IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 121 OF 2021

DENIS JOSEPH @ SAA MOJA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the Decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam]

(Rwizile, J.)

dated the 15th day of February, 2021

in

(DC) Criminal Appeal No. 303 of 2019

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JUDGMENT OF THE COURT

15th February & 13th March, 2023

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania, Dar es Salaam District Registry (the High Court) which dismissed the appellant's appeal against conviction and sentence meted out by the District Court of Mkuranga at Mkuranga (the trial court). Before the trial court, the appellant Denis Joseph @ Saa Moja stood charged in the first count with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) while the second was unnatural offence contrary to section 154 (1) (a) both of the Penal Code [CAP 16 R.E. 2002] (the Penal Code).

The particulars of the offence were that, on the unknown date in June, 2018 at 9:30 hours at Mwanambaya village within Mkuranga

District in Coast Region the appellant had sexual intercourse with and carnal knowledge against the order of nature of a school girl to be referred by her acronym 'DKM' aged ten years. The appellant denied the charge but at the end of the trial he was convicted and sentenced to imprisonment of thirty years in each count. The terms of imprisonment were ordered to run concurrently. He was aggrieved by that decision and his appeal before the High Court was not successful. Undaunted, the appellant has approached the Court on a second appeal.

In order to prove their case, the prosecution had a total of five witnesses and tendered one documentary exhibit. The evidence from those witnesses can briefly be recapitulated as follows:

It all started sometime in June, 2018 when 'KM' (name withheld to hide his identity), a father of the victim who testified as PW1 received some disturbing information from his wife. According to him, his wife told him that the wife of the appellant had complained to her that the victim was involved in an intimate relationship with her husband, the appellant and wanted them to stop her from that conduct. The two families were close neighbours.

Upon that information, PW1 inquired from the victim who in turn confirmed that truly she had been involved with the appellant sexually

and that she had been raped twice and sodomised. Subsequently, PW1 reported the matter to the hamlet chairman one Ali Abdallah Mchanje, PW4.

On his part, PW4 summoned the appellant to the village office and upon interrogation, the appellant admitted the allegations and asked for forgiveness on a promise not to repeat the act. That notwithstanding, the matter was reported to the Mkuranga Police Station where a PF3 was issued for the victim to be taken to the hospital for examination. At the hospital, the victim was attended by Dr. Seif Mussa Mkwinda, PW3.

According to PW3, the victim had scars in her vagina, had no hymen and the vagina was too wide for the girl of her age. He also testified that the victim's anal area had old scars though outer sphincter muscle was tight. PW3 concluded that the victim had vaginal and anal sexual intercourse. PW3's findings were recorded in the PF3 which he tendered in court and was admitted as exhibit P1.

As to what happened to her, the victim who was aged ten years in 2010 and a primary school pupil, testified as PW2. She narrated that, sometime in June, 2018 when she was coming from a stream to fetch water she met the appellant, their neighbour. Upon that encounter, the appellant bumped at her and a bucket of water fell down. He pulled her

into the bush, undressed her and undressed his trousers to the knees level. He forcefully lay her down and penetrated his male organ into her vagina. According to PW2, since the penetration was painful, she cried out. She added that, thereafter, she felt some mucus coming from her vagina down to her legs. Before he left, the appellant warned her not to reveal that encounter to her parents. PW2 went on to testify that, after the appellant had left, she dressed but couldn't walk properly. She went back to fetch water and headed home.

In her further testimony, PW2 explained that the second time, was when she was going to join her mother at the farm and as she passed near the appellant's house, the appellant grabbed and tried to pull her inside his house. However, his wife appeared and inquired what was going on, but the appellant pretended as if nothing had happened.

On the third incident, PW2 narrated that while she was going to church, the appellant appeared from behind and pulled her and had both vagina and anal sexual intercourse where upon completion, she went to church. PW2 went on to testify that their little secret came out when the appellant's wife informed her mother of her suspicion. That is when she explained the whole episode to her mother and later her father. The matter was reported to local leaders, then to the police and she was taken to hospital for examination.

The appellant who was the only witness in his defence, denied the charge. In his testimony, he narrated that in February 2018, PW1 and PW2 came to his house with allegations that he had sexual relationship with the victim. He was surprised at those accusations since the two families had good relationship like relatives thus, he thought it was just a joke. However, PW1 promised to deal with him.

The appellant went on to testify that, no any action was taken until on 16th June, 2018 when his wife told him that he was needed at the village officer the following day. On that day, he went to the village office together with his wife where PW2 was also there. The rape allegations were presented before PW3 and the Village Executive Officer (VEO) who testified as PW5. The matter was reported to the police station and PW2 was taken to hospital.

It was the appellant's further testimony that, he could not commit the alleged act as he is impotent and although he was married could not perform his marital obligation as a husband. According to his evidence, his wife is of unsound mind hence should not have been taken seriously when she complained about the alleged sexual relationship. He complained that this case is a frame up though he had no quarrels with the victim's family as they lived peacefully as relatives.

At the close of the evidence from both sides, the trial court found that both counts were proved as required in law, the appellant was convicted and sentenced as shown earlier.

As indicated earlier, the appellant's appeal was not successful before the High Court. Before this Court, the appellant has raised seven grounds of appeal which we have paraphrased into the following four points of complaint that: **One,** the charge was not proved beyond reasonable doubt against the appellant; **two,** the particulars of the offence were at variance with the evidence of PW2; **three,** the trial court contravened the provisions of section 234 (2) of Criminal Procedure Act following substitution of the charge; and **four**, the prosecution evidence was contradictory.

On the day the appeal was called on for hearing, the appellant appeared in person, unrepresented while Mses. Elizabeth Olomi and Rachel Mwaipyana, learned State Attorneys teamed up to represent the respondent Republic.

When he took the stage to argue the appeal, the appellant did not have much to say. He only adopted his grounds of appeal and paved way for the learned State Attorney to respond, of course reserving his

right to rejoin should the need to do so arise. On the other hand, Ms. Olomi for the respondent Republic did not support the appeal.

As regards the first ground, Ms. Olomi argued that in order to prove the charge against the appellant, the prosecution was enjoined to prove that the age of the victim was below eighteen years and there was penetration. In respect of the age, the learned counsel contended that PW1, the father of the victim testified that she was ten years old, thus below the age of eighteen years. Ms. Olomi substantiated her contention with the Court's decision in the case of **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported) which observed that age of the victim can be proved by either the victim of the offence, a parent, a relative or a medical practitioner.

As to the second requirement, Ms. Olomi argued that since in sexual offences the best evidence is that of the victim; PW2 sufficiently explained how the appellant used to have sexual intercourse with her. She fortified her assertion with the decisions of the Court in **Selemani Makumba v. Republic** [2006] T.L.R. 379 and **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (unreported). She contended further that the evidence of the victim was corroborated by the doctor, PW3 who found that there was vaginal and anal penetration

on the victim. For these reasons, the learned counsel urged us to reject the first ground.

It was Ms. Olomi's contention in relation to the second ground that there was no variance between the particulars of the offence and the evidence of PW2. She argued further that even if there was any variance it did not go to the root of the case.

The complaint in the third ground of appeal is that the trial court contravened the provisions of section 234 (2) (b) of the Criminal Procedure Act [CAP 20 R.E. 2022] (the CPA). Responding to this complaint, Ms. Olomi submitted that after substitution of the charge, the trial court accorded the appellant his right to recall PW1 who had already testified for cross-examination, but he did not wish to exercise that right. However, the learned counsel argued that the trial court did not inform the appellant that he could require PW1 to be recalled to give his evidence afresh. She contended that the omission is curable under section 388 of the CPA as it did no occasion injustice to the appellant.

Responding to the fourth ground, Ms. Olomi argued that the prosecution evidence is not contradictory. She submitted that the High Court correctly analysed the evidence of PW2, the victim of the offence whose evidence cannot be said it contradicted the evidence of PW1,

PW3 and PW5 who only received report of the incident. The learned counsel argued that the contradiction, if any, was very minor citing for instance the evidence of PW5 who testified on how she received the information about the incident. She contended that not every contradiction in the evidence is fatal to the case. She supported her stance with the decision of this Court in the case of **Bakari Hamisi Ling'ambe v. Republic,** Criminal Appeal No. 214 of 2008 (unreported). Based on these arguments, Ms. Olomi contended that the charge against the appellant was proved beyond reasonable doubt and thus the High Court did not err to uphold his conviction.

Before she took leave, the learned State Attorney brought to our attention the fact in regard to the sentence meted out against the appellant in respect of the second count of unnatural offence. She submitted that since the victim of the offence was aged below eighteen years at the material time, in terms of section 154 (2) of the Penal Code, the appellant ought to have been sentenced to life and not thirty years imprisonment. She therefore urged us to revise the sentence and replace it with the proper one.

In rejoinder, the appellant complained that, since he had separated from his wife, she colluded with PW1's wife and framed up

this case against him. Being a lay person, he did not have useful contribution in relation to the issue of sentence.

Having considered the submissions from both parties, it is now our turn to examine the grounds of appeal as raised. However, before we do that, we wish to state from the outset that in our determination of this appeal, we shall be guided by the principle of law that, in a second appeal like this one, the Court cannot interfere with concurrent findings of facts by the two courts below unless it is satisfied that there has been a misapprehension of the facts of the case. There are various pronouncements of the Court in relation to this principle, some of them include the cases of **Karimu Jamary @ Kesi v. R,** Criminal Appeal No. 412 of 2018; **Faraji Ally Likenge v. R,** Criminal Appeal No. 381 of 2016; and **Joseph Yombo @ Mahema v. R,** Criminal Appeal No. 448 of 2016; (all unreported). For example, in the case of **Joseph Yombo @ Mahema** (supra), the Court stated thus:

> *"It is trite principle that where there are concurrent findings of facts by two courts below, the appellate court cannot interfere with such findings, unless, there are sufficient grounds for doing so."*

In our determination, we propose to begin with the third ground of appeal which raises a pure point of law. The appellant's complaint in this ground is that the trial court contravened the provisions of section 234 (2) (b) of the CPA upon substitution of the charge. The import of this provision is that when in the course of the trial the charge is substituted, the court is enjoined to inform the accused of his right to recall witnesses who may have already testified to give their evidence afresh or for further cross-examination. For ease of reference, this provision is reproduced thus:

> *"234.- (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*
>
> *(2) Subject to subsection (1), where a charge is altered under that subsection –*

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) ***the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and,*** *in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination."* [Emphasis added]

According to the record of appeal at page 13, the charge was substituted on 8th November, 2018 when PW1 had already testified. Subsequent to the substitution, the charge was read over and explained to the appellant who pleaded not guilty and then a preliminary hearing was conducted afresh. What followed thereafter is best told as follows:

*"**Court:** the accused is explained his rights to recall PW1 for cross-examination if he desires on added count after his testimony.*

Accused: *I have nothing more to cross-examine him. Let the case proceed."*

Although the appellant has not explained the manner in which the said provision has been violated, reading from the excerpt above, we have found that the trial court did not address the appellant on whether PW1 could be *recalled to give his evidence afresh.* He was only address on the issue of cross-examination of PW1 following substitution of the charge where the count of unnatural offence was added. We have considered this complaint and found that the omission did not prejudice the appellant for the following reasons: *Firstly,* because he was addressed his right to recall PW1. Even if the trial court did not fully address him, had he had anything he wanted PW1 to clarify, he would have aired it out. *Secondly,* PW1 was not an eye witness to both offences as he was only informed what happened by PW2.

In our previous decision in the case of **John Kihombo v. Republic,** Criminal Appeal No. 437 (unreported), the trial court had omitted to inform the appellant of his right to recall witnesses after substitution of the charge to reflect the proper category of rape based on the age of the victim. Addressing the appellant's complaint to that effect the Court stated thus:

> *"Having considered the nature of the variance which made the prosecution to substitute the charge and the fact that the appellant's plea was*

taken, we agree with Mr. Misango that the omission did not occasion miscarriage of justice."

Based on the foregoing, we find the appellant's complaint in the third ground unmerited and we reject it.

The appellant's complaint in the second ground is that, the evidence by PW2 was at variance with the particulars of the offences. Again, the appellant did not explain how the particulars of the offences varied from the evidence of PW2. However, as correctly argued by the learned State Attorney, there is no variance between the evidence of PW2 and the particulars of the offences. This is because, the particulars of the offences as well as the evidence of PW2 show that sometime in June 2018 the appellant raped and sodomised PW2. This ground fails too.

We have also considered the appellant's complaint in the fourth ground of appeal that there was contradiction between the prosecution witnesses. As regards the evidence of PW1 and PW2, it is not disputed that the former was only informed about the incident by the latter who was the only one who gave direct evidence. In any case, PW1 testified that he was informed by PW2 that the appellant had sexual intercourse with her two times and this is what PW2 stated in her testimony. This complaint is also unfounded.

Likewise, we have not found any contradiction between PW2 and PW3, the medical doctor who examined her and found that she had been sexually assaulted. PW3 did not say he witnessed the incident but his evidence was based on what he found on the private parts of the victim. This applies to PW5, the VEO whose testimony only accounted on how she followed up the matter as there was delay to report it to the relevant authorities.

The last ground of complaint is whether the prosecution case was proved beyond reasonable doubt. In this case, PW2 was the only eye witness of the offences where she explained how she met the appellant, her neighbour, on three different occasions, two of which he raped and sodomised her. It is trite law in our jurisdiction that, the best evidence in the offence of rape is that of the victim of the offence. In the celebrated case of **Selemani Makumba** (supra), the Court stated thus:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."*
>
> [Page 384]

In the instant appeal, PW2 was straight forward that the appellant was the perpetrator of the two offences. She evidenced that, at first the appellant inserted his male organ into her female organ and the second instance, he inserted his male organ into her vagina and anus. This evidence was supported by PW3 who testified to have found bruises in PW2's vagina and anus and she had no hymen. As the victim was aged below eighteen years, consent was irrelevant and therefore this evidence proved penetration in respect of both rape and the unnatural offence.

On his part, the appellant's defence did not shake the evidence of the victim. He complained that the case was fabricated by his wife but he did not explain why and how. He also complained that his wife was a mentally sick person but he did not present any evidence to that effect and did not cross-examine the prosecution witnesses on that issue. In totality, according to the evidence of PW2, there is no doubt that it is the appellant who committed the two offences on her. She also reported the incident to PW1, PW4 and PW5 that the appellant is the one who had sexually assaulted her.

For the foregoing reasons, we are of the settled view that the prosecution case was proved beyond reasonable doubt and therefore the conviction was properly grounded. Further, we agree with Ms. Olomi

that thirty years imprisonment imposed on the appellant in respect of the second count is illegal. Section 154 of the Penal Code which is relevant here provides thus:

> ***"154.- (1) Any person who–***
>
> ***(a) has carnal knowledge of any person against the order of nature;*** *or*
>
> *(b) has carnal knowledge of an animal; or*
>
> *(c) permits a male person to have carnal knowledge of him or her against the order of nature,*
>
> *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) of this section is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."***
>
> [Emphasis ours]

According to this provision, where the unnatural offence is committed to a child under the age of eighteen years, the offender should be sentenced to life imprisonment. Now, in the case under consideration, since the victim of the offence was aged ten years at the material date, the proper sentence should have been as provided under

this law. Therefore, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and set aside the sentence of thirty years in respect of the second count of the unnatural offence and substitute it with life imprisonment. The two terms of imprisonment shall run concurrently, which means the appellant shall serve life imprisonment.

Consequently, we find the appeal without merit which we hereby dismiss in its entirety.

DATED at **DAR ES SALAAM** this 7th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 13th day of March, 2023 in the presence of the Appellant in person via video link from Ukonga Prison and Ms. Rachel Danny Mwaipyana, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

E.G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL