IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: JUMA C.J, MZIRAY, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 148 OF 2017

YUSUPH MGENDI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from Judgment of the High Court of Tanzania at Iringa)

(Sameji, J.)

Dated 31st day of March, 2017
in
Criminal Appeal No. 68 of 2016

JUDGMENT OF THE COURT

22nd & 30th August, 2019

MKUYE, J.A.:

In the District Court of Mufindi at Mafinga the appellant Yusuph Mgendi was charged and convicted of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap 16 RE 2002. It was alleged that on 15th July 2014 at Usokami village within Mufindi District and the Region of Iringa, the appellant did have carnal knowledge against the order of nature to one **MM**, a child aged five (5) years old. Upon a full trial, the appellant was convicted and sentenced to life imprisonment. His appeal to the High Court was dismissed, hence this second appeal to this court.

In order to prove the case, the prosecution marshalled three witnesses, that is, the victim of the alleged offence **MM** (PW1), the victim's father Anicheto Mgimba (PW2) and the medical Doctor at Mafinga Government Hospital, Patrick David Kivambe (PW3). For the defence, only the appellant testified.

The brief background of the case can be stated as follows:

MM, whose evidence was taken after the *voire dire* examination was conducted, testified that she knew Kitale (the appellant) whom she also identified in the accused's dock in court. She said, she recalled that on 15/7/2014, she went at the appellant's house in order to play with her friends, Umi and Nicey, who were staying in that house. As they were playing the appellant held her hand and took her to his room. PW1 testified that while inside that room the appellant rubbed her anus with soap and then inserted his "msumari" (male organ) into it (anus). PW1 told the court that she felt much pain and started bleeding. Thereafter, she went home and informed her mother on what befell her. Later, she was taken to the hospital where she underwent treatment.

PW2, testified on how he was informed by his wife about their child who was "raped" by Yusuph Mgendi (the appellant). He testified that he

rushed home and found his wife and PW1 crying. He said, he inspected the victim's private parts and found her anus bleeding and when he inquired as to what happened, PW1 told him that Yusuph Mgendi "amemchoma na msumari matakoni" which he had. Literally translated, that "Yusuph Mgendi has pierced in her buttocks with a nail."

PW3's evidence was in relation to the interpretation of the PF 3 that was filled by another doctor who was on study leave. He testified that normally injuries caused by a sharp object are deep and the bruises cannot be caused by object like a nail. He testified further that the bruises in anus or vagina are normally caused by penis. He said that according to the PF 3 (Exh PI) he was required to interpret, there was on element of carnal knowledge. He said, he came to that opinion due to the fact that the Doctor who examined the victim prescribed drugs/medicines for prevention of HIV/AIDS infection.

In defence, the appellant generally assailed the prosecutions witnesses as not credible witnesses. He said, PW1 did not answer questions posed by him; PW2 adduced a hearsay evidence as he did not see when the offence was committed; and that, the PF3 did not show that he was the one who raped the victim. He also blamed PW3 for not

conducting medical examination on him. He went on to testify that he is an HIV/AIDs victim and as such he wondered why the PF3 did not show that the victim was also infected with the disease.

Upon the conclusion of hearing, the trial court was satisfied that the appellant was clearly identified by PW1 since the offence was committed in the morning while there was light and that the proximity between the victim and the appellant at the time the offence was committed favoured a clear identification. The trial magistrate did not agree with the appellant's defence of *alibi* as he failed to prove where he was, say, by producing tickets. He also rejected the appellant's contention that the victim failed to disclose the colour of the clothes the appellant had worn, due to the fact that the victim being a child could not have remembered such details; and the victim's failure to tell the other child's gender as immaterial for having not related to the offence.

In the High Court, the first appellate court expunged the PF3 but upheld the trial court's decision on account that the conviction of the appellant was based on the credibility of PW1, (the victim) and hence, it was satisfied that the prosecution proved the case to the required standard of beyond reasonable doubt in terms of section 127(7) of the Evidence Act.

Still protesting his innocence, the appellant filed this appeal on eight (8) grounds of appeal to the effect that, **one,** PW1 failed to interpret the term "nail" which was inserted into her anus. **Two,** the prosecution failed to call the children, PW1 was playing with; **three,** the *voire dire* test on PW1 was not properly conducted; **four,** the place where the offence was committed was not explained; **five,** the evidence of PW1 showed that the nail was inserted in her anus; **six,** the trial court did not consider the appellant's evidence that he was an HIV/ AIDS victim; **seven,** the evidence of PW1 was contradictory; and **eight,** the case was not proved beyond reasonable doubt which can basically be taken to cover all the grounds of appeal.

At the hearing of the appeal, the appellant appeared in person and was not represented, whereas the respondent Republic was represented by Mr. Adolf Maganda, learned Senior State Attorney. When the appellant was called upon to amplify his grounds of appeal he opted to let the learned Senior State Attorney submit first and reserved his right to rejoin later, if need would arise.

Mr. Maganda prefaced by declaring his position of supporting both the conviction and sentence meted out against the appellant. He said, and

rightly so in our view that, though the appellant brought eight grounds of appeal they boiled down into one ground of appeal which is that, the prosecution failed to prove the case beyond reasonable doubt. On the basis of that ground, Mr. Maganda submitted that the case was proved by three witnesses and PW1 testified at the age of six (6) years. He pointed out that, PW1 whose evidence was taken after the *voire dire* test was conducted in terms of section 127(2) of Evidence Act, Cap 6 R E 2002 and found **not to understand the nature of oath** but **she knew the duty of speaking the truth,** explained on how she was carnally known by the appellant when she went to play with her fellow children at the appellant's house. He said, PW1 explained that the appellant took her into his room where he started rubbing her anus with soap and then inserted his male organ in it. PW1 also explained that the appellant was not a stranger to her as they lived in the same street.

The learned State Attorney contented further that the evidence of PW1 was corroborated by PW2, the victims' father, who examined her and saw some blood in her anus and when he asked her as to what happened she mentioned the appellant being the one who inserted a nail in her anus. He went on to submit that PW3 also corroborated PW1's evidence on how he interpreted the PF3 authored by another doctor which, through his

expert opinion which showed that the victim must have been carnally known. The learned Senior State Attorney, however, argued that even if the PF3 is expunged on account of having not authored by the witness, still the evidence of PW1 is sufficient to sustain the conviction. He referred us to the case of **Selemani Makumba V Republic,** TLR [2006] 379 in which it was held that in sexual offences the best evidence comes from the victim. In that regard, he stressed that the prosecution proved the case beyond reasonable doubt and urged the Court to dismiss the appeal in its entirety.

In rejoinder, the appellant while reiterating his grounds of appeal, assailed the first appellate court for relying on PW1's evidence that "she was pierced by a nail" "amenichoma na msumari" which he said, was not clear. He also blamed the prosecution for not calling the child who was playing with PW1 and he wondered why the victim (PW1) failed to raise alarm/shout. The other complaint was on the charge sheet which, he said, was defective for not indicating that a nail was inserted on PW1's anus; and that the prosecution failed to prove the case beyond reasonable doubt. At the end, he prayed to the Court to allow the appeal and release him from prison.

On our part, we have examined the record of appeal, the decisions of the trial and the first appellate courts, the grounds of appeal and the submissions from both sides. There is no doubts that the first appellate court upheld the conviction mainly on the basis of the evidence of PW1 whose evidence was taken when she was 6 years old despite the fact that the PF3 was expunged. The appellant's complaint is that it was wrong to rely on PW1's evidence since it was taken after *voire dire* test was not properly conducted and in his view, this caused her to be untruthful witness as to whether it was a nail which was inserted in her anus or otherwise.

With regard to this issue, we agree with the learned Senior State Attorney, that the *voire dire* test was conducted, though, partially. Our perusal of the record of appeal has revealed that after *voire dire* test was conducted the trial court made a finding that the **witness did not understand the nature of oath** but **knew the duty of speaking the truth** and thereafter, PW1 testified without taking oath. It is vivid from the record of appeal that the trial court did not indicate **whether the witness possessed sufficient intelligence** for the reception of her evidence. Unfortunately, this went unnoticed by the appellate court on the first appeal

and the learned Senior State Attorney who argued this appeal before us. This was a clear misapplication of section 127(2) of the Evidence Act which states 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."* (Emphasis added)

This, however, does not mean that her evidence could not be taken. Despite the failure to indicate whether or not PW1 possessed sufficient intelligence for reception of her evidence, her evidence could still be taken and be accorded a deserving weight. (See the case of **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported).) And, it is obvious that such evidence would need corroboration.

As we have alluded to earlier on, the first appellate court upheld the trial court's decision on the basis of section 127 (7) of the Evidence Act which provides as follows:-

> *"127 (7) Notwithstanding the preceding provisions of this section, where in a criminal proceedings* ***involving sexual offence the only independent evidence is that of a child of a tender years*** *or 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 reason to be recorded in the proceedings the court is satisfied that the child of tender age is*** *or victim of the sexual offence* ***is telling nothing but the truth****."* [Emphasis added.

To our understanding, the above provision waives the requirement of corroboration in sexual offences where the court is satisfied that the victim of sexual offence (the child of tender age inclusive) is telling nothing but the truth. This provision, in our view, should be read together with section 127(2) of the Evidence Act. And, we think that the waiver would apply where *voire dire* examination is properly conducted in terms of section 127(2) of Evidence Act. On this, we are guided by the case of **Nguza Viking @Babu Seya and 4 Others v. Republic,** Criminal Appeal No 56 of 2005 (unreported) in which the Court discussed the thrust of the provisions of subsections (2) and (7) of section 127 of Evidence Act and stated as follows:

> *"From the wording of the section, before the court relies on the evidence of the independent child witness to enter a conviction, it must be satisfied that the child witness told nothing but the truth.* ***This means that, there must first be compliance with section 127(2) before involving section 127(7) of the Evidence Act; "voire dire" examination must be conducted to ascertain whether the child possesses sufficient intelligence and understands the duty to speak the truth.*** *If the*

child witness understands the duty to speak the truth, it is only then its evidence can be relied on for conviction without any corroboration otherwise the position of the law remains the same, ***that is to say that unsworn evidence of a child witness requires corroboration".***

Also, in the case of **Kimbute Otiniel v. Republic,** Criminal Appeal No. 300 of 2011(unreported), the Full Bench of the Court agreed with the view taken in **Nguza Viking @ Babu Seya's** case (supra) and stated as hereunder:

We fully re-endorse that view. The word "Notwithstanding" in section 127(7) should not be read too legalistically, but more contextually and purposely. In enacting section 127(7) Parliament could not have intended to ratify an irregularity. We readily agree with Mr. Pande and Professor Rutinwa that section ***127(7) only obviates the need for corroboration, direct or circumstantial where the evidence taken under section 127(2) emanates from a properly conducted voire dire thereunder; however it does not dispense with or remove the requirement of corroboration***

where the evidence taken originates from a misapplication or non-direction of section *127(2)."*

[Emphasis added]

Admittedly, in this case, PW1's evidence was crucial in mounting a conviction against the appellant. Since her evidence was taken after the provisions of section 127 (2) were misapplied, it is obvious that such evidence needed corroboration. The question we ask is whether there was other evidence.

At this juncture, we think, we need to revisit the evidence of PW1, PW2 and PW3. PW1, the victim, clearly testified that the appellant whom she knew even his nickname "Kitale" took her in his room, rubbed her anus with a soap and thereafter inserted his "msumari" into her anus and she started bleeding. This evidence was corroborated by PW2 who saw PW1's anus bleeding after he went home following the information he received from his wife that their child was raped. He even asked PW1 as to what happened to her and she told him that Yusuph Mgendi had inserted his "msumari" in her buttocks. But again, PW3 in his opinion stated that normally injuries caused by a sharp object would be deep and that bruises could not be caused by a nail.

Though the appellant's complaint is on the really meaning of "msumari" suggesting that it could have been caused by an improper voire dire test; and perhaps due to the language that was used, PW1 clarified it when she was cross examined by the appellant that he put his penis into her anus. Also, PW3's evidence corroborated PW1's evidence in that injuries caused by a sharp object would be deep and the bruises cannot be caused by object like a nail. He even went further to say that the bruises in anus or vagina are normally caused by penis. PW1 was further supported by PW2 who saw blood in PW1's anus. Hence, we find the appellant's contention that the victim (PW1) did not elaborate as to what was meant by term "msumari" and that this could have been due to improper *voire dire* test, to have no merit in view of the explanation given by PW1 and supported by the evidence of PW2 and PW3. This means that PW1 could not have been pierced by the nail as the appellant seems to suggest. To the contrary, it is our finding that the appellant inserted his penis in PW1's anus.

In any case, we think, we need to emphasize that it is now settled that it is not expected that in proving all cases of rape each victim of such offence would graphically explain how a male organ was inserted into her female organ. (See **Baha Dagari v. Republic**, Criminal Appeal No. 39 of

2014 (unreported). In the case of **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 (unreported) which was cited with approval in **Baha Dagari's case** (supra) the Court expounded several factors which may lead the victim not to explain explicitly that the appellant inserted his penis in her vagina as follows:-

> *"Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and* ***the age of the person giving the evidence. The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina.*** *This is because of cultural restrictions mentioned and related matters."* [Emphasis added.]

In this case, much as PW1 clarified it during cross examination, we think, given the age of the victim and what she experienced after the appellant's male organ was inserted into her anus, she was justified to use

the term "msumari". In any case, as we have already demonstrated above, there is ample evidence which clarified it to be a penis.

We have also considered the appellant's complaint relating to failure by the prosecution to call the victim's friend but in our view calling her would not have been of assistance as she did not witness when the offence was committed. As to the appellant's complaint relating to the PF3, we find it to be misconceived for having been expunged by the High Court. It does not form part of the prosecution case. (**See Abeid Mponzi V Republic,** Criminal Appeal No. 476 of 2016 (unreported). The appellant was wrong to bring this ground of appeal at this stage. Regarding PW3's evidence/opinion, we think that, since he was qualified and competent to give evidence, his opinion was relevant to the fact in issue. We find that his opinion relating to the nature of injuries which could be caused by nail was important since, it did not feature in the PF3 which was expunged. In relation to failure to examine him, it is our view that it is not a requirement of law to do so.

In the final analysis, looking at the totality of the evidence given by PW1, PW2 and PW3, we entertain no doubt that the case was proved beyond reasonable doubt that PW1 was carnally known against the order

of nature by the appellant. In other words, though on different reason, we see no reason to fault the concurrent findings by both the trial and the first appellate court on the appellant's conviction and sentence meted out against him.

Hence, we find the appeal to be devoid of merit. We accordingly dismiss it in its entirety.

DATED at **IRINGA** this 29th day of August, 2019.

I. H. JUMA
CHIEF JUSTICE

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

This Judgment delivered this 30th day of August, 2019 in the presence of the Appellant in person and Mr. Alex Mwita learned State Attorney, for Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL