IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 367 OF 2017

(Originating from Kilosa District Court Criminal Case No. 40/2017

MASANJA MAKUNGU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

B. K. PHILLIP. J.

In the District Court of Kilosa at Kilosa, the appellant, Masanja s/o Makunga was charged and convicted of grave sexual abuse c/s 138 ((1) and (2) (b) of the Penal Code (Cap. 16, R.E. 2002). He was sentenced to 20yrs imprisonment.

The particulars of the offence were that on 21st day of January, 2017 at about 18.30hrs at Kibaoni area within Kilosa District in Morogoro Region for sexual gratification, the appellant did share public hair and deep kiss into mouth and ear of Amina D/o Hashimu, a girl of 13 year old.

Briefly, the prosecution case against the appellant was built around six witnesses. It all began when the appellant went to PW1's home and requested her to fallow him to his residence for the purpose of giving him local medicines for protection from witch craft the. Appellant was a traditional doctor. PW1 was sworn in court and stated that, on 21/1/2017 the appellant convinced her to go to his residence for the purpose of giving her local medicine for protection from witchcraft. The appellant told her that he was instructed by her father to give her local medicine for her protection.

She was accompanied by his young brother, one Shomari, whom upon reaching the appellant's residence, he was told by the appellant to remain outside. PW1 entered into the appellant's room with the appellant, then, the appellant directed to her undress herself and smeared some local medicine into parts of her body. Thereafter, he directed her to lie down and shaved her pubic hair using a razor and later on, he sucked her manta and ears, with his legs put on PW1's lap. At that time, the appellant had taken off his trousers and remained with a small part only. The appellant later on released PW1 and escorted her back home.

Mwanaisha Salum (PW2) who was staying with PW1 as her guardian testified in court, that on 21/7/2017, she came back home at around 7.00pm, only to find that PW1 was not at home. She went to her neighbours to look for her but she could not find her. Later on PW1 came back home and explained to her (PW2) what transpired when she was at the appellant's residence. PW2 informed PW1's mother and village leaders about what happened to PW1. The village leaders and PW2's neighbours assisted in arresting the appellant. PW3 was among the neighbours who were involved in arresting the appellant as well as interrogating him. PW3 testified in court that upon being interrogated, the appellant admitted to have done some of the things alleged by PW1, but denied to have shaved PW1's public hair. Mwajuma Nasibu (PW4) was the appellant's landlady. She testified that on 21/7/2017, she saw the appellant with PW1 and a young boy coming to her house, where the appellant was staying. She saw the appellant and PW1 going together into the appellant's room, while the young boy remained outside. PW4 said further that she did not know what transpired in the appellant's room but the appellant and PW1 stayed in the room for half an hour and then they left. PW5 was PW1's father. This witness was just informed by PW2 what happened to his daughter. PW6 was a police officer

who took the appellant's caution statement and tendered in court as an exhibit. In the caution statement, the appellant admitted to have administered some local medicines into PW1's body, but denied completely to have committed the offence charged against him. The appellant gave a sworn testimony and called no witnesses. His defence was a complete denial.

The appellant's petition of appeal contains six grounds of appeal and in essence the broad areas of complaints are as follows:

The first area of complaint is that the trial magistrate's failure to conduct 'voire dire' test in respect of PW1 who was a child of tender age.

The second area of complaint is that the caution statement was not read over in court before being admitted.

The third broad area of complaint is on the weight and analysis of the evidence. It is the appellant's contention that, the trial magistrate erred to convict him because in its totality the prosecution's evidence failed to prove the case against him beyond reasonable doubts. Also, he challenges the evidence of PW2, PW3 and PW4 as being hear say, evidence. Further more,

the appellant claims that his defence was not taken into consideration by the trial magistrate.

The fourth area of complaint is on the appellant's claims that s. 235 (1) and 312 (2) of the CPA, Cap 20 was not complied with. He alleges that he was not convicted.

At the hearing of this appeal, the appellant appeared in person. Ms Yasinta Peter learned State Attorney appeared for the respondent.

The appellant opted to rely on the grounds of appeal filed in court, so he did not give and elaborations on the grounds of appeal and after the state Attorney's submission he did not make any reply.

In her submission, the learned State Attorney supported the appellant's conviction. On the first area of complaint, the learned State Attorney submitted that, since the court's record shows that when PW1 was making her testimony in court was 14yrs old, '*voire dire*' test was not mandatory. She further submitted that, PW1 was sworn in court and her testimony was consistent, hence has not occasioned any injustices. Her evidence is good evidence to be relied upon by the court. She referred this court to the case of **Jerald Daudi Vs Republic Criminal Appeal** No. 591/2015

(unreported.) On the second area of complaint, the learned State Attorney admitted that the caution statement was not read over in court. So it has to be expunged from the court's records. However, she submitted further that, even if the caution statement is expunged from the court's records the evidence of PW1, PW2, PW3 PW4 and PW5 is sufficient to prove the offence charged against the appellant.

On the third area of complaint, the leaned State Attorney submitted that the evidence of PW2, PW3 and PW4 is not hearsay evidence. PW2 testified on things she knew and heard direct from PW1. PW3 testified on things he heard himself from the appellant when he interrogated him. PW4 testified on things she saw herself and collaborated the evidence of PW1.

The State Attorney submitted further that, the appellant's defence that he was not in good terms with some of the prosecution's witnesses and that one lady took his cell phone is baseless because the appellant failed to state clearly as who among the prosecutions witness took his cellphone. She insisted that the evidence adduced by the prosecution proved the offence charged against the appellant beyond reasonable doubts.

On the fourth area of complaint the State Attorney submitted that, the provisions of sections 235 (1) and 312 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002 were complied with. The typed copy of the Judgment as well as the proceedings show that the appellant was convicted.

Before I dwell on the complaint on the trial magistrates' omission to conduct '*voire dire'* test before taking PW 1's testimony, let me start first by determining whether the provisions of s. 235(1) and 312 (2) of the Criminal Procedure Act, Cap. 20, were complied with. As regards the compliance to the above cited provisions of the Criminal Procedure Act Cap. 20, I subscribe to the submission of the learned State Attorney to the effect the Judgment as well as the proceedings shows clearly that the appellant was convicted of the offence charged and sentenced to 20yrs imprisonment.

As regards the trial court's omission to conduct a '*voire dire*' examination ahead of availing itself the evidence of PW1, I entirely agree with the state Attorney's submission According to the provisions of the evidence Act, Cap. 6 '*voire dire'* test is not mandatory. The amendment of section 127 of the evidence Act [Cap. 6] by section 26 of the Laws (miscellaneous Amendments)

(No. 2) Act, 2016 removed the legal requirement to conduct '*voire dire'* test prior to taking evidence of a child of tender age. Section 26 of the laws (Miscellaneous Amendment) (No. 2) Act 2016 reads as follows:

S.26: section 127 of the principal Act is amended by-

(a) deleting subsections (2) and (3) and substituting for them the following:

"(2) A child of tender age may give evidence without taking an oath or making affirmation but shall, before giving evidence promise to tell the truth to the court and not to tell any lies

(b) re-numbering subsection (4), (5), (6), (7) and (8) as subsections (3), (4), (5), (6) and 7 respectively.

With the above cited amendment of section 127 of the evidence Act, (Cap. 6) this court finds that the trial court was not obliged to conduct a *voire dire* test before taking PW1's testimony. Furthermore this court finds that PW1's testimony was consistent, and what she said before the court was pure truth. According to the court's records PW1 upon being cross examined by the appellant said that the appellant used to identify himself as a "mganga" a fact which was also stated by PW4. This shows that

PW1 spoke the truth and her testimony on what transpired when she was in the room with the appellant deserves to be believed. The evidence of PW2, PW3 and PW4 corroborated PW1's evidence in establishing that on 29/7/2017 at 6.30pm, PW1 was with the appellant in his room. PW4 testified that she saw PW1 and the appellant entering into the appellant's room and stayed there for half an hour, while PW2 who was PW1's guardian testified in court that on 21/7/2017 at 7.00pm PW1 was not at home. PW3 testified that, the appellant upon being arrested and interrogated admitted some of the things alleged by PW1 though he denied to have shaved PW1's pubic hair.

As correctly submitted by the state Attorney, the evidence of PW2, PW3 and PW4 is not hearsay evidence. These witnesses testified on things they saw and/or heard themselves.

I have noted that the trial magistrate made a proper analysis of all the evidence adduced in court, including the appellant's defence, hence his complaint that his defence was not considered is unfounded.

I agree with the submission made by the learned state Attorney that the evidence of PW1, PW2, PW3 and PW4 proves the offence charged against the appellant beyond reasonable doubts. Having found that the evidence of the above mentioned prosecution witnesses proves the offence against the appellant to the standard required by the law, I shall not spend any more time to determine the complaint on the procedure used in admitting the caution statement.

With due respect to the learned state Attorney, the case of **Gelard Daudi vs Republic,** criminal appeal No. 591 of 2015 which she cited in her submission is not relevant to the issues raised in this appeal.

I find no reason to disturb the decision of the trial court. This appeal against conviction and sentence is hereby dismissed.

Dated at Dar es Salaam this 11th day of June 2018.

B. K. PHILLIP

JUDGE

11/6/2018