IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 113 OF 2019

(Arising from Criminal Case No.339 of 2018, the District Court of Kahama, Kyaruzi, SRM)

MAJALIWA CHRIZANT..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

6/7&14/8/2020

G. J. Mdemu, J.;

Majaliwa Chrizant, referred to as the Appellant in this appeal, was charged in the District Court of Kahama for unnatural offence contrary to the provisions of section 154 (1) (a) and (2) of the Penal Code, Cap. 16. It is in the particulars of offence that, on the 18th of October 2018 at Kakola area within the District of Kahama, the Appellant had the carnal knowledge of "A", (PW1), a boy of ten (10) years old against the order of nature.

On the fateful day, PW2, one Joyce Charles, a mother to PW1, left home for a while leaving behind PW1 at home. Among the tenants in a house rented by PW2 was the Appellant. The Appellant then called PW1 in his room, asked him to undress himself and thereafter had carnal knowledge of him against the order of nature on a bed. In a short while, PW2 returned and upon inquiry of the where about of PW1, the latter responded while in the room of the Appellant. PW1 then got out of the room while trying to dress himself properly.

When asked as to what was up in the room of the Appellant, PW1 replied that, he was assisting the Appellant to clean some utensils, but when PW2 pressed so much, PW1 stated that the Appellant carnally knew him against the order of nature.

PW2, on that account, inspected the victim and noted some signs of sperms. She then reported the matter to Village Executive Officer (VEO). The Appellant was arrested and both with PW1 were referred to police station where, PW1 was issued with a PF3 for medical examination. PW3 one Silas Zabron Kayanda examined PW1 the same day at about 22:00 hours in which, according to the filled PF3 tendered as exhibit P1, PW1 had anal penetration smeared with sperms.

The Appellant, on that note, was thus charged, and though denied, to conclusion of his trial, he was accordingly found guilty, and upon conviction, a life sentence was met to him. This was on 28th of August 2018. Aggrieved by that decision, the Appellant preferred the instant appeal on six grounds which may be summarized in the following: **One**, the prosecution case was not proved. **Two**, *voire dire* was not conducted to PW1; **three**, the Appellant was denied with the right to call his wife in evidence and **Four**, that neighbors were not called in evidence to corroborate the prosecution case.

The appeal of the Appellant was heard on 6th of July 2020. On that date, appearance of the Appellant was dispensed with following prevalent of COVID19 pandemic. He also, by his letter dated 20th of April, 2020, blessed hearing of the appeal to proceed in his absence. The Respondent Republic on that date had the service of Mr. Nestory Mwenda, learned State Attorney who resisted the appeal. In the 6 filed grounds of appeal, the learned State Attorney

argued on two points only. One proof of the prosecution case and two was with regard to the requirement to conduct *voire dire* examination.

As to proof of the prosecution case, Mr. Mwenda was of the view that, the evidence on record proved the prosecution case beyond reasonable doubt. He submitted on the evidence of PW1 (the victim) who narrated the whole story and that, the Appellant carnally knew him against the order of nature five times. He also emphasized that, the evidence of PW1 alone met the tests in the case of **Seleman Makumba vs. R (2006) TLR 379** requiring best evidence in sexual offences be that of the victim. He added on this that, the Appellant failed to cross examine PW1 on his testimony thus accepted the truth.

Still on proof of the prosecution case, Mr. Mwenda also considered the evidence of PW2 being corroborative evidence in that, PW1 was in the room of the Appellant and when she inquired, was told by PW1 what the Appellant did to him. He added that, PW2 also examined PW1 and detected wetness in his anal part. With this, together with the evidence of PW3, the Doctor, the learned State Attorney thought the evidence is watertight to sustain conviction.

With regard to the age of the victim and the requirement to have *voire dire* test, Mr. Mwenda was no doubt that, the age of PW1 was proved to be 10 years by the evidence of his mother PW2 and PW1 himself. In this, he cited the case of **Simba Nyangula v. R. Criminal Appeal No.144 of 2008** (unreported). As to *voire dire* test he was of the view that, the court inquired to PW1 some basic questions and was satisfied that PW1 knew the nature of oath. He was therefore of the view by citing the case of **Elia John v Republic, Criminal Appeal No. 306 of 2016** and **Issa Salum Nambuka v R, Criminal Appeal No.**

272 of 2018 (both unreported) that, procedure to ascertain and determine the ability of PW1 to tell the truth got complied before he testified.

Mr. Mwenda finally commented on the charge that, as PW1 was of the age of 10 years, the Appellant ought to have been charged under the provisions of section 154 (1) (a) and not 154 (1) (a) and (2) of the Penal Code, Cap.16. He also thought by referring to the case of **Jamal Ally Salum v. R, Criminal Appeal No. 52 of 2017** (unreported) that, the defect is curable under section 388 of the Criminal Procedure Act, Cap. 20. Under the premises, he submitted that the Appellant was to be sentenced for a custodial term of thirty (30) years and not life sentence as met by the trial court.

I have heard the position of the Respondent Republic. I have also duly considered all grounds of appeal together with the entire evidence on record. I will resolve the grounds of appeal of the Appellant by going through the four points I raised above. I think, I should out rightly point out that, this being a sexual offence, it is trite law that, the best evidence must be from the victim of sexual offence, in this case is PW1.See the case of **Seleman Makumba vs R** (supra).

Now going to the grounds of appeal, I should begin with the question of want of *voire dire test.* As from 2016, through Written Laws (Miscellaneous Amendment) Act, No. 4 of 2016, that amended the provisions of section 127 of the Evidence Act, Cap.6, *voire dire* test is no longer a legal requirement. A witness of tender age through that amendment is required to promise to tell the truth and not lies. The amendment reads:

"26. Section 127 of the principal Act is amended by-

(a) deleting subsection (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 any lies."*

The question now is whether, the said requirement got complied. From the plain meaning of the provisions of subsection (2) of section 127 of the Evidence Act, a child of tender age may give evidence after taking oath or affirmation or without oath or affirmation. See **Issa Salum Nambuka v R** (supra). In this latter requirement, the question of promising to tell the truth and not lies introduced by the amendment have to be complied. As was to the requirement of *voire dire* test, the methodology in arriving as to whether the child of tender age should give evidence on oath or affirmation or promise to tell the truth and not to tell lies, has all along being left to the trial court. In the case of **Geoffrey Wilson v R. Criminal Appeal No.168 0f 2018** (unreported) the Court of Appeal observed the following regarding methodology:

> *"We think the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case as follows:*
>
> 1. *The age of the child*
> 2. *The religion which the child professes and whether he/she understands the nature of oath.*

3. *Whether or not the child promises to tell the truth and not to tell lies."*

Having that in mind, the learned trial magistrate in the instant appeal before receiving the evidence of PW1, deployed the following methodology as seen at page 13 of the proceedings:

> *"**PP**: The witness, the victim is of 10 years, his name is James Zacharia*
>
> ***Court**:That being the situation, this court has to assess the witness so as to find whether this child is competent to testify.*
>
> ***Question**: what is your age?*
>
> ***Answer the witness**: I am ten years old.*
>
> ***Question**: what is your religion.*
>
> ***Answer**: I am a Christian, Sabbath.*
>
> ***Question**: Do you know what an oath is?*
>
> ***Answer**: Yes.*
>
> ***Question:** What an oath mean?*
>
> ***Answer**: I know; it means you have to state nothing but the truth on what you swear.*
>
> ***Question**: what the court should expect from you upon making an oath?*

***Answer**: it means I am going to state the truth only. I cannot tell lies. I am a Christian. Once I tell lies it is a sin. You cannot be forgiven until you ask forgiveness from God.*

E.N.Kyaruzi- SRM

12/04/2019

***Court:** this court is satisfied that this child understands the nature and obligations of an oath. This child/ witness is allowed to make a sworn statement.*

E.N.Kyaruzi- SRM

12/04/2019"

Given the above methodology, questions put to the witness of tender age, that is PW1, intended to explore if at all PW1 understands the meaning of oath. As stated in the case of **Geoffrey Wilson v R.**(supra), nature of questions put to the witness by the learned trial magistrate archived the requirement. In that stance, the complaint of the Appellant regarding the need to have *voire dire* test is unfounded and is accordingly dismissed.

On proof of the prosecution case, as alluded above, this being a sexual offence, the best evidence is that of PW1, the victim of sexual offence. The question is therefore how that evidence is trusted. One of the criteria is what has been discussed in the foregoing ground that, the evidence of PW1 was taken in compliance with the provisions of section 127 (2) of the Evidence Act as amended by Act No.4 of 2016. PW1 understood the nature of oath thus gave a sworn evidence.

Second, is the evidence itself. As submitted by the learned state Attorney, PW1 was called by the Appellant in his room and thereat was ordered to undress himself thereby the Appellant knew him against the order of nature. This evidence has not been contradicted by the Appellant more so because the Appellant, for reasons not apparent on record, did not cross examine PW1 on this important aspect of the case. In this, as observed by the learned trial magistrate, there is no reason not to trust the testimony of PW1. In my considered view, this is the best evidence of the victim of sexual offence thus met the test stated in the case of **Seleman Makumba vs R** (supra).

As observed above, the evidence of PW1 has not been shaken and has further been corroborated by the evidence of PW2, the mother of the victim whose evidence is to the effect that, she saw PW1 coming out of the room of the Appellant and that, the Appellant was also present. Importantly is the fact that, PW1 named the Appellant to his mother PW2 to be the one who ravished him. This was also cemented by the act of PW2 noting some fluid like sperms in the anal part of PW1 which PW3, who examined, him confirmed to be sperms. As submitted by the learned State Attorney, this evidence of the prosecution is watertight and has proved the case beyond reasonable doubt. On that account, complaint of the Appellant that the prosecution case was not proved is devoid of any merit.

In another attempt to exonerate himself from liability, the Appellant complained in his grounds of appeal that neighbours or co tenants were not called in evidence. I agree with him that, throughout the prosecution case, no any co tenant got deployed in evidence. It is in the evidence of PW2 where the land lady/lord was mentioned. However, this land lady was informed by PW2

that, the Appellant is the one who ravished PW1. Hers therefore would have been hearsay even when deployed in evidence. As no any neighbor or co tenant witnessed, calling them in evidence by virtue of being neighbors, will not have any value addition to either the prosecution or the defence case. Notwithstanding, as said, the basis of conviction was on the evidence of PW1, among others, which the court trusted. This ground of complaint is equally dismissed.

In the last listed point, is the complaint that his wife was not called in evidence despite his demand. I have perused record of the trial court. However, I have seen nothing regarding the demand of the Appellant to have his wife in evidence but the court refuted. This therefore is an afterthought and should not detain me.

The trial court also considered the evidence of the Appellant on the raised grudges. In this, the trial magistrate made the following observation at page 4 of the judgment:

> *"It appears that the accused person is not stating the truth because he had an opportunity of cross examining PW2, he did not ask questions suggesting that there were grudges between the two. He did not even cross examine the victim something suggesting that he had admitted all what was said by the victim."*

There is substance in the above observation of the learned trial magistrate. It is said so because it is trite law that, failure to cross examine a witness on important matters normally suggests acceptance to the extent of

what was not cross examined from the witness. (See **Damian Ruhele v R, Criminal Appeal No.501 of 2007** (unreported)

Regarding the sentence, as PW1 was of 10 years old, the provisions of section 154 (1) (a) of the Penal Code provides that:

> *(1) Any person who–*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b) has carnal knowledge of an animal; or*
>
> *(c) permits a male person to have carnal knowledge of him or her against the order of nature,*
>
> *commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment.*

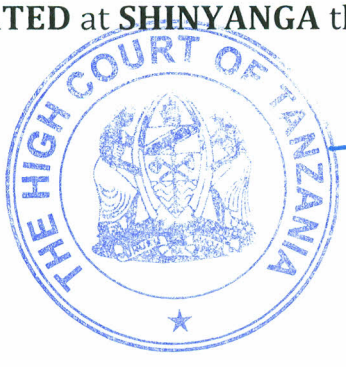
From the section as reproduced above, age of the victim is very material and elementary when it comes to the issue of considering the appropriate sentence to be meted to the culprit of the offence. this, therefore, calls for the need to ascertain the age of the victim before the charge under this provisions is leveled against the perpetrator (see **Elia John v Republic** (supra). In the instant appeal, life sentence was to be met where PW1 was proved to be under the age of 10 years. Meaning that, he should have been of the age of 9 years and

below. It appears the learned trial magistrate did not go extra mile to analyze this. As submitted by the learned State Attorney, the proper sentence in terms of the law is thirty years' prison term.

That said, this appeal is hereby dismissed. As to sentence, the sentence of life imprisonment met to the Appellant is hereby quashed and substituted in lieu thereof the sentence of thirty (30) years which starts to run from when he was sentenced by the trial court. It is so ordered.

Gerson J. Mdemu
JUDGE
14/8/2020

DATED at **SHINYANGA** this 14th day of August, 2020.



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