**IN THE COURT OF APPEAL OF TANZANIA**
**AT IRINGA**

**(CORAM: MZIRAY, J. A., MWAMBEGELE, J. A. And MWANDAMBO, J. A.)**

**CRIMINAL APPEAL NO. 205 OF 2018**

**JOSHUA MGAYA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania, at Iringa)**

**(Feleshi, J.)**

**dated the 1st day of June, 2018**
**in**
**DC. Criminal Appeal No. 3 of 2018**
**.....**

# JUDGMENT OF THE COURT

28th April & 13th May, 2020

## MWANDAMBO, J.A.:

Before the District Court of Iringa, Joshua Mgaya, the appellant stood charged with the offence of rape of and unnatural offence involving a girl of the tender age of 11 years. Being satisfied that the prosecution evidence proved both counts beyond reasonable doubt, it convicted the appellant and meted out to him a sentence of thirty years for the first count (rape) and life imprisonment on the second count; (unnatural offence). The

appellant's appeal to the High Court was unsuccessful and hence second appeal to this court predicated on 7 grounds of appeal.

The appellant's conviction and the ultimate sentences sustained by the High Court came about as a result of the facts which will become apparent shortly. On 29th May, 2017, PW2, a girl of tender age of 11 years a standard V student returned home at 18:00 hours, unusually late. That prompted her mother, Furaha Sanga (PW1) to ask her as she had no tuition classes that date PW1 whose identity shall be concealed and referred to as NM or the victim revealed to PW1 that Joshua Mgaya, the appellant had raped her in a semi finished building near a place called Mashine Tatu around Kidohombi Mosque. Upon examining NM, PW1 discovered defecation from NM's anus and some whitish fluid from her vagina which suggested that someone had sexual intercourse with her. A moment later, PW1 took NM to a police station where she obtained a PF3 before taking the victim to Iringa Regional Referral Hospital where NM was medically examined by Dr. Francis Kwetukia (PW3). Having examined NM, PW3 posted his findings in the PF3 revealing that NM's sphincter muscles had been relaxed as a result of several penetrations in her anus. Likewise, PW3's observation revealed that NM's vagina had lost hymen as a result of

several forced penetrations by a blunt object but with no bruises. Since NM had already taken a bath before she was taken to hospital for examination PW3 found no blood or semen from her vagina. According to PW3, NM's anus was loosely discharging defecation and her vagina was not intact which was unusual at her age.

Subsequently, the appellant was arraigned in the District Court of Iringa charged with two offences namely; rape contrary to section 130 (1) (2) (e) and 131 (1); and unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 [R.E. 2002] as amended by section 185 of the Law of the Child Act, No. 21 of 2009 (the Penal Code) to which the appellant pleaded not guilty. After a trial involving four prosecution witnesses and three for the defence, the trial court found that the evidence for the prosecution proved the case against the appellant to the required standard and convicted him on both counts followed by custodial sentences of thirty years on each ordered to run concurrently.

The appellant's appeal to the High Court sitting at Iringa hit a snag, for that court found no merit in the appeal containing six grounds of complaint. It dismissed the appeal but enhanced the sentence on the count on unnatural offence from thirty years' imprisonment to a life sentence as

dictated by section 154 (1) (b) and (2) of the Penal Code. Undaunted, the appellant has preferred the instant appeal predicated on 6 (six) grounds in the original memorandum of appeal and one additional ground in a supplementary memorandum of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented connected through a video link from prison. Ms. Blandina Manyanda, learned State Attorney appeared for the respondent Republic resisting the appeal. At the very outset, the appellant adopted his grounds of appeal and urged us to consider them and preferred the learned State Attorney to submit in reply before he could make his rejoinder if such need arose.

Stripped of the unnecessary details, the appellant faults the High Court for dismissing his appeal on the grounds: one, penetration was not proved regardless of the loss of hymen and relaxation of the victim's anus; two, uncertainty of the exact dates and time on which the alleged offences were committed; three, the victim's ability to show the unfinished building she is alleged to have been raped and sodomised was not sufficient proof that he committed the charged offences; four, failure to properly direct its mind on PW2's evidence which was contradictory, fabricated and

incredible; five, the evidence relied by the trial court to convict him did not prove the charge beyond reasonable doubt and; six, PW2's testimony was not corroborated. The appellant's additional ground faults the High Court for enhancing sentence on the count involving unnatural offence without affording him an opportunity to be heard.

Ms. Manyanda commenced her submissions on ground one in which the complaint is that the appellant was convicted of rape and unnatural offence in the absence of sufficient evidence to prove penetration regardless of lack of hymen and relaxation of PW2's anus. The learned State Attorney argued that the evidence of PW2, the victim of the sexual offences is very clear that the appellant committed the offence on three different occasions. To fortify his position, Ms. Manyanda referred the Court to its previous decided cases in **Joseph Leko v. R**, Criminal Appeal No. 124 of 2013 (unreported) reiterating the principle laid down in **Selemani Makumba v. R** [2006] T.L.R. 379 in which the Court held that the best evidence in sexual offences must come from the victim. Asked whether the evidence of the victim was received in compliance with section 127 (2) of the Evidence Act, Cap. 6 R.E 2002 (now R.E 2019) as amended by the written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 (the

Act), the learned State Attorney gave an affirmative answer. She argued that consistent with section 127 (2) of the Act, PW2 promised to tell the truth and nothing but the truth regardless of the trial court's failure to state in the record how PW2 came to that answer. Ms. Manyanda urged us to hold that the failure was not fatal to the reception of her evidence and so we should uphold the lower courts' concurrent findings and hold that there was sufficient evidence to prove penetration and thus ground one should be dismissed for lack of merit.

In relation to ground two, the learned State Attorney argued that contrary to the appellant's contention, it was quite clear that the charge sheet indicated the dates on which the appellant committed the offences supported by PW2's evidence at pages 14 and 15 of the record. Placing reliance on our decision in **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387, the learned State Attorney contended that the minimum standards ensuring fair trial were met in the instant appeal including the ability of the accused (appellant) to understand the nature of the charge to which he pleaded not guilty. He likewise urged the Court to find no merit in this ground and dismiss it.

Ms. Manyanda addressed the Court on ground 3 reiterating her arguments in ground 1. In addition, the learned State Attorney argued that the victim gave credible evidence on how the appellant committed the awful acts on three different occasions in a semi finished building and, at his instance, NM was able to show the place as reflected at pages 35 to 38 of the record of appeal. He thus invited the Court to dismiss this ground as well.

In response to ground 4, the learned State Attorney submitted that contrary to the appellant's contention, there was no any contradiction in PW2's testimony and so the High Court was correct in dismissing his appeal. As to ground 6, Ms. Manyanda argued that PW2's evidence was sufficiently corroborated by PW3 who examined her and posted his findings on the PF3 tendered in evidence as exhibit P1 showing that NM's hymen was not intact which was proof of penetration on PW2's vagina by a blunt object more than once. In the light of the above submissions, the learned State Attorney reverted to ground 5 and argued that in its totality, the evidence by the prosecution proved the case on both counts to the required standard and so the High Court was right in sustaining the conviction against the appellant.

Regarding the supplementary ground, whilst conceding that the first appellate court enhanced the sentence in relation to the second count without hearing the parties, Ms. Manyanda contended that it was legally proper for the High Court to do so because the sentence it imposed was one sanctioned by the law regardless whether or not the appellant was given opportunity to be heard on the mandatory sentence. In fine, the learned State Attorney invited the Court to dismiss the appeal.

When it was his turn to address the Court, the appellant took issue with the learned State Attorney on the submissions made. **One,** PW3 did not prove that the victim was raped despite his findings that her hymen had been lost and relaxation of sphincter muscles. **Two,** he was not heard on the substitution of life sentence from 30 years imposed by the trial court in relation to the second count; unnatural offence. **Three,** he was prejudiced in his defence by the discrepancy on the dates on which the alleged offences were committed. **Four**, contrary to the learned State Attorney's submissions, neither PW1 nor PW3 corroborated each other in relation to existence of whitish fluid on PW2's private parts. According to him, PW2 lied to the trial court, for it is inconceivable for PW2, a girl of 11

years old to have kept quiet and sustain the pains from the effect of rape and sodomy for three consecutive days.

On the whole, the appellant urged the Court to allow his appeal.

We have heard the rival submissions for and against the appeal. Our starting point is to state the obvious; that is to say; this is a second appeal in which, strictly speaking the Court's consideration is largely in relation to points of law or mixed facts and law alleged to have been wrongly decided by the first appellate court (See: rule 72(2) of the Tanzania Court of Appeal Rules. Arising from the above, the Court has held in previous cases that it will be loath to interfere with concurrent findings of the two courts below unless it is plain that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. See for instance: **Diskson s/o Joseph Luyana & Another v. R,** Criminal Appeal No. 1 of 2015, **Juma Mzee v. R,** Criminal Appeal No. 19 of 2017 and **Felix s/o Kichele & Emmanuel s/o Tienyi @ Marwa v. R,** Criminal Appeal No. 159 of 159 of 2005 (all unreported).

The other aspect which we consider to be relevant at this stage relates to the status of the evidence of witnesses of tender age in sexual

offences such as the one involved in this appeal. NM who was the victim of the offence gave unsworn evidence as reflected at page 11 to 16 of the record of appeal. According to section 127(2) of the Act, such evidence could only be received if and only if the tender age witness promised to tell the truth and not lies. As seen above, Ms. Manyanda argued that NM's evidence was received in compliance with the law. We agree with her although we consider it to be desirable by the trial courts to pay regard to our decision in **Godfrey Wilson v. R.**, Criminal Appeal No. 168 of 2018- [2019] TZCA 109 at www.tanzlii.org by asking some preliminary questions to the tender age witness before recording his/her evidence.

With the forgoing preliminary remarks, we now turn our attention to a discussion on the grounds of appeal. Although the learned State Attorney argued the grounds separately, we propose to combine our discussion on grounds 1, 3, 4, and 6 because they all hinge on the issue whether the prosecution marshaled evidence proving the case against the appellant to the standard required in criminal cases which is the essence of the appellant's complaint in ground 5. However, before doing so, we propose to deal with ground two albeit briefly.

The complaint in ground 2 is that the charge sheet was uncertain regarding the actual dates on which the appellant is alleged to have committed the offences. Apparently, that was also a subject of ground 1 before the High Court although it did not specifically deal with it. Nevertheless, we find no merit in this ground because, as rightly submitted by Ms. Manyanda, the charge sheet explicitly disclosed the dates on which NM said to have suffered the ordeal at the hands of the appellant that is; between 26th and 29th May 2017. Although the appellant has complained that he was prejudiced in his defence, we do not think so because we are settled in our mind that the minimum standards for a fair trial discussed in **Mussa Mwaikunda** (supra) were met. This is more so because the appellant did not raise any defence of alibi during the trial and indeed, none of his witnesses led any evidence proving that he was outside Iringa on the said dates. Accordingly, this ground fails which takes to grounds 1, 3, 4, 5 and 6.

The appellant was charged with two sexual offences namely; rape contrary to sections 130(1), (2) (c) and 131(1), and 154(1)(b) (2) of the Penal Code. It is common ground that NM was a girl of tender age and so, unlike in other cases of rape involving adult women where consent is a

necessary ingredient, the only ingredient in this case was penetration. This is what is referred to as statutory rape. The appellant has valiantly challenged PW2's evidence regarding penetration on several fronts that is to say; contradiction, unreliability, fabrication and lack of corroboration.

A few questions arise in the appellant's attack against NM's evidence, one, was her evidence unreliable for being contradictory? Two, did her evidence require any corroboration and if so, was there any other evidence to corroborate her testimony? We shall address them shortly.

The trial court formulated four issues in its judgment. The 3rd and 4th issue related to whether the appellant committed the two offences. We shall let the trial court speak for itself as appearing at page 9 of the judgment thus:-

> *"... I [really] find very [weighty] evidence from the prosecution side proving that the accused had carnal knowledge of [NM], a girl of 11 years old. It is through the evidence of this little girl who boldly and elaborately stated [on] how she was raped in the incomplete building which dictate to the truthfulness of the ordeal. In every incidence, PW2 left nothing unexplained and executed the*

*commission of the offence..."* [(page 50 of the record of appeal).

The above excerpt is in relation to the offence of rape. Regarding the offence against the order of nature, the learned trial magistrate made the following finding at page 51 of the record:-

> *"...But again, PW2 gave evidence to the effect that DW1 could make a turn [in the] anus from the vagina. Again, I find no evidence from defence side to challenge the strong evidence from the prosecution side. I also hold that the accused had carnal knowledge against [the] order of nature with the victim..."*

The first appellate court concurred with the trial court in its findings and stated:-

> *"Therefore, considering the testimony adduced by PW2, a girl of 11 years of age and considering her evidence in chief and during cross-examination, I agree with the learned trial magistrate who found her evidence on how the appellant subjected her to the charged offences wonderful, justifiable and is well within the authorities cited by the trial court"* [At page 65 of the record].

What emerges from the foregoing is that the trial court found PW2's evidence to be credible and reliable proving that the appellant committed both rape and carnal knowledge of her against the order of nature. The High Court concurred with the findings of the trial court as seen above. To assail the concurrent findings of the two courts below, it was incumbent upon the appellant to demonstrate to us that the trial court arrived at those findings out of misapprehension of the evidence, miscarriage of justice or a violation of some principles of law or practice in line with the Court's previous decisions including; **Dickson s/o Joseph Luyana & Another** (supra), **Juma Mzee (supra)** and **Felix s/o Kichele & Emmanuel s/o Tienyi @ Marwa** (supra). There is no such indication from the appellant's submissions neither did we find any in our examination of the record. Conversely, as rightly submitted by Ms. Manyanda, both courts below were alive to the principle enunciated in **Selemani Makumba** (supra) that the best evidence in sexual offences has to come from the victim. Upon being satisfied that the victim (NM), had adduced credible evidence, the trial court proceeded to convict the appellant independent of any other corroborating evidence from PW1 and PW3 together with PF3 (exhibit P1). The totality of the evidence by PW1, a mother of the victim and PW3, the medical officer who examined NM at

two different times shows that she was penetrated and sodomised. PW1 is on record (at page 12 of the record) that she found whitish fluid from NM's vagina. She too observed faeces flowing from her (NM's) anus. PW3 for his part confirmed upon examination of NM that she had lost her hymen as a result of penetration into her vagina by a blunt object more than once and that is why he found no bruises at the time of examination. As for the anus, PW3 observed that NM's anus was unusually relaxed by reason of penetration by a blunt object on occasions more than once. This witness explained also that NM's anus was loosely discharging defecation and that since she had bathed at the time he examined her, he was not able to see blood stains or sperms. Despite the above, the appellant would have us hold that the two courts below were wrong because loss of hymen and relaxation of sphincter muscles was not a sufficient proof of neither rape nor sodomy. We have refused to agree with him.

Next we consider the appellant's attack against the testimonies of PW1 and PW3 on account that they did not support each other. From our examination of the evidence adduced at the trial, we find no semblance of merit in this complaint. **First**, based on the evidence of PW2 found to be sufficient by both courts below, there was penetration of a male sexual

organ into her vagina at the behest of the appellant. Likewise, the two courts below concurred that PW2 gave sufficient evidence proving that the appellant had carnal knowledge of her against the order of nature for three consecutive days. Granted that the loss of hymen and relaxation of sphincter muscles was not conclusive proof that NM was carnally known by the appellant but in our view, that could only be a fanciful possibility which is not the same as a reasonable doubt consistent with our previous decisions including, **Chandrakant Joshubhai Patel v. R,** Criminal Appeal No. 13 of 1998 (unreported). **Secondly**, there is not dispute that PW1 and PW3 examined NM at different times and under different circumstances. That being the case, their findings could not have been 100% similar. As hinted hereinabove, PW3 examined NM after she had bathed whereas PW1 did so before but what is common in their observation is that NM's anus was loosely discharging faeces as a result of the relaxation of sphincter muscles which PW3 stated in the PF3 that it was a result of penetration by a blunt object for more than one occasion. In any event, unlike PW1, PW3 was a medical doctor, a gynaecologist to be exact and so his observation cannot be compared to one by PW1 who was a lay person. In consequence, we reject the appellant's arguments for lacking in merit. In the final analysis, we find no merit in grounds 1, 2, 4

and 6 in the memorandum of appeal and ultimately, the claim in ground 5 that the prosecution did not prove its case against the appellant beyond reasonable doubt crumbles as well.

Having disposed of the grounds of appeal in the original memorandum of appeal, we now turn our attention to the additional ground in the supplementary memorandum. That ground relates to a complaint against the first appellate court's enhancement of a sentence of the count on unnatural offence.

There is no dispute that the trial court imposed a sentence of 30 years' imprisonment on each count upon convicting the appellant on both of them. Apparently, the respondent Republic did not find any anomaly in the sentencing and that explains why it supported conviction and sentence during the hearing of the appeal before the first appellate court as can been seen at page 59 of the record of appeal. That notwithstanding, the High Court found the sentence on the second count irregular in that it was contrary to the mandatory provisions of section 154 (1) (a) and (2) as amended by the Penal Code. It did so in the course of composing its judgment and it imposed a mandatory sentence sanctioned by the law; life

imprisonment because the victim of the offence was a child below the age of 18 years.

Ms. Manyanda found nothing prejudicial to the appellant by the first appellate court substituting the sentence without hearing the parties. It is trite law that the right to be heard is fundamental engraved under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). However, the law under which the appellant was charged with in relation to the 2nd count was in existence at the time the trial court passed the sentence ostensibly in ignorance of it in so far as it is presumed that every person knows the law, it must be taken that the appellant was aware of the deserving sentence during the hearing and upon the trial court entering conviction on both counts. The record shows (at page 52) that before passing the sentences, the appellant was given opportunity to express his views in mitigation. Instead of doing so, he only said that he did not commit the offence despite the prosecution urging the trial court to impose a stiff punishment. In our view, although it would be desirable by the first appellate court to invite the parties to express their views in relation to enhancement of sentence in deserving cases, we do not think the substitution of the sentence by the first appellate court by imposing the

appropriate and mandatory sentence after dismissing the appeal was fatal and prejudicial to the appellant. A similar issue arose in **Simon Kanoni@Semen v. R**, Criminal Appeal No. 145 of 2015 (unreported) in which the Court dealt with variation of sentence to reflect the dictates of the law. The High Court had reduced the sentence imposed by the trial court in an offence of armed robbery on the ground that the appellant committed a lesser offence of robbery with violence which attracted 15 years imprisonment. In dealing with the issue, the Court relied on **Marwa Mahende v. R** [1998] T.L.R 249 wherein it was stated:

> *"We think, however, that there is nothing improper about this. The duty of the courts is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the Courts below. In the instant case this Court is pointing out that the correct procedure as sanctioned by law i.e. Section 226(2), as construed hereinbefore, was not followed, and that this should be put right. We think that it was not only proper for this Court to adopt such a course, but that the Court had a duty to do so, provided that in carrying out that duty it affords adequate opportunity to both parties or their counsel to be heard on the matter as indeed was done in this case."*

On the basis of the foregoing, the Court felt constrained to put the law on the right course by imposing the appropriate sentence. Having heard the parties, we think the first appellate court cannot be faulted for applying the law and substituting the sentence as it did. In the event, we dismiss this ground as well.

In the light of the foregoing, we find no merit in the appeal and dismiss it in its entirety.

**DATED** at **IRINGA** this 12th day of May, 2020.

R. E. S. MZIRAY
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

The Judgment delivered this 13th day of May, 2020 in the presence of the Appellant appeared in person through video conference and Ms. Pienzia Nichombe, learned State Attorney for the 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**