IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 557 OF 2017

GABRIEL LUCAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)
(Opiyo, J.)

dated the 25th day of September, 2017
in
Criminal Appeal No. 46 of 2017

.....

JUDGMENT OF THE COURT

22nd & 30th November, 2021

NDIKA, J.A.:

The appellant, Gabriel Lucas, was convicted of unnatural offence before the Resident Magistrate's Court of Manyara at Babati and was sentenced to the mandatory life imprisonment. His first appeal against the conviction and sentence was dismissed by the High Court of Tanzania at Arusha (Opiyo, J.), hence this second and final appeal.

It is vital to provide, at first, the salient facts of the case. The prosecution produced four witnesses along with two exhibits to establish the accusation that the appellant, on 9th June, 2014, at Kiru Six village within Babati District in Manyara Region had carnal knowledge of a boy aged six years against the

order of nature. For the sake of protecting the victim's privacy, we will refer to him as the victim or simply PW1, the codename by which he testified at the trial.

The prosecution case tended to show that on 9th June, 2014 around 19:00 hours, PW1 was walking back home from his grandmother's home when he bumped into the appellant. While he was with the appellant, PW3 Raheli Joseph alias Mama Hussein passed by. There and then, the appellant lured the unsuspecting victim to a nearby farm, promising to give him some money. At the farm, he stripped the victim's shorts and laid him down on the stomach. He then removed his trousers and inserted his male member into the victim's anus. Meanwhile, the appellant covered the victim's mouth with a piece of clothing known as *mgolore* to muffle the victim's screams. He continued ravishing the boy but stopped upon noticing that the victim was discharging faeces from his bloodied anus. He threatened to kill the boy should he spill the beans and then left the scene.

PW1 went back home but did not tell his parents about his ordeal fearing a reprisal from the appellant. On the following day around 11:00 hours, his father saw him trudging in difficulty and pain. Upon inquiry, PW1 narrated to his father and mother about the whole incident. He was immediately taken to

a local police station where a formal complaint was made. Thereafter, he was taken to hospital for treatment.

PW2 Namnyaki Lebahati, the victim's mother, recalled to have examined the victim's anus after she had learnt of the demonic incident. Apart from finding it ruptured and stained with blood, she found the victim's shorts soiled with a discharge of stool. Both PW2 and PW3 Raheli Joseph accompanied Police Officer No. G.2336 Detective Constable Juma (PW4), the investigator, in a visit at the scene of the crime. According to them, the ground at the scene was stained with what appeared to be faeces and blood. A sketch drawing of the scene was admitted as Exhibit P.1. On her part, PW3 confirmed at the trial to have seen the appellant in the fateful evening holding the victim's hand not far from the scene of the crime.

The investigator (PW4) also told the trial court that the appellant was arrested and taken to the police station on 7th September, 2014 where he recorded a cautioned statement confessing to the crime. Despite the appellant's protestation that the statement was extracted from him by force, the trial court admitted and marked it as Exhibit P.1.

When he was put to his defence, the appellant acknowledged his manner of arrest on 7th September, 2014 as narrated by PW4. However, he raised an

alibi, saying that he was at Kisuvu at the material time, not at the scene of the crime. He also bemoaned that no identification parade was conducted to verify if he was correctly identified at the scene.

In her well-reasoned judgment, the learned trial Senior Resident Magistrate (Hon. B.T. Maziku) was impressed by PW1's evidence identifying the appellant as the offender who sodomized him. That evidence was supported by PW3's testimony that she saw the appellant holding the victim's hand in the fateful evening near the scene of the crime. For clarity, we wish to extract from the trial court's judgment, at page 35 of the record of appeal, thus:

> *"When the victim ... met the accused it was not dark yet. The accused was not a stranger to him. The victim being a child believed the accused's promises ... that's why he followed him. His evidence is supported [by] the evidence of PW3 Raheli Joseph (Mama Hussein) who met the accused on the way on 9/6/2014 at 07:00 p.m. [She] saw the accused holding the victim's hand and asked him where he was taking the victim ... but [she was] told by the accused that he was taking the victim to his mother. The accused was not stranger to PW1 and PW3. "*

Directing her mind to section 127 (7) of the Evidence Act, Cap. 6 R.E. 2002 (which is now section 127 (6) of the Evidence Act, R.E. 2019) ("the EA") that the testimony of a victim of a sexual offence, if credible, is the true and best evidence, the learned trial magistrate accepted and acted on PW1's evidence as she believed it to be nothing but truth. She also took into account the evidence of PW4 that the appellant confessed to the charged offence vide the cautioned statement (Exhibit P.1). On that basis, the trial court found the charge of unnatural offence proven against the appellant.

