IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 368 OF 2017

(an appeal from the judgment of Ilala District Court delivered by Hon. Hassan SRM on 23rd August, 2017 in Criminal Case No. 364 of 2016)

FURAHA SHABANI CHUGA ..... APPELLANT

VERSUS

THE REPUBLC ..... RESPONDENT

JUDGMENT

Date of Last Order: 06/06/2018

Date of Judgment: 03/07/2018

BANZI, J.:

On 24th November, 2016, the appellant was arraigned before the District Court of Ilala at Samora Avenue, facing the charge of unnatural offence contrary to section 154(1)(a) of the Penal Code [Cap.16 R.E. 2002]. At the end of trial, he was convicted and sentenced to life imprisonment. Aggrieved with both conviction and sentence, the appellant preferred this appeal.

Before this Court the appellant filed a Petition of Appeal with five grounds which may be crystallized into the following: -

1. *That, the trial Magistrate erred in receiving the evidence of PW1 without conducting voire dire test.*
2. *That, the trial Magistrate grossly erred in convicting the appellant basing on contradictory testimony of PW1.*
3. *That, the Prosecution did not prove its case beyond reasonable doubt.*

Briefly, the factual background of the case is that in 2016, the victim one Hadija Mariki (PW1), a young girl aged eight (8) was living at Kiwalani area with her grandmother before moved to her aunt one Halima Saidi Marwa (PW2) after the incident occurred. The appellant was also living at the same area. On unspecified date of November, 2016, the appellant asked PW1 to go and buy cigarette for him. Upon her return, the he took her to the valley, undressed her and inserted his penis into her anus. She felt pain but couldn't rise an alarm because the appellant covered her mouth. Thereafter, the appellant escaped and PW1 returned home. She could not tell her grandmother because the appellant threatened her not to tell anybody.

When PW2 visited her mother, she noticed that PW1 was not walking properly and upon inquiry, she revealed what befallen her.

She also told her that she knows the person who sodomized her by face. PW2 examined her and found some faeces from her buttocks. PW1 also revealed that the appellant used to sodomized her several times and gave her 1000/=. They reported the matter to the police and then she was sent to hospital. On 14th November 2016, doctor Godfrey Kamani (PW4) of Amana hospital examined PW1 and concluded that there was penetration on her anus. The PF3 was tendered and admitted as exhibit P1.

In his defence, the appellant denied to have committed the offence. He told the trial court that PW1's mother was his concubine. He also complained that, the complainants were his neighbour and there was land dispute between.

At the hearing of this appeal, the appellant appeared in person and fended for himself. The respondent Republic had the service of Mr. Bryson Ngidos, the learned State Attorney.

The appellant, being a layperson did not have much to say he merely requested the court to consider his grounds of appeal and set him free.

Arguing in support of the appeal, Mr. Ngidos conceded that, the trial Magistrate received the evidence of PW1 without examining whether the witness promised to tell the truth. He further submitted that, section 26 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 amends the Law of Evidence Act by deleting section 127(2) and (3) which had the requirement of *voire dire*. However, the new section put in place the requirement of examining the child on promise to tell the truth to court and not lies. Mr. Ngidos further contended that, looking at page 14 of the proceedings, the trial Magistrate failed to comply with this section before PW1 testified, hence her evidence shall be treated as unsworn which needs corroboration. According to him in the case at hand there was corroboration on the issue of penetration but there is none on identification of the appellant.

Turning to the issue that the appellant's conviction was based on contradictory evidence of PW1, Mr. Ngidos submitted that, there was contradictions on how the crime was detected. According to him, PW1 testified that her aunt came home and found her not walking

properly. On the other hand, PW2 testified that, PW1 went to her home and it was when she interrogated her.

In respect of the last ground, the learned State Attorney submitted that, the identification of the appellant was questionable as there was no any witness who explained how the appellant was identified by PW1. Mr. Ngidos further submitted that, PW3 being the investigator failed to give evidence on how the appellant was identified and how he was arrested in connection with the alleged offence.

In winding up his submission, Mr. Ngidos submitted that, it is well known that the burden of proof lies on the prosecution side. In the instant case, in the presence of contradictions and doubt on evidence of identification, the prosecutions failed to prove the case beyond reasonable doubt. Therefore, he prayed for this appeal to be allowed.

In a brief rejoinder, the appellant submitted that, his conviction was based on contradictory evidence. He argued that, PW1 said she was sexually assaulted seven times on different dates. If that was true, then how comes they failed to detect it. The appellant i

that, this case was framed up. He therefore prayed his release upon allowing his appeal.

Starting with the first ground, before section 127(2) of the Evidence Act [Cap.6 R.E. 2002] was amended in 2016, the trial courts were under obligation to conduct competency determination test to a child of tender age before receiving her evidence. This process was famously known as *voire dire* which involves two tests (a) the oaths test and (b) the intelligibility and truth test. For sworn evidence the child must pass oaths test and for unsworn evidence she had to pass the intelligibility and truth test.

However, in 2016 through section 26 of the Written Laws (Miscellaneous Amendments) (No.2) Act, section 127 of the Evidence Act was amended and two subsections (2) and (3) were deleting and substituted by the following sub section. I will reproduce the new subsection (2) for ease of reference.

> *"A child of tender age may give evidence without taking an oath or making an affirmation but* ***shall, before giving evidence, promise to tell the truth***

to the court and not to tell any lies". *(emphasis supplied)*

Following these amendments, it is apparent that evidence from a child taken without an oath or affirmation shall be proceeded by a promise to tell the truth and not any lie from that child.

In the case at hand, it is shown on record that on 05/07/2017 when the prosecution opened their case, the first witness to testify was the victim who by then was nine (9) years of age. PW1's evidence was taken without oath but the record does not show if the she promised to tell the truth and not to tell any lies as it is required by the law. One may wonder why unsworn evidence from a child is proceeded by a promise to tell the truth and not lies.

As a general rule an unsworn evidence requires corroboration for a conviction to stand. However, section 127(7) of the Evidence Act as amended is an exceptional to that general rule when it comes to sexual offences. The subsection empowers the court to convict the accused basing on independent evidence of the child or victim of sexual offence without any corroboration upon satisfaction basing on

reasons to be recorded in the proceedings that the child or victim is telling nothing but the truth.

The question now is that can court arrived at a conclusion that the child is telling nothing but the truth without such promise required by the law? In my considered view the answer is no. For that reason, it cannot be said that of PW1 was telling nothing but the truth. In that regard, her remains as unsworn evidence which requires corroboration.

Taking the evidence of PW1 as a whole, she claimed to have known the appellant by face and after he was arrested it was when she came to know his name. However, her evidence is silent on how she described the appellant to PW2 and others who came to realize it was the appellant who committed that offence and not someone else. Bad enough there was no evidence adduced in court to show that how the appellant was arrested and what factors initiated his arrest. Was it PW1 herself who arrested the appellant? Or was it PW2 and other neighbours or the police? But if it was PW2 or the police how and why did they know it was the appellant without the description given by PW1. All these questions leave a lot to be desired on

identification of the appellant if at all he was the one who committed the alleged offence.

I inclined to agree with the learned State Attorney that, there is neither concrete evidence nor corroboration to prove that it was the appellant who sodomized PW1. In the absence of sufficient evidence to establish the guilt of the appellant it cannot be said that the prosecution had proved their case beyond reasonable doubt.

In upshot, I find the appeal meritorious. Hence, I accordingly allow it, quash the conviction and set aside the sentence imposed on him. I order the release of the appellant forthwith from prison, unless otherwise lawfully held.

I.K. BANZI
JUDGE
03/07/2018

Delivered this 3nd day of July, 2018 in the presence of Bryson Ngidos the learned State Attorney for the respondent and the appellant in person.

I.K. BANZI
JUDGE
03/07/2018

Right of appeal explained.

I.K. BANZI
JUDGE
03/07/2018