IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

DC CRIMINAL APPEAL NO. 67 OF 2021

(C/f Criminal Case No. 343 of 2018 in the District Court of Moshi)

EMMANUEL SAM @ MDIO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

13/9/2021 & 24/11/2021

MWENEMPAZI, J

The appellant Emmanuel Sam@ Mdio was charged in the District Court of Moshi with the offence of unnatural offence contrary to section 154(1) of the Penal Code, CAP 16 R. E 2002 read together with section 185 if the Law of the child Act, 2009. He denied the charge and after hearing or full trial, the appellant was found guilty, convicted and sentenced to life imprisonment. The appellant is dissatisfied with decision of the trial court and has appealed against it raising eight grounds of appeal. The appellant has not pursued all the grounds of appeal instead he has reduced them into three grounds of appeal. I will therefore deal with them as argued in the submission.

At the hearing the appellant was unrepresented and the Respondent Republic was being represented by Mr. Kassim Nassir, State Attorney. The

appellant prayed to be granted leave to argue the appeal by way of written submission; leave was granted and scheduling order was given.

The appellant in his written submission is challenging the decision of the District Court (trial court) in three fronts. **One**, that taking of evidence by PW2 a child of ten (10) years was against the provision of Section 127(2) of the Tanzania Evidence Act [Cap 6 R. E 2019]. In the opinion of the appellant, although the trial Magistrate recorded that the child made promise to speak the truth but the Honourable Magistrate did not record how he was able to ascertain that the child has necessary intelligence to speak the truth and not lies. On this line the appellant cited the case of ***Rajabu Ngoma Msangi versus The Republic [Criminal Appeal No. 22 of 2019***] wherein Honorable F. A. Twaib, J (as he then was) cited the case of ***Godfrey Wilson vs Republic, Criminal Appeal No. 168 of 2019, Court of Appeal of Tanzania, at Bukoba*** (unreported) at page 7 where the court stated that: -

> *"The Trial Magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended imperatively requires a child of underage to give a promise of telling truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question, however, would be on how to reach at that stage. We think the trial Magistrate or Judge can ask the witness of a tender age such simplified questions, which may not be exhausted 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 understandings the nature of oath;

(3) whether or not the child promises to tell the truth and not lies...."

It is the submission of the appellant that recording the statement that 'the child has promised to speak the truth' without ascertaining that the child possessed sufficient intelligence to justify the reception of her evidence and without displaying the question she put on that witness and the rational answers to the questions contravened the mandatory provisions of law which governs the reception of the evidence of the child of a tender age. In the opinion of the appellant, it cannot be said with certainty that the evidence of PW2 was properly relied upon to convict the appellant.

Second, the trial Magistrate failed to grasp the fact that the prosecution witnesses gave a highly improbable and inconceivable evidence which was supposed to be approached with great caution as it demonstrated a manifest intention and desire to lie in order to achieve a certain end. In the demonstration of the statement above, the appellant has argued that the evidence of PW4 and PW2 was contradicting. In order to clarify the point, the appellant has submitted that PW2 (victim) testified that it was on June, 2018 when the ordeal occurred against him; surprisingly, PW4 (the medical doctor) in his evidence stated that he was told by PW2 that the last time to be sodomized by the appellant was 15/07/2018; and, PW4 went further and testified that upon his examination of the victim, he found fresh bruises on

his (PW2) anus. According to the appellant, a point to note is that PW4 said the victim was taken to him 18/7/2018.

Therefore, saying that the victim told him that the last time to be unnaturally entered was 15/07/2018 was trying to convince the trial Court to believe his opinion that he found fresh bruises on victim's anus; and that victim was unnaturally entered three (3) days past while the victim himself testified that the ordeal against him occurred in June 2018 and not in July as stated by PW4. The contradictions indicate that something is fishy on the prosecution case.

Third, the appellant has gone further to submit that the evidence of either witness when looked at in isolation, appears superficially convincing and conclusive if not subjected to an objective evaluation. But in many cases of this nature, there occurs other circumstances quite apart from manner and demeanor, which go to shake credibility of the witnesses. He has given the example of PW1 the father of the victim who was told about the ordeal by one Margaret. This person has nowhere been called to testify. Further PW1 testified that he is the one who went to the Police Station to report the matter. Again, PW3(the Victim's teacher) stated that he is the one who reported to the police; and he was informed by Doreen about the ordeal against PW2 but PW1 in his evidence said after receiving the information about his son (PW2) being unnatural offence he went to the PW2's school.

The appellant prays that the appeal he allowed, the trial court's Judgement be quashed and sentence set aside.

The respondent through their counsel, Kassim Nassir, Learned State Attorney is not supporting the appeal. The learned state attorney submitted that the appellant has submitted that the testimony of PW2 'AAA' a child of 10 years was recorded or taken in contraventions of section 127(2) of the **Tanzania Evidence Act [Cap 16 R. E 2019]**. He has alleged that PW2 did not promise to tell the truth and the trial magistrate did not put questions to PW2 to before the child promised that he is going to tell the truth and not lies. In the opinion of the learned state attorney, this ground lack merit. The witness PW2 promised to tell the truth as required by law. Section 127 (2) of the **Tanzania Evidence Act, Cap 6 R. E 2019** read as follows:

> *"(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 counsel has submitted that there is no requirement of recording questions put to a child of tender age before his promise to tell the truth and not lies. The counsel has submitted that even in the case of ***Rajabu Ngoma Msangi vs Republic, (Supra)*** there was no mandatory requirement to record questions put on the child of tender age before the promise. What was stated was: -

> "We think the trial Magistrate or Judge **can ask the witness** of a tender age such simplified questions"

Here, the word use is **'can ask'** not **'shall ask'** and there is no requirement of the trial Magistrate or Judge to record the questions asked. Even if it is assumed that the oath taken up PW2 is a problem, still the swearing was

proceeded by a promise to tell the truth. Hence there is no problem. In the case of ***Masanja Makunga Vs Republic, Criminal Appeal No. 378 of 2018, Court of Appeal of Tanzania at Dar es Salaam*** (Unreported) at page 10 and 11 the court expounded the principle that the promise to tell the truth is embraced in an oath; it was held that: -

> *"It was the court's view that understanding of the nature of oath which was followed by her being sworn in means that she was found to tell the truth and not lies"*

In this case the oath was proceeded by a promise to tell the truth. He referred this court to page 13 of the typed proceedings (last paragraph).

On the second point, the Learned State Attorney had the opinion that basing on the evidence of PW2 the question of discrepancies is out of place given the fact that the appellant did the complained act many times so that referring on specific dates won't have any effect to shake the evidence for the prosecution. In the opinion of the counsel, and he has submitted that in this case, at page 15 of the typed proceedings last paragraph, during cross examination stated that the appellant did the act quite often to him without specifying the dates and hence the difference in dates cannot be taken as a discrepancy. The counsel has cited the case of ***Chukwudi Denis Okechukwu and 3 others vs The Republic, Criminal Appeal No. 507 of 2015 court of Appeal of Tanzania, AT Dar es Salaam*** (unreported), it was held at page 19:

> *"It has been the practice of the court when considering the question of discrepancies and in consistencies of evidence, to*

look at serious discrepancies and consider them in wholesome. The court does not pick out some few sentences and consider them in isolation from the rest of the evidence."

In his opinion this ground has no merit; he prays it be dismissed.

On the third point the appellant has complained that key witnesses have not been called to testify. However, it is a settled principle in law that the best evidence in sexual offences is that of the victim. PW2 alone can prove the allegations against the appellant. As there are no any number of witnesses needed to prove a charge as provided for under section 143 of Tanzania evidence Act, Cap 6 R. E 2019. Also, the issue as to who reported to the Police is immaterial in this case because it proves no allegation.

I have as well read the record and also read the written submission by the appellant and the respondent. The first point of consideration is whether the evidence of the victim was properly taken and relied upon by the trial Magistrate. This question is relevant and material because, one, that evidence is necessary for the proof of the offence in the case against the appellant; two, that there was no other witness when the events were taking place except the appellant and the victim; and three, it is settled position of law that in cases of this nature the best evidence is that of the victim. According to section 127(2) of the Tanzania Evidence Act [Cap. 6 R.E. 2019] a child of tender age may testify without taking oath but he must promise to speak the truth and not lies. The appellant has submitted that PW2 being a child of 10 years did not take oath nor did he promise to speak the truth before testifying. He further argued that the trial magistrate did not put

question which would enable her to ascertain that the child had sufficient intelligence to testify. That, in his opinion, is in contravention of the law and he prays this court to allow the appeal.

The respondent however has argued that the law as it is, has not prescribed the requirement of recording questions which has been put to a child of tender age before his or her promise to tell the truth and not lies. That also is the position in the case of ***Rajabu Ngoma Msangi Vs. The Republic, Criminal Appeal No. 22 of 2019.***

In the proceedings, when the said PW2 was about to testify, at page 13 the trial Magistrate recorded that the witness PW2 promised to speak the truth. Then, it is recorded that the court is satisfied that the child is intelligent enough. The Court of Appeal of Tanzania in the case of ***Godfrey Wilson Vs. The Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba*** (unreported) it was held that:

> *"...section 127(2) as amended imperatively requires a child of tender age to give promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of tender age."*

I think, given the fact that the proceedings show the child promised to speak the truth and not lies, the condition was fulfilled as shown at page 13 of the typed proceedings. As to how to read at such stage, in the same cited case at page 13 the Court of Appeal of Tanzania observed as follows:

"We think, the trial magistrate or judge ***can ask the witness of a tender age such simplified question,*** *which may not be exhaustive depending on the circumstances of the case"*

The way their Ladyship Judges of Appeal opined, it is not mandatory that the questions put to the child should be recorded. What is important is the finding that the child is possessed of the sufficient intelligence to speak the truth. Under the circumstances, the first point in the appeal is found to have no merit and therefore dismissed.

On the second point the appellant has alleged that there were contradictions in the evidence of PW2 and PW4 which creates doubt that their evidence could not be relied by the trial Magistrate. Basically, the complaint is on the dates the events took place. According to the appellant, the evidence by PW4 who is the Doctor who examined the victim, was calculated to mention the dates which will justify that the offence was committed by the appellant.

The learned State Attorney has responded to the submission and stated that guided by case of **Chukwudi Denis Okechukwu and 3 others VS. The Republic,Criminal Appeal NO. 507 of 2015, Court of Appeal of Tanzania at Dar es Salaam**(unreported) where it was held that when considering the question of discrepancies and inconsistencies of evidence, we must look at serious discrepancies and consider them in wholesome. Looking at the evidence by the victim (PW2) at page 15 of the proceedings he testified that the appellant did the alleged act quite often to him without specifying dates. Hence, the difference in dates cannot be taken as a discrepancy.

I think the counsel is right, given the circumstances and age of the child, it is enough the testimony did show that the appellant did the act often times without specifying on the exact dates. I don't see any valid point for consideration. Since the victim was firm that the ordeal was repetitive and he did not specify the date, the allegation on contradiction is not valid and the point is dismissed.

On the third point, the appellant allege important witnesses were not called to testify. He gave an example of Doreen who was the first person to tell PW3, Judith Iwatasia, a teacher at Shirimatunda Primary School, she was not called to testify. The learned State Attorney has submitted on the point that section 143 of the **Tanzania Evidence Act, [Cap. 6 R.E.2019]** does not provide for a specific number of witnesses. It is also a principle of law in sexual offences that the best evidence is that of victim. PW2 alone can prove the allegations against the appellant. I do also subscribe to the position because no other person who witnessed the event except the victim. Since the victim testified, we need not dwell much on the point; also, the question as to who reported is irrelevant because the victim already testified that he was sodomised by the appellant often times and he failed to reveal to the grand father fearing for his own life. This ground also fails.

For the reasons, the appeal lacks merit and is therefore dismissed in its entirety. The decision of the trial court is hereby upheld. It is so ordered.

Dated and delivered at MOSHI this 24th day of November, 2021.

T. M. MWENEMPAZI

JUDGE

Judgement delivered this 24th day of November, 2021 in Court in the presence of the appellant and absence of the respondent. The right to appeal has been explained to the appellant.

T. M. MWENEMPAZI

JUDGE