On the first appeal, the learned appellate Judge upheld the trial court's findings after analyzing the evidence afresh. However, on the authority of **Robinson Mwanjisi & Three Others v. Republic** [2003] TLR 218, the learned Judge rightly found merit in the appellant's complaint that the cautioned statement (Exhibit P.1) was wrongly admitted in evidence by the trial court without conducting an inquiry into its voluntariness following the appellant's protestation that he was coerced to make it. Accordingly, the learned Judge discounted the statement.

The appellant has predicated the appeal on four grounds of complaint as follows: **one**, that the first appellate court erred in upholding the trial court's finding that the prosecution witnesses were credible; **two**, that both courts below erred in failing to note that the appellant was taken to court beyond

twenty-four hours after his arrest; **three**, that the first appellate court did not consider that the appellant was arrested three months after the alleged incident while the prosecution witnesses claimed that they knew him before the incident; and **finally**, that the conviction and sentence were illegal and unsustainable on account of non-citation of the provisions of law under which they were made.

At the hearing before us, the appellant, who prosecuted his appeal in person, sought and obtained leave in terms of Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 to argue an additional ground of appeal. The contention in that ground is that PW1's evidence was wrongly received at the trial. Having adopted his initial four grounds of appeal as well as the aforesaid additional complaint, the appellant urged us to allow his appeal. On the other hand, Ms. Akisa Mhando, learned Senior State Attorney, together with Ms. Alice Mtenga, learned State Attorney, fervently opposed the appeal on behalf of the respondent.

We wish to state at the outset that this being a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE 2019, to deal with matters of law only but not matters of fact. However, in consonance with our decision in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a litany of decisions that

followed, the Court can intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice – see also **D.R. Pandya v. R.** [1957] E.A. 336.

We find it convenient to deal, at first, with the respondent's argument made by Ms. Mtenga that ground three as formulated above was a new grievance that was not raised before the first appellate court. Relying on the Court's decision in **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016 (unreported), she submitted that the Court is precluded from entertaining any new ground raising factual contentions, not pure questions of law. On his part, the appellant offered no rebuttal quite understandably as he appeared unacquainted with the thrust of the learned State Attorney's submission.

Certainly, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal – see **Jacob Mayani** (*supra*) cited by Ms. Mtenga. See also, **Hassan Bundala v. Republic**, Criminal Appeal No. 385 of 2015; **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016; **Florence Athanas @ Baba Ali and Emmanuel Mwanandenje v. Republic**, Criminal Appeal No. 438 of 2016; **Festo Domician v. Republic**, Criminal Appeal No.

447 of 2016; and **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017 (all unreported).

We agree with the learned State Attorney that ground three raises no more than a mere factual claim questioning the delayed arrest of the appellant so as to cast doubt on the believability of the evidence of PW1, PW2 and PW3 who had alleged to have known him before the occurrence of the ghastly incident. This contention was not raised to the High Court for consideration and determination. It cannot be raised on a second appeal. In the premises, we abstain from entertaining it.

We find it logical to deal, next, with the second ground of appeal. On this ground, the appellant criticized the courts below, contending that they failed to note and act on the fact that he was taken to court beyond twenty-four hours after his arrest.

As shown in the memorandum of matters not in dispute, at page 7 of the record of appeal, recorded after a preliminary hearing was conducted in terms of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA"), it was undisputed that the appellant was arrested on 7th September, 2014 and that he was produced before the trial court for arraignment on 3rd December,

2015. It means that there was an intervening period of almost fifteen months between the arrest and his first appearance before the trial court.

The detention of arrested persons is regulated by section 32 (1) of the CPA, which stipulates as follows:

> *"**32**.-(1) When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which he is brought may, in any case, and shall if it **does not appear practicable to bring him before an appropriate court within twenty four hours after he was so taken into custody**, inquire into the case and, unless the offence appears to that officer to be of a serious nature, **release the person on his executing a bond with or without sureties**, for a reasonable amount to appear before a court at a time and place to be named in the bond; **but where he is retained in custody he shall be brought before a court as soon as practicable**.*
>
> *(2) [Inapplicable]*
>
> *(3) Where any person is arrested under a warrant of arrest he shall be brought before a court as soon as practicable.*

(4) Notwithstanding anything contained in subsections (1), (2) and (3), ***an officer in charge of a police station may release a person arrested on suspicion of committing any offence if after due police inquiry insufficient evidence is, in his opinion, disclosed on which to proceed with a charge.*** *"*[Emphasis added]

Subsection (1) above governs the pre-arraignment detention of a person taken into police custody without warrant for an offence other than one punishable with death. It imposes on the officer in charge of the police station concerned ("the OCS") the duty to inquire into the case once such a person is taken into police custody and bring such person before an appropriate court within twenty-four hours after he was so taken into custody. However, if it does not appear practicable to bring such person before a court within twenty-four hours, the OCS is enjoined to release him on his executing a bond, with or without sureties, pending investigations into the case, unless the offence appears to that officer to be of a serious nature. Nonetheless, where the suspect is retained in custody he must be brought before an appropriate court *"as soon as practicable."* The OCS may, in terms of subsection (4) above, release a suspect if, after due police inquiry, insufficient evidence is disclosed on which to proceed with a charge.

To put the appellant's claim in its proper perspective, it appears to be his contention that he was detained by the police for almost fifteen months over a bailable offence contrary to the dictates of the above statutory provisions. While conceding that it is on record that the appellant was produced before the trial court for arraignment on 3rd December, 2015 following his arrest on 7th September, 2014, Ms. Mtenga argued that the record does not indicate that the appellant was in police custody during the intervening period and that it was likely that he was out on bail. She wondered that if the claim was true why the appellant failed to cross-examine the police investigator (PW4) on that aspect. On that basis, she contended that there was no factual basis upon which this Court could investigate and determine the matter.

With respect, we are in agreement with the learned State Attorney that there is nothing on record substantiating the claim that the appellant suffered such prolonged illegal detention at the hands of the police. Before us the appellant candidly acknowledged that he did not bring any such complaint to the attention of the courts below. We think that the trial court was best placed to consider and determine the issue had the appellant brought it up. Thus, both courts cannot be blamed for not dealing with an allegation of which they were not cognizant. Given the circumstances, we find this claim not just an

afterthought but also implausible. At any rate, the said claim has no bearing on the merits of the case. The second ground of appeal stands dismissed.

We now turn to the additional ground. Here it is the appellant's contention that PW1's evidence was wrongly received at the trial on 22nd February, 2016 without the witness having given any promise to tell the truth to the court and not to tell any lies. He was under the impression that PW1, being a child of tender years as he was aged 8 years at the material time, was supposed to testify after promising to tell the truth in terms of section 127 (2) of the EA. The said option of giving evidence upon a promise was enacted pursuant to the amendment of section 127 of the EA by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, Act No. 4 of 2016 ("Act No. 4 of 2016"). As amended, section 127 (2) provides in permissive terms the procedure for the giving of evidence by a child of tender age as follows:

> *"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]

It occurs to us that the complaint at hand was fully answered by Ms. Mtenga. She posited that PW1's testimony was rightly received on 22nd February, 2016 under the procedure that existed at the time before section

127 (2) of the EA was amended by section 26 of Act No. 4 of 2016 that became effective on 8th July, 2016. She referred us to pages 10 and 11 of the record of appeal showing that the learned trial Magistrate duly conducted a *voire dire* examination on PW1 and allowed him to testify without oath. To bolster her submission, she cited **Denis Joram @ Denis Msenga v. Republic**, Criminal Appeal No. 78 of 2020 (unreported).

We entertain no doubt that the complaint at hand is plainly misconceived. As rightly submitted by Ms. Mtenga, the procedure for a child witness of tender years testifying upon a promise to tell the truth under section 127 (2) of the EA, as amended, became effective on 8th July, 2016 and, therefore, it was inexistent on 22nd February, 2016 when PW1 testified at the trial. We agree that the learned trial magistrate acted in accordance with the law as at the time as elaborated in **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) by conducting a *voire dire* examination on PW1 to determine his competence to testify before allowing him to do so. Having examined the record of the *voire dire* examination at pages 10 and 11 of the record of appeal referred to us by the learned State Attorney, we found no fault in the learned trial magistrate's conclusion, at page 11 of the record, that:

> "**Court**: According to questions and answers given by [PW1], a child of 8 years, this court is satisfied that though he does not know the meaning of

oath, he does possess sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth. Therefore, this court allows him to testify. Section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 complied with."

In the premises, we hold that PW1 was rightly allowed to testify without oath. Thus, the additional ground of appeal fails.

Next, we deal with the first ground of appeal. The appellant posited in this ground that the first appellate court erred in upholding the trial court's finding that the evidence by the prosecution witnesses was sufficiently credible and reliable to sustain his conviction.

For the respondent, Ms. Mtenga reviewed the evidence on record and urged us to uphold the concurrent finding by the courts below that all prosecution witnesses gave believable testimonies. Elaborating, she contended that PW1 gave a detailed and uncontradicted account of what the appellant did to him at the scene before sunset having lured him by the promise of money. The victim's account drew support from PW3 who adduced that she saw the appellant in the fateful evening before darkness had set in holding PW1's hand not far from the scene of the crime. To buttress her submission, she referred us to **Halfan Ndubashe v. Republic**, Criminal Appeal No. 493 of 2017 (unreported) and **Jacob Mayani** (*supra*) for the proposition that the best and true evidence in a case involving a sexual offence usually comes from

the victim. She made further reference to the Court's decision in **Abdul Ally Chande v. Republic**, Criminal Appeal No. 529 of 2019 (unreported) that the determination of the credibility of a witness' account is essentially a preserve of the trial court that sees the witness as he or she testifies in the witness box and determines their demeanor. Rejoining, the appellant maintained his claim that the prosecution case was founded on weak and unreliable evidence.

It is apt to remark that in view of the essential nature of sexual offences that they are committed where only two persons are usually involved, the testimony of the victim is of paramount significance and that it must be scrutinized carefully. Consequently, the credibility of the victim becomes the single most important consideration. If the testimony of the victim is credible, persuasive and consistent with human nature as well as the ordinary course of things, the accused may be convicted wholly on that evidence.

As hinted earlier, the prosecution case was anchored on the victim's testimony, as direct evidence, as well as the testimonies of PW2 and PW3, as corroborating evidence. Having looked at this body of evidence in the light of the concurrent findings of the courts below, we find no cause to disagree with the said courts, which gave full credence to the victim's detailed and compelling narrative of what the appellant, whom he was familiar with, did to him. Apart from the victim's version being clear, spontaneous and reliable, it was not

controverted in cross-examination. Both courts rightly directed themselves, in analyzing the evidence on record, to the basic principle under section 127 (7) of the EA (now section 127 (6) as amended by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016) that the testimony of a victim of a sexual offence, if credible, is most reliable – see also **Selemani Makumba v. Republic** [2006] T.L.R. 379. To illustrate the point, we excerpt a part of victim's testimony, at pages 11 and 12 of the record of appeal, as he narrated so candidly and explicitly on how the bestial act was committed to him by the appellant:

> *"Since he told me that he was going to give me money, I agreed to go with him but I didn't know his intentions. When [we] arrived ... at the farm, the accused Lucas took off my [shorts] .... I had no underpants. He held and put me down. I lay on my stomach (alinilaza chini kwa tumbo) while naked. The accused wore short trousers .... The accused also took off his short trousers and underpants. He took his penis and put it into my anus."*

Like the courts below, we take the view that, even though the revolting sexual act was committed in the evening, there was no possibility of mistaken identity because, based on the testimonies of PW1 and PW3, it was not dark yet at the scene of the crime and that both of them knew the appellant. In

fact, PW3 recounted to have engaged the appellant in a conversation, asking him as to where he was taking the victim. Moreover, since PW1 and PW3 knew the appellant prior to the incident, his complaint that no identification parade was conducted is beside the point. We note that PW1's account was further bolstered by the testimony of PW2 who examined the victim's anus on the following day and found it ruptured. Her evidence dovetailed with the victim's claim that he was sodomized the previous day.

It is settled that when the credibility of a witness is of paramount consideration, as in the instant case, the findings of the trial court must be accorded respect, if not conclusive effect – see, for example, **Abdul Ally Chande** (*supra*). Once the trial court's findings have been affirmed by the first appellate court, as in the instant case, they are normally binding upon this Court. Having reviewed the evidence on record as demonstrated above, we find no cause for disturbing the lower courts' concurrent finding that the prosecution case was credible and weighty. The appellant's defence of *alibi* was rightly rejected as PW1 and PW3's evidence cogently placed him at the scene of the crime at the material time. Accordingly, we uphold the finding that he sodomized the victim. The first ground of complaint is equally bereft of merit.

Finally, we consider the complaint in the fourth ground of appeal. Although the appellant did not elaborate on this ground, Ms. Mtenga conceded the omission by the learned trial magistrate to specify the corresponding provisions for conviction and sentence. She submitted that in terms of section 312 (2) of the CPA, the trial court was enjoined to cite in the judgment the statutory provisions under which the conviction and sentence were made. However, she hastened to argue, on the authority of **Abubakar Msafiri v. Republic**, Criminal Appeal No. 378 of 2017 (unreported), that the omission complained of was curable pursuant to section 388 of the CPA.

Section 312 (2) of the CPA expressly requires the trial court to specify in the judgment the statutory provisions under which conviction is entered and sentence imposed. It provides thus:

> *"(2) In the case of conviction the judgment shall specify the offence of which, and* ***the section of the Penal Code or other law under which****, the accused person is convicted and the punishment to which he is sentenced."* [Emphasis added]

We agree with the appellant and Ms. Mtenga that, as shown at pages 36 and 37 of the record of appeal, the learned trial magistrate did not specify the corresponding provisions of the law for the conviction and sentence. However,

with respect, we endorse the learned State Attorney's submission that the said irregularity is curable under section 388 of the CPA. In **Abubakar Msafiri** (*supra*), relied upon by Ms. Mtenga, we took the same stance following our earlier decision in **Emmanuel s/o Phabian v. Republic**, Criminal Appeal No. 259 of 2017 (unreported) where we dealt with a similar irregularity. For clarity, we extract the relevant passage from the latter decision:

> *"In his judgment, the learned trial Resident Magistrate convicted the appellant as charged meaning that he was convicted of the offence of rape under ss. 130 (2) and 131 of the Penal Code which the trial magistrate specified at the beginning of the judgment. Thus the fact that the offence and the sections of the law were not restated did not amount to non-compliance with s. 312 (2) of the CPA. - See for instance, the case of* ***Hassani Saidi Twalib v. Republic,*** *Criminal Appeal No. 95 of 2019 (unreported). As found above, although there was omission to cite paragraph (a) of s. 130 (2) of the Penal Code, that did not vitiate the conviction."*

Certainly, in the instant case too, as revealed at page 28 of the record of appeal, the learned trial magistrate specified section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019) ("the Penal Code") at the beginning of her judgment as the charging and punishment provisions. The

fact that these provisions were not subsequently restated was not fatal. The final ground of appeal fails.

In the upshot, we find the appellant's conviction unassailable. Since the victim of the offence was a six-year-old boy, the life imprisonment sentence imposed on the appellant was in accord with the dictates of section 154 (2) of the Penal Code as the mandatory penalty. We thus dismiss the appeal in its entirety.

DATED at **ARUSHA** this 27th day of November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 30th day of November, 2021 in the presence of the Appellant in person and Ms. Eunice Makala, learned State Attorney for the Respondent/Republic is hereby certified as true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL