IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MASSATI, J.A., ORIYO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 31 OF 2015

EMMANUEL ADAM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Ngwala, J.)

dated the 28th day of November, 2014

in

Criminal Appeal No. 86 of 2013

JUDGMENT OF THE COURT

10th & 18th August, 2015

ORIYO, J.A.:

Emmanuel Adam, the appellant herein, was 40 years old when he was convicted of the offence of unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code and sentenced to life imprisonment by the District Court of Chunya at Chunya, (O. N. Ngatunga, DRM) on the 4th of December, 2013. He unsuccessfully appealed to the High Court at Mbeya. He has come to the Court on a second appeal.

Facts leading to the arraignment, conviction and sentence can be traced back to the events of 12th December 2012, at Chalangwa village,

Chunya District, Mbeya Region. On the fateful day, PW1 Doreen Abijani, a child of five (5) years of age, was playing with her friends including PW4, Jesca Weston, a girl aged 10 years. Then the appellant appeared at the scene, picked Doreen by the hand, led her to his house which was in the neighbourhood, closed the door and sodomised her. And as if that was not bad enough, after satisfying his lust, he placed the victim under his bed naked, until when one of her friends went around looking for her. PW 4 Jesca Weston, found PW1 in the house of the appellant crying as she laid under the bed, naked. PW4 took her out. Subsequently, information was sent around to her grandmother who notified her parents of the incident. PW1 was taken to hospital for medical examination and treatment while the appellant was arrested and taken to the police for necessary action. Thereafter he was sent to court and charged accordingly.

The appellant had lodged a Memorandum of Appeal in Court with seven (7) grounds of complaints, which can be summarized as follows: -

> *"1. Conviction was based on testimonies of PW1 and PW4, children of tender age, after an attempt to conduct voire dire, which did not comply with the dictates of the law.*

2. *He was convicted in reliance of contradictory evidence in Exhibit PE2 (PF3 of PW1) and PW3, (a medical doctor), on whether PW1 was sodomised only or was sodomised and raped.*
3. *Failure to conduct D.N.A. test on the appellant to establish that it was him who caused the bruises in the private parts of PW1.*
4. *Failure to summon the mother of the appellant to testify that the underpant of PW1 was found inside his house, in the absence of a seizure report.*
5. *Failure to tender in court proof that PW1 was indeed below ten (10) years old."*
6. *Lastly, he made a general complaint that the charge against him was not proved beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant appeared in person while the respondent Republic was represented by Mr. J. Pande, learned Principal State Attorney, who argued in support of appeal. He was of the firm view that the conviction and the sentence imposed on the appellant were predicated on full compliance with the provisions of section 127 (1), (2) and (7) of the Evidence Act, Cap 6 and section 154 (1) (a) and (2) of the Penal Code, which was not the case. He specifically took issues

with the lower courts that the age of PW1 was not proved through her own testimony or that of PW2, her father. His further attacks were directed at the time of the incident which was not specific whether it was in the morning, afternoon or evening; on why Schola, one of the children playing with PW1 was not called to testify; on the absence of nexus between the appellant and how he was arrested, etc.

In his view, the learned Principal State Attorney submitted that the few unresolved issues create doubts on the guilt of the appellant.

In response to the submissions by the learned Senior State Attorney, the respondent had nothing useful to tell us, save that he was in agreement with the submissions made by the respondent Republic.

Regarding the age of PW1, the record bears out the concern of the Principal State Attorney. PW1 testified in court on 23/4/2013 that she was a pupil at a nursery school, without testifying on her exact age. The trial court conducted a **voire dire** examination in compliance with the dictates of section 127(2) of the Evidence Act.

In its finding, the court was of the opinion that PW1, a child of tender age, did not understand the nature of an oath but was possessed of sufficient

intelligence to justify the reception of her unsworn evidence. The court proceeded to take her unsworn evidence.

Section 127(2), (7) of the Evidence Act, specifically caters for receipt and reliance by courts on the evidence of children of tender age summoned as witnesses to testify. The two subsections provide as follows: -

> *"127.-(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.*
>
> *(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of*

tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

In view of the legal position as expounded in section 127 of the Evidence Act, the testimony of PW1 was in order and was properly received at the trial court and relied upon to convict.

As for the complaint on the exact age of PW1 at the time of incident, save that PW1 stated during her unsworn evidence to have been a nursery school student in her home village, we agree with the learned Principal State Attorney that there was no direct evidence on the age of PW1 either from herself or from PW2, her father.

The appellant was found guilty, convicted and sentenced to life imprisonment, in terms of section 154(2) of the Penal Code which provides as follows: -

> *"154. – (2) Where the offence under subsection (1) of this section is committed* ***to a child under the age of ten years****, the offender shall be sentenced to life imprisonment."*
> (Emphasis provided.)

If the public prosecutor who had had an opportunity to see and interview PW1 and PW2 on the incident, sincerely believed that PW1 was below the age of ten years as alleged in the charge sheet, then he ought to have led evidence to prove that.

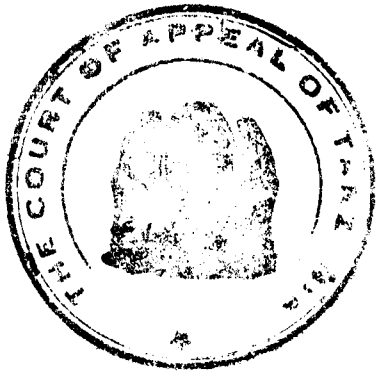
We have given due consideration to the absence of prosecution evidence on the age of PW1 and the fact that the trial court proceeded to sentence the appellant under section 154(2), (supra). We are of the settled mind that the prosecution failed to prove this aspect of the charge against the appellant in the trial court. In the absence of evidence on the age of PW1, that she was below the age of ten years, the trial court ought not to have sentenced the appellant under section 154(2) (supra), as it did.

In the event, we invoke the Courts revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 (R.E. 2002), to quash and set aside the sentence of life imprisonment imposed on the appellant. Instead,

we substitute thereof a sentence of thirty (30) years imprisonment, in terms of section 154(1) of the Penal Code. The substituted sentence to run from the date of conviction.

For the reasons stated we find the conviction of the appellant to be well founded. Otherwise the appeal against conviction is accordingly dismissed.

DATED at **MBEYA** this 17th day of August, 2015.



S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

P. W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL