IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 267 OF 2018

(Origin: Criminal Case No. 217 of 2017 District Court of Ilala at Samora)

DENIS S/O JORAM @

DENIS MASENGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 12/9/2019

Date of Judgment: 31/12/2019

S.M. Kulita, J.

The appellant, Denis s/o Joram @ Denis Masenga was charged in the District Court of Ilala at Samora for ***Unnatural Offence*** Contrary to section 154(a) and 2 of the Penal Code [Cap. 16 R.E 2002]. He was convicted and sentenced to 30 years imprisonment. Aggrieved by the said decision he filed this appeal basing on eight grounds of appeal in his petition of appeal and six grounds in the supplementary grounds of appeal of which can be consolidated into the following 6 grounds;

1. That the testimony of the victim (PW3) who is a child of tender age was taken without voire dire test and that age of the victim was not disclosed.

2. That the Medical Examination (Pw3) for the victim was un-procedurally received by the court and does not consist the DNA test as it was not conducted.
3. That most of the prosecution witnesses at the lower court were the victim's relatives.
4. That the court had never addressed him to have a case to answer after the closure of the prosecution case.
5. That the charge sheet was defective.
6. That the case was not proved beyond all reasonable doubts.

The brief background of the matter is that on the diverse dates of March, 2017 at Buguruni Mivinjeni area within Ilala District in the Region of Dar es Salaam the appellant herein did have Carnal knowledge with the victim one Abdallah Barua, a boy of 10 years old against the order of nature. In his testimony before the trial court, PW.3 (the victim) testified that the accused put lubricants on placed his penis and inserted it into his anus and that the accused/appellant had been doing so for more than ten times. The appellant was convicted on the basis of the evidence of PW.1, PW.2 and PW.3. In his defence the appellant denied to have committed the offence. He alleged to have not known PW.3 save for the fact that he met him at this court.

Before the court, the appellant who appeared in person (unrepresented) submitted that he was convicted by Ilala Ilala district Court at Samora on 2/7/2018 for Unnatural Offence and he was sentenced to serve imprisonment of 30 years. He was aggrieved with

both conviction and sentence hence appealed to this court. He further submitted that he did not commit the said offence. The appellant further prayed for his grounds of appeal filed in this court be considered as a part of his submissions.

The Respondent (Republic) through Ms. Monica Ndakidemu learned State Attorney submitted that the allegation that voire dire was not proper has no legal weight. She pointed that by 2017 when this case was heard the doctrine of voir dire was already removed from the law by the Amendment Act No. 2 of 2016 which requires just the Magistrate to satisfy himself/herself that the witness/child can speak the truth. She said that it can be seen to have been complied with by the court at page 15 as the proceedings.

As for the issue of the PF 3 and failure to conduct DNA the counsel submitted that it was properly admitted. It was tendered by the author (PW.2), the Doctor who had examined the victim and observed that she (victim) was affected with venereal deceases and HIV. The State Attorney submitted that in that situation there was no need of the DNA test as the said examination was enough to prove the case.

As for the ground of conviction relying on the testimonies of the victim's relatives the learned State Attorney submitted that the witnesses being relatives to the victim is not fatal so long as their evidence is credible. She cited the case of **RAMADHAN KIHIYO V. R (2006) TLR 324** to support her argument.

As for the ground of a case to answer not being addressed to the Accused/Appellant the counsel submitted that the said allegation by the appellant that he was not addressed as to whether he had a case or not

is untrue. She said that it is there in the records as it can be seen from page 22 of the typed proceedings. She added that the accused was also informed of his right after he was found to have a case to answer.

On his supplementary ground of appeal as per the age of the victim the learned state Attorney submitted that he is ten years old by the time he was testifying. She further addressed the court that even the Doctor who conducted the medical examination to the victim testified that he was a child. However, the Counsel added that even if the victim is above 10 years the penalty remains the same, that is 30 years imprisonment.

As for the issue of absence of any police officer who testified for prosecution the learned counsel also submitted that there is no law which provides a mandatory condition that the police officer must appear and testify before the court of law. On furtherance to that the State Attorney submitted that there was no dispute the accused was arrested by the police, but it is upon the prosecution to bring in court witnesses whom they find proper and necessary for proving their case.

In rejoinder, the appellant submitted that he had not been examined whether he is affected with HIV and reiterate that the charge is defective. He also stated that he was not interrogated by police. He further prays for his appeal to be allowed and the conviction and sentence be set aside.

Having received the parties' submissions I hereby start to analyse the issuesof Voire Dire. As the original case was heard in 2017 and by that time the procedure of voire dire examination had already been removed I find that ground has no merit. After the amendment of the

Criminal Procedure Act in 2006 the requirement was to the effect that the Court was to satisfy itself that the child who is a witness speaks the truth. This procedure had been fully complied with by the trial Magistrate at the lower court as it can be seen on page 15 of the typed proceedings whereby after examining the victim he commented the following words before the victim (PW3) had given his testimony;

"COURT: Upon those questions. I am satisfied that the witness is competent to tell this court the truth of what he says".

I therefore dismiss this ground of appeal for having no legal weight.

As for the issue of DNA test and PF 3 the appellant contended that the PF.3 was wrongly received and there was no DNA Test. It is the court record that Doctor (PW.2) testified before the court that he is the one who examined the victim and that is only he was required to do according to the law. Further as rightly stated by the Defence Counsel that under the circumstance of the case at hand there were no need of DNA test. I concur with her that what had been done was enough for the proof of whether the victim was carnally known and that fact was so proved. This ground as well lacks merit, hence dismissed.

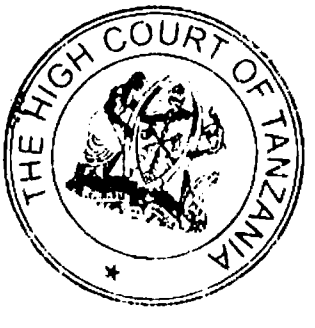
As for the ground that the prosecution witnesses were all relative to the victim, it is not fatal so long as they are credible witnesses, see the case of **MUSTAPHA RAMADHANI KIHIYO V.R. (2006) TLR 324**. This ground lack merit and I will dismiss the same.

The appellant also contended that he was not accorded with the court to have a case to answer or not. As rightly disputed by the Learned Counsel for the defence that it is not true, such allegation is afterthought. The record at the typed pages no. 22 and 23 of the typed

proceedings is clear that the appellant was accordingly informed by the trial court and he mentioned the two names of witnesses he had intended to call as his witnesses. The record also transpires that he would testify under oath. This ground has no merit and I accordingly dismiss it.

As for the issue of age of the victim the evidence is very clear that he was 10 years at the time is testifying. Even the Doctor (PW2) testified the same while testifying before the court that the victim is a child. But I find the issue of exactly age of the victim has nothing to do with this matter. The fact that his testimony was taken after the inquiry by the trial Magistrate, the age been mentioned in a charge sheet and the PF3 being 10 years old as well as per the testimonies of a PW2 (Doctor) and PW1 obvious the victim is a child. Upon the prosecution bringing witnesses who are proper and necessary for their case there was no need for them to bring a specific witness to prove age of the victim, and in fact it was unnecessary for the matter at hand. This ground also lacks merit, hence dismissed as well.

In upshot I find this appeal has no merit and therefore dismissed in its entirely.



S.M Kulita

JUDGE

31/12/2019