IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 177 OF 2020

NYAMASHEKI MALIMA @ MENGI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Musoma at Musoma)

(Hon. M.A. Moyo, SRM – Ext. Juris.)

dated the 26th day of March, 2020
in
Criminal Appeal No. 74 of 2019

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JUDGMENT OF THE COURT

6th & 9th June, 2022

NDIKA, J.A.:

The appellant, Nyamasheki s/o Malima @ Mengi, was convicted by the District Court of Musoma at Musoma of unnatural offence, on two counts, contrary to section 154 (1) (a) of the Penal Code, Cap. 16 R.E. 2019 (henceforth "the Penal Code") and was sentenced to thirty years' imprisonment on each count. His first appeal to the High Court, which was duly transferred and determined by the Resident Magistrate's Court of

Musoma with extended powers (Hon. M.A. Moyo, SRM – Ext. Juris.), ended in vain. This is his second and final appeal.

The essence of the charge, on the first count, was the accusation that the appellant, on diverse dates between 2017 and September, 2018 at Lake side area within the District and Municipality of Musoma in Mara Region, had carnal knowledge of a boy [name withheld] aged eleven years against the order of nature. We shall refer to the victim as "PW2", the codename by which he testified.

As regards the second count, it was alleged that the appellant, on diverse dates between July and August 2017 at Lake side area within the District and Municipality of Musoma in Mara Region, had carnal knowledge of a boy [name withheld] aged thirteen years against the order of nature. The victim in respect of this count shall be referred to henceforth as "PW4", the moniker by which he adduced evidence.

The case for the prosecution was primarily based on the testimonies of the two victims. But it all started with the discovery by PW2's uncle and guardian, Denis Mgaya Nyakisinda (PW1), who learnt that his nephew was not attending school properly and that, at least on one occasion, he

returned home rather late at 8:00 p.m. On quizzing him on the issue on 30th September, 2018, PW2 revealed what was undoubtedly a deep-seated secret that he and his friend (that is PW4) had been frequenting the appellant's home in which he forced them to smoke bhang and then sodomized them. On the following day, PW1 reported the disturbing revelation to the regional government functionaries in Musoma and then on 2nd October, 2018 the matter was formally reported to the police.

Both victims gave somewhat identical accounts. They adduced that the appellant doubled as a gardener and a fisherman and that he lived alone in a hut in the same neighbourhood with PW2 who was living in PW1's home. PW2 recalled that he visited the appellant's home many times and that on several occasions he made him smoke bhang before stripping him naked, undressing himself and then sodomizing him. He chillingly recounted that occasionally stool came out in the course of being ravished by the appellant. Moreover, he said that he used to lie at home that he was going to school only to end up at the appellant's hut. He did not reveal the ordeal because he feared a reprisal from the appellant.

PW4's evidence mirrored his friend's account. He adduced that with the lure of buns and a handout of TZS. 500.00 from the appellant, he went

to the appellant's hut for the first time. When he went there for the second time, the appellant forcibly sodomized him and then warned him not to spill the beans. He said that overall the appellant sodomised him several occasions after he had made him smoke bhang on each occasion.

PW5 Dr. Mary Kuboja, an Assistant Medical Officer at Musoma Referral Hospital, adduced that she examined PW2 on 2nd October, 2018. According to her, PW2 had a loose anus consistent with it having been penetrated by a blunt object repeatedly. Her medical examination report was admitted as Exhibit P1. As regards the examination on PW4, Dr. Neema Chilo (PW6), a Medical Officer, also from Musoma Referral Hospital, testified that PW4's anus exhibited healed bruises and that anal sphincter tone was loose. She too concluded in her report (Exhibit P2) that the results were consistent with PW4's anus having been penetrated constantly by a blunt object.

The appellant denied the accusations against him, claiming that he was, after all, impotent since he was born and that he could never have any sexual intercourse. He recounted the manner of his arrest and denied to have known any of the alleged victims who he said to have seen them at the trial for the first time.

Based on the testimonies of PW2 and PW4 supported by the evidence of the two medical witnesses (PW5 and PW6) and their respective medical reports (Exhibits P1 and P2), the learned trial magistrate (Hon. J.E. Ndira – RM) found it proven that the complainants were, indeed, sodomized as alleged. As to who the perpetrator of the sexual abuse was, the learned trial magistrate gave full weight and credence to the complainants' version and held that the appellant was the sodomite who ravished the two boys.

The learned trial magistrate duly considered the appellant's defence that he was impotent. However, he rejected it as a lie in view of the evidence of the victims, which he found unimpeachable, that the appellant inserted his penis into their respective anal orifices.

As hinted earlier, the appellant's first appeal bore no fruit. The first appellate court upheld the trial court's finding, based on the victims' testimonies, that they were carnally known by the appellant against the order of nature.

The appeal is premised upon five grounds of grievance: **one**, that there was no eyewitness evidence to prove the alleged offences. **Two**,

that the medical report (Exhibit P1) was invalid and unreliable and that the appellant was denied the opportunity to cross-examine the two medical witnesses (PW5 and PW6). **Three**, that certain material and independent witnesses were not called as witnesses. **Four**, that the evidence on record including the defence evidence was not properly analysed. **Finally**, that the prosecution case was based upon contradictory and insufficient evidence.

At the hearing of the appeal, the appellant, who was self-represented, did not elaborate on his grounds of appeal but maintained that the case against him was a frame up and that he could not have sex due to total erectile dysfunction. On the other hand, Mr. Isihaka Ibrahim, learned State Attorney, who was assisted by Ms. Agma Haule, also learned State Attorney, stoutly opposed the appeal.

We begin with the first ground, which can be disposed of easily and briefly. We think that the complaint at hand is clearly misconceived. As rightly argued by Mr. Ibrahim, the testimonies given by the two victims, which formed the main basis for the impugned convictions, constituted direct witness accounts. Their testimonies constituted the best proof of the charged offences in view of the settled principle that the best evidence of

rape (or any other sexual offence) must come from the complainant whose evidence, if credible, convincing and consistent with human nature as well as the ordinary course of things can be acted upon singly as the basis of conviction – see, for instance, **Selemani Makumba v. Republic** [2006] TLR 379. See also section 127 (6) of the Evidence Act, Cap. 6 R.E. 2019 (henceforth "the Evidence Act").

Equally misconceived are the complaints in the second ground of appeal. The first complaint that Exhibit P1 was invalid and unreliable on the ground that the victim (PW2) was not attended to and examined on the alleged date of the incident was fully answered by the learned State Attorney. He rightly submitted that PW2 could not have been examined earlier than 2nd October, 2018. Indeed, it is in the evidence that PW2 was repeatedly sodomized by the appellant in secrecy between 2017 and September, 2018 and that the said criminal wrongdoing only came to light on 30th September, 2018 after the victim had revealed his ordeal to PW1. It was, therefore, impossible for him to have been examined much earlier. Besides, it is noteworthy that Exhibit P1, indicating that PW2's anus was penetrated by a blunt object, was admitted in evidence without any objection.

The other claim that the appellant was denied the opportunity to cross-examine the two medical witnesses (PW5 and PW6) is plainly unavailing. Mr. Ibrahim was correct that the appellant declined the opportunity to cross-examine PW5, as revealed at page 25 of the record of appeal, but that he cross-questioned PW6 very briefly, as shown at page 28 of the record. We are, therefore, satisfied that the appellant's right to cross-examine the two medical witnesses in terms of section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019 was not abrogated.

In the third ground, the appellant protested that certain material and independent witnesses were not called as witnesses to corroborate the victims' version. Although he did not elaborate on the grievance, we assumed that he wanted us to draw an adverse inference against the prosecution for not fielding any witnesses particularly those residing adjacent to his home, the alleged scene of the crime. This ground, in our view, is unmerited because, in the first place, the evidence on record does not suggest that there were any material witnesses who observed the alleged wrongdoing that were left out by the prosecution. Secondly, it is the prosecution that determines which witness should be summoned to prove its prosecution case. As rightly argued by Mr. Ibrahim, it is not the

number of witnesses that matters but rather it is the credibility of the testimony that is important to prove a particular fact and that is why section 143 of the Evidence Act disregards the number of witnesses required to prove a certain fact.

Next, we deal with the fourth and fifth grounds of appeal whose thrust, in our view, is whether the appellant's convictions were sustainable upon the evidence on record.

To establish the charged offence, on both counts, the prosecution had to establish that the appellant had carnal knowledge of the two victims against the order of nature. Put differently, it had to be established that the appellant had sexual intercourse with the victims against the order of nature, meaning that he caused his penis to enter into each of the victim's anus. We are alert that even slight penetration of a victim's anal orifice is sufficient.

Having carefully reviewed the evidence on record as appraised by the courts below, we are in agreement with Mr. Ibrahim that the appellant's convictions were soundly based upon properly evaluated evidence. As found by both courts below, the complainants gave

spontaneous, coherent, consistent and detailed evidence as to what befell them at the hands of the appellant after he had made them smoke bhang. They stated in common that he sexually abused them on many occasions. Secondly, the boys gave a vivid account of the layout of the appellant's home and how messy it was indicating that they were quite familiar with it. Thirdly, the appellant admitted that he had not quarreled with the complainants or their parents, which, therefore, meant that the complainants had no cause to lie against the appellant. As we stated earlier, the victims' evidence in the instant case was the best proof of the wrongdoing in consonance with our numerous decisions notably **Selemani Makumba** (*supra*). Fourthly, the medical evidence, adduced by PW5 and PW6 and supported by their respective reports (Exhibits P1 and P2), materially validated the victims' testimonies. The findings by PW5 and PW6 that the victims had loose sphincter tone in their respective anal areas were consistent with their common accusation that the appellant repeatedly abused them.

