IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 344 OF 2017

JOEL S/O NGAILO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. E. FELESHI, J.)

dated the 31st day of August, 2017

in

DC Criminal Appeal No. 23 of 2016

JUDGMENT OF THE COURT

21st & 29th August, 2019

JUMA, C.J.:

The appellant JOEL S/O NGAILO was convicted by the District Court of Ludewa of unnatural offence contrary to Section 154 (1) (a) and (2) of the Penal Code Cap 16. He was sentenced to life imprisonment. His first appeal to the High Court at Iringa against the conviction and sentence was dismissed.

The appellant now appeals to this Court on five grounds of appeal which may be summarized as follows: In the first ground, the appellant

faults the first appellate court for believing the evidence of the complainant (PW1) saying that the appellant had pushed his '*kidudu*' or '*kibolo*" into PW1's anus, constituted the unnatural offence for which he was convicted. The second ground faulted the first appellate Judge for receiving and relying on as corroborative, the evidence of a witness (PW3), who was in the first place not included in the list of witnesses during the preliminary hearing. The third ground faults the first appellate court for believing the hearsay evidence of PW2, who had no medical or other expertise to qualify him to examine private parts of victims of unnatural offences. As his fourth ground, the appellant claims that the High Court should not have relied on a medical report prepared by PW4 to dismiss his appeal, because that report had already been expunged from the record of appeal. Lastly, as his fifth ground, the appellant contends that the prosecution's case against him was not proved beyond reasonable doubt.

Briefly, the events providing the background to this appeal took place on 25th July 2016 around 14:00 hours at Mbugani village (Madope Ward) in Ludewa District. The prosecution is based on the evidence of two witnesses, five year old boy **G.G.M.** (PW1), and a fourteen year old **G.A.M.** (PW3). We have initialized their names to protect their identity. It

began when the appellant set upon PW1. PW1 testified that he knew the appellant. He recalled on the day of attack how the appellant pushed his "*Kidudu chake kibolo*" (meaning penis) into PW1's anus causing him severe pain. PW3 testified on how he saw the appellant undressing, and proceeding to violently attack and sodomise PW1. Several people came over responding to cries for help, and were able to arrest the appellant. Somehow, the appellant managed to free himself and escaped from the scene.

Although Gustafu Mtweve (PW2) did not actually witness the assault, he testified that he was amongst the first responders to arrive at the scene of crime. PW2 testified that he carried the injured PW1 to St. John's Hospital at Lugarawa.

When called to his defence, the appellant denied committing the offence and blamed it all on his employer, who he accused of framing him up.

At the hearing on 21st August 2019 the respondent Republic was represented by two learned State Attorneys, Mr. Alex Mwita assisted by Ms Hope Charles Masambu. The appellant, who appeared in person, placed full

reliance on his grounds of appeal, which he urged the learned State Attorneys to respond to first.

At the very outset Mr. Alex Mwita, learned State Attorney, opposed the appeal. He staked a position that the two courts below were right to conclude that the prosecution had proved its case against the appellant beyond reasonable doubt.

Before he adverted to the five grounds of appeal, Mr. Mwita found it appropriate to first address the amendment of the Evidence Act, Cap 6 by the **Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016** [**Act No. 4 of 2016**]. This amendment, he submitted, changed the procedure to be followed before children, whose apparent age is not more than fourteen years, can testify as competent witnesses. According to Mr. Mwita, these amendments were gazetted, and operated from 28th July, 2016. That date of operation, he added, was just a month before 29th August 2016 when PW1 testified under oath after passing through a *voir dire* test. The learned State Attorney submitted that according to the record of appeal, the learned trial Magistrate was not aware of the amendments on the Evidence Act, and therefore proceeded under the previous legal position before Act NO. 4 of 2016 came into effect on 28th

July, 2016. He cited to us the amended section 127(2), which removed the requirement for oath or affirmation, but insisted on a child witness to tell nothing but the truth:

> *"127 (2).- 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."*

Reverting back to the first ground of appeal where the appellant complained that the way PW1 used the words "*Kidudu chake kibolo*", which the appellant had regarded to be insufficient to describe the unnatural offence he is accused of committing. The learned State Attorney submitted that because PW1 was only but a five year old boy when he testified, he could not be expected to use such sordid and vulgar words like penis and anus in public. He submitted that despite his being a child, PW1 successfully replied the questions put across by the appellant during cross examination: *"...you pushed your penis to my anus."* The learned State Attorney submitted that PW1 sufficiently explained to the trial and first appellate courts how the appellant had grabbed him violently, before sodomising him.

Mr. Mwita urged us to take into account the fact that the testimony of PW1 was preceded by a promise he made to the trial Magistrate to speak the truth. After the trial magistrate had put out PW1 under *voir dire* examination, the learned State Attorney submitted, the trial Magistrate recorded on page 7 of the record of proceedings that PW1 understood his duty to speak the truth.

Reacting to the second ground, where the appellant complains that PW3 was not listed as a witness during the preliminary hearing, Mr. Mwita submitted that indeed PW3 was not listed as a witness at the Preliminary Hearing. But, the learned State Attorney quickly added that the provisions of section 192 of the Criminal Procedure Act Cap 20 (CPA) which govern preliminary hearing do not require the prosecution to mention all its witnesses at that stage of Preliminary Hearing in the subordinate court.

With regard to the third ground of appeal, where the appellant questioned the expertise of PW2, Mr. Mwita submitted that this witness did not testify as an expert witness. Instead, PW2 gave evidence on what he actually saw when he arrived at the scene of crime, which was immediately after the incident and he took the injured PW1 to hospital.

The learned State Attorney submitted the fourth ground of appeal wherein the appellant blames the High Court for relying on medical examination report to convict him. This ground is misconceived and should be dismissed, he submitted. He referred us to page 35 of the judgment of the High Court where the first appellate judge had expunged the appellant's and also PW1's medical reports (Exhibit P1). The claim that these reports could be relied on after being expunged is unfounded, he submitted.

On the fifth ground of appeal the learned State Attorney reiterated that the prosecution had proved its case against the appellant beyond reasonable doubt. He referred us to the evidence of the victim PW1, who testified on how the appellant had sodomised him. He also referred us to the eye-witness account of PW3, who during *voir dire* examination had promised to tell the trial court nothing but the truth. PW3 evidence, he submitted, corroborated what PW1 had testified on earlier. Further, the learned State Attorney referred us to the evidence of Dr. Apolinary Moses Nombo (PW4), and submitted that although the medical reports (Exhibit P1) which he had prepared were expunged by the High Court; PW4's oral evidence corroborated the victim's account. PW4 stated how, upon

examining PW1, he saw blood and bruises on PW1's anus. PW4 gave an oral account that the appellant not only admitted to him that he had sexual intercourse with the boy; but he saw dried blood on the appellant's penis. All these pieces of evidence, Mr. Mwita submitted, prove that the prosecution proved its case beyond reasonable doubt.

When called upon to respond, the appellant reiterated his innocence by pointing out that PW1 did not elaborate what he meant by "*kibolo*" to warrant the conclusion reached by the two courts below to convict him.

After considering the five grounds of appeal, and after hearing the submissions by the appellant, as well as by the learned State Attorney, we must point out that the jurisdiction of the Court sitting as second appellate court is limited to consideration of points of law only. As this Court has stated on several occasions, on second appeal the Court can only interfere with findings of facts by the courts below if in evaluating the evidence the courts below misdirected themselves and in so doing occasioned miscarriage of justice to the appellants.

Penetration, however slight into the anus, with or without consent; is an essential ingredient of unnatural offence under section 154 (1) (a) of

the Penal Code. Proof of penetration is the main ingredient that makes this offence complete.

We think the learned State Attorney is right in submitting that the evidence of PW1, even on its own merit, sustains the completeness of the unnatural offence for which the appellant was tried and convicted. We also agree that PW1's evidence is corroborated by the evidence of PW3, who gave an eye-witness account that the appellant: *"...captured violently PW1 undressed his clothes and pushed his penis to the anus of the victim one* ***G.G.M.*** *and proceeded to push while the victim cried."* The record of appeal also bears out the learned State Attorney's assertion that although both PW1 and PW3 testified as children of tender ages; their evidences were recorded by trial Magistrate to be truthful as is required by section 127 (2) of the Evidence Act as amended by **Act No. 4 of 2016**.

Furthermore, having believed the truthfulness of PW1 and PW3, their respective evidences can stand on their own respective merits to sustain a conviction. The weight of their evidence is recognized under subsection 127 (6) of the Evidence Act which provides:

> *"(6) 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 of 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.* [Emphasis added].

The upshot of the foregoing is that this second appeal lacks merit and is hereby dismissed.

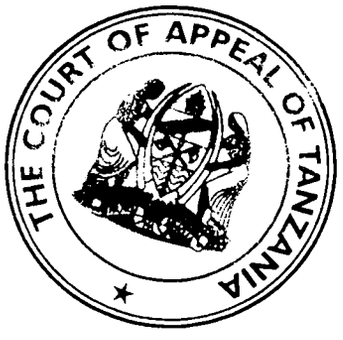
DATED at **IRINGA** this 29th day of August, 2019.

I. H. JUMA
CHIEF JUSTICE

R. E. S. MZIRAY
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on this 29th day of August, 2019 in the presence of Appellant in person and Mr. Alex Mwita, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL