IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM :KILEO,J.A., JUMA, J.A., And MWARIJA,J.A.)

CRIMINAL APPEAL NO.307 OF 2009

HAJI OMARY.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and sentence/acquittal of the High Court of Tanzania at Arusha)

(Sambo, J.)

Dated the 15th day of October, 2009
In
Criminal Appeal No. 87 of 2007

JUDGMENT OF THE COURT

28th& 30th September, 2015

KILEO, J.A.:

In the District Court of Arusha at Arusha vide Criminal Case no. 22 of 2002 the appellant Haji Omary was charged with and convicted of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code as amended by Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to life imprisonment. He lost his appeal to the High Court hence this second appeal.

The facts of the case as they divulged in the trial court were simple. On the date of the incident, which was 5/1/2002, PW3, Kimaro Michael (aged 11 years at that time) was playing with the victim of the crime, Juma

s/o Yasini (then aged about 4 years) when the appellant appeared and called out the child to follow him to his house. No sooner had the child gone with the appellant into his house then PW3 heard the child crying. Being concerned, PW3 sought the assistance of PW4 who stopped eating his lunch and rushed to the appellant's house. After calling out to the appellant to open the door without response PW4 kicked it open and as he did so he collided with the appellant who was rushing out of the room. PW4 prevented him from escaping by holding him and at the same time raising an alarm. When other people arrived he handed the appellant over to them and went into the room where he found the child victim holding his shorts. The witness noticed blood on the bed as well as on the buttocks of the child. The victim was examined by PW5, a medical officer who filled in the PF3 (Exhibit P1) that was issued by the police. Upon his examination he found three bruises around the anus opening. He was of the opinion that the bruises might have been caused by pressing an index finger or a penis into the anus of the victim.

In his defence the appellant claimed that the charge against him was fabricated by a co-worker in order to cover up a robbery that he had committed upon him. He mentioned PW4 as the said co-worker.

The appellant who appeared before us in person had filed a memorandum of appeal comprising of four grounds. Essentially however, the appellant's complaint is to the effect that the first appellate judge erred to have upheld the decision of the trial court while the case against him was not proved beyond reasonable doubt.He made mention ofthe fact that the victim neither testified in court nor was his age mentioned in the charge sheet. He also complained that the doctor's evidence did not prove the case nor was the tendered exhibit properly scrutinized.

When he was prompted to address us the appellant preferred that the respondent address us first. Mr.JumaRamadhani, learned Principal State Attorney appeared for the respondent Republic. Resisting the appeal the learned Principal State Attorney submitted that the evidence that was tendered at the trial established beyond reasonable doubt that the appellant committed the offence that he was charged with. Referring to section 143 of the Evidence Act the learned Principal State Attorney argued that the fact that the victim of the crime did not testify in court did not weaken the case for the prosecution as there was other sufficient evidence that linked the appellant to the commission of the crime. Further, in response to the complaint that the first appellate judge erred when he held

that PW5 proved the case beyond doubt, the learned Principal State Attorney was quick to point out that the case for the prosecution was not based on the testimony of PW5 alone. Regarding the failure to mention the age of the victim in the charge sheet, Mr.Ramadhani submitted that this was not at all fatal to the case for the prosecution as age was immaterial in so far as proof of the unnatural offence was concerned. He argued that age was material only in connection to sentence.

In response to Mr.Ramadhani's submission the appellant maintained that the case against him was fabricated. He urged us to hold in his favour bearing in mind **first**, the fact that the victim never testified in court **second**, the fact that the age of the victim was not indicated in the charge sheet and **third** the fact that the PF3 showed to have been signed on 14/2/2002 while the crime was said to have been committed on 5/1/2002.

There is one main issue that needs our determination in this case and it is whether the case against the appellant was proved beyond reasonable doubt. Accompanying this issue is;**one**, whether the fact that the victim did not testify weakened the case for the prosecution and **two**, whether the fact that the age of victim was not mentioned had any adverse impact on the prosecution case.

The matter need not detain us. We agree with the learned Principal State Attorney that the evidence against the appellant was overwhelming.PW3 explained how the victim who was playing with him was lured by the appellant into his room and how after a short while he heard cries from the child. PW3 reported the matter to PW4 who immediately proceeded to the appellant's house only to find the victim who was then aged 4 years holding his shorts in his hands with blood on his buttocks and excreta and blood on the bed. The appellant who had locked himself in his room with the victim tried to escape but he was apprehended at the scene and the law took its course. PW5 who was the examining doctor testified to the effect that the child had indeed been molested as per findings which were reflected on the PF3 that he filled in.

The complaint that the case was not proved beyond reasonable doubt because the victim never appeared in court nor was a finding made to the effect that he was not competent to testify does not in our considered view water down the case for the prosecution. The law recognizes that there are instances where charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased. Senility, tender age or decease of the mind may

prevent a victim from testifying in court (See section 127 of the Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victims' testimony. In this case the victim was a four year old child. He was indeed a child of tender age. Though we agree that ideally the reason for the non-taking of the testimony of the victim should have been entered on record however such failure neither weakened the case for the prosecution nor resulted in a failure of justice.

As for the non- mentioning of the age of the victim in the charge sheet we agree with the learned Principal State Attorney that the charge sheet was not rendered defective thereby. We are of the settled view that in a charge of Unnatural Offence contrary to section 154 of the Penal Code age is immaterial in so far as proof of the charge is concerned. Age is only relevant when it comes to sentencing. Unlike in rape where consent is material (save for statutory rape where consent is immaterial), in unnatural offence, the question of consent does not arise in the proof of the crime. As pointed out above, age is relevant only when it comes to sentencing. The appellant also challenged the finding of the first appellate judge for having failed to take into consideration the fact that the PF3 was signed several days after the victim had been examined. It is true that the PF3

was not signed on the same day that it was issued. It shows that it was signed on 14/2/2002 while it was issued on 5/1/2002. What missed the appellant's attention however is the fact that it was recorded in the PF3 that the victim was *"admitted in the surgical ward 5th-6th January 2002"*. PW5 did not say anywhere that he examined the victim on 14/2/2002. This date is just the date that the PF3 was signed. It is not uncommon for medical reports to be signed days after the injury or illness has been attended. Like the other the arguments advanced by the appellant this one also lacks value.

Before we are done with this appeal, for the sake of justice, we would wish to refer to a point that was raised by the appellant in the course of responding to the submission by the learned Principal State Attorney, a point which however did not feature in the grounds of appeal. He complained that the first appellate judge failed to appreciate his defence that the case was fabricated against him. We are satisfied that this complaint lacks any basis. The learned first appellate judge thoroughly considered this complaint which was one of the grounds of appeal in the High Court and found that it lacked any substance. He found that the trial court was justified to believe the testimonies of PW3, PW4 and PW5 who

established the prosecution case. We see no reason to fault the learned judge's finding on this complaint. When PW4 against whom the complaint was directed testified the appellant did not cross-examine him on that matter. That the case was a fabrication was raised for the first time during defence and we are settled in our minds that it must have been an afterthought.

Having considered the appeal as above we find it to be lacking in merit. In the circumstances we dismiss it in its entirety.

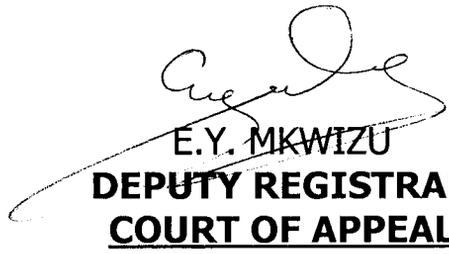
Dated at **Arusha** this 29th day of September, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL