IN THE UNITED REPUBLIC OF TANZANIA

THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 34 OF 2020

(Originating from District Court of Kinondoni in Criminal Case No. 313 of 2018)

HALFANI RAJAB MOHAMED..APPELLANT

Versus

THE REPUBLIC..RESPONDENT

JUDGMENT

14th May, 2020 - 27th May, 2020

J. A. DE-MELLO J;

The Appellant, **Halfani Rajab Mohamed,** aged **fourty seven (47),** stood charged before the **District Court of Kinondoni** at **Dar Es Salaam** with one offence of **'Unnatural Offence'** contrary to **section 154 (1) (a) & (2)** of the **Penal Code Cap. 16 R.E 2002).** This offence he was charged with, was allegedly claimed to have been committed on **17th** day of **June, 2018** at **Kimara Stop Over area** within **Ubungo District** in **Dar Es Salaam Region** against one **Evan Paul Lusato** a five years old boy (5). At the end of full trial, the Court found the accused now the Appellant, guilty, convicted him and sentenced to life imprisonment.

He is aggrieved, and, now at this Court, for first Appeal against both the conviction and, sentence as follows;.

1. **That, the Trial Court erred in law and, fact by giving weight and considering expert opinion of PW3 which was given without legal or factual base.**
2. **That, the Trial Court erred in law and, fact disregarding the fact not calling the Medical practitioner who attended the victim for the first time at AAR Hospital smears doubt in the respondents case.**
3. **That, the Trial Court erred in law and, fact by considering unsworn evidence which had not been independently corroborated.**
4. **That, the Trial Court erred in law and, fact in disregarding the fact that, the appellants stayed in remand in police station for 30 days without explanation before being taken to court.**
5. **That, the Trial Court erred in law and, fact in not considering the Appellants submissions simply because the respondent did not file hers.**

Written submissions were preferred and which the Court granted with scheduling order and both in adherence. Regarding the first ground, Counsel is of a firm view that, the expert opinion that, the Court admitted forming part of reasons for conviction had no any added value and, weight. Unless and, until it was tendered by an expert, the same is unlawful. What **PW3** did was, only to examine the victim by merely looking at his anus, alleging it to be bruised which he then opined to look like one or two weeks old wound without giving professional details to form basis of his

opinion. In cross examination as indicated in **page 28** of the proceedings, he even admitted not necessary the bruise to be a result of carnal penetration but, there may be other causes. He also testified that, he used his finger to examine the boy's anus of which it penetrated easily, not considerate of the size of fingers with their capacity to penetrate easily or not, Counsel observed. Other than that, **PW3** corroborated what **PW1** testified and, as it is shown on **page 28** of the proceedings saying; **"the father claimed his boy was being unnaturally known. I asked the boy as he was able to communicate..."** This piece of evidence, laments, does not conform to the provisions of **section 47,** of the **Law of Evidence, Cap. 6**. In support of this ground the case of **Fauzia Jamal Mohamed** vs. **Oceanic Bay Hotel Limited, Civil Appeal No. 161** of **2018 (unreported)** to support the above argument. With reference to the second ground, **PW1** testimony that, she had to first take the **victim to AAR Hospital** as seen on **page 11** and **14** of the typed proceedings prior to reporting the matter to the police, it was appropriate to summon the medical officer who attended the victim, as was held in the case of **Azizi Abdallah** vs. **Republic [1991] T.L.R 71.** Addressing the **3rd ground of appeal**, he argued that, the only eye witness to the commission of the alleged offence was **PW2**, a child of tender age and whose evidence as set out under **section 127** of the **Evidence Act Cap. 6**, as amended under **section 27** of **Sexual Offences Special Provision Act (SOSPA), Act No. 4** of the **1998** gives the minimum conditions, even in absence of corroboration, however the case of **Joseph Mapunda & Hamis Selemani** vs. **Republic [2003] TLR 366** put a test for such

evidence to be independently worked upon. It was an **unsworn evidence** for sure which needed corroboration as was held in n a case of **Marco Gervas** vs. **Republic [2002], TLR, 27** that;

"the unsworn evidence of the complainant who was of a tender years needed corroboration"

The mere allegation that, **PW2** was in pains and, did not report that incident soon thereafter its commission, is by any standards, attracted corroboration. Combining the **4th** and, **5th grounds**, Counsel submits that the Appellant was denied 'Right to Access of Fair Justice' contrary to **section 32 (3)** of the **Criminal Procedure Act, Cap. 20,** since the accused was arrested on **17th June, 2018,** and, arraigned into Court **17th July 2018** in as far evidence of **PW1, PW4,** and **PW5** but not documented from the charge. The **one month delay** he believes, attributed to building up a non existing, fabricated case. He is of a further view that, may be the reason why the bias by the Trial Magistrate as shown in **page 2** of his judgment, disregarding the Appellant's evidence in support of his defence. With all these, Counsel prayed for the Appeal to be allowed, conviction and, sentence set aside, the Appellant be put at liberty.

Chronologically so, the Respondent submitted commencing with the **1st** ground, alleging that **PW3** is a qualified Medical doctor, one who examined the victim and, filled the **PF3**, the same who appeared and, testified on what he actually observed. At **page 3** of the proceedings he explained how he examined the victim's anus to find a lose anus with bruises which

suggests penetration. His duty, other than the examination of the body is to listen attentively to a Patient's medical history, which **PW3** is an independent witness and experienced medical doctor over fifteen (15) years of working experience, did exacly that, with no indication whatsoever for him to lie before the Court. On the **2nd ground**, true **PW1** went to a nearest **AAR Hospital** where she was guided and, advised to report the matter to the **Police Station** first where having accomplished the process there she was advised to attend any **Governmental Hospital.** This is inline with the common practice to receive treatments in **Government Hospital** when it comes to criminal related cases. That, a doctor from **AAR Hospital** and one who never examined was not key rather important than **PW3.** Submitting on the **3rd ground** the respondent strongly disputed it stating that, **PW2** testimony cannot be treated as unsworn testimony because it was taken in compliance with **section 127 (2)** of the **Evidence Act, Cap. 6** as amended by **Act No. 3 of 2016** which require a child of tender age to promise to tell the truth as indicated at **page 22** of the proceedings. The case of **Suleman Mkumba** vs. **The Republic [2006] T.L.R 379** which held;

"True evidence of a rape comes from the victim..."

Thus, in the offences like rape and the like, it is the victim who is the best, with or without corroborated, which **PWI** and, **PW3** did. Joining the **4th** and **5th** grounds, it is her position that, not true the Appellant was denied access to justice for being kept in custody as alleged until dragged to Court. Under **section 64 (2)** of the **Criminal Procedure Act Cap. 20,** he had the right to apply for the Police Bail which he did not exercise

rendering it an afterthought, not having been brought to the attention of the Court, anywhere in the proceeding. Record has it that, the caution statement was recorded the very day the accused was arrested and, arraigned in Court after **thirty (30)** days which was a normal procedure based on pending and accomplishing investigation. No rejoinder was filed and, which then brings the matter rest for the Court to determine.

Commencing with the **1st ground** regarding the expert opinion, I find it worth to refer to **section 47** of the **Evidence Act, Cap. 6**.

Which provides that;

> **"When a Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions, the opinion, upon that point of persons (generally called experts) possessing special knowledge, skill, experience or training in such foreign law, science or art or question as to identity of handwriting or finger or other impressions are relevant facts."**

This is what it always happen in our Courts, more so in matters of criminal nature like the one at hand. However, such is to assist or not, in the event such science or faculty can aid in determining the matter at hand before the Court.

The position however in Tanzania, is that;

"The Court is not bound to accept medical testimony, if there is good reasons for not doing so, at the end of the day, that is, it remains the duty of the trial Court to make the findings and in doing so, it is incumbent upon it to look at, and assess, the totality of the evidence before it, including that o f a medical expert".

This was re stated in the case of **Frank Onesmo** vs. **the Republic, Criminal Appeal No. 147 of 2019, High Court** at **Mwanza (unreported)**, **Agnes Doris Lindu** vs.. **Republic [1980] T.L.R** and **Nyinge Siwato** vs. **R, [1959] EA 974.**

Much as expert evidence is not binding on Court, I feel obliged and considering such matter , to consider his opinion in assisting the Court in the right position. The prosecution and the ones with the right of choice of witnesses, found him crucial and summoned **PW3 Dr. Ngendo Fanuel Robby** who in-turn gave evidence as to what the medical examination revealed. That it is even a practice for medical practitioners to take conversation with their patients and, or in aid of guardians in case of any limitation, in view of analyzing with a view of concluding their findings. Exhibit **PE1** the **PF3,** was properly tendered and admitted by **PW3** himself a qualified Medical Practitioner, read over to the Appellant who was given his right to cross examine. I find nothing to fault it as I dismiss the 1st ground not to have merit. Regarding the second ground, the Appellant believes that, failure or neglect to summon the first doctor approached by the family at **AAR Hospital** compromised his case and, citing the case of **Azizi Abdallah** vs. **Republic [1991] TLR 71 (CAT),** praying the Court to

make adverse inference against the prosecution, which I for one differ. It is a cardinal principle of law and, which **section 127 (1)** of the **Evidence Act, Cap 6** provides as follows;**(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.**

The **AAR doctor** never attended the victim having established a Police Report is wanting and, advised for one. The Police having issued **PF3** in-turn recommended for a **Government hospital.** It is **PW3** who the Prosecution found crucial and, material key witness to summon, the one filled out the **PF3 and** quite competent witness as opposed to **AAR doctor** who never attended **PW2.** Regarding the third ground, this Court observes that, through the **Written Laws (Miscellaneous Amendments) No. 2 Act, 2016 (Act No. 4 of 2016)** which came into force on **8/7/2016,** that, **'Voire Dire'** test in its sense is no longer applicable but only to on satisfaction of knowledge of what the truth is. It is in the wake of the **2016** amendment through **Act No. 4** of **2016, subsections (2)** and **(3)** of **section 127** of the **Evidence Act** were deleted and substituted with subsection (2) in the following manner:-

In **section 26** of the said act it was stipulated that, **section 127** the Principal Act is amended by -

(1) 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 an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies. "

To my understanding, the above provision as amended, provides for two conditions, one, to allow the child of a tender age to give evidence without oath or affirmation. Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the Court and not to tell lies, simple. In emphasizing this position the Court in the case of **Msiba Leonard Mchere Kumwaga** vs. **Republic, Criminal Appeal No. 550** of **2015 (unreported)** observed as follows:

> **"...Before dealing with the matter before us, we have deemed it crucial to paint out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No.4 of 2016 (Amendment Act).**
>
> **Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell/ the truth and not tell/lies.**

The case of **Selemani Makumba** vs. **Republic, (2000) TLR 379** is for victim as the best witness. At **page 22** of the proceeding **PW2** the victim did promise to tell the truth and, evidence of which was corroborated by **PW1** and, **PW3,** to make his evidence is credible and, cogent. Also I will similarly respond to **grounds 4 and 5** jointly and, reading from the lower

Court records, the issue of arrest until Trial was never raised for attention of this Court to determine. In the case of **Hassan Bundala@Swaga** vs. **Republic, Criminal Appeal No. 386 of 2015,** held that;

"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided,' not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal".

The above was also affirmed in the case of **Godfrey Wilson** vs. **The Republic, Criminal Appeal No. 168** of **2018, Court of Appeal of Tanzania at Bukoba.** It is an afterthought and misplaced. Not even the submission on the **5th ground, page 2** of the Trial Court's judgment which had the following;

> **"...I thank him for his effort and useful submission, however in the course of writing my judgment, I will not referring to it unless there is good and compelling reason to do so".**

It is even vivid that, the defence case was closed after the Appellant finished adducing his defence and, order of filling the final written submissions scheduled. This then bring us to the finding that, **section 210 (3)** of the **Evidence Act, Cap. 6** was adhered to in the manner of recording evidence, to allow itself to entertain additional evidence. Even if it was so considered it would not have any effect to the given judgment.

In conclusion, I am without doubt, fully satisfied that, this Appeal has no merits, the unnatural offence was adequately proved within the standards set by law in Criminal matters, **"proof beyond reasonable doubt"**.

I therefore dismiss the Appeal in its entirety.

It is so ordered.

J. A. DE- MELLO

JUDGE

27th May, 2020