IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 323 OF 2021

ABRAHAMAN YUSUF @ZINZA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mkwizu, J.)

dated the 21st day of May, 2021

in

Criminal Appeal No. 5 of 2020

.....

JUDGMENT OF THE COURT

6th & 12th December, 2023

KOROSSO, J.A.:

The appeal before us emanates from the decision of the High Court (Mkwizu, J.) in Criminal Appeal No. 5 of 2020. In the Kahama District Court at Kahama in Criminal Case No. 240 of 2019, the appellant was charged with two counts of unnatural offence contrary to section 154(1)(a) of the Penal Code. On the first count it was alleged that at different times on the 25th and 27th of June, 2019 in Nyasubi area, Kahama District within Shinyanga Region, the appellant had carnal knowledge against the order of nature with a person of ten years of age whom we shall henceforth refer to as "CD" or PW1 to conceal the identity. In the second count, it was alleged that on 25/6/2019, around

10.00 hours, at area, District, and Region as in the first count, the appellant did have carnal knowledge against the order of nature with a person, aged seven years, whom we shall henceforth refer to as "ST" or PW2 to disguise the identity. The appellant was convicted and sentenced to life imprisonment for each count. It was further ordered that the appellant pays each victim compensation of Tshs. 500,000/=.

It is on record that a trial ensued after the appellant's plea of not guilty to both counts. The prosecution side proceeded to call four witnesses to prove its case; CD (PW1), ST (PW2), Agness Charles (PW3), and George Wilson Masasi (PW4). Furthermore, two exhibits were tendered and admitted, PF3 of CD (exhibit P1) and PF3 of ST (exhibit P2). The case for the prosecution was that on 25/6/2019 at 10.00 hours, PW1 and PW2 were at Nyasubi area grazing cattle together with the appellant. The appellant then approached PW1 first and inserted his male organ into PW1's anus while PW2 was watching. After that, the appellant approached PW2 and did the same act to him. PW1 and PW2 went back home and none of them disclosed the incident to anyone. On 27/6/2019, when they were grazing cattle in the same area as the first time, the appellant repeated the atrocious act to PW1. On reaching home, PW1 reported to his mother, PW3 what the appellant has been doing to him and his friend ST. PW3 reported the incident to village leaders and the police. With PF3s from the police on hand, CD and ST were taken to the

hospital for medical examination. According to PW4, a medical doctor who examined CD and ST, each of them had been sodomized. He tendered their PF3s which were admitted as exhibits P1 and P2 respectively.

In defence, the appellant's testimony was essentially a general denial of committing the offence charged and a narration of the circumstances of his arrest on 29/6/2019. Upon finalization of the trial, the appellant was convicted as charged and sentenced as alluded to herein above. He was aggrieved and his appeal to the High Court was barren of fruits. Still dissatisfied, the appellant on 4/8/2021 filed a memorandum of appeal premised on six grounds that we have essentially paraphrased into four complaints that fault the trial and the first appellate courts for:

1. The conviction of the appellant was based on a defective charge.
2. Failure to properly analyze evidence before it and to consider the defence evidence.
3. Failure to seek corroborating evidence and wrongly according value to exhibits P1 and P2 to prove that the appellant committed the offence charged.
4. Failure to discredit the evidence of PW1 and PW2 having failed to name the appellant as the culprit at the earliest opportunity.

During the hearing of the appeal, the appellant was present in person and fended for himself. Ms. Caroline Mushi and Messrs. Leonard Kiwango

and Katandukila Kadata, learned State Attorneys entered appearance for the respondent Republic.

In arguing his appeal, the appellant upon adopting the grounds of appeal as filed, urged us to allow the learned State Attorneys to respond to his grounds first, while retaining the right to rejoin thereafter if there would be such need.

Having granted the appellant's prayer above, Ms. Mushi took the lead in submitting for the respondent Republic. She commenced by averring her support for the conviction and sentence against the appellant handed down by the trial court and affirmed by the first appellate court. She then informed us that her response to the grounds of appeal would be by addressing them one after another except for the last two, which she would address conjointly.

On the first complaint regarding the appellant having been convicted on a defective charge, the learned State Attorney conceded that the statement of offence was defective for missing the punishment provision which is subsection 2 of section 154 of the Penal Code, she, however, argued that the defect is neither substantive nor prejudicial to the rights of the appellant, since the particulars of the offence provided all the information relevant for the appellant to fully understand the nature of the offence charged which enabled him to defend himself effectively. She contended further that the charge complied with sections 132 and

135(a)(ii) of the Criminal Procedure Act (the CPA), which provide for the contents of a charge. She argued that failure to cite a punishment section in a charge was curable under certain circumstances including the instant appeal and referred us to the decision in the case of **Abdul Mohamed Namwanga @ Madodo v. Republic**, Criminal Appeal No. 257 of 2020 (unreported). Ms. Mushi thus implored us to find the grievance to have no merit.

Suffice it to say, that we are aware that this ground was not considered by the High Court on the first appeal. However, being on a point of law we shall proceed to consider it. Indeed, as alluded to by the learned State Attorney, the mode of framing a criminal charge or information is governed by the provisions of sections 132 and 135 of the CPA. It is well settled that, in criminal cases, the charge is the foundation of any trial. Section 132 of the CPA requires a charge or information to have a statement that specifies the offence or offences with which the accused person is charged together with such particulars as may be necessary to provide reasonable information as to the nature of the offence charged. Section 135(a) (ii) of the CPA states that a charge or information shall commence with a statement of offence of the offence charged that describes the offence in brief, in ordinary language and cites a correct reference of the section of the law that creates a particular offence allegedly committed.

We have scrutinized the charge sheet as found in the record of appeal and found that the statement of offence for both counts reads as hereunder:

> *"UNNATURAL OFFENCE C/S 154 (1)(a) of the Penal Code Cap. 16 (R.E. 2002)"*

The particulars of the offence in the first count, it is alleged that the appellant on 25th and 27th June 2019 at different times in Nyasubi area, Kahama District, Shinyanga Region did have carnal knowledge of PW1 against the order of nature. In the second count, it is stated that the appellant on 25th June 2019 at about 10.00 hours at the area, District, and Region stated in the first count did have carnal knowledge of PW2 against the order of nature.

Section 154 (1)(a) of the Penal Code under which the appellant was charged states:

> *"154. - (1) Any person who-*
>
> *(a) Has carnal knowledge of any person against the order of nature;*
>
> *(b) (N/A)*
>
> *(c) (N/A)*
>
> *Commits an offence, and is liable to imprisonment for life end in any case to imprisonment for a term of not less than thirty years".*

The provision of law that the appellant and the learned State Attorney agreed is missing in the charge is subsection (2) of section 154 of the Penal Code, which stipulates that:

> *" S. 154(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 the appeal before us, it is not disputed that both victims were under the age of ten years. This fact is reflected in the charge sheet in the particulars of the victims and the adduced evidence. PW3 stated that her son CD was 9 years of age and exhibit P1 reveals CD to be about 10 years old. Exhibit P2 states that ST is about 7 years old. The issue for our determination is thus whether the non-inclusion of subsection (2) of section 154 of the Penal Code in the statement of offence in the charge, is fatal or not and the consequence thereto. The learned State Attorney has implored us to find the defect to be inconsequential, while the appellant wants us to find that it renders the charge defective and the conviction against him improper.

Considering the circumstances of this case, we agree with the learned State Attorney that failure to cite subsection (2) of section 154 of the Penal Code did not occasion any injustice in this case. While aware of our decisions on the subject matter in such cases as **Mussa Nuru @ Saguti v. Republic**, Criminal Appeal No. 66 of 2017 and **Godfrey**

Simon and Another v. Republic, Criminal Appeal No. 296 of 2018 (both unreported), we are of the firm view that the position stated therein is distinguishable for the following reasons; **Firstly**, the instant appeal is in the wake of what we stated in the case of **Jamal Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported). In the case of **Jamal Ally @ Salum** (supra), we were implored to look further than the defective charge to consider as well the particulars of the offence, the evidence adduced by both the prosecution, and the position taken by the defence on the matter in issue and consider whether the appellant was prejudiced or not. If no prejudice was caused to the appellant, then the defects in the charge are considered to be curable under section 388(1) of the CPA (see also, **Elia John v. Republic**, Criminal Appeal No. 306 of 2016 and **Burton Mwipabilege v. Republic**, Criminal Appeal No. 200 of 2009 (both unreported)).

Taking into account what we have alluded to above, there is no doubt that the appellant was made aware of the substance of the offence charged including the respective ages of the victims (PW1 and PW3), in which case we hold that he was not prejudiced. **Secondly**, we adopt the observations made by the Court in **Abdul Mohamed Namwanga @ Madodo v. Republic** (supra), when distinguishing the holding of the Court on the way forward upon failure to cite the punishment section. In **Said Hussein v. Republic**, Criminal Appeal No.

110 of 2016 (unreported) and **Mussa Nuru @ Saguti** (supra) cited above, the Court stated:

> *"We acknowledge that, in the aforesaid cases, we took the view that the omission to cite the applicable penalty provision warranted reversal of the conviction. However, we arrived at that conclusion having not fully considered the import of sections 132 and 135 of the CPA, which as discussed above, do not expressly require the citation of the penalty provision".*

Therefore, finding that the appellant was in no way prejudiced or embarrassed by the defects in the charge in the present appeal, we hold that the defect is curable under section 388 of the CPA. (See also, **Peter Kabi and Another v. Republic**, Criminal Appeal No. 5 of 2020 and **Jafari Salum @ Kikoti v. Republic**, Criminal Appeal No. 370 of 2017 (both unreported)). We thus hold the complaint to be unmerited.

Confronting the second complaint challenging the trial court and High Court's failure to wholistically, evaluate the evidence adduced by both parties, particularly not considering the appellant's defence evidence that expounded that he was not employed by anyone, the learned State Attorney argued that looking at page 25 of the record of appeal, where his defence is recorded, we found nothing adduced on his employment. This fact was also observed by the first appellate court on page 57 of the record of appeal. She thus contended that the ground is

unmeritorious because the complaint raised is not based on the evidence on record.

In the instant appeal, the testimony of the appellant is found on pages 24 and 25 of the record of appeal, and it is as follows:

> *"Date: 28/11/2019 ....*
> ***HEARING OF DEFENCE CASE***
> ***DW1: ABRAHAMAN YUSUPH***
> ***AGE: 18 YEARS***
> ***RELIGION: MUSLIM***
> ***AFFIRM AND STATES:***
> *I recall on 29/06/2019 in the morning hours, I was arrested. On 3/07/2019 brought in this court. I deny the charge of unnatural offence against me. No one saw me committing the crime. I pray to be set free. No one raised an alarm.*
>
> *Signed*
> *E. N. Kyaruzi- SRM*
> *28/11/2019*
>
> ***DW1 XXD by PP***
> *I know the victims. We live in the same locality. They are my neighbors. I am not an employee of anyone. I have no job. I have no grudges with either of the prosecution's witnesses.*
>
> *Signed*
> *E.N. Kyaruzi- SRM*
> *28/11/2019*
>
> *Accused: I am closing my case.*

Signed

E.N. Kyaruzi- SRM

28/11/2019".

As can be discerned from the excerpt, there is nothing related to the appellant being employed discussed in his defence as shown in his complaint. In discussing the defence case, the trial court observed thus:

> *"In his defence the accused person denied the charges. I find it hard to believe in his defence because the victims were very clear in their evidence and had no reasons to fabricate their story just to incriminate him."*

In the High Court on the first appeal, when discussing the appellant's evidence on page 57 of the record of appeal, it was stated:

> *"I have examined the prosecution's evidence as well as the defence, apart from a general denial, the appellant's defence raised no doubts on the prosecution case. Even when he was asked whether he had any grudges with any of the prosecution witnesses, the appellant himself at page 23 of the proceedings said he had none."*

In the above passages, it shows that both the trial and first appellate courts properly considered the defence evidence, which was, in essence, a general denial of the offence charged. Our perusal of the record of appeal has shown that the only reference to the appellant's

employment was adduced by PW1 and PW2 on pages 12 and 14 of the record of appeal, stating that the incident occurred while assisting the appellant in grazing cattle that belonged to Mzee Simba. Therefore, whether it was important to call Mzee Simba to testify was upon the prosecution who had the duty to prove the case against the appellant if it believed that he would assist to prove their case. Furthermore, it is also important to remember that in terms of section 143 of the Evidence Act, it is not the number of witnesses that matters, but the credibility to be attached to the evidence that a witness adduces. Flowing therefrom, we find the complaint to be misconceived.

Grievance number three challenges the conviction of the appellant in the absence of corroborating evidence and affording value to exhibits P1 and P2 in proving that it was the appellant who committed the offence. Having heard the submissions from both sides, we are inclined to agree with the learned State Attorney that exhibits P1 and P2 and the PF3s of the victims, were not intended to prove that it is the appellant who committed the offence, but to corroborate the evidence of the victims that there was penetration.

It should be borne in mind that as held in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 at pg. 384:

> *"A medical report or evidence of a doctor may help to show that there was unconsented sex....*

True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."

Indeed, in the present appeal, the evidence of the victims, found to be credible by both the trial and first appellate courts was intended to prove that the appellant did have carnal knowledge of each of them against the order of nature as charged. The said evidence was corroborated by the evidence of PW3, who narrated that PW1 had reported to her about the incident and that the appellant was the culprit. Exhibits P1 and P2 tendered by PW4, the medical doctor who examined the victims further corroborated the evidence of PW1 and PW2 that there was penetration. It is also important to note that exhibits P1 and P2 were not objected to by the appellant when tendered for admission. Thereafter, admitted and read aloud in court. Therefore, like the trial and first appellate courts, we find that the two exhibits were admitted according to the guiding procedure under section 240 of the CPA and nothing to lead us to doubt their relevance, authenticity, process of their admissibility and the value accorded to them by the trial and first appellate courts under the circumstances. In the present case, there was a concurrent finding by the two lower courts that the prosecution witnesses were credible. Therefore, the complaint has no substance.

On the fourth complaint faulting the trial court and the High Court for not discrediting the evidence of PW1 and PW2 for not naming the appellant as the culprit at the earliest opportunity, the learned State Attorney contended that the complaint has no substance since even if the victims had not reported at the earliest it does not negate the fact that the appellant had carnal knowledge of each of them against the order of nature. She also implored us to take into account the vulnerable age of the victims, who most probably were afraid to report the incident and for PW1 it was not until the appellant repeated the act that he gathered the courage to report the incident to his mother, who corroborated his evidence on that fact.

Having perused the record of appeal, it is true as argued by the appellant, that PW1 and PW2 did not report the incident to anyone at the earliest opportunity as according to PW3, PW1 reported to her on 29/06/2019 while the incident occurred on the 25th and 27th of June 2019 as per the adduced evidence. It is a well-settled position, as spelled out in our decisions in **Rashid Kaniki v. Republic** [1993] TLR 258 and **Goodluck Kyando v. Republic** [2006] TLR 393, that the evidence of every witness is entitled to be believed and accepted unless there exist compelling reasons to do otherwise.

In the appeal before us, we have found no compelling reason to accept the invitation to discredit the evidence of PW1 and PW2 foe

delaying to report the incident occasioned by the appellant and subject to this appeal for the following reasons; **one**, considering the young age they were, it is understandable as argued by the learned State Attorney. They must have been in shock and this can be discerned from the evidence of PW3 who stated that PW1 was acting strangely and unsettled before he revealed the incident to her. **Two**, the appellant had an opportunity to question the victims on the issue when he cross-examined them, however, there was nothing in the record to suggest that he did question them on the matter. Upon failure to do so, the appellant is prevented from inviting us to draw adverse inferences on the matters (See, **Ridhiwani Nassoro Gendo v. Republic**, Criminal Appeal No. 201 of 2018 and **Hassan Mohamed Ngoya v. Republic**, Criminal Appeal No. 134 of 2014 (both unreported). As stated earlier, the evidence of the victims was found to be credible and was sufficiently corroborated to lead the trial court to convict the appellant and the High Court to affirm it. The complaint thus falls.

For the foregoing, since all the four complaints above are unmerited, it follows that the appeal against the appellant's conviction has no merit. That notwithstanding, we invited the parties to address us on whether or not the sentence imposed on the appellant was warranted on account that the charge sheet and the appellant, at the start of his testimony stated that he was eighteen years of age at the time of the

trial and essentially when he committed the offence. While the appellant being a lay person had nothing of substance to state, just praying to be set at liberty. On the part of the learned State Attorney, whilst not disputing the age of the appellant as stated in the charge sheet and his defence, she argued that section 154 (2) of the Penal Code which provides for the punishment for the offence charged, does not address the age of the accused similar to section 131 (2) of the Penal Code related to rape charges.

Delving into the issue, we find that the Court had on previous occasions addressed this perplexity. In **Zuberi Mohamed @ Mkapa v. Republic**, Criminal Appeal No. 563 of 2020 (unreported), the appellant was charged with having committed an unnatural offence against the order of nature to a four-year-old child contrary to section 154(1)(a) and (2) of the Penal Code. Upon a full trial, he was convicted and sentenced to serve 30 years imprisonment and his appeal to the High Court was unsuccessful. The Court, while upholding the conviction it however, held that the sentence imposed was improper in terms of section 160B of the Penal Code. Section 160B of the Penal Code provides:

> *"For promotion and protection of the right of the child, nothing in chapter XV of the Code shall prevent the court from exercising-*

(a) Revisionary powers to satisfy that cruel sentences are not imposed to persons of or below the age of eighteen years or

(b) *Discretionary powers in imposing sentences to persons of or below the age of eighteen years."*

The Court held thus:

> *"We agree with the counsel for both sides that in terms of the above provision, since the appellant was of the age of 18 years at the time of commission of the offence, upon conviction he was supposed to be sentenced to corporal punishment, but that was not the case. Failure to observe the dictates of the law in our considered view, occasioned miscarriage of justice on the part of the appellant as he was sentenced to more than what he deserved..."*

Taking into consideration the similar circumstances we faced in the instant appeal, where the appellant was 18 years old, and having upheld the conviction against the appellant, concerning the sentence imposed, we are of the view that in the circumstances of his case, the cited holding above best meets the needs of this case in sentencing the appellant. The fact that the appellant was 18 years of age at the time he committed the offence charged is undoubted, and thus guided by the provisions of section 160B of the Penal Code, we set aside the sentence of life imprisonment and substitute it with one of corporal punishment. We have however, further considered the time the appellant has spent

imprisoned and therefore order for his immediate release from custody unless held for other lawful purposes. All in all, the appeal stands dismissed save for the revised sentence.

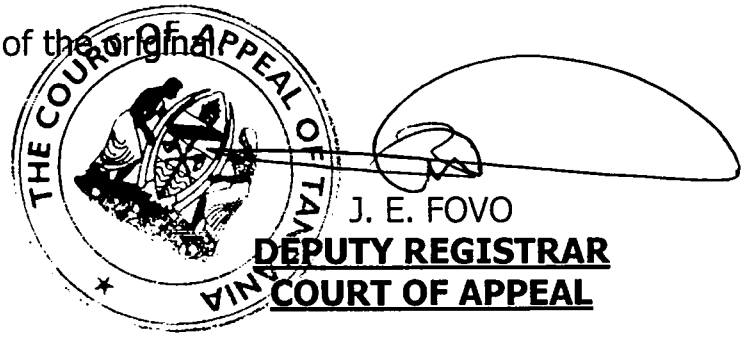
DATED at **SHINYANGA** this 12th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2023 in the presence of the appellant in person and Mr. Louis Boniface Mbwambo, 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