IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI., J.A. And RUMANYIKA., J.A.)

CRIMINAL APPEAL NO. 532 OF 2020

SEIPH ATHUMANI KIBINDA.....1ST APPELLANT

ALLY RAMADHANI KAPESA.....2ND APPELLANT

TUMAINI AHAMADI NGALAWA.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]

(Kakolaki, J.)

dated the 29th day of September, 2020

in

Hc. Consolidated Criminal Appeals No. 306, 307 & 309 of 2020

JUDGMENT OF THE COURT

14th February, & 8th March, 2022

KITUSI, J.A.:

This second appeal arises from the following background; On 16/3/2019 at night, a 14-year-old girl (PW3), who was living with her elder sister Mwajuma Jumanne (PW1), told her that she was going for a short call. However, that was just a trick by PW3 because her real intention was to go to a discotheque within the township in Mvomero District. The girl never returned home that night.

Instead, the next morning she was found in a room at a certain house being in a very bad shape. She was naked, with foam in her

mouth and feaces sticking out of her anus. It was obvious, and there has been no dispute that she had been raped and sodomized.

Consequently, the appellants were charged with gang rape under section 131A (1) and (2) of the Penal Code, it being alleged that on that date the trio had carnal knowledge of PW3. In the second count laid under section 154 (1) (a) of the Penal Code, the appellants were charged with having carnal knowledge of PW3 against the order of nature.

The District Court of Mvomero convicted the appellants on both counts and sentenced them to 30 years imprisonment for each count, with an order that the sentences should run concurrently. Their appeal to the High Court did not achieve much so to speak, because although the first appellate court quashed the conviction on the first count and set aside the sentence for finding the charge defective, it upheld the conviction for unnatural offence and enhanced the sentence to life imprisonment.

This appeal is therefore, against the conviction and sentence for unnatural offence. There are 12 grounds of appeal jointly lodged by the first and second appellants and 11 grounds of appeal separately lodged

by the third appellant. Invariably, the two sets of grounds of appeal raise identical issues.

Before we address the grounds of appeal, we set out the background story, covering from the discotheque where PW3 had gone on the fateful night to the time she was found in the following morning. She testified that when she got to the disco venue, she took no particular interest in getting into the music hall, so she stood outside. While she was there, Ally (we take this as reference to Ally Ramadhani Kapesa) the second appellant, approached her, with a threat. He addressed her as follows: -

> *"Wewe simama hapo hapo uone tunachokufanyia leo".*

Meaning that: -*"You just go on standing there and see what we are going to do to you today."* Then Ally made a phone call with a loud speaker on, and talked to Mkapa the first appellant. He told the first appellant to get out of the hall so that the two would buy PW3 a drink and proceed to have sex with her. The two men took PW3 into the hall and offered her two bottles of a drink known as K-Vant, which she drank. We would have wondered why PW3 had no cause for suspecting her companions' generosity after their threat on her, but her being a girl

of below the age of 18 years, her rather compromising behaviour, was not relevant.

When PW3 was helplessly drunk, the two appellants rode with her on a motor cycle to the place of abode of one Karimu (PW4). The latter's testimony confirms the fact that PW3 was brought to his house by the first and second appellants and one other man referred to as Juma. Juma who was said to be PW3's brother was carrying her on his back, and the three of them wanted to keep the girl there but PW4 refused. Since the first and second appellants became confrontational, PW4 reported the matter to the village chairperson, Sabina Mathew (PW5).

PW5 went to PW4's place where she found PW3 very drunk in the company of the appellants, and her brother Juma was also there. She instructed the men to take PW3 to PW1's house where she lived. The three men left with PW3 on a motorcycle towards PW3's residence.

However, according to PW3 she was taken to the second appellant's place where the three men including Juma, her brother, had vaginal and anal sex with her in turns. The third appellant who had been outside keeping watch, had his turn on PW3 too. When the men were

through with her, they fled, leaving her semi-conscious with exhaustion from excessive alcohol and sex.

PW3 was found by people, including PW2, in that bad state, and PW5 got informed of what had befallen the young girl. She ordered the arrest of the three men she had previously instructed to take PW3 home. The victim was taken to hospital and attended by Samwel Joseph Nasari (PW7) a medical practitioner. He tendered a PF3 in which he had posted his findings that PW3 had been raped and sodomized.

In defence, each appellant pointed an accusing finger at Juma and PW4 as being the ones who were involved with PW3 on that night. They admitted though, that they were among those who were assigned to take PW3 at her home but maintained that on arrival, they left her outside because no one in the house would open for her. The second appellant, at whose place PW3 was found, added that he did not spend the night in his bedroom on that night because when he got there after leaving PW3 outside her home, he found the room occupied by his friends.

In convicting the appellants, the trial court found PW3, the prosecutrix, to be a reliable witness and cited the case of **Godi**

Kasenegala v. Republic, Criminal Appeal No. 10 of 2008 (unreported) in support. It concluded that the medical evidence led by PW7 sufficiently supported PW3's account. Similarly, the High Court accepted PW3's version as truthful and that it tended to establish the fact that it is the appellants, and no one else, who had carnal knowledge of her against the order of nature. In terms of section 154 (2) of the Penal Code it substituted the sentence of 30 years with that of life imprisonment.

We stated earlier that there are two sets of memoranda of appeal but which raise somewhat identical issues. We shall cluster the main complaints as follows: - **One,** violation of section 127 (2) of the Tanzania Evidence Act (TEA) in recording the evidence of PW2 and PW3. This has been raised in ground 1 in the first memorandum of appeal, and ground 2 in the second memorandum of appeal. **Two,** the question as to whether PW3 was sane at the time of the alleged incident and reliable in her recollection of events. This has been raised in grounds 2 and 3 of the first memorandum of appeal and ground 7 of the second memorandum of appeal. **Three**, whether PW7 is a reliable witness on medical issues, and whether his testimony recorded by a magistrate other than the trial magistrate, could be relied upon. This has been

raised in grounds 7 and 8 of the first memorandum of appeal and grounds 4 and 9 of the second memorandum of appeal. **Four**, that failure to call Juma Kiroboto as a witness should attract adverse inference against the prosecution. This complaint is in ground 5 of the first memorandum of appeal and ground 10 of the second memorandum of appeal. **Five**, that the prosecution failed to prove their case beyond all reasonable doubt. This is a common complaint raised in ground 12 of the first memorandum of appeal and ground 11 of the second. The first and second appellants also raised the issue of the victim's age not having been proved.

The third appellant lodged written submissions which we shall, where necessary, be referring to. Before we address the main issues, we wish to weed out one matter that appears to us too obvious to wait for long. This is on the alleged succession of trial by Hon. Mwangaba from Hon. Waziri in violation of section 214 of the Criminal Procedure Act, (the CPA).

It is true that section 214 of the CPA provides that no magistrate shall take over conduct of a case from another without assigning reasons for doing so. See also our decisions in **Vicent Kija v.**

Republic, Criminal Appeal No. 232 of 2017 and; **Tumaini Jonaz v. Republic,** Criminal Appeal No. 337 of 2020 (both unreported).

In this case however, in our perusal of the original record of appeal, we have been satisfied that the name of Hon. Mwangaba, RM appears in the typed proceedings merely as a result of a typing error because he did not record evidence of any witness in this case. Thus, grounds 8 in the first memorandum of appeal and 9 in the second memorandum have no merits because they are based on misinformation.

Turning to the merits of this appeal we must begin by observing that it is not contentious, because Ms. Anita Sinare, learned Principal State Attorney who was appearing for the respondent along with Mr. Gabriel Kamugisha, learned State Attorney, indicated so at the very outset. She supported the appeal mainly on the issue of non-compliance with section 127 (2) of the TEA in recording the evidence of PW3, the victim of the alleged unnatural offence. She cited the decision of the Court in **Hassan Yusuph Ally v. Republic**, Criminal Appeal No. 462 of 2019 (unreported), to demonstrate that the procedure was flawed, rendering the evidence of PW3 liable to being disregarded. Ms. Sinare

submitted that section 127 of the TEA provides for two options in recording evidence of a witness of tender age. One option is that he may testify on oath or affirmation. When this option is taken, it must be shown on the record that the court got satisfied that the said witness understands the meaning of oath or affirmation as the case may be. The second option is for a witness to testify without oath or affirmation. In the latter case, the witness must promise the court to tell the truth and not lies.

The learned Principal State Attorney pointed out that PW3 was 14 years at the time of testifying, therefore she was caught by the requirements of section 127 (2) of the TEA. However, she criticized the learned trial magistrate for administering oath on PW3 without indicating how he had come to the conclusion that the witness understood the meaning of oath. She cited the decision of the Court in **Hassan Yusuph Ally v. Republic**, (supra), to demonstrate that the procedure was flawed rendering the evidence of PW2 and PW3 liable to being disregarded.

Ms. Sinare went on to submit that when the evidence of PW3 is disregarded, the remaining evidence is insufficient to prove the charge

because, she argued, the best evidence in sexual offences has to come from the victim. Responding to our probing whether circumstantial evidence would not suffice to incriminate the appellants, Ms. Sinare held a different view. She submitted that PW3 did not testify on how she identified the first and third appellants who are not owners of the house in which she was found and further that the prosecution did not lead evidence of the owner of the house to prove that the second appellant was the occupier of the room in which PW3 was found.

The appellants who did not enjoy legal representation simply stood by their grounds of appeal and prayed that the appeal be allowed and their freedom be restored. We note that in addition to the written submissions, the third appellant had also lodged a list of authorities featuring two cases on the procedure for recording evidence of witnesses of tender age. These are: - **Hassan Yusuph Ally v. Republic**, (supra) and **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported).

In our determination of this ground of appeal, we only echo the settled principle that the best evidence in sexual offences comes from the victim. After the Court's decision on that principle in **Seleman**

Makumba v. Republic, [2006] T.L.R. 379, there have been many decisions on the same. See; **Mussa Ally Onyango v. Republic,** Criminal Appeal No. 75 of 2016 **Mbaga Julius v. Republic**, Criminal Appeal No.131 of 2015; **Nasibu Ramadhani v. Republic**, Criminal Appeal No. 310 of 2017; **Julius Kandonga v. Republic**, Criminal Appeal No. 77 of 2017 and; **Amir Rashid v. Republic**, Criminal Appeal No. 187 of 2018 (all unreported).

Likewise, in this case, the best evidence as to what happened has to come from PW3, the victim of the unnatural offence. However, as the taking of her evidence contravened the provisions of section 127 (2) of TEA, we have to disregard that evidence as we did in **Hassan Yusuph Ally v. Republic (supra)** and **Issa Salum Nambaluka v. Republic,** Criminal Appeal No. 195 of 2018 (both unreported). On the basis of the foregoing therefore, the two courts below erred in finding PW3 reliable and resting conviction of the appellants on her evidence.

We respectfully agree with Ms. Sinare and the third appellant that after excluding the evidence of PW3, all what remains is mere suspicion that the appellants are the architects of what befell her. However, suspicion no matter how strong, may not form a basis of conviction.

The third appellant submitted in his written arguments, and we agree with him that: -

> *"Second after PW3's evidence being discounted, the testimonies of PW1, PW2, PW4, PW5, PW6 and PW7 could not stand alone and establish the offence of (sic) unnatural".*

We agree with the third appellant again on the argument that the remaining evidence was contradictory. There was contradiction as to who and how many people took PW3 to PW4's house. There was also no common story as to how many people and who took PW3 to her home. It is trite law that contradictions that go to the root of the matter as the two cited above, tend to affect the prosecution case materially. See the case of **Dickson Anyosisye v. Republic**, Criminal Appeal No. 155 of 2017 (unreported).

All said, we find merit in the two grounds of appeal raising the issue of violation of section 127 (2) of TEA in recording PW3's evidence. As PW3 should have provided the best evidence, the violation leads us to the conclusion that the prosecution did not prove the case beyond reasonable doubt, which is also a complaint in grounds 12 and 11 respectively of the two memoranda of appeal.

Consequently, as these grounds are sufficient to dispose of the appeal, we allow the appeal. We quash the conviction of the appellants and set aside the sentence. Accordingly, we order their immediate release unless they are held for some other lawful cause.

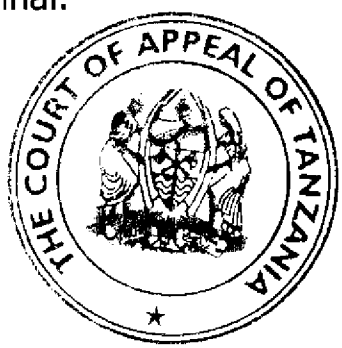
DATED at **DAR ES SALAAM** this 3rd day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of March, 2022 in the presence of the appellants in person who are linked through video facility from Ukonga Prison and Ms. Angelina Nchalla, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL