IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 115 OF 2017

(Appeal from decision of District Court of Temeke, Before: Kihawa -21/11/2016)

SHUKURU S/O PETER..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

NGWEMBE, J.

Shukuru Peter was arraigned in the District Court of Temeke at Temeke, charged and convicted of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap. 16 R.E. 2002, hence on 21st November, 2016 was sentenced to serve thirty (30) years' imprisonment. Being dissatisfied with the conviction and sentence, he preferred this appeal, armed with thirteen (13) grounds of appeal, which were filed in court on 21st April, 2017. The notice of appeal was filed in court on 28th November, 2017, equal to seven (7) days from the date of conviction and sentence.

During the hearing of this appeal, the Appellant being unrepresented, ended up adopting his grounds of appeal with a prayer that this court should consider them and let him free. The grounds of appeal may be conveniently, condensed into three major ones:

First, whether the evidence of PW2 was credible and followed the required procedure of Voire dire;

Second, whether the appellant was given an opportunity to cross examine P[1]

Three, whether the prosecution proved the case against him to the standard requires.

In reply, the respondent was represented by the learned State Attorney Elen Masululi (SA), who supported the conviction and sentence. The Learned State Attorney submitted that offences related to sexual offences, when it comes to a child, the best evidence is a child him/herself. She referred this court to section 127 (2) of the Law of Evidence Act Cap 6 R.E. 2002: The section is quoted for easy of reference:

> ***"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth"***

The State Attorney, further stated that what should be proved in court is penetration. It is in record that PW2 testified that he had severe pain when the appellant's penis penetrated to his anus. The medical report and the evidence of a medical doctor PW3 corroborated the evidence of PW2. The victim (PW2) testified that he failed to cry for help because the appellant threatened to kill him. The State Attorney concluded that the circumstances, which led into the offence was done in a closed door and no one could witness the commission of that offence other than the victim himself and the appellant. Therefore, the evidence of PW2 is the best evidence and the most reliable corroborated by PW3 who medically examined PW2.

According to the recorded evidence, what is not in dispute is that, on Sunday 1st May, 2016 the appellant was in his mother's house at Mbagala Kingugi area in Temeke District. The appellant's mother was living with his own child Emmanuel Shukuru aged 12 years. The appellant's mother went to church for worship leaving the appellant with his own son Emmanuel Shukuru. That the victim on the very day was carnally known and the victim (PW2) was the one who reported the incidence to police post at Magenge Ishirini.

At the trial the court carried voire dire to PW2 as appears on the hearing of 25/7/2016 whereby the court asked several questions to the child to test his ability to understand and speak nothing but truth. At the end the trial court found ***"The child knows the duty of speaking the truth much as the nature of oath"***

However, I wish to note that I am mindful of the provision of section **127 (7)** of the Evidence Act 1967 which allow a trial court to ground a conviction on uncorroborated evidence in sexual offence. The section states;

> "***Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offences, the only independent evidence is that a child of tender years of a victim of sexual offence, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".***

The purpose of conducting voire dire is three folds;

(a) Whether a child of tender years is possessed of sufficient intelligence to testify;
(b) Whether the child understands the duty to tell the truth; and
(c) Whether the child knows the meaning of an oath.

It is apparent from the evidence on record that the trial magistrate conducted **voire dire** examination satisfactorily and at the end the trail court found that the child knew

the duty of speaking the truth much as the nature of oath in compliance with the provision of section 127 (7) of the Evidence Act, Cap 6 R.E 2002.

Despite, the fact that the trial magistrate conducted voire dire, yet the contents of the section cited above, voire dire was not necessary on sexual offences, what was required was the court to satisfy if the child of tender years understood the meaning of telling nothing but the truth. PW2 was standard V aged 12 years, under normal circumstances, a child of that class is taught many things related to biology (science subject). Therefore, no doubt PW2 knew what was done to his private parts (anus). The evidence of PW2 explain that the episode commenced immediately after PW1 left the house to church, leaving the child with his father. DW1 took the child to a nearby bar where he drunk brew (pombe) (not known whether it was a local brew, or manufactured ones). Later on they went home and forced the child to his father's bed room where the offence was committed. After the act, he forced the child to go and buy 5 kasuku exercise books, that was the time when the victim went to report the incidence to Police post at Magenge Ishirini.

PW3 was a medical doctor of Mbagala hospital, who at the same date round 19.00 hours, conducted physical examination to PW2 and found his anus was open and had bruises proving that, there was penetration. PF 3 was filled in and was tendered in court as exhibit P1. In cross examination, the appellant did not record any relevant question which was capable of shacking the evidence of PW3.
The evidence of PW1 was purely hearsay, save on the stage of taking the victim to hospital.

It is a cardinal principle that in criminal proceedings, unless otherwise specifically provided, the onus is always on the prosecution to establish every ingredient of the

offence charged. Applying that principle in the circumstance of this appeal, the prosecution proved their case beyond all reasonable doubt on strength of evidence of PW2 and PW3 together with PF3 which was produced in court as exhibit P1. As rightly pointed out herein above, the evidence of PW2 was accepted and this court find that a proper examination of the child ability to understand and tell nothing but truth was properly done. Therefore, ground one on voire dire is answered in negative.

The second issue is on the right of the appellant to cross examine PW1 who is the appellant's mother. The evidence of PW1 as recorded in the proceedings are purely hearsay. It is in record that PW1 was called to police post of Magenge Ishirini, when she arrived therein she was told to take the child to Mbagala hospital for medical examination, thereafter returned PF 3 to police. In the circumstances of the available evidence of PW1, there was nothing to cross – examine. Notwithstanding, the weak evidence of PW1, yet the court ought to have given the appellant a right to ask questions if any. However, that alone could not have done injustice to the appellant for the court did not convict the appellant on the strength of evidence of PW1, but a combined evidence of PW2, PW3, PW4 and the PF3 report. Therefore, this ground also must fail.

The remaining ground is on whether the prosecution established a prima facie case against the appellant. It is on record that PW2 was with the appellant on the fateful date. They were only two in the house after the grandmother of PW2, who is a mother of the appellant, went to church. The evidence of PW2 was corroborated by PW3 a medical doctor who examined PW2 and found, according to his words:

> ***"I conducted the physical examination where I discovered at the anus he complained for pain, the anus was open and had bruises This shows that he was sodomized"*** Further attested that ***"I made laboratory test where introduced him the HI preservation medicine"***

Finally, PW3 tendered PF3 as documentary evidence. Further in cross examination PW3 concluded that since oxlips is open and bruises were seen, the private parts of the patient (PW2) was penetrated.

PW4 a police officer who investigated the offence, his evidence was very short which supported the evidence of PW2 and PW3. He prepared documents and took the appellant in court.

In defense, the appellant did not contradict or raise doubt on the evidence of PW2 and PW3, rather made a totally different story related to witchcraft and family conflict related to selling of landed property at Charambe -Mbagala area. That defence had nothing to do with the offence charged against him. Even when he was allowed to cross examine witnesses, DW1 did not ask relevant questions related to the offence. Though the duty of proving criminal case to the standard required is solely on the prosecution, yet the defence has statutory duty to contradict that evidence with a view of raising reasonable doubt to shack (raise doubt) on the credibility of the prosecution's case, which the defense failed.

I am mindful of the decision of Georges, C.J in **fanuel s/o Kiula V. R (1967) 369** on the duty of the defence in criminal cases when he said:

> ***"It is not necessary to accept a defence of the accused in order to find him not guilty. All that an accused need to do is to raise a reasonable doubt as to his guilty"***

Indeed, I find the prosecution proved the case to the standard required and the trial magistrate decided on the strength of the prosecution evidence. Therefore, this ground also must fail.

In the circumstances, I find there has been no injustice occasioned by the judgement of the trial court, consequently I have no reason to tamper with it and therefore

uphold the conviction and sentence. Therefore, the appeal is dismissed and the conviction and sentence by the trial court is sustained.

Order accordingly.

Right to appeal to the court of appeal explained.

Dated at Dar es Salaam this 28 Day of June, 2018

P. J. Ngwembe, J.

28/06/2018

Delivered at Dar es Salaam in Chambers on this 28 day of June, 2018; in the presence of the Appellant in person and Ms. Monica Ndakidemi State Attorney for respondent.

P.J. Ngwembe, J

28/6/2018