As regards the appellant's defence of general denial and the claim that he was impotent, we are of the view that the said defence was duly considered and rightly rejected. So far as the alleged impotence was

concerned, it was an issue within his own knowledge and, therefore, the burden of proof lay on him to prove that he had total penile disfunction and that he could not have had any form of sexual intercourse. We took that view in **Nguza Vikings @ Babu Seya & Three Others v. Republic**, Criminal Appeal No. 56 of 2005 (unreported) where a similar defence was raised by the first appellant as we stated that the said burden of proof was as stipulated by section 114 (1) of the Evidence Act, which reads thus:

> *"Where a person is accused of any offence,* ***the burden of proving the existence of circumstances*** *bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged, and* ***the burden of proving any fact especially within the knowledge of such person is upon him****.*
>
> *Provided that such burden shall be deemed to be discharged if the court is satisfied by the evidence given by the prosecution, whether on cross-examination or otherwise, that such circumstances or facts exist.*

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence, creates a reasonable doubt as to the guilt of the accused person in that respect." [Emphasis added]

The Court then held in **Nguza Vikings** (*supra*) thus:

"The question as to whether the 1st appellant's penis was functioning or not was one within his knowledge. Under section 114(1) of the Evidence Act the burden was on him to prove that he was impotent. He has not done so. The case does not fall within any of the provisos given in the said section. Under the circumstances we find that the offence of rape in count 7 was proved in respect of the 1st appellant"

In the above case, the Court added that in terms of section 114 (2) (b) of the Evidence Act, the prosecution had no duty to prove that the appellant was not impotent.

Given that the appellant in the instant case did not produce any proof of his alleged erectile dysfunction and that the prosecution had no burden

to prove that he was not impotent and given that the medical evidence on record in support of the victims' accusation against the appellant was found credible and reliable, we are inclined to uphold the concurrent finding by the courts below that the claimed impotence was most probably a lie. We thus hold that the appellant's defence was justifiably rejected.

As we are decidedly of the view that the courts below properly assessed the victims' evidence and rightly gave it full credence and that we do not detect any misapprehension of the evidence on record, we find no justification to interfere with their concurrent findings and conclusion. In the premises, we uphold the two convictions against the appellant.

We finally deal with the legality of the sentence of thirty years' imprisonment imposed on the appellant, an issue that we raised *suo motu* ahead of the hearing of the appeal.

While quite understandably the appellant, presumably a lay person, passed up the chance to address us on the issue, Mr. Ibrahim submitted so incisively but briefly that the proper sentence on each count in view of the tender ages of the victims was life imprisonment as stipulated by section 154 (2) of the Penal Code. He thus implored us to invoke our

revisional powers and rectify the anomaly by setting aside the aforesaid illegal sentences and substituting for each of them a life sentence.

As indicated earlier, the charges against the appellant were laid under section 154 (1) (a) of the Penal Code, the applicable punishment provision being subsection (2) of that section. For clarity, we extract the said section thus:

> *"**154**.-(1) Any person who-*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b) [Not applicable]*
>
> *(c) [Not applicable],*
>
> *commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(2) Where the offence under subsection (1) is committed* ***to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.****"* [Emphasis added]

The above provisions are straightforward. While subsection (1) of the above section enacts general punishment for unnatural offence, subsection (2) imposes specific punishment where the said offence is committed to a child under the age of eighteen years. While in the former case, life imprisonment is the maximum penalty with the minimum set at thirty years' imprisonment, in the latter case the mandatory punishment is life imprisonment.

In the instant case, it was proven that the victims were aged eleven and thirteen years, respectively, meaning that both of them were children below the age of eighteen years at the time the offences were committed. Thus, the proper sentence was life imprisonment as we have discussed. We are, therefore, enjoined to intervene to rectify the anomaly. Consequently, invoking our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, we set aside the sentence of thirty years' imprisonment imposed on the appellant by the trial court on each count and substitute for it the sentence of life imprisonment in terms of section 154 (2) of the Penal Code on each count.

In the upshot, we dismiss the appeal in its entirety. For avoidance of doubt, the two sentences of life imprisonment shall be deemed to have taken effect from the date of the convictions as recorded by the trial court.

DATED at **MUSOMA** this 8th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 9th day of June, 2022 in the presence of the appellant in person and Mr. Tawabu Yahya Issa learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL