictate to the appellant as to which witnesses to call, and which ones to leave out.

In the circumstances, it is our firm position that, what matters to the trial court, is the competence and credibility of the witnesses called, their number or positions they hold in society, notwithstanding. This position finds support and validation under the provisions of sections 127 (1) and (6) and 143 both of the Evidence Act. In this case therefore, the trial court having received the evidence of PW1, which was corroborated by that of PW2 and PW4, we are in agreement with Ms. Meli, that indeed, the evidence of the witnesses mentioned in grounds 1, 2, 3 and 8 was unnecessary for the prosecution case. If those witnesses

were necessary for the appellant's defence, there is no evidence that he was prevented from calling any of them. In the circumstances, grounds 1, 2, 3 and 8 have no merit and the same are hereby dismissed.

As for the 4th ground of appeal, the appellant's complaint was that, whereas it was indicated in the charge sheet that the crime was committed at Bukama Village, the evidence adduced demonstrated that the offence was committed at Malambeka Village, both in Bunda District.

On this complaint, Ms. Meli did not quarrel with the validity of the allegation, rather her point was that the disparity did not at all prejudice the appellant. That is so, she argued, because; **first**, the appellant did not cross examine any witness on that subject; **second**, both the appellant and the victim were residents of Malambeka Village where the offence was committed and; **third**, the appellant admitted to have met PW1 and PW3 at the scene of crime in Malambeka Village. She moved the Court to rely on the case of **Jamal Ally @ Salum v. R**, Criminal Appeal No. 52 of 2017 (unreported), where it was held that improper or non-citations of appropriate provisions of law in the charge was curable under section 388 of the Criminal Procedure Act [Cap 20 R.E. 2022], if the particulars of offence and the evidence are sufficiently informative to let the appellant understand the nature of the case facing him. In brief,

the learned State Attorney moved us to dismiss the 4th ground of appeal for want of merit.

At the outset, we must confess that the general rule is that time and place of the commission of the offence as contained in the charge, must be proved at the trial. That is the position that has been taken by this Court on many occasions including in the cases of **Salum Rashid Chitende v. R,** Criminal Appeal No. 204 of 2015 and **Marki Said Mbega v. R,** Criminal Appeal No. 203 of 2018 (both unreported). However, that is not on all occasions and in all circumstances.

In the case of **Matata Nassoro and Another v. R,** Criminal Appeal No. 329 of 2019 (unreported), the charge sheet stated that the appellants were found in unlawful possession of Government trophies at Mawe Mairo along Babati – Arusha Road, while during the evidence PW4 mentioned the place as Mamire and PW1 and PW5 mentioned it as Mmairo. Although the scene of crime as per the evidence was different as compared to that in the charge sheet, still this Court dismissed a ground of appeal complaining about that disparity because, it held that the error did not prejudice the appellants as they knew well the charges against them. On the same point see also **Damian Ruhere v. R**,

Criminal Appeal No. 501 of 2007 and **Oswald Mokiwa Sudi v. R**, Criminal Appeal No. 190 of 2014 (both unreported).

In this case, we agree with Ms. Meli's position on the basis that; **one**, the appellant did not deny to have been at Malambeka Village, say by raising an *alibi*; **two,** looking at his evidence, the appellant defended himself fully for the offence that was committed at Malambeka Village. **Three**, the appellant did not cross examine any witness including PW1, if he was uncertain as to the village in which the crime was committed. It is part of our law that, where one does not cross examine on a particular aspect in a case facing him, the truthfulness of such a fact stands unchallenged, and any attempts to question its authenticity at a later stage, is deemed to be an afterthought, see **Goodluck Kyando v. R** [2006] T.L.R. 363.

In the circumstances, we are satisfied that, the error complained of, did not occasion a failure of justice to the appellant. Thus, the 4th ground of appeal has no substance, and we dismiss it.

There is one more aspect of critical significance we need to highlight upon, before we can conclude. It relates to the sentence that was imposed upon the appellant by the trial court and upheld by the first appellate court. The sentenced was thirty years imprisonment and

compensation of Tshs. 200,000/=. However, at the hearing we invited Ms. Meli, to address us on the sufficiency or otherwise of the sentence in view of the provisions of section 154 (2) of the Penal Code. In that respect, the learned State Attorney submitted that the sentence imposed was inadequate, because the appropriate sentence for the person who is convicted of committing unnatural offence against a person whose age is bellow eighteen years, is life imprisonment. In reply, the appellant submitted that in case we find his appeal to have no merit, we be pleased to retain the existing sentence. The above referred section 154 (2) of the Penal Code provides that: -

> *"(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years, the offender shall be sentenced to life imprisonment."*

In view of the above provision, we are satisfied that the sentence of thirty years imprisonment and compensation of Tshs. 200,000/=, was erroneously imposed. The appropriate sentence is life imprisonment.

Thus, we substitute the sentence of thirty years imprisonment with the statutory life imprisonment as provided for under section 154 (2) of the Penal Code.

In summary, this appeal is dismissed in its entirety for want of merit, and as indicated above, the sentence of thirty years imprisonment has been enhanced to life imprisonment.

It is so ordered.

DATED at **MWANZA**, this 13th day of February, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 14th day of February, 2023 in the presence of Appellant in person and Ms. Naila Chamba, learned State Attorney for the respondent /Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL