IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: KOROSSO, J.A., KIHWELO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 336 OF 2019

EDMUND JOHN @ SHAYO ..... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

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

(Mkapa, J.)

Dated the 12th day of July, 2019
in
Criminal Appeal No. 26 of 2018

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JUDGMENT OF THE COURT

5th & 11th July,2023

KOROSSO, J.A.:

This is the second appeal by Edmund John Shayo, the appellant, still protesting his innocence upon being convicted and sentenced to twenty (20) years imprisonment on the offence of attempting to commit an unnatural offence contrary to section 155 of the Penal Code, Cap. 16 (the Penal Code). The appellant's first appeal in Criminal Appeal No. 26 of 2019 was dismissed.

The appellant was arraigned in the District Court of Moshi at Moshi, charged with the offence of attempt to commit an unnatural offence contrary to the provision shown above. It was alleged that on

3/11/2016, at Makaa Primary School area within Moshi District, Kilimanjaro Region, the appellant did attempt to have carnal knowledge of a boy aged seven (7) years against the order of nature. Henceforth, in this judgment, the seven-year-old boy in the charge shall be referred to as "PW4 or the victim" to hide his identity. The appellant pleaded not guilty to the charge.

The arraignment of the appellant arose from an event that is alleged to have been occasioned on 3/11/2016 at Makaa Primary School. It transpired that Joyce Mohamed Mbugu (PW3) and her younger brother Freman Gerald while enroute to buy buns, and passing the school toilet saw the appellant calling a young boy who was entering the toilet. The appellant followed up the boy inside the toilet. Freman Gerald became suspicious and alerted PW3 and they decided to investigate. They first peeped through a window and then entered the toilet only to find the boy's shorts removed the appellant touching the victim's buttocks at the same time gave him Tshs. 500/=.

According to PW3, they put the appellant under restraint and reported the matter to the school authority. Veronica Ofoo Mkoyi (PW1), a teacher at Makaa Primary School, was the one who took up the matter after the incident was reported and took the victim to the

hospital where medical examination revealed that he was not sodomized. The appellant was taken to the police station. The victim, who testified as PW4 stated that on the fateful day and time while in the school toilet, the appellant also entered in it, and gave him Tshs. 500/= and then removed the belt of his trouser and then removed the victim's shorts, soon after, some people came and saved him.

At the trial, four witnesses testified for the prosecution, apart from PW1, PW3 and PW4 already mentioned, there was also Anna Joseph Abdallah (PW2), the victim's mother. The appellant's defence was one of denial stating that he was not arrested in the school toilet but on the road and narrated the circumstances of his apprehension by civilians. He alleged that the charge was fabricated against him since PW1 had grudges against him having refused to work at her house. The trial court, satisfied that the prosecution had proven the charges against the appellant, convicted him. As alluded to before, his appeal to the High Court was unsuccessful, hence the current appeal before the Court armed with the memorandum of appeal with six grounds addressing the following complaints:

1. *The erroneous holdings of both courts below that the charge was proved beyond reasonable doubt.*

2. *Procedural irregularities of the trial court for contravening section 186(3) of the Criminal Procedure Act, Cap 20 (the CPA) leading to miscarriage of justice for the appellant.*
3. *Failure of both lower courts to draw adverse inference on the prosecution side failure to call essential witnesses to testify.*
4. *Conviction of the appellant based on unsworn and uncorroborated evidence of the victim (PW4).*
5. *Conviction of the appellant based on a fatally and incurably defective charge which is at variance with the evidence of PW4.*
6. *Conviction based on weak, tenuous, incoherent, contradictory and wholly unreliable prosecution evidence*

On the day the appeal was called for hearing, the appellant appeared in person, self-represented. Messrs. Paul Kimweri and Geofrey Mlagala, learned Senior State Attorneys represented the respondent Republic. The appellant commenced by adopting his grounds of appeal and urged the Court to let the State Attorneys proceed to respond to his appeal and thereafter allow him to rejoin. He also prayed for his appeal to be allowed so that he enjoys his liberty.

Mr. Kimweri began by registering his objection to the appeal for the reason that it lacked merit. He informed the Court that all the grounds of appeal will be confronted conjointly through the first ground faulting the appellant's conviction by the first appellate courts even

though the prosecution side had not proven the charge against him to the standard required.

The essence of Mr. Kimweri's submission was that the prosecution did prove their case through the evidence of PW3 and PW4. He argued that PW3 testified to have seen the appellant enter the school toilet behind the victim, followed him, and saw him give the appellant money, then open his trouser belt and then remove the victim's shorts which led her and a younger brother to arrest the appellant in the said toilet interceding his intention to have carnal knowledge of the victim against the order of nature.

According to Mr. Kimweri, PW3's evidence invariably supported the evidence of the victim, who narrated how the appellant came into the toilet and offered him Tshs. 500/= and then proceeded to remove his trouser belt and PW3's shorts while PW4 remained perplexed about what was happening. He argued that the fact that the appellant was arrested in the school toilet was supported by the evidence of PW1, the teacher who thereafter, reported the incident to the police and took the victim to the hospital for medical examination.

The learned Senior State Attorney argued further that PW3's evidence cannot be faulted since it was found by both the trial and first

appellate courts to be credible, and her testimony of having witnessed the appellant's undressing the victim and also himself inside the school toilet, left no doubt of his ill intention towards the victim, especially considering that the appellant was neither a student nor an employee at the said school. The fact that the appellant was arrested at the scene of the crime should also further strengthen the prosecution case against the appellant, he argued.

Concerning the complaint on the propriety of relying on the evidence of PW4 allegedly taken in contravention of section 127 (2) of the Evidence Act, Cap. 6 (the Evidence Act), Mr. Kimweri contended that the complaint is misconceived since the trial court did comply with the said provision because the evidence of PW4 was unsworn and thus there is no requirement under the provision for the trial court to ask any preliminary questions to the victim except to get his promise, to tell the truth, and not to tell lies. According to the learned Senior State Attorney, the record of appeal reveals that at the trial court, prior to recording PW4's evidence, she had promised to tell the truth. He thus argued that section 127 (2) of the Evidence Act was complied with. He cited the decision in the case of **Hamisi Issa v. Republic**, Criminal

Appeal No. 274 of 2018 to reinforce his argument on the propriety of PW4's evidence in terms of section 127 (2) of the Evidence Act.

Confronting the appellant's grievance faulting the trial and first appellate courts for not drawing adverse inference on the prosecution side for its failure to call material witnesses, Mr. Kimweri argued that the appellant did not show the witnesses who were not called. However, he argued that the law is clear, in that by virtue of section 143 of the Evidence Act, there is no number of witnesses required to prove a fact and that the witnesses called by the prosecution to prove the case were sufficient. The learned Senior State Attorney made reference to the case of **Furaha Alick Edwin v. Republic**, Criminal Appeal No. 274 of 2018, to cement his stance.

Whilst Mr. Kimweri conceded to the complaint by the appellant that the trial was not held in camera as prescribed by the law, he however implored the Court to find that this anomaly is curable since the appellant was not prejudiced in any way. He argued that the rationale for holding in camera trials concerning sexual offences is to protect the child victim, and in this case, PW4 and not the accused. He thus asserted that, if a party had to complain it should have been the victim and not the appellant. He further implored the Court to find the

complaint that the appellant was unable to to cross-examine the prosecution witnesses at the trial, since it was not in camera was an afterthought and misconceived. His argument was based on the fact that the record of appeal shows that the appellant managed to cross-examine all four prosecution witnesses without any hesitation.

The learned Senior State Attorney urged us to find the complaint on the charge being defective not to hold water there being no defect seen. In the alternative, even if it were so, he argued that apart from the failure of the appellant to show how he was prejudiced, the particulars of the offence and the adduced evidence clearly enabled the appellant to understand the substance and seriousness of the offence for which he was charged with and thus he was not prejudiced in any way. He concluded by beseeching the Court to find that the case against the appellant was proved beyond reasonable doubt and to dismiss the appeal.

In rejoinder, the appellant had nothing much to state except to deny having committed the offence and reiterated his earlier prayer for the appeal to be allowed and to be granted his liberty.

Having carefully considered the record of appeal, oral submissions by the appellant and the learned Senior State Attorney, and the cases

referred, our approach shall be to first consider and determine grounds of grievance that address points of law, essentially starting with the fifth, second, fourth and third grounds and then conclude with the sixth and first grounds.

The complaint in the fifth ground is that the charge is at variance with the evidence of PW4 and thus fatally and incurably defective. To be noted is the fact that under section 234 (1) of the Criminal Procedure Act, Cap 20 (the CPA) where in the course of the trial, it is discovered that there is variance between the charge and evidence, essentially, making the charge to be defective, the charge may be amended. Section 234 (1) states:

> *"234 -(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and all amendments made under the provisions*

of this sub-section shall be made upon such terms as to the court shall seem just."

Having carefully scrutinized the evidence of the prosecution witnesses in the record of appeal, we have to agree with the learned Senior State Attorney that there is no variance discerned between the said evidence and the charge sheet. PW4's evidence related to what transpired in the toilet, being given 500/= by the appellant, the appellant removing PW4's shorts and also removing his own belt holding his trousers. The charge against the appellant was attempting to have carnal knowledge of PW4 against the order of nature, which we find augurs well with PW4's testimony. We thus find the appellant's complaint unsubstantiated and thus unmerited.

Regarding the second complaint on irregularity in proceedings of the trial having contravened of section 186 (3) of the CPA, it is pertinent to understand the contents of the said provision. Section 186 (3) of the CPA provides:

"Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or

other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newpaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions."

The provision essentially imposes the requirement that the evidence of all persons in all trials involving sexual offences is received by the court in camera. There is also a prohibition on publication of such proceedings in the media.

Certainly, having revisited the record of appeal, there is no evidence that the trial was held in camera in compliance with the said provision and this was conceded by the learned Senior State Attorney. That notwithstanding, the issue for our determination is whether that anomaly is fatal and vitiated the trial proceedings.

The learned Senior State Attorney's position is that in the circumstances of the instant case, the appellant was not prejudiced by the said irregularity. We are also of similar view, since one, the appellant failed to show how he was prejudiced. Two, the requirement for trials involving sexual offence to proceed in camera its purpose is

essentially to protect the victims of sexual offences. In **Leonard Salim Kimweri v. Republic,** Criminal Appeal No. 453 of 2015 (unreported), the Court held that section 186 (3) of the CPA requirement is intended to protect the victim of any sexual offence and not the accused person and that non-compliance with the said requirement by a trial magistrate would invariably occasion no miscarriage of justice. [See also, **Godlove Azael @ Mbise v. Republic**, Criminal Appeal No. 312 of 2007; **Saning'o Meshuki Mollel v. Republic,** Criminal Appeal No. 3 of 2009; **Faraja Leserian v. Republic**, Criminal Appeal No. 203 of 2012; and **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015 (all unreported)].

In **Godlove Azael** (supra), it was held:

> *"In what way was the appellant prejudiced under section 186(3) of the CPA? Even at the late stage when he made his defence as DW1, he did not protest that since he was charged with sexual offence, his evidence should be received in camera."*

Three, there is no evidence that at any stage of the trial, the appellant did complain of non-compliance of section 186 (3) of the CPA and having cross-examined all the prosecution witnesses, it does not

seem that the appellant was in any way hindered to enjoy his rights because the trial was not conducted in camera. For the said reasons, we are satisfied that the appellant has failed to demonstrate that non-compliance with section 186 (3) of the CPA had any adverse effect for him to exercise his rights or that he was in any way prejudiced. The ground thus fails.

In the fourth ground of appeal, the appellant laments that his conviction was unwarranted since both the trial and first appellate courts relied on the evidence of PW4, a child of seven years of age, as the key witness for the prosecution whilst its recording did not comply with section 127 (2) of the Evidence Act. Section 127 (2) of the Evidence Act provides:

> *"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 tell lies."*

There are various decisions of this Court that have discussed what the provision requires and its significance. In cases such as **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, **Hamisi Issa v. Republic**, Criminal Appeal No. 274 of 2018 and **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (all

unreported), the Court essentially held that section 127 (2) of the Evidence Act requires that, where the evidence of a child of tender age is taken without oath, the intended witness must promise the court to tell the truth and not to tell lies. That, in the absence of any direction engrained in the provision of how the promise can be procured, the court must prior to getting the said promise, ask few and simple questions to the said witness to determine, foremost, whether the child understands the nature of oath or affirmation. When the answer is in the affirmative then receive the testimony under oath or affirmation. If not, then the child witness should be required to promise to tell the truth and not tell lies.

In the appeal before us, as regards what transpired prior to the recording of the testimony of PW4 is found on page 22 of the record of appeal and reads that:

> *"25/10/2017*
> *Coram:- A. H. Mwilapwa- SRM*
> *Pros:- Miss Agatha, State Attorney*
> *B/C:- Mwakabole*
> *Accused: Present*
> ***State Attorney:-*** *The case is for hearing*

PW.4:- *(The victim- name withheld), boy, aged 7 Yrs. Old:*

COURT

PW4 is the child of tender year the court asked him if he promise to speak the truth in court and he replies

The victim:- *I will speak the truth your honour relating to the evidence*

A.H. Mwilapwa -SRM

25/10/2017"

Thereafter, the court recorded the testimony of PW4. In the reproduced excerpt above, the Court does not seem to make any finding regarding whether or not PW4 understands the meaning of an oath or affirmation and whether he has promised to tell the truth and not tell lies. We have observed that there is an absence of any record of there being any test conducted by way of simple questions from the trial court to PW4 in line with what was expounded in the cases cited above, **Geofrey Wilson** (supra) or **Issa Salum Nambaluka** (supra).

In **John Mkorongo James v. Republic**, Criminal Appeal No. 498 of 2020 (unreported), the Court held:

"The omission to conduct a brief examination on a child witness of a tender ages to test his

competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court to tell the truth and not tell lies, is fatal and renders the evidence valueless."

That being the position, having found that there was contravention of section 127 (2) of the Evidence Act in the instant appeal with regard to recording PW4's evidence, undoubtedly, renders the said evidence inconsequential. The consequence is to expunge the said evidence from the record (See, **John Mkorongo James** (supra)). Therefore, the evidence of PW4 is hereby expunged from the record.

Upon purging away the evidence of PW4, we proceed to ask ourselves whether the remaining evidence is sufficient to support the appellant's conviction. When the learned Senior State Attorney was queried, what will be his position if the evidence of PW4 was to be found wanting for non-compliance of section 127 (2) of the Evidence Act, he responded that the remaining prosecution evidence will not sustain the appellant's conviction. We agree with him.

To be noted is that the other witnesses for the prosecution were PW1, PW2 and PW3. PW3, is the neighbour who stated that she and her young brother arrested the appellant, a non student, having seen

him enter the toilet behind PW4. What is clear from the summation of the first appellate court, is that the conviction was sustained upon believing the evidence of PW4 on what transpired in the toilet and PW3's evidence while held to be reliable was only mentioned in passing. The relevance of PW3's evidence with regard to the offence charged was primarily on seeing the appellant enter the toilet and arresting him at the scene of the crime. We find her evidence related to what she saw may not go to the ingredients of the offence charged. Her evidence found on pages 20 and 21 of the record of appeal reveals that:

> *"On 3/11/2016 I was living with Gerald, it was 8.30 hours I sent my little brother Freman Gerald to buy bans he saw one person who called him, he peeped into the wall of the school toilet as we are neighbours to that school toilet, he went on seems via the window he saw a person who called pupil and the suspect kneeled down. I told my brother to go there, we went at the toilet, we saw the suspect with the pupil at the toilet corner, we arrested the victim when he did want to run we also ordered the suspect not to run...."*

Having scrutinized the above passage, we have failed to gather how such evidence can prove the offence charged against the appellant

in the absence of the evidence of PW4. The evidence of PW1, the teacher, related to having been informed of the incident by PW3. She did not witness anything in the toilet, the same for PW2, the mother of PW4 who was also informed of the incident. The evidence of PW4 is the one which alluded to the fact that the appellant had started to undress. In **Mwanahamisi Abdallah Hamis v. Republic** [1983] T.L.R. 265, it was held:

> *"Attempt to commit an unnatural offence is not committed where the appellant had not started to undress himself."*

For the foregoing, it is clear that in the absence of the evidence of PW4, which narrated the fact that the appellant had removed his trouser belt, and thus had started to undress, the remaining evidence is weak to prove the offence charged against the appellant and thus cannot sustain his conviction.

We find our findings in the determined three grounds of appeal, suffice to dispose of the appeal and find no reason to proceed to address the remaining grounds of appeal. In the final analysis, we allow the appeal, quash the conviction against the appellant and set aside the

sentence imposed against him. The appellant is to be released from prison immediately unless otherwise lawfully held.

DATED at **MOSHI** this 10th day of July, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2023 in the presence of the Appellant in person, Mr. Paul Kimweri assisted by Mr. Geofrey Mlagala both learned Senior State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.

A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL