IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MZIRAY, J.A, MKUYE, J.A AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 69 OF 2017

ATHUMANI JAMES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Mbeya at Mbeya)

(Lyamuya, SRM – Ext. Juris.)

dated the 20th day of July, 2016
in
Criminal Appeal No 4 of 2016

JUDGMENT OF THE COURT

22nd & 29th October, 2019

MWAMBEGELE, J. A.:

Before the Court of the Resident Magistrate of Mbeya at Mbeya, the appellant Athumani James was arraigned for three counts of the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (b) of the Penal Code, Cap. 16 of the Revised Edition, 2002. He was convicted in the first and third counts and awarded a twenty years' jail term in each count as well as paying compensation of Tshs. 500,000/= to each victim. The custodial sentences were ordered to

run concurrently. It was particularized in the first count that on 18.03.2014, at Nonde area within the City and Region of Mbeya, the appellant, for sexual gratification and by using his fingers, did grope about the genital parts of the victim; we will use the pseudonym of MG to hide her identity, a girl aged 12 years. With respect to the third count, the particulars of the offence had it that on the same date and place, the appellant, for sexual gratification and using his penis, did rub his penis onto genital parts of one SD; a girl aged 11 years.

Aggrieved by the conviction and sentence referred to above, the appellant appealed to the High Court where the matter was transferred to the Resident Magistrates' Court of Mbeya to be presided over by a Resident Magistrate where Lyamuya, SRM with extended jurisdiction, dismissed the appeal. Undeterred, the appellant has come to this Court on a second appeal assailing the decision of the Resident Magistrates' Court on only one ground to the effect that the prosecution did not prove the case against the appellant beyond reasonable doubt. We interpose here to state that, initially, the appellant through Mr. Pacience Maumba, his advocate, had filed four

grounds of appeal but dropped three of them before hearing of the appeal commenced in earnest. The reason ascribed to that course of action by counsel for the appellant was that the dropped grounds were new not dealt with by the first appellate court.

Before going into the determination of the appeal, we find it apposite to narrate, albeit briefly, the relevant factual background of the case leading to the present appeal before us as can be gleaned from the record of appeal. It is this: the appellant, at the material time, was a primary school teacher at Nonde Primary School within the City and Region of Mbeya at which the victims were Standard III pupils. On 18.03.2014 during or immediately after recess, the victims and the appellant were at school together with others. At some point, the appellant called SD (who testified at the trial as PW1) and beckoned her to the toilet. PW1 went thither and, there, the appellant told her that he wanted to inspect her cleanliness especially her undergarments. Despite some protests, the appellant forcibly undressed PW1 asking her in the process if she had ever had an affair with a man. PW1 answered in the negative but all the same the

appellant asked her if his finger could penetrate her vagina and forcibly bent her and inserted what the victim thought was his finger. Her efforts to cry for help proved futile as the appellant gagged her mouth with his palm to prevent her from sounding an alarm for help.

Thereafter, perhaps fearing the cat would be let out of the bag because of PW1's noises, the appellant released her and asked her to call MG (PW4); the second victim. PW1 obeyed. But before she called PW4, she noticed some blood stains in her private parts.

PW4 was called by PW1 and the appellant also beckoned her to the toilet where he lured into the same heinous act. He told her that he was a doctor, nurse and a science subject teacher so she should not be afraid and, at the end of the day, she was also sexually abused by groping her vagina using his finger.

What transpired thereafter is that PW4 complained to a female teacher and later to Elimboto Benjamin (PW3); the Head Teacher of the school who later convened a staff meeting and notified the City Education Officer. Later, the matter was brought to the attention of

the police and, consequently, the appellant was arrested and arraigned accordingly.

On his part, the appellant dissociates himself from the charges levelled against him. He does not deny, however, that on the material date and time, he was at Nonde Primary School and assigned three pupils; the victims and another pupil; a certain EA who was the subject of the second count in which he was found not guilty, to clean toilets and that, after a while, he sent some pupils to inspect if the toilets had been cleaned as assigned who brought an affirmative answer. On 27.03.2014 he was phone-called by the Head Teacher who told him to report at the office of the City Education Officer. He went to see the City Education Officer where he was told to report at the Police Station to answer charges for raping SD. At the Police Station, he was put under arrest and later the charges the subject of this appeal were preferred against him. He denies to have committed grave sexual abuse against the victims.

So much for the background facts.

When the appeal was placed before us for hearing on 22.10.2019, the appellant entered appearance and was represented by the said Mr. Pacience Maumba, learned advocate. The respondent Republic appeared through Mr. Hebel Kihaka, learned State Attorney.

Mr. Maumba had earlier on filed in the Court written submissions in support of the appeal which he sought to adopt as part of the oral hearing. In the submissions, the learned counsel submitted on the only ground of appeal. Encapsulated in the ground of appeal were complaints that the appellant was wrongly convicted basing on uncorroborated evidence of the victims, that the evidence of the prosecution witnesses was marred with glaring contradictions which could not be glossed over and that both courts below erred in terming those contradictions as minor.

Regarding the first complaint, Mr. Maumba submitted that as the victims were of tender age and testified without oath, their testimony needed corroboration. He submitted that there was a fragrant disregard of the provisions of section 127 (7) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (the Evidence Act) which dictate that

the court should not convict on uncorroborated evidence of the child unless it "is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth". In the instant case, he went on, the court did not state anywhere that the victims were witnesses of truth who could tell nothing but the truth.

Relying on **Augustino Lyanga v. Republic**, Criminal Appeal No. 105 of 1995 (unreported) the learned counsel submitted that in terms of section 127 (2) of the Evidence Act, a court of law is entitled to receive evidence of a child of tender years who does not understand the nature of oath only when it is satisfied that in the opinion of the court, the child is possessed of sufficient intelligence and must be recorded in the proceedings. This was not the case in the case at hand.

On material contradictions in the testimony of witnesses, Mr. Maumba submitted that while PW1 told the trial court that on the material date about 10.000 am, the appellant entered their classroom and told her, PW4 and EA to go to and clean the toilet, PW4 told a

different story to the effect that she was called by PW1 to go to the toilet.

As if that is not enough, he went on, the Head Teacher (PW3) came out with a different story altogether; that one of the victims was abused in the toilet and two of them were abused in the office. These contradictions are not minor as the two courts below termed them.

Having stated as above, the learned counsel prayed that this appeal be allowed.

Arguing against the appeal, Mr. Kihaka supported the findings of both courts below against the appellant as well as the sentences meted out to him. The learned State Attorney submitted that the appellant was convicted on the strength of the testimonies of PW1 and PW4 who were victims. In cases of this nature, he submitted, the testimonies of the victims are of utmost importance. He cited the cases of **Selemani Makumba v. Republic** [2006] TLR 379 and **Diha Matofali v. Republic**, Criminal appeal No. 245 of 2015 (unreported) to buttress this proposition.

In the case at hand, Mr. Kihaka went on, the victims were children of tender age on both of whom a *voire dire* test was conducted separately and both testified without oath. He submitted that the courts below were justified to found a conviction against the appellant on the strength of their testimonies even without corroboration from independent evidence. To bolster this argument, the learned counsel cited to us **Hassan Kamunyu v. Republic**, Criminal Appeal No. 277 of 2016 and **Mtendawema Said v. Republic**, Criminal Appeal No. 199 of 2011 (both unreported) at pp. 16 – 22 and 9 - 11 respectively.

Mr. Kihaka, having so submitted and argued, prayed for the dismissal of the appeal in its entirety.

In a short rejoinder, Mr. Maumba conceded that in cases of this nature, the best evidence is that of the victim and in the light of the decision of the Court in **Hassan Kamunyu** (supra), uncorroborated evidence of a child of tender years received without oath can be relied on to mount a conviction against an accused person provided that the court is satisfied that the child victim tells but the truth. In the instant

case, he submitted, PW1 and PW4 did not speak the truth hence the courts below were not legally justified to hold that their evidence sufficed to found the appellant's conviction. In the premises, the learned counsel reiterated his prayer to have the appeal allowed and set the appellant free.

Having set the material background facts of the appeal before us and having summarized the rival submissions of the learned counsel for the parties, the ball is now on our court to determine the ground of appeal. As already alluded to above, encapsulated in the lone ground of appeal are issues; **one**, whether the testimonies of PW1 and PW4 needed corroboration, and; **two**, whether the evidence of the prosecution witnesses was marred with glaring contradictions which could not be glossed over.

With regard to the first issue, as good luck would have it, this has been the subject of discussion in a number of cases one of them being **Hassan Kamunyu** (supra), referred to by the learned State Attorney and acknowledged by the learned counsel for the appellant. Others in the list are **Nguza Vikings @ Babu Seya & 4 Others v.**

Republic, Criminal Appeal No. 56 of 2005, **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011, **Mtendawema Said** (supra) and **Rajabu Ponda v. Republic**, Criminal Appeal No. 342 of 2017 (all unreported). In all the above cases, we held that an unsworn testimony of a child of tender age may be used to found a conviction without corroboration provided that the court is satisfied that the witness spoke but the truth. We shall demonstrate shortly.

We wish to interject, at this juncture, that the relevant provisions applicable in the case at hand are those of section 127 of the Evidence Act as they stood before being amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016. Subsection (7) thereof, as it stood then, read:

> *"(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."

The Full Bench of the Court in **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) had an opportunity to expound the tenor and purport of section 127 (7) [now section 127 (6)] of the Evidence Act. The Full Bench of the Court, at p. 79 of the judgment, reproduced the following excerpt from our unreported decision in **Nguza Vikings @ Babu Seya & 4 Others v. Republic**, Criminal Appeal No. 56 of 2005 to the effect that section 127 (7) [now section 127 (6)] was not intended to override the then section 127 (2) [now section 127 (2) as deleted and substituted by a consolidated subsection with subsection (3)] of the Evidence Act:

"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".

The Full Bench of the Court went on at p. 80 of the judgment:

"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. … 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).

Given that section 127(7) neither details the mode of assessing the credibility of the only independent child witness nor that of establishing that the witness is telling the court nothing but the truth, in our opinion the necessity for corroboration we have just stressed becomes an even more essential and pressing requirement for evaluating the credibility of a witness and allocating it the weight it deserves. Moreover, in the absence of confirmation from other supporting evidence, it would be too over-confidential, if not risky for the court to be fully satisfied that a child witness is telling nothing but the truth, without having positively found out earlier that he or she even knows the duty of telling the truth ...."

We took the same position in **Mtendawema Said** (supra) and restated it in **Rajabu Ponda** (supra).

The hallmark of the cases cited above is that section 127 (7) [now section 127 (6)] of the Evidence Act enacts that corroboration is not necessary to support an unsworn evidence of a child of tender years provided the letter of section 127 (2) of the same Act has been complied with.

Reverting to the case at hand, it is no gainsaying that before taking the evidence of PW1 and PW4; whose age was tender, the trial court conducted a *voire dire* test pursuant to section 127 (2) of the Evidence Act. This appears at pp. 11 and 21 in respect of PW1 and PW4, respectively. We will let the record speak for itself.

At p. 11 the *voire dire* is recorded as follows:

> *"My name is SD. I am in standard three at Nonde Primary School. My class teacher is Juma. I am an orphan. I live with my grandmother. I know how to tell the truth. I don't know the meaning of oath. I go to*

the church on Sundays we are taught to be truthful."

Having so done, the trial court recorded:

> *"After examining the child, the court has found that the child does know the meaning of telling the truth but does not know the meaning of oath. The witness intelligence/intellectual capacity is good. She is swing rational answers to questions asked. The witness will proceed testifying without oath"*

And thereafter PW1 proceeded to testify without oath.

The process was repeated in respect of PW4. This is what transpired in the trial court as appearing at p. 21 of the record of appeal.

> *"I don't know what does oath mean. I am in standard three at Nonde Primary School. My class teacher is Juma. I pray in church at the Lutheran Church. I know how to speak the truth."*

That done, the trial court recorded:

> *"The child does not know the meaning of oath but understands the meaning of telling the truth and has intelligence to know the meaning of telling the truth. We are taking her evidence without oath."*

In view of the above, it is crystal clear that the record bears out that the *voire dire* test was conducted in respect of both victims. It also bears out, from what the trial court observed, that the two victims did not understand the nature of oath but understood the duty to speak the truth. Both proceeded to testify without oath. As the court was satisfied that the victims, despite their not knowing the meaning of oath, they understood the duty of speaking the truth and found at p. 51 of the record of appeal (in the judgment) that they told the court only the truth and thus their evidence was sufficient to found a conviction, in terms of the then subsection (7) of section 127 of the Evidence Act and cases cited above, it was justified to found a conviction relying on their unsworn and uncorroborated testimonies. The complaint by the appellant that the testimonies of the two victims needed corroboration is therefore misconceived. We dismiss it.

Next for consideration is the complaint that the evidence of witnesses for the prosecution was marred with material contradictions. We have given a serious thought to this complaint in the light of the evidence on the record of appeal. With unfeigned respect, we profoundly disagree that contradictions, if any, were such that they were material. We are aware that the witnesses could not be identical in every detail. We were confronted with an akin situation in **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported) and, to resolve the problem, we relied on our previous decisions in **Dickson Elia Nsamba Shapwata v. Republic,** Criminal Appeal No. 92 of 2007 (unreported) to observe that discrepancies which do not go to the root of the matter, can be overlooked. In the same line of reasoning, we observed in **John Gilikola v. Republic,** Criminal Appeal No. 31 of 1999 (unreported) that due to the frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies.

In connection with the above discussion, we find it irresistible to associate ourselves with what was stated by the High Court [Mnzavas,

J. (as he then was)] in **Evarist Kachembeho & Others v. Republic** [1978] LRT n. 70 wherein it was observed at p. 351:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story".*

We have considered the evidence of the two victims. Indeed, there are slight differences with regard to details. The details complained of by the learned counsel for the appellant is that while PW1 testified that the appellant entered their classroom and told her, PW4 and EA to go clean the toilet, PW4 told a different story to the effect that she was called by PW1 to go to the toilet. This discrepancy, in our view, is trivial and does not go to the root of the case. It can therefore be glossed over. With regard to discrepancy in the testimony of PW3; the Head Teacher, we wish to state that the trial court did not convict the appellant on the strength of his evidence. If anything, his testimony, with respect to what actually transpired, was but hearsay evidence. The second complaint in the only ground of appeal is also without merits. We dismiss it.

The sum total of the above discussion is that there was cogent and uncontradicted evidence on record from the two victims which established the guilt of the appellant to the hilt. In the premises, we find this appeal lacking in merits. It stands dismissed entirely.

Order accordingly.

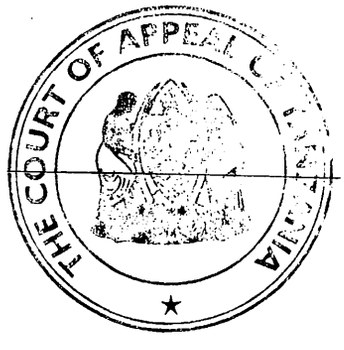
DATED at **MBEYA** this 28th day of October, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2019 in the presence of Athumani James, the Appellant appeared in person and Ms. Marietha Maguta, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL