IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 24 OF 2020

JUMA SHIJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, at Shinyanga)

(Mkeha, J.)

dated the 3rd day of December, 2019

in

Criminal Appeal No. 2 of 2018

JUDGMENT OF THE COURT

4th & 11th July, 2023

KITUSI, J.A.:

The appellant Juma Shija has preferred this second appeal after his conviction for unnatural offence (section 154 of the Penal Code) and sentence to life imprisonment were upheld by the High Court. He has raised nine grounds of appeal including the first ground complaining that the offence was not proved beyond reasonable doubt, which we propose to deal with, last.

It is mainly a narration of a father (PW3) and his two sons, PW1 and PW2 as to what is alleged to have happened before the appellant was charged and subsequently convicted. It goes thus: On the material day, PW1 a boy of 9 years according to his father, was incharge of

livestock at the grazing field within Mwime Village in Kahama District, where the family lived. That is when one person, unfamiliar to the boy, turned up unexpectedly, allegedly pounced on him and had anal sex with him by force. PW1 gave graphic details of how the ravisher went about it, but those details are, in our view, scarcely necessary for our determination of this matter.

When the ravisher was done with PW1 and let him go, the victim walked home awkwardly in pain but met his brother PW2 on the way before reaching home. He immediately disclosed to his elder brother what he had suffered in the hands of the stranger at the field. The two brothers walked back to the field where from a vantage position, they saw the culprit, who turned out to be the appellant, still there. They resumed the walk towards home where they informed their father (PW3) about PW1's predicament. The trio walked back to the filed, apprehended the appellant, and turned him over to the police after formalities at the office of the Village Executive Officer, (VEO).

PW4 a medical practitioner testified on his findings upon running an examination on PW1. He detected a bruised anus smeared with sperms and faeces, which informed his conclusion that the boy had been sodomized.

Not only did the appellant not contradict the prosecution witnesses by cross-examination but he offered a surprisingly short account when

he took the witness box. He denied knowing and sodomizing PW1 and simply stated that on a date he could not recall, he had traveled from Mpanda District in Rukwa Region in search of employment at Mwime.

The trial court was satisfied that PW1 had been sodomized and that it was the appellant who committed the sodomy. It accepted the testimonies of PW1 on the identify of the appellant as his ravisher and that shortly after the event, PW1 and PW2 saw him still hanging around at the scene. It rejected the defence as the appellant had not cross-examined the prosecution witnesses to contradict them, and did not suggest why PW1 and members of his family would pick on him, being a stranger. The same position was taken by the High Court on first appeal which had raised four grounds.

Before us, the appellant has raised 9 grounds of appeal which he did not elaborate on apart from asking that we should consider them and, on their basis, restore his freedom. Ms. Mwamini Fyeregete, learned Senior State Attorney who appeared with the assistance of Ms. Upendo Mwakimonga, learned State Attorney for the respondent Republic pointed out that 8 out of the 9 grounds of appeal are new therefore, should not be dealt with by us. The appellant could hardly comprehend this point so he insisted that we should consider the substance of all grounds and allow the appeal.

We do not need to cite cases to justify this settled law that our Court may not deal with grounds of appeal or issues that were not first raised and determined by the first appellate court unless they raise legal points. See the case of **Njile Samwel @ John v. Republic**, Criminal Appeal No. 31 of 2018 (unreported). In this case, even at a glance, the fact that the petition of appeal to the High Court raised only four grounds of appeal tends to suggest that among the nine grounds now being raised on this second appeal, there are bound to be new ones. In line with that principle, we are not going to consider six of those grounds. These are ground 2 which raises the issue of contradiction in the evidence. Ground 3 which demands that there should have been proof by DNA. Ground 4 alleging that PW4 did not establish his qualification as a medical practitioner. Ground 5 which suggests that it would not be possible for the appellant to tame PW1 undress and sodomize him all at the same time. Ground 6 raises a complaint that the omission to call the VEO was fatal. Lastly, ground 8 which complains that PW1, PW2 and PW3 are all family members.

Ms. Fyeregete proposed, and we agree with the learned Senior State Attorney, that the appeal turns on our determination of three grounds. The first attacks the two courts below for having proceeded without proof of age of PW1 by a birth certificate. The other is ground two which challenges the decisions for having been based on the

evidence of PW1 whose testimony was recorded in violation of the law because no *voire dire* examination was conducted. The last as earlier intimated, is ground nine which alleges that the prosecution did not prove the case beyond reasonable doubts.

Beginning with the question of proof of age of the victim, Ms. Fyeregete submitted that such proof need not be by a birth certificate as suggested by the appellant in the first ground of appeal. She pointed out that PW3 who is the victim's father provided that proof. The learned Senior State Attorney submitted that age may be proved by a parent as in this case, or relative, or guardian or medical practitioner.

The appellant did not address this point, but the law is settled as submitted by Ms. Fyeregete, that proof of age of a victim of sexual offence, need not be by a birth certificate. The case of **Peter Bugumba @ Cherehani v. Republic,** Criminal Appeal No. 251 of 2019 (unreported) cited by the learned Senior State Attorney is on point. It cited the case of **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported) which has hitherto set that position. Therefore this ground of appeal has no merit and stands dismissed. It needs to be made clear that, unlike in cases of rape where age may be relevant in determining one's guilt, that is not the case with unnatural offence except for sentencing. Sodomy is an offence regardless of the victim's age because consent is immaterial.

We now turn to ground 7 on the omission to conduct a *voire dire* examination. Ms. Fyeregete submitted that *voire dire* is no longer a requirement after the amendment to section 127 of the Evidence Act which came into force on 8th July 2016. Under the current section 127 of the Evidence Act, she submitted, all the trial court needs to do is to extract from a witness of tender age a promise to tell the truth and not lies. She submitted in conclusion, that there was full compliance with that requirement according to the proceedings immediately before PW1 gave evidence.

It is true that under the old as well as the new section 127 of the Evidence Act, persons of the age below 14 years may not testify unless they demonstrate to the court that they can. The Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 introduced the requirement for the witness of tender age to promise to tell the truth and not lies. The cases of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 and **Issa Salum Nambaluka v. Republic**, Criminal Appeal No 272 of 2018 (both unreported), give guidance on what should be done in complying with that requirement.

In this case, this is what transpired before the evidence of PW1 was recorded:

*"**Court:** The witness is young; he is not an adult. He is hereby addressed on the importance of stating the truth about what he knows.*

***Witness** – PW1- I am going to state the truth, I am going to tell the truth only, it is wrong to tell lies.*

Signed"

We are satisfied like the learned Senior State Attorney is, that the above excerpt demonstrates substantial compliance with the requirement of section 127 (2) of the Evidence Act, therefore PW1's evidence was properly received because he promised to tell the truth and not lies. The seventh ground of appeal has no merit, and it is dismissed.

The ninth ground of appeal comes last. It complains that the trial court should not have found the appellant guilty and convicted him with the charged offence because the prosecution did not prove it beyond reasonable doubt. Ms. Fyeregete submitted that proof of the charge came from the evidence of PW1 who gave details of what he went through in the hands of the appellant during hours of the day. Then the evidence of PW2 his brother, to whom PW1 immediately disclosed the ordeal after which the two went to the scene and saw the appellant from a vantage position. There is also the evidence of PW3 their father

who found the appellant right at the scene of the crime and apprehended him.

We agree with the concurrent findings of the two courts below that sodomy was in fact committed on PW1 according to the latter's evidence and that of PW4, the medical doctor who examined him immediately. We also agree with the learned Senior State Attorney that the evidence of PW1, PW2 and PW3 provided proof of the fact that it was the appellant who committed the charged offence. As we alluded to earlier, the appellant did not seek to impeach these witnesses by way of cross examinations, which we found quite strange in view of the serious allegations that were placed at his door. We reiterate what we have stated previously on this point that:

> *"We are aware that there is a useful guidance in law that a person should not cross- examine if he/ she cannot contradict. But it is also trite law that failure to cross- examine a witness on an important matter ordinarily implies the acceptance of the truth of the witnesses' evidence".*

[**Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), reproducing that paragraph from **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 (also unreported)].

The appellant's flat denial during his defence, which was also unusually brief, could not, in view of the solid evidence of PW1, PW2 and PW3 cast any reasonable doubt to the prosecution case. The ninth ground of appeal is therefore without merit, and we dismiss it.

In fine, the entire appeal has no merit and it is hereby dismissed.

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

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2023 in the presence of the Appellant in person and Ms. Rehema Sakafu, Ms. Fransisca Ntemi and Ms. Rosemary Kimaro both learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL