IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A, And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 333 OF 2019

DAUD WILLIAM @ MACHA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 2nd day of August, 2019

in

DC. Criminal Appeal No. 21 of 2018

.....

JUDGMENT OF THE COURT

18th & 29th August, 2023

FIKIRINI, J. A.:

In the District Court of Moshi at Moshi, the appellant, Daud William Macha, was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, [Cap. 16 R. E. 2002; now R. E. 2022] (the Penal Code).

Briefly, the facts of the case are that, on different dates in October, 2016 at Kiborloni area within the Municipality of Moshi in Kilimanjaro Region, the appellant had carnal knowledge of a boy of 9 years old against the order

of nature. In this judgment, we will refer to him as PW2 or the victim to conceal his true identity. The appellant was convicted, and the trial court sentenced him to life imprisonment. His appeal to the High Court was dismissed on 2nd August, 2019.

But before we consider the merits of the appeal, a background to the case culminating in this appeal is indispensable. At the trial, the prosecution, in an endeavor to prove its case, summoned six (6) witnesses, whereas the appellant fended for himself. What is gathered from the record is that on 29th September, 2016, Juma Hamisi Mkenga (PW3), a head teacher at Kiborloni Primary School, convened a guardian/parent–teacher meeting. The issues to be addressed were cruelty by guardians and parents to their children and increased sexual abuse incidents, on which they were asked to be vigilant and follow up on their children's activities.

The meeting nudged Agnes Sosthene (PW1), who is PW2's auntie, to follow up on PW2, who had already shown signs, such as wetting the couch when sitting, smelling, and being unable to control himself when he felt the urge to visit the toilet. Upon grilling and beating, PW2 revealed to PW1 that his friends at school were the ones who did the disgusting acts to him. Upon PW1's inquiry with the school, PW3 declined that to have possibly happened at the school. Further probing by PW1 led PW2 to disclose that his friend, whom

he did not name or describe, used to apply some jelly to his anus before inserting his penis in it. This took place at the toilet of the unfinished house and he was rewarded with biscuits and sweets. Learning what PW2 has been through, PW1 reported the findings to the school, from which PW3 confirmed the experience at school that PW2 could not control his urge whenever he wanted to use the toilet. A delay in permitting him led him to soil or wet his clothes. PW2 was interrogated at school and he gave the same account he did to PW1.

PW1 to report the matter to the Police, and the appellant was arrested by the assistance of a militia man commonly known as "Police Jamii." Though PW2 could not describe the alleged suspect but told George Kirita (PW4) that he would remember him when he sees him. The appellant was arrested after PW2 pointed him when they met a group of men coming from the opposite direction. According to PW4 the appellant had a fair complexion, was slim and was a bit tall. Upon interrogation he denied knowing PW2, while PW2 insisted he was the one who sexually abused him. The appellant was taken to Majengo Police Station.

At the Police Station Pili Mohamed (PW5) was assigned to investigate the case. During her investigation, she took PW2 to Mawenzi hospital, where Michael Reginald Kombania (PW6), a doctor, examined him on 15th October,

2016. In his findings, he reported loosening of the anal sphincter muscles and opening of the anus caused by penetration of a blunt object. A PF3 signed by PW6 was tendered and admitted as exhibit P1.

In his short defence, the appellant, who testified as DW1 and who was a sole witness without any exhibit to tender, denied having had canal knowledge of PW2 against the order of nature. What he knows was the Police were sent to arrest him. Despite refuting committing the offence he was beaten and later arraigned.

As intimated earlier, the appellant was convicted and accordingly sentenced and his appeal to the High Court was in vain. He thus preferred this appeal to challenge the latter decision, listing nine (9) grounds of complaint, five (5) from the initial Memorandum of Appeal lodged on 12th November, 2019, and four (4) from the Supplementary Memorandum of Appeal lodged on 5th October, 2021. The grounds are condensed as follows: **one,** failure to comply with section 186 (3) of the CPA, causing the appellant not to cross-examine prosecution witnesses. **Two,** failure by the trial court to caution itself by relying on single witness evidence to convict. **Three,** PW2's failure to name the accused at the earliest opportunity could have given credence to his evidence. **Four,** the trial court wrongly relied on exhibit P1 (PF3), which was not read aloud in court. This ground covered the third ground in the

Supplementary Memorandum of Appeal. **Five**, both lower courts relied on weak, contradictory and inconsistent prosecution evidence. **Six,** that the charge was incurably defective. **Seven,** that section 127 (2) of the Evidence Act was not complied with and **Eight,** that the prosecution failed to prove its case beyond reasonable doubt.

During the hearing of the appeal, the appellant was present unrepresented. Ms. Cecilia Mkonongo, learned Principal State Attorney, Mr. Diaz Fred Makule, learned State Attorney and Mr. Henry Chaula, learned State Attorney, appeared representing the Republic.

The appellant having adopted his grounds of appeal preferred the respondent to address the Court, and he would rejoin if need to do so would arise. In answering the main ground of appeal, whether the prosecution case has been proved beyond reasonable, Mr. Makule, who addressed the Court on behalf of the respondent's team, focused on discussing the grounds of appeal, starting with the first ground, contending that the prosecution had proved its case beyond reasonable doubt.

On non-compliance with section 186 (3) of the CPA that sexual offence trials, mainly those involving underage, should be held in camera, Mr. Makule admitted the requirements illustrated in the provision. Still, he contended that

the provision covered the victims, not the accused. He cited the case of **Leornard Salim Kimweri v. R,** Criminal Appeal No. 453 of 2015 (unreported), in support of his contention. He further contended that, even if there was an omission by not holding a hearing in camera, it was still not fatal and could be cured under section 388 (1) of the CPA.

Regarding the second ground on the danger of relying on a single witness, Mr. Makule countered the complaint, arguing that no specific number of witnesses was required to prove a fact. Instead, a witness was entitled to credence and must be believed unless there was a good reason for not believing him/her. He supported his proposition by citing the case of **Goodluck Kyando v. R** [2006] T. L. R. 363.

Adding to his submission, Mr. Makule argued that in sexual offences cases, usually, the best evidence comes from the victim. On this point, he referred us to the case of **Selemani Makumba v. R** [2006] T. L. R. 379.

Submitting on the third ground that the victim failed to name the accused at the earliest opportunity, something which had impacted the victim's credence, he countered the scrutiny and argued in favour of the prosecution case that PW2 gave an account of what occurred to him as shown on pages 15-16 and was later able to recognize and pointed out the appellant

who was in a group of other men to PW4 who arrested him. Mr. Makule also pointed out that PW2 was threatened as reflected on page 16 of the record of appeal. Moreover, the appellant's failure to cross-examine the witness indicated admission, Mr. Makule stressed. To fortify his submission, he referred us to the case of **Shabani Haruna Mwagilo @ Dr. Mwagilo v. R,** Criminal Appeal No. 397 of 2017 (unreported). When questioned by the Court on the appellant's defence, Mr. Makule responded that the appellant denied committing the offence and said nothing much. Still, as per PW2's account on page 16 of the record of appeal, the appellant was the one who bought him sweets and biscuits and committed the offence.

Responding to the fourth ground on the reliance of exhibit P1 (PF3), which was not read out loud in court, Mr. Makule admitted outright that exhibit P1 was not read out in court and implored us to expunge it from the record. For this anomaly, he cited the case of **Robinson Mwanjisi and Three Others v. R** [2003] T. L. R. 218. He further contended that, despite expunging the PF3, the oral evidence of PW6 still suffices prove to what was contained in the PF3, citing the case of **Simon Shauri Awaki @ Dawi v. R,** Criminal Appeal No. 62 of 2020 (unreported), to support his submission.

On the fifth ground on contradiction and inconsistencies in the prosecution case, Mr. Makule ignored them as minor and, which did not go to

the root of the case. Bolstering his position, he cited the case of **Emmanuel Lyabonga v. R,** Criminal Appeal No. 257 of 2019 (unreported).

Touching on the Supplementary Memorandum of Appeal, Mr. Makule started with the second ground on non-compliance to section 127 (2) of the Evidence Act, Cap. 6 R. E. 2002 [Now R. E. 2019] (the Evidence Act); his argument was that there was no omission, as PW2 promised to tell the truth. And if the Court finds there was an omission, it should still consider that the witness told the truth. More so, the omission was not fatal, he submitted.

The last ground, he argued, was the first ground on the defective charge. He submitted that the charge was proper and the ground was thus without merit.

In rejoinder, the appellant had nothing to say save for prayer that his appeal be allowed, conviction quashed, a sentence set aside and he be set free.

In determining this appeal, we shall consider the first ground on non-compliance with section 186 (3) of the CPA separately, and all other grounds shall be examined together. We wish to start by looking at the provisions of section 186 (3) of the CPA, which states thus:-

> "(3) *Notwithstanding the provisions of any other law,* ***the evidence of all persons in all trials involving sexual offences shall be received by the court in camera,*** *and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions*". [Emphasis added]

Even though the provision has stipulated that all such evidence should be received in camera, the emphasis was on protecting victims of sexual offences rather than anyone else. We had an opportunity of considering the issue in our previous decisions, namely **Leornard Salim Kimweri** (supra) referred to by the Republic, **Godlove Azael @ Mbise v. R**, Criminal Appeal No. 312 of 2007, **Saning'o Meshuki Mollel v. R,** Criminal Appeal No. 3 of 2009, **Faraja Leserian v. R,** Criminal Appeal No. 203 of 2011 and later in the case of **Edmund John @ Shayo v. R,** Criminal Appeal No. 453 of 2019 (all unreported) to name a few, where we underlined that, proceedings in camera are mainly to protect the victim of the sexual offences than the appellant. We thus agree with Mr. Makule that if there was omission to observe the provision

of section 186 (3) of the CPA, which in this case was, it did not occasion any miscarriage of justice to the appellant. Moreover, the appellant never protested that the conduct of the proceedings he was involved in should be in camera. This ground is without merits.

Coming to the primary ground and backbone of the case, we are called upon to determine whether the prosecution proved its case beyond reasonable doubt. There is no dispute that the sexual offence against PW2 was committed during the day. The issue bugling our mind is who committed the offence, knowing that the commission of the crime could be quickly resolved in most cases; the controversy is usually on the person who committed the offence. And that is where the identification of the accused person becomes relevant. In cases where it is undisputed and there is evidence that the accused person was caught red-handed while committing a crime or was well known to the victim or witnesses, the question of identity becomes immaterial. However, where the accused person is not known to the victim or witnesses and his name is not mentioned to anyone, the question of identity becomes significant.

Identification of the accused person is essential in all conditions, unfavourable and favourable, including an offence committed during day time. Even though the degree and weight attached to identification might be slightly

different for the identification under favourable conditions compared to that under unfavourable conditions, still identification and description of the person who committed the offence are vital and an exercise that cannot be dispensed with. See: **Jumapili Msyete v. R,** Criminal Appeal No. 110 of 2014 (unreported).

In the case of **Yohana Chibwingu v. R,** Criminal Appeal No. 117 of 2015 (unreported), when discussing the identity of the assailant, the Court stated:

> "*That in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of highest importance of which evidence ought to be given first,* ***of course by the person who gave a description, or purports to identify the accused person and then by the person to whom the description was given.***"
> [Emphasis added]

After closely examining PW2's evidence, the victim and sole eye witness, we find the evidence is lacking to warrant a conviction. This is because apart from his evidence, the remaining evidence from PW1, PW3, PW4, PW5 and PW6, is purely hearsay.

Tracing from the record, it is evident that the appellant was a stranger to PW2 despite their alleged two encounters. According to PW1, when giving evidence as indicated on page 13 of the record of appeal, she recounted what PW2 had told her, that the one who sexually abused him was a "bodaboda" rider. Since PW2 had already informed the appellant that PW1 was aware of what was happening, they moved their meeting place from the toilet to the unfinished house. All these were without the appellant's description.

PW4, who was in the company of PW1 when effecting the appellant's arrest, relied on PW2's pointed person in a group of other men. Without a prior description of the purported suspect to the arresting officer or any other person, concluding that the appellant linked to the offence's commission was identified correctly becomes difficult. In the case of **Hando Dawido v. R,** Criminal Appeal No. 107 of 2018 (unreported), the Court dispelled the question of mistaken identity after being convinced that PW4 and PW5 correctly identified the accused person. The incident of sexual abuse in that case took place in broad daylight, at around 11:15 a.m. PW4, who was being sexually abused and PW5, who witnessed the incident, knew the appellant before they could mention his name in full and that the incident took minutes. With that evidence, the court was content that mistaken identity could not arise.

See also: **Mkumbo Hamisi v. R,** Criminal Appeal No. 24 of 2007, **Joseph Mkumbwa & Another v. R,** Criminal Appeal No. 94 of 2007, **Hashimu Mohamedi & Another v. R,** Criminal Appeal No. 152 of 2008 (all unreported). In all these cases, the incident occurred in broad daylight, yet the description and identification of the assailant was deemed a must.

Mr. Makule's submission and reference to the case of **Selemani Makumba**, that the best evidence in sexual offences comes from the victim, while not contested, but in that case, the prosecution went ahead and proved the assaulter's identity. The link connecting the appellant to the commission of the offence, is missing in the present appeal. There having been no description given by PW2 to either PW1 or PW4, the arresting officer and the terms of that description, which are matters of the highest importance, have miserably weakened the prosecution case. Giving a description should have been one of the initial tasks to be fulfilled even before the arrest and reporting the incident to the Police. Had the description been given, PW4 would have acted on it, not how it happened in the present case, which raises doubt if the appellant was actually the one who committed the offence. Failure to do that taints the prosecution case with doubts which we are constrained to resolve in favour of the appellant.

For the above reasons, we agree with the appellant that the prosecution case has not been proved beyond reasonable doubt. As a result, the appellant's conviction is quashed, the sentence metted against him set aside. The appellant is to be released immediately from prison unless he is otherwise unlawfully held.

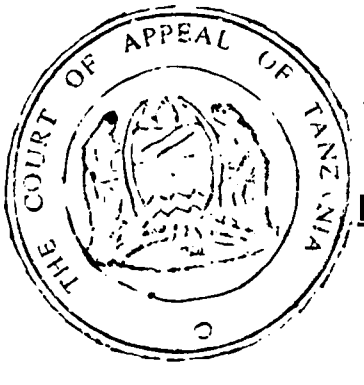
DATED at **MOSHI** this 28th day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of August, 2023 in the presence of the Appellant who appeared in person and Mr. Innocent Exavery Ng'assi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL