IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 17 OF 2020

(Originating from the District Court of Simanjiro at Orkesumet in Criminal Case No. 55 of 2019)

METHOD LEODIGA KOMBA @ TODI.....1ST APPELLANT

ISIHAKA ADAM .....2ND APPELLANT

VERSUS

THE D.P.P .....RESPONDENT

JUDGMENT OF THE COURT

02/09/2020 & 12/11/2020

GWAE, J.

In the District Court of Simanjiro at Orkesumet (trial court) the appellants, Method Leodiga Komba @ Todi and Isihaka Adam (hereinafter to be referred to as 1st appellant and 2nd appellant respectively) were jointly and together charged with and tried for the offence of unnatural offence c/s 154 (1) (a) of the penal code, cap 16 of Revised Edition, 2002.

Particulars of the charge read; that on 29th April 2019 at Zaire Kai Street – Mirerani within Simanjiro District in Manyara Region the said appellants did have

carnal knowledge of one whose name shall be referred to as Y.H (victim) a boy aged 15 years against the order of nature.

The briefs prosecution evidence which led to the full satisfaction of the trial court that the charge against the appellants was proved to the required standard is as follows; that on the material date (29/4/2019 at about 21: 00 hrs the victim (PW1) while from her mother's canteen to his parent's residential house, he met the appellants whom he knew by names of **Todi** and **Isihaka.** The appellants then requested the victim to go with them to the 1st appellant's residence. The victim responded to the appellants' request. That, the victim and appellants went to the 1st appellant's residential house in which there were two rooms, one with mattress and another without mattress. The appellants ordered the victim to undress his clothes, the order which was positively complied with by the victim. Thereafter, the appellants threw the victim on the bed.

The appellant further ordered the victim to kneel down while naked. The victim did what he was ordered, the 1st appellant started having unnatural carnal knowledge with the victim followed by the 2nd appellant. According to the victim (PW1), each appellant had managed to sodomize him twice on that material date. The victim and appellants spent the whole night till morning of the following day (30/04/2019) when the 2nd appellant paid the victim Tshs. 20, 000/=as his reward. The victim then went home where he met his father (Y-

PW2) who wanted to know where he (his son) slept on the material night. The victim feared to tell his father the truth as a result he lied that he was at the residential house of his relative one Ramadhani. The said Ramadhani was subsequently summoned by the victim's father for ascertainment of the victim's assertion. The said Ramadhani (PW4) went to the residence of the victim's father when asked if the victim slept at his residence he replied not in affirmative. The victim's father ([PW2) having noted that the victim was not telling him the truth he decided to take the victim to police station where he met a woman police (PW5) who professionally interviewed the victim. Eventually the victim told the woman police the truth of the incidence as aforestated. It was further adduced to the effect that it was not the first time the appellants to have had unnatural sex with the victim.

Having been told the actuality of what transpired on the material night of material date (29/04/2019) between the appellants and the victim, the police issued PF3 (PE2). The victim was taken to Mirerani Health Centre where he was medically examined and it was revealed that the victim's anus muscles were loose or weak and that there were bruises (PW6 & PE2) diagnosed in the victim's anus.

The 1st appellant patently denied having committed the offence and seriously contended that on the day of 30/5/2019 he did not go out and that he

could not have unnatural sex with the victim since in his residence there were persons including his wife and a child. In support of his testimony he summoned his young bother, Paul Alex Komba (DW3) and Adam Komba (DW4) who told the trial court that on the 29/5/2019 the 1st appellant was at his residence.

In his defence, the 2nd appellant is found refuting to have committed the offence of unnatural offence on the material date on the contention that he was at his work place from morning till 25: 00 hrs when he reported off duty. His assertion was supported by his witnesses, Mariam Idd and Rajab Idd (DW5 & DW6).

After the close of the trial, the trial court found the appellants guilty of the offence of unnatural offence and proceeded to convict them to the term of **forty (40)** years imprisonment. Feeling aggrieved by the trial court's conviction and sentence, the appellants lodged a joint petition of appeal before this court containing six grounds as herein under quoted;

1. That, the learned trial Magistrate erred in law and in facts by relying on shaky and unrealible evidence adduced by the PW1 (victim).
2. That, the learned Magistrate erred in law by not complying with mandatory provisions of Sec. 234 (2) (b) of the Criminal Procedure Act, Cap 20 Revised Edition, 2002 (CPA)

3. That, the learned trial Magistrate erred in law and in fact by not taking into consideration of the material evidence adduced by the appellants
4. That, the learned trial Magistrate erred in law and in fact in holding that the case was proved as per required cardinal principle which is beyond reasonable doubt
5. That, the PF3 which contained the report of the doctor on the alleged penetration of the male organ into the victim's anus was not read over after it was admitted As an exhibit P1
6. That, the learned trial Magistrate erred in law and in fact in not drawing an adverse inference against the prosecution for their deliberate failure to summon or call material witnesses

During the hearing of this appeal the appellants were not represented whilst the Respondent, the Republic was duly represented by Mr. Hatibu, the learned state attorney.

Arguing in support of his appeal, the 1st appellant merely stated that, the identification heavily relied by the trial court was not free of doubts since important and essential ingredients such as distance and other ingredients were not mentioned by the PW1 and that he was not at the scene of crime whereas the 2nd appellant had nothing to add to his grounds of appeal.

On the other hand, the counsel for the respondent supported the trial court decision and responded to the appellants' grounds of appeal as follows;

In the 1st ground, the learned state attorney argued that, the victim of the offence was able to properly identify the appellants as she was familiar with the appellants. He added that the appellants were known to the victim and above all the victim and appellants walked together till to the room of the 1st appellant and above all they had spent the whole night together. He then invited this court to make a reference to the famous case of **Waziri Amani v. Republic** (1980) TLR 250).

Regarding the appellants' complaint on alleged non-compliance of section 234 (2) (b) of CPA, admittedly, the counsel for the Republic focusedly argued that the amendment was based on typing error which, according to him, it did not change any substantive matter to the former charge and that the trial court was mandatorily required to do so nor did it prejudice the appellants.

In the 3rd ground of the appellants' appeal, he argued that the trial court did consider the defence of alibi as glaringly depicted in the impugned trial court judgment.

As to the appellants' 5th ground, he was of the view that, the prosecution evidence satisfactorily established the guilt of both appellants since the evidence of the victim is credible and that the same was sufficiently corroborated by the PE2, (PF3) which revealed that the victim's anus had bruises as diagnosed and

testified by the PW6. Mr. Hatibu went on arguing that, the appellants failed to cross-examine the investigator (PW3) on what he was being told by the victim and his observation at the scene of crime.

Mr. Hatibu admittedly argued that, the PF3 (PE2) be expunged for not being read over after its admission as complained by the appellants. Lastly, the respondent's representative told this court that, the 6th ground is baseless since the victim (PW1) and investigator (PW3) were material witnesses and they were summoned and they appeared before the trial court for testimonial purpose. Having argued as herein above, the learned state attorney prayed for dismissal of this appeal in its entirety.

In their rejoinder, the 1st appellant reiteratedly stated that, the victim's evidence is not reliable as to where he certainly slept on the material date adding that the evidence of a medical expert (PW6) is also questionable since he only conducted medical examination in respect of the victim.

Having briefly given the accounts of what transpired in the trial court and in this court exercising its appellate jurisdiction, it is now the noble duty of the court to determine the appellants' grounds of appeal herein above.

Starting with the **1st ground** of appeal on the complaint that, the visual identification was wrongly relied by the trial court. I am alive of the principle that, the evidence of visual identification of an accused person at the scene of crime should always be treated with great care or caution before being relied to

form basis of conviction (See judicial jurisprudence in **Kamau v. Republic** (1975) 1 EA 139 and **Rashidi Ally v. Republic** (1987) TLR 97).

In our instant case, it is found as alleged by the appellants that during trial of the case, the victim (PW1) did not give detailed descriptions necessary for unmistaken identity. Neverthess, according to the evidence of PW1 and PW2 as well as that of appellants, it is clearly established that the victim and the appellants knew each other well. Hence, to my considered view, there was no need to give detailed descriptions taking into account that the victim lucidly testified that he walked with the appellants towards the 1st appellant's residential house and that during unnatural sex the victim was able to see the appellants applying oil as the appellants flashed their torches ("You had torches light on that's why I saw you when applying oil"), that victim and appellants slept together till morning of the following day.

In the circumstances of this particular case, it is my considered view that the distance between the victim and his rapists or the appellants' appearance or type of clothes worn by the appellants on the material date or issue of intensity of light which might have assisted him to identify his assailants do not arise in this particular visual identification.

Despite the proven familiarity between the victims and appellants, I have also taken into account the nature of acts and distance thereto as well as time taken. It is in view of these reasons, this ground is therefore found misplaced.

In the **2nd ground** on the complained non-compliance with provisions of Section 234 (2) (b) of the Criminal Procedure Act, Cap 20 Revised Edition, 2002. It is evident from record of the trial court that initially the charge was admitted on 13/5/2019 and on 12/6/2019, the charge was amended after a total of five prosecution witnesses had testified (PW1-PW1). The record further reveals that on 12/6/2019, the amended charge was read over to the appellants who persistently pleaded not guilty. The only amendment made from the former to the latter charge is date of incidence that in the former charge it was indicated to be 30th April 2019 while in the later is 29th April 2019. For easy of understanding, it is pertinent to reproduce section 234 of CPA

> **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 subsection shall be made upon such terms as to the court shall seem just.
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> (2) Subject to subsection (1), where a charge is altered under that subsection–

(a) The court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.

In this criminal case, it is clearly depicted from the trial court record that, when preliminary hearing was conducted on 17/05/2019, the date of occurrence was indicated to be as appearing in the amended charge. The difference on the dates of occurrence of the wrongful act in the former charge and amended charge, to my view, did not prejudice the appellants nor did it require re-summoning of the prosecution witnesses (PW1-PW5) since all witnesses testified that the incidence occurred on the night of 29th April 2019 and more so the PHG

conducted was informing the appellants the date of incident to be 29.04.2019 and not otherwise. Moreover the incident was on the nights of 29.04.2019 and 30.04.2019.

As to regards the appellants' complaint that the trial court did not take into account of the defence (3rd complaint). In order to be safer when determining this ground, I am to carefully look at the trial court's judgment which reveals that the trial court did not consider the defence of alibi attemptedly raised by the appellants as rightly contended by the appellants. Both appellants had tried to demonstrate that on the material date (29/4/2019) at about 21:00 hrs, they did not meet the victim at Alfarah Mosque area at Zaire Kati as the 1st appellant was at home located at Zaire Kati the whole day (Monday) till the following day (Tuesday) when he was called by police officers who instantly arrested him and the 2nd appellant's contention is to the effect that from the morning of the material date he was at his work place (Mosque area–Zaire Kati) till 23: 00 hrs when he reported off duty.

Looking at the nature of vicinity of the scene of crime and the area where the appellants are contending to have been on the material date is the same where the victim patently testified to have met them (appellants). In addition to that when the 1st appellant was cross examined as if he had spent the whole night of the material date at home or if he slept together with his young brother (DW3), he replied to the negative. Equally, the 2nd appellant defence of alibi

does not shaken or raise any doubt to the prosecution evidence as it was possible for the 2nd appellant to do what he is alleged to have wrongly done and turn back to his working place. Moreover their defence witnesses are not credible for instance the evidence of DW6.

I have further taken notice of the contradictory dates given by the 1st appellant and his witnesses (DW3 & DW4) when they testified that the date of occurrence to be 29/5/2019 instead of 29/04/2019. I am of thinking that the error is not fatal. To my understanding, the 1st appellant and his witnesses must have intended to testify that it was on 29/04/2019 Monday.

As to the 5th ground of appeal on the alleged failure to read the contents of the exhibit (PF3) after its admission. As correctly complained and admitted by the appellants and respondent respectively. The trial court proceeding dated 12th June 2019 reveals that the prosecutor prayed for a leave to be supplied with the PE2 so that the PW6 would explain to court what he filled and the court supplied it as requested. In appreciating the requirement of reading the contents of an exhibit, I would like to make a reference to the case of **Sprian Justine Tarimo versus the Republic,** Criminal Appeal No. 226 of 2007 (unreported), where Court of Appeal approving its decisions in **Kashana Buyoka v Republic,** Criminal Appeal No. 176 of 2004 and **Sultan s/o Mohamed v Republic,** Criminal Appeal No. 176 of 2003 (unreported) held;

"In the trial under scrutiny, omission to comply with section 240 (3) was not the only flaw. Another fatal flaw is that the contents of Exhibit P1 were not even read out to the appellant. So the appellant was convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial".

The same position has been stressed in **Robinson Mwanjisi & 3 others v. Republic,** Criminal Appeal No. 154 of 1994, (2003) TLR No. 218 where it was held;

"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the court to be seen not to have been influenced by the same"

In our instant criminal mater, I have observed that the trial court supplied the PF3 to the prosecution side and indicated to that effect but did not indicate if the contents of the PF3 so admitted were read over by the medical practitioner (PW6) who examined the victim and filled the PF3. That was legally wrong for not causing it be read over and or failure to indicate to that effect. This ground of appeal is therefore found meritorious, the PF3 (PE2) is consequently expunged from the record.

Regarding the complaint No. 6 on the alleged failure to summon material witnesses by the prosecution. Carefully looking at the evidence adduced by the prosecution in its totality, I am not increasingly persuaded by the appellants' assertion if there was any material witnesses for the prosecution who were not summoned since the record of the trial court clearly reveals that, the victim was only with the appellants and he did not say that he met any other person while at the 1st appellant's residence. The material witnesses were, to my view, the victim's mother, father (PW2), woman police (PW5), investigator of the case (PW3) who visited the scene of crime and drew sketch map and medical practitioner (PW6) as well as the one whose residence the victim cheated to his father to have slept on the material date (PW4).

It therefore follows that the only person who was not called is the victim's mother who, to my considered view, was not more important or more material than the victim's father since the victim did not disclose the factual happenings of the incidence in that morning of 30th April 2019 to his parents till when he was thoroughly interviewed by PW5 at police station. The testimony of the victim's mother would be no more than duplicity of evidence to that of the PW2. For that reason, this ground of appeal is thus dismissed.

Lastly; the appellants' complaint no. 4 on the alleged failure by the prosecution to prove the charge beyond reasonable doubts. According to the evidence richly adduced by the victim (PW1) which is also corroborated by that

of the medical expert (PW6) as well as the evidence adduced by the PW2 and PW5 to whom the victim was able to tell what made him absent from his parents' residential house on the night of the material date. The evidence of the victim is credible to safely secure a conviction as per section 127 (7) of the Tanzania Evidence Act, Cap 6 Revised Edition, 2002 unless the contrary was established by the appellants which is not the case here. More so the victim's testimony is sufficiently corroborated as rightly argued by Mr. Hatibu, the respondent's state attorney.

In the upshot, the appeal therefore lacks merit save for the order I made herein expunging the PF3 (PE1) from the record. The appellants' appeal is consequently dismissed.

M. R. GWAE,
JUDGE.
11.11. 2020

Court. Right of appeal fully explained.

M. R. GWAE,
JUDGE.
11.11. 2020