IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And MDEMU, J.A.)

CRIMINAL APPEAL NO. 434 OF 2020

MOHAMED JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court of Arusha, at Arusha)

(Ngoka, RM-Ext. Jur.)

dated the 26th day of February, 2020
in
Extended Jurisdiction Criminal No. 48 of 2019

JUDGMENT OF THE COURT

19th & 25th September, 2023

KEREFU, J.A.:

The appellant, Mohamed Juma was charged and convicted by the Resident Magistrate's Court of Arusha at Arusha of unnatural offence contrary to section 154 (1) (a) of the Penal Code, Cap. 16 (the Penal Code). It was alleged that on 15th May, 2017 at Njiro area within the city and Region of Arusha, the appellant had carnal knowledge of a boy child aged four (4) years. To conceal his identity, we shall refer to him as 'AM' or simply 'PW2', the codename by which he testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. The prosecution case was built on evidence adduced by four witnesses augmented by two documentary exhibits namely, the appellant's cautioned statement (exhibit P1) and Police Form No. 3 (exhibit P2). On his side, the appellant testified alone, as he did not summon any witness.

Briefly, the prosecution case as obtained from the record of appeal indicates that, on 15th May, 2017, Asia Adam (PW1), the mother of the victim (PW2), went to the hospital while leaving PW2 under the care of the appellant who was her neighbour. She came back home at around 14:00 hours and observed that PW2 was walking with some difficulty. She thus inquired from PW2 what had happened to him. Initially, PW2 hesitated to reveal the ordeal, but at the end, he told his mother that uncle Mudy (the appellant) inserted his penis into his anus. In his own words, PW2 said, '...*uncle Mud (the appellant) took his chuchulu (penis) and penetrated it into my back (anus). He promised to give me money.*' PW1 revealed that shocking information to PW2's father and the matter was reported to Njiro Police Station where they were availed with the PF3 for PW2's medical examination.

Upon obtaining the PF3, PW2 was brought to Nane Nane Hospital where he was examined and treated by Dr. Frida Paschal Njau (PW4) who found that PW2's anus had bruises and his sphincter muscles were loose indicating that the anus had been penetrated by a blunt object. PW4 recorded her findings in the PF3 (exhibit P2).

E 2606 D/CPL Unuku (PW3) the investigation officer testified that, he was involved in the investigation of the incident, interviewed the appellant and recorded his cautioned statement. PW3 stated that during the interview, the appellant admitted to have committed the alleged offence. The said statement was admitted in evidence as exhibit P1.

In his defence, the appellant, apart from admitting that he knows PW2 as the child of his uncle, dissociated himself from the accusations levelled against him by raising a defence of *alibi*. He testified that, on the fateful date, he was not at the scene of the crime. He thus challenged the evidence of PW1 and PW2 that they gave untrue story before the trial court. He complained that, the case was framed up against him due to the existing land dispute between him and PW2's father. The appellant testified further that he was arrested on 14th May, 2017.

At the end of it all, the trial court relied on the testimony of PW2 whose evidence was corroborated by PW1, PW3 and PW4 and found that the charge against the appellant was proved to the hilt. Thus, the appellant was found guilty, convicted and sentenced to life imprisonment.

The appellant's first appeal was unsuccessful, as the first appellate court dismissed it and upheld the decision of the trial court. Undaunted, the appellant preferred this second appeal. In the memorandum of appeal lodged on 6th June, 2022, he raised five (5) grounds of appeal which can be conveniently paraphrased herein below:

(1) *The first appellate court erred in law for upholding the appellant's conviction and sentence without observing that the conviction was based on a defective charge for non-citation of sub section (2) to section 154 of the Penal Code which provides for the punishment of the charged offence;*

(2) *The first appellate court erred in law and fact for failure to observe that the evidence of PW2 was recorded contrary to the requirement of section 127 (2) of the Evidence Act, Cap. 6 (the Evidence Act);*

(3) *The first appellate court erred in law and fact by failure to find that the appellant's defence was not considered;*

(4) *The first appellate court erred in law and fact by failure to observe that the preliminary hearing was conducted contrary*

to section 192 (2) and (3) of the Criminal Procedure Act, Cap. 20 (the CPA); and

(5) *That, both lower courts erred in law and facts for failure to find that the prosecution case was not proved to the required standard.*

In addition, on 14th September, 2023, the appellant lodged a supplementary memorandum of appeal consisting of one ground, that:

(1) *The lower courts erred in law and fact by convicting and sentencing the appellant based on a cautioned statement which was illegally procured.*

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Mses. Tarsila Asenga and Upendo Shemkole, both learned Senior State Attorneys.

When given an opportunity to amplify on his grounds of appeal, the appellant adopted all grounds indicated in the two memoranda and preferred to let the learned State Attorneys respond first but he reserved his right to rejoin, if the need to do so would arise.

In response, Ms. Shemkole from the outset, declared the respondent's stance of opposing the appeal and intimated that she will start to argue the first, second, third and fourth grounds indicated in the substantive memorandum of appeal, followed by the ground of appeal in the supplementary memorandum of appeal and finally, the fifth ground

in the substantive memorandum of appeal. We shall therefore determine the grounds of appeal, in the same manner as indicated by the learned Senior State Attorney.

However, before doing so, it is crucial to state that, this being a second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there were no mis-directions or non-directions on evidence. Where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Salum Mhando v. Republic** [1993] T.L.R. 170 and **Mussa Mwaikunda v. The Republic** [2006] T.L.R. 387. We shall be guided by the above principle in disposing this appeal.

Starting with the appellant's complaint on the first ground, although, Ms. Shemkole readily conceded that the charge did not indicate the punishment provisions, she was quick to cite sections 132 and 135 of the CPA and argued that there is no legal requirement of indicating punishment provisions in a charge. It was her further argument that, since the appellant was aware of the charged offence from the particulars of the offence which were clearly stated, and he properly marshalled his defence, there was no any prejudice occasioned

against him. To support her proposition, she referred us to the case of **Joseph Kanankira v. Republic**, Criminal Appeal No. 240 of 2019 [2022] TZCA 688: [27 October 2022: TanzLII].

We wish to start by stating that, the process of framing a charge is governed by sections 132 and 135 (a) (ii) of the CPA. The said provisions prescribe the mode and the format to be adopted in framing the charge or on the manner in which the offences are to be charged. For the sake of clarity, section 132 of the CPA provides that:

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"*

Similarly, section 135 (a) (ii) of the CPA requires the statement of the offence to cite a correct reference of the section of the law which sets out or creates a particular offence alleged to have been committed, that:

> *"The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all essential elements*

of the offence and, ***if the offence charged is one created by enactment shall contain reference to the section of the enactment creating the offence.*** *" [Emphasis added].*

This Court on several occasions, had pronounced itself on the applicability of the above provisions. See for instance, the cases of **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 [2019] TZCA 32: [28 February 2019: TanzLII]; **Jafari Salum @ Kikoti v. Republic**, Criminal Appeal No. 370 of 2017 [2020] TZCA 221: [13 May 2020: TanzLII]; **Khamisi Abderehemani v. The Republic,** Criminal Appeal No. 21 of 2017 [2019] TZCA 520: [26 February 2019: TanzLII]. In all these cases, the Court stated that irregularities on non-citation and citations of inapplicable provisions in the charge are curable under section 388 (1) of the CPA.

In addition, in **Joseph Kanankira** (supra) and **Abdul Mohamed Namwanga @ Madodo v. Republic**, Criminal Appeal No. 257 of 2020 [2022] TZCA 123: [21 March 2022: TanzLII], when considered the omission of citing punishment provisions in the charge, the Court stated that, since indicating a punishment provision in the charge is not a legal requirement, its omission does not render it defective, more so when

the particulars are clear enough to inform the accused the nature of the offence he was charged with.

Similarly, in the instant appeal, having closely examined the contents of the charge found at page 1 of the record of appeal together with the key requirements for framing charges stipulated under sections 132 and 135 of the CPA, we agree with the learned Senior State Attorney that the appellant's complaint under this ground is unfounded. We thus find the first ground devoid of merit.

Responding to the second ground of appeal, Ms. Shemkole challenged the appellant's complaint regarding the evidence of PW2 by referring us to page 15 of the record of appeal where PW2 testified and argued that, PW2's evidence was properly recorded as the trial court had complied with the provisions of section 127 (2) of the Evidence Act. That, the learned trial Magistrate, before recording and receiving the said evidence, he clearly indicated that PW2 promised to tell the truth to the court. She insisted that, the said provision does not require a *voire dire test* to be conducted to a child of tender age who is giving unsworn evidence. To buttress her proposition, she cited the case of **Raphael Ideje @ Mwanahapa v. The Director of Public Prosecutions,** Criminal Appeal No. 230 of 2019 [2022] TZCA 71: [25 February 2022: TanzLII] and invited us to find the appellant's complaint unfounded.

Having perused the record of appeal and considered the parties' submissions, we agree with the learned Senior State Attorney that, the appellant's complaint on this aspect is baseless and it is not supported by the record. it is undisputable fact that at the time of giving his evidence, PW2 was a child aged four (4) years and thus a child of tender age in terms of section 127 (4) of the Evidence Act. It is also undisputable fact, and as correctly argued by Ms. Shemkole that at page 15 of the record of appeal PW2, before giving his evidence he promised to tell the truth to the court. Section 127 (2) of the Evidence Act provides that:

> *"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 to tell any lies." [Emphasis added].***

The above provision has been consistently construed by the Court to mean that, giving a promise to tell the truth and not lies is a condition precedent for the admissibility of the evidence of a child of tender age (not more than fourteen years) which is given without oath or affirmation. For instance, in the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 [2019] TZCA 109: [6 May 2019:

TanzLII], while considered the import of the above section, the Court stated that:

> *"To our understanding, the ...provision as amended provides for two conditions.* ***One,*** *it allows the child of tender age to give evidence without oath or affirmation.* ***Two,*** *before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies."*

In addition, in **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 [2020] TZCA 10: [21 February 2020: TanzLII], the Court emphasized that:

> *"In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies."*

Furthermore, in **John Ngonda v. Republic**, Criminal Appeal No. 45 of 2020 [2023] TZCA 13: [15 February 2023: TanzLII], when the Court was considering the evidence of a child of a tender age given under the promise, it stated that:

> *"...Although it is shown at page 8 of the record of appeal that the trial Magistrate did not ask any preliminary questions to determine if the witness understood the nature of oath for her to qualify to give evidence on oath,*

it is evident that he recorded her to have said "I promise that I will speak the truth" before he allowed her to testify. Certainly, the trial court could not let her testify on oath since it had not established whether she understood what an oath entailed. ***Nonetheless, so long as the trial Magistrate extracted the child witness' promise to speak the truth in compliance with the law, he rightly allowed her to give evidence on the strength of such promise.*** *The appellant's twofold complaint on this aspect is plainly unfounded. We dismiss it." [Emphasis added].*

Likewise, in the current appeal, since from the record it is clear that, PW2, before giving his evidence, promised to tell the truth to the court, the fact that the trial court did not ask preliminary questions to determine the manner in which he would give evidence does not have any effect as regards the validity of his evidence. As such, we find the appellant's complaints to have no legal basis. We are mindful of the fact that the appellant based his complaint on our earlier decision in **John Mkorongo James v. Republic**, Criminal Appeal No. 498 of 2020 [2022] TZCA 111: [11 March 2022: TanzLII]. We however find the said case to be distinguishable and not applicable in the circumstance of this appeal as in that case, the promise by the witness, among other things,

was given in a reported speech which is not the case herein. We thus dismiss the second ground for lack of merit.

The appellant's complaint on the third ground hinges on the failure by the lower courts to consider his defence evidence. He contended that, both lower courts did not objectively evaluate and/or analyze his defence evidence and no reasons were assigned for such omission. Relying on our previous decision in **Farida Abdul Ismail v. Republic**, Criminal Appeal No. 83 of 2017 (unreported) he urged us to find that the said omission had occasioned miscarriage of justice on his part.

Responding to this ground, Ms. Shemkole was very brief and to the point that both lower courts sufficiently considered the appellant's defence and rejected it for being incapable of weakening the prosecution case. To clarify her argument, she referred us to pages 40, 41 and 63 of the record of appeal. She thus urged us to dismiss the third ground for lack of merit.

Having perused the record of appeal, we agree with Ms. Shemkole that the appellant's complaint under this ground is not supported by the record, as it is vivid at pages 40, 41 and 63 of the record of appeal that both lower courts adequately considered and weighed the appellant's defence against the prosecution case but rejected it. We thus find the

case of **Farida Abdul Ismail** (supra) relied upon by the appellant on this aspect distinguishable with the circumstances of this appeal, as in that case, the defence evidence was completely not considered which is not the case in the current appeal. We take the view that, it is one thing to consider the defence case and it is quite another to accept it. It cannot be argued that the defence was not considered merely because its version was not accepted by the Court. See the case of **David Gamata and Another v. Republic**, Criminal Appeal No. 216 of 2014 (unreported). As such, we also find this is ground without merit.

On the fourth ground, the appellant contended that the preliminary hearing was conducted contrary to the provisions of section 192 (2) and (3) of the CPA. That, the trial court did not read out his cautioned statement at that stage of preliminary hearing. To support his proposition, he referred us to the case of **Kanisius Mwita Marwa v. Republic**, Criminal Appeal No. 306 of 2013 (unreported) and urged us to find that the said omission was fatal and had vitiated the trial court's proceedings.

In her response, Ms. Shemkole challenged the appellant's complaint on this aspect by referring us to page 6 of the record of appeal and argued that the preliminary hearing was properly conducted. She however added that non-compliance with section 192 (2) and (3) of

the CPA, only vitiates the preliminary hearing proceedings, and not the entire trial proceedings as claimed by the appellant.

We find the appellant's complaint on this ground to be misconceived because it is not a legal requirement to read an accused person's cautioned statement at the stage of preliminary hearing. It is common ground that the aim of preliminary hearing is to expedite criminal trials by reducing number of witnesses who would have been called to testify on undisputed facts of a case thus saving court's time and costs. As correctly argued by Ms. Shemkole, non–compliance with section 192 of the CPA vitiates only its proceedings and not the entire trial court's proceedings as claimed by the appellant. See for instance our previous decisions in **Kalist Clemence @ Kanyaga v. R,** Criminal Appeal No. 1 of 2000 (unreported) and **Kanisius Mwita Marwa** (supra) relied upon by the appellant. However, since we have already pointed out that the appellant's complaint in this ground is misconceived, we dismiss it.

The appellant's complaint in the ground of appeal contained in the supplementary memorandum of appeal is to the effect that his cautioned statement (exhibit P1) was illegally procured and thus invalid. That, although, he was arrested on 14th May, 2017, the said statement was recorded on 16th May, 2017 beyond the four hours prescribed under

the provisions of sections 50 (1) and 51 of the CPA. He contended further that, the allegation by the prosecution that he was arrested on 16th May, 2017 was not proved because the police officer who arrested him was not summoned to testify before the trial court. Relying on our previous decision in **Anold Loishie @ Leshai v. Republic**, Criminal Appeal No. 249 of 2017 [2021] TZCA 528: [27 September 2021: TanzLII], he urged us to expunge exhibit P1 from the record.

In her response, Ms. Shemkole argued that exhibit P1 was properly obtained within the time prescribed by the law. She argued that, during the trial, the appellant did not raise that issue and/or object the admissibility of the said statement in evidence. She thus challenged the appellant to raise such an issue at this stage. She added that the appellant's allegations that he was arrested on 14th May, 2017 is nothing but an afterthought.

Having revisited the testimony of PW3 who tendered the appellant's cautioned statement before the trial court, we agree with Ms. Shemkole that the appellant's complaint on this ground is baseless. It is apparent at pages 18 to 19 of the record of appeal that during the trial, when PW3 tendered the said statement for admission, the appellant did not object to its admission in evidence and/or raise an issue that the same was illegally obtained and/or invalid. In **Emmanuel Lohay and**

Udagene Yatosha v. Republic, Criminal Appeal No. 278 of 2010 (unreported), when faced with an akin situation, the Court held that:

> *"**It is trite law that if an accused person intends to object to the admissibility of a statement/confession, he must do so before it is admitted** and not during cross-examination or during defence - **Shihoze Semi and Another v. Republic** (1992) TLR 330. In this case, the appellants 'missed the boat' by trying to disown the statements at the defence stage. That was already too late. **Objections, if any, ought to have been taken before they were admitted in evidence.**" [Emphasis added].*

Being guided by the above authority, it is our considered view that, even in this appeal, the appellant has missed the boat long before he came before us. Therefore, the appellant's complaint of objecting the admissibility of his statement at this eleventh hour offends the above stated principle. We equally find his allegation that he was arrested on 14th May, 2017 to be unfounded because according to the charge and evidence of PW1 and PW2 the offence was committed on 15th May, 2017 and PW1 clearly testified at page 14 of the record of appeal that the appellant was arrested on 16th May, 2017. It is clear to us that the

appellant could not have been arrested prior to the commission of the said offence. For these reasons, we do not find merit in this ground.

On the last ground in the substantive memorandum of appeal, the appellant faulted the first appellate court for failure to observe that the prosecution case was not proved to the required standard. He contended that PW1 and PW2 were incredible and unreliable witnesses as their testimonies were tainted with contradictions. He clarified that at page 15 of the record of appeal, PW2 testified that when PW1 came, she found him with the appellant while PW1 at page 13 of the same record stated that she did not find PW2 at home and a moment later, he came back with a bubble gum and the appellant was absent. In addition, the appellant pointed out that, in her testimony, PW1 stated that she observed that PW2 was walking with difficulty and asked him what had happened to him, while PW2 in his testimony, he never mentioned that aspect. It was therefore the appellant's complaint that the said contradictions in PW1 and PW2's evidence raised doubts in the prosecution case which should have been determined in his favour.

In response, Ms. Shemkole contended that PW1 and PW2 were credible and reliable witnesses. She, however argued that, even if the said contradictions do exist, the same are minor defect which do not go to the root of the matter. She argued further that, in convicting the

appellant, the trial court relied on the testimony of PW2 whose evidence was corroborated by PW1, PW3 and PW4. Relying on the principle established by this Court in proving sexual offences, Ms. Shemkole argued that, the evidence of PW2 was the best evidence which could have been used by the trial court to mount the appellant's conviction even without any corroboration, as long as the court was satisfied that the witness was telling the truth. In that regard, she stressed that the prosecution case was proved beyond reasonable doubt and urged us to dismiss the appeal in its entirety.

Having considered the contradictions complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW1 and PW2. By any means, we cannot expect PW1 and PW2 to match in their testimonies in all aspects. As such, we have no hesitation to agree with Ms. Shemkole that the appellant's complaint on that aspect is plainly baseless because the pointed-out contradictions do not go to the root of the matter.

It is on record that PW2, the key witness in this case, at page 15 of the record of appeal clearly explained the incident on how the appellant sodomized him. Likewise, PW1 at pages 13 to 14 of the same record, testified on how she left PW2 under the care of the appellant and later, when she came back, found PW2 walking with difficulty and

upon inquiry, he informed her that he was sodomized by uncle Mud (the appellant). It is our considered view that the act of mentioning the appellant at the earliest opportunity, adds credence to the reliability and assurance of the PW2's evidence.

In addition, PW3 testified on how he managed to record the appellant's statement where he admitted to have committed the offence. In the said statement the appellant clearly explained in detail how he sodomized PW2. As stated above, the appellant did not challenge the said statement during cross examination or during his defence. On her part, PW4 explained on how she examined PW2's anus and found it with bruises and its sphincter muscles loose an indication that it had been penetrated by a blunt object.

It is also on record that in convicting the appellant, the trial court relied mostly on the evidence of PW2 which was corroborated by PW1, PW3, PW4 and the appellant's cautioned statement. As such, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion. It is therefore, our settled view that there are no sufficient reasons for the Court to fault the findings of the two courts below on this ground of appeal. In the circumstances, we also find the fifth ground with no merit.

In conclusion, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole established that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and hereby dismissed it in its entirety.

DATED at **ARUSHA** this 25th day of September, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 25th day of September, 2023 in the presence of the appellant in person and Mr. Allawi Hassan, 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