IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

MUSOMA

CRIMINAL APPEAL No. 77 OF 2020

(Originating from Criminal Case No 146 of 2019 of the District Court of Serengeti at Mugumu)

GEOFREY S/O ANTHONY @ SENGERI

@NYANCHAGE @ ANDREA.....APPELLANT

Versus

THE REPUBLIC .....RESPONDENT

JUDGMENT

10th August & 1st October, 2020

Kahyoza, J.

The trial court convicted **Geofrey Anthony @ Sengeri,** (the appellant) with the unnatural offence. The prosecution alleged that **Geofrey Anthony @ Sengeri,** had carnal knowledge of a boy named **YY** against the order of nature. The prosecution alleged further that **YY**, the victim, was a girl 9 years old and a pupil in standard three at one primary school.

The appellant denied the charge. He contended in his defence that the doctor did not identify a person who committed the offence and that the village executive office who testified against him had his interest to serve.

The trial court convicted the appellant and sentenced him to serve a life imprisonment.

Aggrieved with both conviction and sentence, the appellant petitioned to this Court. The appellant contends that the trial court erred to rely on the evidence of Pw2 and Pw3 and by disregarding his defence, that the prosecution did not summon key witness to prove the case, that the trial court denied him an opportunity to call witnesses and that there was no justification for imposing a life sentence.

The appellant's five grounds of appeal raised the following issues-

1. Did the trial court err to convict the appellant or did the prosecution adduce enough evidence to establish the appellant's guilt?
2. Did the trial court consider the appellant's defence?
3. Was the appellant given a right to be heard?
4. Was the sentence of life imprisonment appropriate?

A brief background is that: The police arraigned **Geofrey Anthony @ Sengeri,** the appellant, before the District Court of Serengeti at Mugumu with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, [Cap 16 R.E. 2019] (the Penal Code). The prosecution evidence was that **YY** a standard three pupil at Nyamatoke primary school met the appellant on the 13th day of October, 2019 at 17.00, while coming from a shop. The victim knew the appellant very well as they lived in the same village. **YY** mentioned the appellant's name as Nyanchage or Geofrey. The appellant hold **YY**'s hand pushed her in the push, took out a knife and

threated **YY**. The appellant undressed her skirt and underwear, laid her down and had carnal knowledge of her against the order of nature. The victim tendered in court a blue underwear and skirt she wore on that day as exh.P.E. 1.

The victim went home and narrated the incident to Pw2, the mother of the victim. Pw2 examined her and found faeces on the underwear and skirt. Pw2 took the victim to the village executive officer (VEO) and informed him what befell her daughter. Pw2, and Emanuel Musoma Wambura (**Pw3)**, took Pw1, the victim, to a dispensary that very day. Idd Khamis Mohamed (Pw4) a clinical officer examined her and confirmed she had had carnal knowledge against the order of nature. Idd Khamis Mohamed **(Pw4**) examined the victim and found that the anus had expanded and had faeces. He treated the victim as she felt pains.

On the following day, that is on the 14th day of October, 2019 Pw2 and the victim reported to police. The police gave them a PF. 3. They took a P.F 3 to Idd Khamis Mohamed **(Pw4**). Idd Khamis Mohamed **(Pw4**) filled the PF.3 and which he tendered as exhibit.

The appellant gave his defence on oath denying to have committed the offence. He stated that the case was fabricated against him. He testified that he was not in good terms with Emanuel Musoma Wambura (**Pw3**), the VEO.

After considering the evidence by both sides, the district court believed the prosecution's case, found the appellant guilty, convicted and sentenced him to life imprisonment for unnatural offence.

The appeal proceeded orally. The appellant had no representation and Mr. Temba, the State Attorney represented the respondent, the Republic. The appellant relied on his ground of appeal. He did not make submission. On the other hand, Mr. Temba, the state attorney, opposed the appeal. I will refer to his submission while considering the grounds of appeal.

This is a first appellate Court, apart from considering the grounds of appeal, I have a duty to re-evaluate the whole evidence on record.

Did the prosecution adduce enough evidence to establish the appellant's guilt?

The appellant complained in the first, third, part of fourth and part of fifth grounds of appeal that there was no evidence to prove the prosecution case beyond all reasonable doubt.

Mr. Temba the respondent's state attorney replied that the prosecution summoned a key witness Pw1, the victim who gave a direct and reliable evidence. He added that the prosecution witnesses, Pw2 and Emanuel Musoma Wambura, **Pw3** did not give hearsay evidence. He averred the offence was committed during the day and the victim knew the appellant very well before the material day.

Mr. Temba, the respondent's state attorney submitted that in sexual offences the best evidence comes from the victim. He referred this Court to the case of **Selemani Mkumba v. R**. [2006] T.L.R. 23. He prayed to this Court to dismiss the first, third, part of fourth and part of fifth grounds of appeal.

In his rejoinder, the appellant contended that on the material

time he was not at the scene of the crime. He was away praying football with his teammates.

I reviewed that evidence as show above the victim knew the appellant before the fateful date. They stayed in the same village. Pw1, the victim was a girl, 9 years old and a standard three pupil. She was capable of identifying a person who ill-treated her. She gave the following evidence-

> *"... I bought it then turn[ed] back home. On my way back home I met with Nyanchage or Geofrey whom we are living with ~~him~~ at the same village. He took me by holding my hand and brings me to the bush. He did take off the knife and told me to keep quiet and he warned me if I could cry he would kill me. He put off my skirt and pant. After that he ~~was~~ laid me and started to carnal knowledge me against the order of nature. I felt pain. Faeces moved out. After he finished he rush[ed] away left me in painful (sic).*

The above piece of evidence is not the evidence of a person who does not know what is talking about. The victim was a competent and reliable witness. I examined the record and found that the victim promised to tell truth as required by section 127 of the **Evidence Act**, [Cap. 6 R.E. 2019]. I have no reason to discredit her evidence.

As submitted by the respondent, the Court of Appeal held in of **Selemani Mkumba v. R**. in sexual offences cases, the best evidence comes from the victim. The victim's evidence is watertight, the culprit who is said d to be the appellant, committed the offence at 17.00hrs. It was during the daytime. The victim knew the appellant before the incident. She could not have mistaken him for any other person. The victim did not shake on being cross-examined by appellant. She

described the appellant's attire on that day that it was a red jacket and that he had a knife. The victims evidence was in itself enough to warrant the appellant's conviction.

Apart from the victim's evidence. I find the evidence of Pw2, the victim's mother and Emanuel Musoma Wambura, **Pw3**, the village executive officer credible. These two witnesses examined the victim immediately after she was sodomized. They found faeces on the skirt and underwear. The appellant sought to discredit Emanuel Musoma Wambura, **Pw3**, on the ground that they had bad blood in his defence. Unfortunately, the appellant did not cross-examine Emanuel Musoma Wambura, **Pw3**, to establish their misunderstanding.

It is settled that a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See **Daniel Ruhere v. Republic** Criminal Appeal No. 501/2007, **Nyerere Nyauge v. R** Criminal Appeal No. 67/2010 and **George Maili Kemboge v. R** Criminal Appeal No. 327/2013, a few to mention. I treat his defence as an afterthought. I cannot buy it. Even if, I hold that Emanuel Musoma Wambura, **Pw3**, is not a reliable witness as the appellant advanced, I find no reason to discredit the victim's mother' evidence.

There is yet another strong piece of evidence, which confirmed that the victim was carnally known against the order of nature. Idd Khamis Mohamed **(Pw4)** a clinical officer examined the victim and found that her anus expanded and had faeces. He confirmed that she

had had carnal knowledge against the order of nature. He tendered a PF.3 as exhibit P.2. Idd Khamis Mohamed **(Pw4**) read and explained the contents of exhibit P.2 to the appellant.

The appellant denied the allegation. He told the court during cross-examination that he was away playing football. The prosecution asked him why did he not summon his any of teammates he stated that it was not important to call them as witness.

Like the trial court, I find that the prosecution did establish the appellant's guilt beyond all reasonable doubt. The **prosecution did adduce enough evidence to establish the appellant's guilt**. I uphold the conviction.

Did the trial court consider the appellant's defence?

The appellant contended that the trial court did not consider his defence. A glance at the judgment of the trial court revealed that trial magistrate did not consider the defence evidence. It is settled that the first appellate court can step into the shoes of the trial court when justice demands and rectify the error. See **Ismail Shaban v. R**. Criminal Appeal No. 344/2013 (CAT unreported) where the Court was confronted with the issues whether it was proper for the High to step into the shoes of the trial court which had not considered the defence and consider the defence at appeal stage. It held that it was proper. It stated-

> *In **Desiderio Kawunyo vs Reginam** [1953] 20 EACA281 the trial High Court of Uganda did not write the judgment in compliance with S. 169 (1) of the Ugandan Criminal Procedure code, Cap. 24 which is pari materia with our 5.312 (1) of the CPA. On appeal to the then Court of Appeal for Eastern African*

the Court said thus:-

"...the defect in the judgment does not necessarily invalidate the conviction. The question in this case is whether we should order retrial or whether there is sufficient material on the record to enable us to consider the appeal on its merits and we have come to the conclusion that there is.....

*In the light of the holding in **Desiderio's** case **(supra)** to which we subscribed fully, what the High Court has done is within its powers. This is because one of the functions of a higher court on appeal is to re-appraise the entire evidence on record with a view to seeing whether justice prevailed.*

As shown above, I have subjected the entire evidence of the prosecution and the defence and found that the appellant's defence did not shake the prosecution's evidence. In the circumstance, I uphold the appellant's ground of appeal that the trial court did not consider his defence. However, I find the same to have no impact. I unable to vitiate the conviction.

Was the appellant given a right to be heard?

The appellant did not substantiate his ground of appeal. Mr.Temba requested the ground of appeal to be dismissed. He contended that all witnesses of the prosecution testified in the presence of the appellant. The court gave the appellant a right to cross-examine them. The appellant did cross-examine some of them. He added that the court address the appellant as per section 231 of the **Criminal Procedure Act**, [Cap.20 R.E. 2019] (the **CPA).**

I totally agree with Mr. Temba that the appellant's complaint that the court did not give him a fair trial is baseless. He was present in

court at all times the prosecution witnesses testified. He cross-examined them. Not only that but also the record shows that the court addressed the appellant in terms of section 231 of the **CPA**, he replied that he will give his defence on oath. The appellant never indicated that he had witnesses to call. He cannot be heard to complain at this stage that the trial court did not give him an opportunity to call witness. Further still, the prosecutor cross-examined the appellant regarding witness and he replied that –

> *"I was one of the players- eleven players. Peter was the goal keeper. Wasn't important to call witnesses."*

It is clear that the appellant had no witness to call. The court did not deny him an opportunity to call witnesses.

I find that the appellant was convicted on the strength of the prosecution's evidence. I uphold the conviction.

Was the sentence of life imprisonment appropriate?

The appellant contended that the trial court erred to impose a life sentence basing on the evidence on record. Pw.1, the victim, was 9 years old. She was a standard three, pupil. Pw2, the victim's mother testified that the victim was born in January, 2010. The offence was committed on the 13th October, 2019.

There was no dispute as to the victim's age. Even if, there was such a dispute, I find there is evidence enough to prove that the victim was 9 years old, the evidence of Pw2. Pw2 is the victim's mother. **It settled that the evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's**

age. Edson Simon Mwombeki v. Republic, Criminal Appeal No. 94 of 2016 (unreported).

I have found that the prosecution proved beyond all reasonable doubt that the appellant had carnal knowledge of girl of nine years old against the order of nature. The sentence for such an offence is life imprisonment. Section 154(2) stipulates that-

> **"154.-(1) N/A**
> (2) *Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."*

In the upshot, I dismiss the appeal in its entirety and uphold the conviction and the life imprisonment sentence imposed by the trial court.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
1/10/2020

Court: Judgment delivered in the presence of the appellant through video link and in the presence of Mr. Temba S/A. B/C Catherine Tenga present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza,
JUDGE
1/10/2020