IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 222 OF 2012

1. JOB MLAMA
2. ANICENTH EDWARD
3. SHIJA MADATA ..... **APPELLANTS**

VERSUS

THE REBUBLIC ..... **RESPONDENT**

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Mruma, J.)

dated 26th September, 2012

in

Criminal Appeal No. 72 of 2009

JUDGMENT OF THE COURT

25th & 31st July, 2013

KIMARO, J.A.:

The three appellants were jointly charged in the Court of Resident Magistrate at Mwanza with three counts of sexual exploitation of a child contrary to section 138B (1) (e) of the Penal Code [CAP 16 R.R.2002]. In the alternative to the first count, all appellants were jointly charged with sexual exploitation of a child contrary to section 138B (1) (a) of CAP 16. The third count is for the third appellant alone and she is charged under section 138B (1) (d) of CAP 16 with sexual exploitation of a child.

The particulars of the offence in the first count alleged that the appellants jointly and together used violence to procure Helena

Kashilimu, a child aged 13 years for sexual intercourse, which ultimately ended in the child having sexual intercourse with a dog known as BADYA. As for the second count, the allegations were that the appellants while knowing that Helena was a child of tender age not supposed to spend a night in the camp did purposely cause the child to remain in the premises in order to unlawfully participate in sexual intercourse with a dog. In the third count the third appellant was alleged to take advantage of her relationship with Helena Kashilimu a child of tender years, a neighbour and friend by asking her to accompany her to a mine camp while knowing it was for purposes of forcing her to engage in sexual intercourse with a dog.

The circumstance under which the offence was committed leave a lot to be desired. It reflects a serious breach of human rights. The late Lukakingira J. was very clear when he held in **Rev. Christopher Mtikila V Attorney General** [1995] T.L.R. 31 that human rights inhere in a person by virtue of birth. This means that the moment a person is born he/she has rights as a human being which should not be infringed in any way. One of such rights is respect. It is no wonder the judgment of the trial court starts with the following observation:

> ***"The Judgment arises from a very serious story of inhuman act of forcing a human being to have sexual intercourse with a***

dog. Apart from being a human being the victim was a child aged 13 years old."

For a person guided by good morals, and respectful, it is hard to avoid falling in making the remarks the trial magistrate made.

To get insight of what actually took place, let us visit the evidence that was put in the trial court. The third appellant, Shija Madata (DW3) was a girlfriend of the first appellant (DW1). That was her own words as she addressed the Court at the hearing of this appeal. The first appellant was working as a cook at Barrick Mines Exploration Camp in Sota Village Sengerama District at Mwanza Region the place where the offence is alleged to have commited. This was also his own evidence as he gave his defence. The second appellant was a watchman in the same Mine. This came from his own defence (DW2).

On 21st March 2008 the third appellant was seen in the company of Hellena Kashilimu (PW1) by Hussein Jaffari (PW2), Rosa Elias (PW3) and Selemani Stephano (PW5) going to the mine. The witnesses were not specific on the time they saw the two, that is the third appellant and the complainant walking to the camp but their evidence shows that it was in the evening. The complainant was living with her mother called Tabu.

What exactly took place in the camp we get it from the evidence of the complainant PW1. Her evidence was taken after she satisfied the

trial court in "voire dire" examination that despite her tender age, she was a competent witness and she knew the meaning of speaking the truth. See the case of cases of **Lyengo Wison V R** Criminal Appeal No.194 of 2009 and **Alfani Ramadhani V R** Criminal Appeal No.2 of 2011 (both unreported). The testimony of the complainant was that she was living with her mother at Sota Village. The third appellant was her friend. She first accompanied the third appellant to the mine on 20th March 2008 and on that day they left safely. The third appellant requested the complainant to accompany her to the camp on the next day. This is the day the prosecution witnesses PW2, PW3 and PW5 saw them walking to the camp together. On that day they left for the mine at about 19.00 hours. The second appellant opened the gate for them. They went to the room of the first appellant. They were in the same room the previous day. They were served food and later they took a bath. What followed was the intolerable ordeal the complainant found herself in.

Describing the awful act that took place, the complainant stated and we reproduce what she said:

> *"Job came and started to talk with Shija in another language not Swahili where I did not hear them what they what we (sic) were talking. After their talking I heard Shija saying*

"Tumpeleke sasa" where Job replied "ee tumpeleke". Shija told me to follow her and we found second accused in another area there was a gate covered with a "turubai". Second accused had keys and opened the gate entered there followed Job and Shija.

I refused to get in that gate where second accused pulled me inside that house. At that time Job and Shida were inside that house. 2nd accused after pulling me he took off all my clothes and forced me to lie."

The complainant went on to describe the role which each of the appellant took in the whole incident:

"Shija held my legs and Job my waist. I started raising noise in Sukuma. "Welelo nayo nacha" meaning "mama nakufa" (mother I am dying. A big dog was inside small hut at that area. The dog was very fat. 2nd accused untied that dog ... The dog came, surrounded me and held me tight with its legs and entered its penis to my vagina forcing me to have sex with it.... The dog continued to have sexual intercourse with me and pulled me to follow the dog where Shija also pushed me so that I follow the dog when pulling me my stomach was aching my vagina got damaged and I started bleeding...,When the dog finished I failed down while my head and stomach were aching."

That was the ordeal which the complainant, a child aged 13 years went through. In "reciprocity" to the sad event the complainant went through, the 2nd appellant gave the complainant an amount of Shillings 1000/=. Unfortunately, and contrary to the law, the age of the appellants is not given in the charge sheet. Section 132 of the Criminal Procedure Act, CAP 20 requires every charge sheet to give sufficient information including the particulars of the accused person. The importance of disclosing the age of the accused person is known. Among them is for sentencing and other matters as directed by the law when determining the proper sentence to impose. Their age as given on the date the appellants testified in court in their defence was 32 years for the 1st appellant, 30 years for the 2nd appellant and 19 years for the 3rd appellant. The age difference between the appellants and the complainant, the victim of the offence was big. We will come back to this point later.

The complainant admitted that after undergoing the sad event she spent the night at the camp in severe stomach pains and on the next day, she left the alone. The severe pains she suffered took her to a shop where she bought medicines thinking that they would help her to heal. She did not heal. The appellants cautioned her not to disclose the incident to anyone. At first she thought it was a wise thing to do but as

pain continued she could not tolerate them. She revealed the incident to her mother, Tabu Ruzula (PW4).

The incident was reported to the Police where F. 716 D/ Sgt Salum (PW6) recorded the statement of the 3rd appellant who is said to have admitted the commission of the offence. The complainant went to hospital. She was attended by Dr. Abraham Mahozo (PW7) who confirmed that the complainant suffered injuries. The hymen was ruptured by a certain force. In cross examination to ascertain whether the complainant was raped, PW7 said he did not see sperms because the examination was done after 72 hours. E 9335 D/Sgt Masato (PW8) arrested the 1st and the 2nd appellants.

With this evidence the appellants were charged. Apart from what we indicated earlier to have been admitted by the appellants, they denied the commission of the offence. The 3rd appellant raised the defence of alibi without notice under section 194 (4) of the Criminal Procedure Act, CAP 20. The 1st and 2nd appellants also brought witnesses to testify on their behalf but their evidence covered administration of the security in the mine. They did not exonerate the 1st and 2nd appellants from the commission of the offence.

After the analysis of the evidence the appellants were found guilty of all the offences charged and were convicted. Each appellant was

sentenced to twenty years imprisonment for the first and second counts and fifteen years imprisonment to the 3rd appellant. The sentences were ordered to run concurrently.

Their appeal to the High Court partly succeeded. Their complaint was mainly on the credibility of the complainant. The first appellate court found the complainant was a credible witness. However, the first appellate court held that it was improper for the appellants to be charged in alternative counts as indicated in the charge sheet. The first appellate court found the appellant guilty on count two which was charged in alternative to court one of forcing the complainant who was a child to remain in the camp and forcing her to have sexual intercourse with a dog.

The appellants are still aggrieved and have filed this appeal. The 1st and 3rd appellants filed a joint memorandum of appeal. They have filed eight grounds of appeal which can safely be reduced to only one ground, and that is whether the appellants were convicted on sufficient evidence. Mr. Salum Amani Magongo, learned advocate filed three grounds of appeal challenging the evidence of PW1 that it was not properly analysed. The second ground challenges the cautioned statement of the 3rd appellant which was admitted as exhibit P2. In his third ground the complaint is the same as the other appellants; that the

prosecution evidence upon which the convictions of the appellants were based was not sufficient.

At the hearing of the appeal 1st and 2nd appellants appeared in person. The 2nd appellant was represented by Mr. Salum Amani Magongo, learned Advocate. The respondent Republic was represented by Mr. Athumani Matuma, learned State Attorney.

A practice has now evolved in unrepresented appellants. They choose to respond to their grounds of appeal after hearing what the Republic would say in respect of their grounds of appeal. This was the option taken by the 1st and 3rd appellants.

In support of the appeal in respect of the 2nd appellant, the learned advocate challenged the evidence of PW1 claiming that she was not a credible witness. The first point of attack in the evidence of the complainant was her failure to immediately report the commission of the offence. His considered opinion was that if the offence was committed, and the complainant suffered injuries, she would not have hesitated to report the incident immediately. The circumstances under which the complainant said the offences were committed, was another aspect of doubt. His main question here was if the complainant was held at the back and the dog was behind her how did she see what was taking place? He also questioned why the witnesses who rode her in a bicycle

after she left the camp on the next day after the incident were not called to testify? As he revisited the evidence of PW2, PW3 and PW5 the learned advocate said the prosecution witnesses were talking about a different person and not the complainant. Regarding the sketch plan, the learned advocate said it omitted some important matters which ought to have been included therein. He referred us to a number of authorities and said the totality of the evidence does not conclusively show that the complainant was sexually abused by the dog. He prayed that the appeal by the 2nd appellant be allowed.

The learned State Attorney supported the conviction and the sentence. In his own assessment of the evidence, the complainant was a credible witness and her evidence left no doubt on the commission of the offence. The learned State Attorney said even if there are contradictions in the prosecution evidence, the contradictions are minor and would not affect the conviction of the appellants.

Reflecting on how the offence was committed, the learned State Attorney said PW1 was specific on how the offence was committed. He said the dog was pulling her to put her in a good position for the intercourse. The learned State Attorney said the evidence on record shows that the offence was committed. The issue that should be addressed is who committed the offence? Did the complainant have

sexual intercourse with a dog or a human being? Mr. Matuma said PW1 explained thoroughly how the incident took place. The 3rd appellant lured the complainant to escort her to the mine knowing that the purpose of taking her there was to force her to an inhuman act of being sexually abused by a dog at the supervision of the 2nd appellant. Speaking in comparative terms in respect of the evidence of the prosecution and the defence, the learned State Attorney said the complainant was a credible witness. She spoke the truth indicating the role which each appellant played in the commission of the offence and her evidence is supported by the evidence of PW2, PW3, and PW5. He said the PF3 showed the injuries suffered in the process of the commission of the offence. Commenting on the penalty imposed on the appellant the learned State Attorney said the circumstances under which the offence was committed justified the sentence.

The 1st appellant did not have much to say. He said the dog was new in the camp and he had no skills to handle dogs. He said he was himself afraid of it because it was of a European type. He said the dog was at a place which was far from where he was and he could not even see what was taking place. He prayed that his appeal be allowed.

On his part, the learned advocate for the 2nd appellant reiterated his earlier submission. He referred to the cautioned statement of the 3rd

appellant saying that it could not be used against his client because it was a statement of a co-accused. He prayed that the appeal by his client be allowed.

The 3rd appellant said she did not commit the offence. She prayed that her appeal be allowed.

We are aware that this is a second appeal. In determining the issues involved in the appeal, we will start with the position of the 2nd appellant. We believe that in the process we will also cover the other appellants. The case of **Salum Mhando V R** [1993].T.L.R.170 referred to us by the learned advocate for the second appellant shows that the Court can interfere with the findings of facts by the lower courts if both courts completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction.

The first question which arises is whether the evidence before the court proved that the offence was committed. Admittedly the only direct evidence on record to prove the commission of the offence is the evidence of the complainant (PW1). The learned advocate said she was not a credible witness. The court below however, found her to be a credible witness.

Do we have a reason to doubt the credibility of PW1. We do not hesitate to say that we have none. We have thoroughly gone through

the evidence of PW1. She was 13 years when the offence was committed. That evidence was not disputed. The "voire dire" examination showed that she was a competent witness. The portions of her evidence reproduced above in this judgment show that she clearly explained each and every thing that took place that is from the time the 3rd appellant and herself visited the camp on 20th and the incident that took place on 21st March 2008. She explained the role played by each of the appellants; the 2nd appellant pulled her into the room, undressed her, caught her by the neck, the 3rd appellant holding her legs apart, and the 1st appellant her waist and how the 2nd appellant brought the dog and the 3rd appellant assisting it to penetrate the vagina of the complainant to its satisfaction. The portions of the evidence of the complainant quoted above show that the whole incident was arranged. This court has persistently held that in rape cases the victim is the best witness. See the case of **Salum Mkumba V R** Criminal Appeal No. 94 of 1999 (unreported). Similar circumstances apply in this case where the complainant was penetrated by a dog against her will.

Secondly, the learned advocate challenged the prosecution for failing to bring the witness who carried her in a bicycle to buy medicine. How would that evidence prove that the complainant was sexually assaulted by a dog? Those were not relevant for proving the commission of the offence.

Apart from the prosecution witnesses PW2, PW3 and PW5 which corroborated the evidence of the complainant, the 1st appellant's and the 2nd appellants defence supported the complainant's case. The complainant identified the 1st appellant as a cook. In both occasions she and the 3rd appellant visited the camp, he served them food. She also identified the 2nd appellant as the one who brought the dog that sexually abused her. The 2nd appellant admitted he was a watchman and he used to use the dog to assist him in his work and he was given training to that effect. Even some of the defence witnesses confirmed that the dog was under the supervision of the 2nd appellant and it was used for security duties. Thirdly, the doctor who conducted examination on the complainant confirmed that her hymen was ruptured something that would not be found in a child of the age of the complainant.

Fourthly, as regard early disclosure of the incident, the issue was in our view, correctly dealt with by the first appeal court. The witness was a young girl. The incident she encountered was not a normal one. It was disrespectful and psychologically humiliating. She suffered physical injury. She had to be hospitalized for a month. She was traumatized. As for contradictions, our considered opinion is that the contradiction we note on the evidence of the complainant is very minor. It is on dates. The case of **Michael Haishi V R** [1992] T.L.R. 92 referred to us by the learned advocate would not apply in the

circumstances of this case. The case speaks of contradiction on identification which is not the case in this appeal. The contradiction which the Court would accept is one which goes to the root of the case.

Fifthly, the learned advocate also said that the cautioned statement of the 3rd appellant cannot be used under section 33 of the Evidence Act [CAP 6 R.E. 2002] to convict the 2nd appellant. With respect to the learned advocate, we agree that is the law. But even if the statement of the 3rd appellant is discounted, there is still on record, sufficient evidence to sustain the conviction of the 2nd appellant. In this respect we find the appeal by the 2nd appellant devoid of merit.

The same position applies for the rest of the appellants. The evidence of the complainant sufficiently implicates them with the commission of the offence. As we stated before, even the third appellant admitted that the 1st appellant was his boyfriend. The complainant said in her evidence when they went to the camp on 21st March 2008 the 3rd appellant informed the 1st appellant that she wanted to go to the room. She went there switched on the lights and went to take bath. If it was not the third appellant who took the complainant to the camp where did the complainant get all the details she gave in court? We remarked about the age difference between the appellants and the complainant. The complainant took the 3rd appellant as a sister.

she knew what was going to befell her. A respectful person with good morals and sense of humanity could not conduct himself/herself in the way the appellants did in this case. What took place was quite inhuman. All evidence and submissions considered, we find the appeal by all the appellants having no merit. It is dismissed.

One observation to make is that the offence which was committed was a serious one, not only degrading the dignity of the complainant but it also exposed the complainant to a risk of diseases. Under the circumstances we order each of the appellants to pay the complainant a compensation of T.shillings 200,000/= (two hundred thousand only).

DATED at MWANZA this 30th day of July, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL