IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 220 OF 2017

LISTA CHALO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Dyansobera, J.)

Dated the 20th day of July, 2016
in
Criminal Appeal No. 81 of 2014

JUDGMENT OF THE COURT

11th & 21st February, 2020

KITUSI, J.A.:

The High Court of Tanzania sitting at Dar es Salaam dismissed the appeal by Lista Chalo in which he had sought to challenge a conviction and sentence of 30 years' imprisonment for unnatural offence. He allegedly had carnal knowledge of a girl whose pseudo name is "JJ", against the order of nature, an offence under section 154 (1) (a) of the Penal Code, [Cap 16 R.E 2002].

At the trial, the said JJ then aged 13 years, testified as PW3 and we shall henceforth interchangeably refer to her as JJ or PW3. She stated that Lista Chalo, the appellant, was her teacher at Anglican

Railway Centre within Morogoro Township, where religious classes organized by the Anglican Church were being conducted. During these teacher-student interactions, the appellant suggested to JJ that they be lovers and subsequently he managed to talk her into visiting him at his place of residence, at Msamvu area within the town. When she got at the appellant's residence with his wife absent, and his children playing outside the house, he took her to one of the rooms where he had both vaginal and anal sex with her. This, according to JJ, was repeated on another occasion when the appellant's wife was out again, and she said each time he used to cover her mouth in the process to prevent possible screams, and she would earn Tshs 4,000/= from him. JJ said she was using the money to pay school contributions which her guardians were not paying for her.

It turns out that JJ was staying with her aunt who detected a change of the child's behaviour as she started returning home unusually late. So, when church elders paid the said aunt a routine visit one day, she disclosed to them the disturbing fact regarding JJ's change of behaviour. According to Angela Ally (PW2) one of the elders who visited JJ's aunt, when JJ was called upon to explain her aunt's concern, she said it was the appellant who was keeping her late as he was sleeping

with her. The matter was reported to police where a PF3 was issued for JJ's medical examination.

Dr. Elizabeth Lukando (PW4) of the Government Hospital in Morogoro examined JJ and testified on her findings. She stated that she found that JJ's hymen had been perforated and the anal sphincter muscles were loose, and that these findings in PW4's conclusion, meant that the girl had had both vaginal and anal sex. Following this, the appellant was arrested and charged.

His defence was more of an account of how he spent his day on 26/8/2011, the date he allegedly committed the offence. Supported by his wife (DW2), and a colleague Robert Mpenda (DW3), he narrated how on that date he was involved in official work, taking photographs of his scholars throughout the day using DW3's camera, and that this went on up to the time of his arrest. In essence the appellant denied committing the offence, and the above account by him and his witnesses tended to suggest that he could not have had the time to commit it, anyway.

In convicting the appellant, the trial court accepted JJ's testimony as true and that the testimonies of PW2 and PW4 as well as the PF3 (Exh. P1) rendered support to her story. The High Court dismissed the

first appeal on the ground that JJ provided the best evidence as to what was done to her and her story which was supported by PW2 could not be faulted. It also took the view that PW4 was competent to testify as a medical practitioner in terms of section 240 (1) and (2) of the Criminal Procedure Act [Cap 20 R.E 2002], (the CPA) therefore her testimony corroborated that of JJ.

The appellant has come to us on second appeal expressing his grievance by a total of 12 grounds, eight in the initial memorandum of appeal which he lodged in court in July 2017, and four in the supplementary memorandum lodged in September 2017. The appellant also filed written submissions, under Rule 74 (1) of the Tanzania Court of Appeal Rules 2009, hereafter to be referred to as the Rules.

Because of the scheme adopted by the learned Senior State Attorney who argued the appeal on behalf of the Republic by combining some of the grounds of appeal in the two Memoranda of appeal, we shall reproduce the grounds of appeal in full so as to maintain the chronology. In the initial memorandum, the grounds are;

> *"1. That the learned 1st appellate Judge misdirected and non-directed in law and uphold the conviction and sentence of the appellant in a case whose charge against the*

appellant, was fatally defective for failure to cite the section of law of the Penal Code which provided the sentence for unnatural offence in compliance with the mandatory requirement of Criminal Procedure Act Cap. 20 R.E. 2002.

2. *That, the 1st appellate court erred in law and fact to uphold the conviction and sentence of the appellant in a case where PW1, PW2 and PW3's evidence does not correlate with the charge sheet including the facts of P/H as regard the actual date of the occurrence of the event.*

3. *That the 1st appellate court erred in law and in fact for not considering the contradiction concerning how many times the offence of rape was committed, as PW2 and PW3 testified that, the victim was raped several times on different days, while the charge sheet including the fact of the P/H indicated that the event did take place on the 26th August 2011 and the appellant was arrested on the same day, this discrepancies ought to have been resolved before determining the case.*

4. *That the 1st Appellate court grossly erred in law and in fact by upholding the conviction and sentence of the appellant relying on Exh.P1 (P.F.3) which was tendered unprocedurally by PW1 who was not its author, in compliance with mandatory provisions of Tanzania Evidence Act [Cap. 6 R.E. 2002].*

5. *That, the 1st Appellate court erred in law to uphold the conviction and sentence of the appellant in a case where the trial court ignored the contents of the statement of the offence in the charge sheet which cited section 154(1) (a) of the Penal Code and in its judgment decided to amend it silently, and there after proceeded to convict the appellant under section 154 of the Penal Code alone without the trial court taking a new plea to the new charge as mandated by the provisions of the Criminal Procedure Act [Cap. 20 R.E. 2002].*

6. *That the 1st Appellate court erred in law and in fact to uphold the conviction and sentence of the appellant in a case where the evidence of the victim that she was raped and sodomized does not correlate with the charge sheet.*

7. *That the 1st Appellate court erred in law and in fact by not assessing exhaustively the credibility of the prosecution evidence before relying on it as basis of convicting the appellant.*

8. *That the learned 1st Appellate court erred in law and in fact to uphold the conviction and sentence of the appellant in a case where the prosecution failed to prove the offence against the appellant beyond reasonable doubt."*

In the supplementary memorandum of appeal the grounds are;

"1. *That, the first appellate court judged grossly erred in both law and fact when he sustained the appellant's conviction and sentence despite there lacking any evidence from the prosecution witness(es) to suggest that there was any crime that occurred on 26th August, 2011 a fact that renders a charge to be incurably defective.*

2. *That, the first appellate court Judge grossly erred in both law and fact by upholding the appellant's conviction and sentence based on incredible and inconsistent evidence of PW1 whose evidence kept on changing in the course of cross-examination, while examined by the court and in re-examination hence leaving more doubts on the veracity of her evidence.*

3. *That, the first appellate court erred in both law and fact by sustaining the conviction and sentence of appellant based on the evidence of PW1 who had dared to conceal the truth to her aunt as to where she had been coming from at late hours, hence we could not rule out possibility of her lying and naming any person in order to cover up her deeds.*

4. *That, the first appellate court erred in both law and fact*

At the hearing, the unrepresented appellant adopted the contents of his memoranda of appeal and the written submissions, then opted to rejoin later after hearing submissions from the State Attorney. Mr. Credo Rugaju, learned Senior State Attorney and Rachel Balilema, learned State Attorney, represented the Republic, although it was Mr. Rugaju who addressed the Court, making his position clear from the outset that he was resisting the appeal.

To begin with, Mr. Rugaju pointed out that some of the grounds of appeal which have been raised now were neither raised nor determined by the first appellate court. He submitted in relation to that point that the Court may not entertain such new grounds, it being settled law. The learned Senior State Attorney referred us to the case of **Kipara Hamisi Misagaa @ Bigi v. Republic,** Criminal Appeal No. 191 of 2016 which cited with approval an earlier decision in **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No.385 of 2015 (both unreported). Mr. Rugaju listed the grounds which he considered to be new and these were; grounds 2 and 6 in the initial memorandum as well as grounds 1, 3 and 4 in the supplementary Memorandum.

Certainly, we are precluded from pronouncing ourselves on matters of fact that were not raised or determined by the High Court

sitting on appeal, so we are in agreement with Mr. Rugaju on the principle. There is a large family of decisions on that principle apart from those cited by the learned Senior State Attorney. These include **Florence Athanas @ Baba Ali and Emmanuel Mwanandeje v. Republic**, Criminal Appeal No. 438 of 2016 and **Festo Domician v. Republic,** Criminal Appeal No. 447 of 2016 (both unreported). In the latter case we underlined the fact that this Court's jurisdiction under Section 6 (1) of the Appellate Jurisdiction Act, Cap 141, R.E 2002 is only appellate, so it cannot decide on a point that has not been decided by the court from which appeals to it emanate.

In line with the above position we have to satisfy ourselves whether the grounds that Mr. Rugaju has argued to be new are, indeed, new. The appellant did not address this point, quite understandably, because being unrepresented and it being a point of law, he may not have appreciated its gist. However, on a close scrutiny of the memoranda of appeal, we agree with the argument that the second and sixth grounds of appeal in the initial memorandum of appeal are new. These allege that the evidence of PW1, PW2 and PW3 is at variance with the charge sheet for referring to both sodomy and rape while the charge only alleges sodomy. We need to add that not only do we agree with the

learned State Attorney that this ground is new but we find it surprising that it has been raised, because the appellant was only charged with unnatural offence and no more. Even if we were to consider this ground, we do not see how it could have advanced the appellant's case.

The first ground in the supplementary memorandum is also new as it raises issue with the date on which the alleged offence was committed. The appellant did not raise the point as regards the dates, not even by way of cross examinations, so the point was not determined by the High Court.

The third and fourth grounds of appeal in the supplementary memorandum have also raised complaints which were not initially raised at the High Court. They allege, for the first time, that JJ's naming of him was merely a cover up for her transgressions, and question the reason for not calling her aunt to testify.

In the end we are satisfied that grounds 2 and 6 in the initial memorandum of appeal, as well as grounds 1, 3 and 4 in the supplementary memorandum of appeal, are new and therefore we refrain from determining them.

We now turn to address the grounds that call for our determination, and we shall begin with the fourth ground of appeal which complains that the PF3 was admitted in violation of the procedure. In his written submissions the appellant faulted the trial court's approach on three grounds; **one**, that the PF3 was tendered by JJ when she took the witness box for the second time and proceeded without oath; **two** that the said PF3 was not read out after its admission and **three**; there was no explanation why the PF3 was not tendered by the medical practitioner who had prepared it.

Initially Mr. Rugaju was bent at defending the course taken by the trial court by demonstrating that JJ was competent to tender the exhibit. He cited to us our unreported decision in the case of **DPP v. Mirzai Pirbakhshi @ Hadji and Others**, Criminal Appeal No. 493 of 2016, in which we said that competence of a witness to tender an exhibit is derived from, among other factors, his or her knowledge regarding it or whether the exhibit was in his or her custody. However, the learned Senior State Attorney threw in the towel when he could not surmount the fact that the PF3 was not read out after its being admitted.

After considering the arguments made by either side, we agree with the appellant that the admission of the PF3 violated the procedure.

This is because at the time of tendering it, if she was competent, JJ had not taken oath and even after it had been admitted in evidence, the PF3 was not read out. The law is settled on this aspect that failure to read an exhibited document denies the accused an opportunity to know its contents and therefore vitiates the trial. We have to repeat what we recently emphasized in the case of **Joseph Maganga and Dotto Salum Butwa v. Republic,** Criminal Appeal No. 536 of 2015 (unreported) where we stated;

> *"The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity."*

Accordingly, we expunge the PF3 from the record because its contents were not read out after the document had been admitted in evidence.

Next for our consideration is the complaint featuring in grounds 1 and 5 of the initial memorandum of appeal, both raising issue with the charge. In the first ground the appellant alleges that the charge sheet

did not specify the subsection that provides for sentence for unnatural offence under Section 154 (1) (a) of the Penal Code. However, in the written submissions, the appellant associated the alleged defect of the charge to variance between the said charge and the evidence. Obviously the two are not in harmony, but we shall resolve the issue in due course. He cited the case of **Masasi Mathias v. Republic**, Criminal Appeal No. 274 of 2009 (unreported). In the fifth ground the appellant's complaint is that the trial court convicted him under section 154 of the Penal Code, with which he had not been charged, and did so without amending the earlier charge and without first calling him to plead to it. In the written submissions the appellant argues that this course by the trial court fatally dented the proceedings, and cited the case of **Elias Deodidas v. Republic,** Criminal Appeal No.259 of 2012 (unreported) to support his argument. In that case the appellant had been charged under section 130 of the Penal Code but the conviction was entered under section 130 (1) and 131 (1) of the Penal Code without there being an order of amendment of the charge and without a fresh plea being taken. We held those proceedings to be a nullity for the reason that the court erred in entering conviction based on a charge that had not been read out to the appellant nor a plea taken. The appellant is now inviting us to do the same in this case.

Addressing the points, Mr. Rugaju submitted that there was nothing wrong with the charge sheet in this case, because it cited section 154 (1) (a) of the Penal Code which stipulates both the offence and the sentence for unnatural offence, and that the conviction was for that offence. In the rejoinder the appellant simply read the written submissions, which we have already taken on board.

In our considered view having subjected the competing arguments to scrutiny, we see a clear distinction between the present case and the case of **Elias Deodidas v. Republic** (supra) cited by the appellant, because in the latter case the charge under section 130 of the Penal Code was defective for not specifying one of the several species of rape that are stipulated under that provision. But in the present case, the charge under section 154 (1) (a) of the Penal Code adequately informed the appellant that he was facing prosecution for an alleged act constituting unnatural offence and it further informed him the penal consequences that followed in the event of a conviction.

The second limb of the appellant's complaint stems from the very last paragraph of the trial court's judgment, which we reproduce for clarity of our discussion;

"In such circumstance the prosecution had proved its case beyond reasonable doubt in consideration of the evidence of PW1 on corroboration with the evidence of PW4 and the exhibit PE1 proves that the accused committed the offence and this court accordingly convict him with the offence of unnatural offence c/s 154 of the Penal Code Cap 16 R.E 2002."

The requirement for a charge sheet to be drawn properly is meant to provide information to the accused of what lies ahead of him so that he prepares his defence, and this is the essence of section 132 of the CPA. In this case we agree with the learned Senior State Attorney that there was nothing wrong with the charge sheet taking note that the appellant prosecuted his defence by leading evidence of three witnesses.

In our conclusive view, the trial magistrate's reference to section 154 of the Penal Code at the end of her decision, whether deliberate or inadvertent, was inconsequential for three reasons. **One,** the conviction was explicitly for unnatural offence, whether or not section 154 of the Penal Code had been cited. We do not see how the citing of that provision changed the clear statement that the conviction was for unnatural offence. **Two**, the appellant had made his defence well before the error being complained of. **Lastly,** we are satisfied that the appellant

was not prejudiced anyhow by the citation of section 154 of the Penal Code which came at the last paragraph of the decision.

For those reasons we find no merit in grounds 1 and 5 of the appeal and dismiss them.

Lastly, we address the complaint that there were contradictions and inconsistencies in the prosecution case. This is the gist of the complaints in grounds 3 and 7 in the initial memorandum of appeal, and ground 2 in the supplementary memorandum. Submitting on this complaint, the appellant attacked PW1 and PW3 for giving contradictory versions as to the number of times JJ was ravished. He pointed out that PW1 stated that she was sodomized twice, but PW3 testified that it was thrice. He also painted PW1 as an unreliable witness who could have been manipulated by anyone to tell lies so as to implicate him.

Responding to these submissions, Mr. Rugaju submitted that PW1's narrative was coherent as it provided the background as well as the scenarios of the perpetration of the offence. The learned Senior State Attorney pointed out that PW3's testimony was based on hearsay and was prone to lapses whereas PW1 was the best witness in such cases. He cited the case of **Hakizimana Syriverster v. Republic**, Criminal Appeal No. 181 of 2007 (unreported) in which the principle that the

victim is the best witness in sexual offences was reiterated. The learned Attorney submitted further that the conviction was based on the court's assessment of PW1's credibility and that the two courts below were satisfied that her testimony was supported by the testimonies of PW2 and PW4.

We have earlier refrained from entertaining points that were neither raised nor decided upon by the High Court because the law precludes us from doing so. However, we need to point out that even where the points were raised and decided, we do not have unlimited powers to interfere with concurrent findings of the two courts below on evidential issues. We may only do so where it is established that in reaching their findings the lower courts misapprehended the evidence or acted on wrong principles. (See, **Salum Mhando v. Republic** [1993] TLR 170 and **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported), to name but a few).

In this case the trial court and the first appellate court found PW1 and PW2 to be truthful witnesses and that the fact that PW1 had been sodomized was corroborated by medical evidence. We think in the absence of a suggestion to the contrary, PW1 and PW2 are entitled to

credence, for that is also elementary law of evidence. (See **Goodluck Kyando v. Republic** [2006] TLR 363.

Therefore, our final decision on grounds 3 and 7 in the initial memorandum and ground 2 in the supplementary memorandum of appeal, is that there were no contradictions in the prosecution case. We say so because there is no reason why we should interfere with the concurrent findings of the two courts below regarding the veracity of PW1 and PW2. Said differently, we see no justification for not believing PW1 and PW2 on whose testimonies the case for the prosecution was built, because they are entitled to credence. The appellant did not even suggest why he holds PW1 as a person who would be manipulated to testify against him, and we cannot perceive of any reason. If anything, we find appellant's attack on PW2's veracity rather strange because during the trial he did not put any question to her when an opportunity to do so was availed to him.

In the premises and for those reasons we dismiss grounds 3 and 7 in the initial memorandum as well as ground 2 in the supplementary memorandum of appeal.

The eighth ground of appeal which is rather general is that, the prosecution failed to prove the case beyond reasonable doubt. Having

dismissed grounds 3 and 7 in the initial memorandum of appeal and ground 2 in the supplementary memorandum of appeal, we are satisfied that the prosecution proved its case against the appellant to the required standard.

We find the conviction to have been well grounded and we uphold it as well as the sentence that was imposed.

For those reasons this appeal is dismissed in its entirety.

DATED at **DAR ES SALAAM** this 19th day of February, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 21st day of February, 2020 in the presence of the appellant in person and Ms. Monica Ndakidemi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL