IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 80 OF 2021

(Originating from the Court of Resident Magistrate of Mbeya, at Mbeya, in Criminal Case No. 218 of 2019)

MUSTAFA ALLY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 22.09.2021

Date of Judgment: 05.11.2021

Ebrahim, J.

In this first appeal, MUSTAFA ALLY the appellant, challenges the judgment of the Court of Resident Magistrate of Mbeya, at Mbeya, (the trial court) in Criminal Case No. 218 of 2019. Before the trial court, the appellant stood charged with two counts namely; rape contrary to section 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap. 16 R.E 2002 (Now R.E 2019), and unnatural offence contrary to section 154 (1) (a) of the same law.

It was alleged regarding the first count that, on diverse dates between June, 2019 and 5th August, 2019 at Songwe area within Songwe District in Mbeya region, the appellant had carnal knowledge of one **SR** (the victim for the purpose of preserving his dignity), a girl of 10 years old. On the second count, it was alleged that on 5th day of August 2019, in the same area the appellant had carnal knowledge of the same girl (victim) against the order of nature.

The appellant pleaded not guilty to the charge, hence a full trial. Having heard both sides, the Trial Court found the appellant guilty, hence convicted him of both counts as he was charged. It sentenced him to serve thirty years imprisonment and twelve strokes of the cane for the first count, and life imprisonment for the second count. It also ordered for the appellant to pay compensation to the victim at a tune of Tanzania shillings 1,000,000/= (Tshs. One million).

The evidence by the prosecution led to the conviction of the appellant as gathered from the record can be stated as follows: the victim was a pupil of standard V at Songwe II Primary School. The appellant was a famous cassava seller at the same school

and other areas in Songwe. After school hours, the victim's mother used to send the victim and her brother to sell firewood at an evening market called Soweto within Songwe area. The appellant was a firewood customer of the victim and his brother. When bought firewood the appellant was not paying instantly, but used to request the victim to carry them to his home so as to collect money.

On the way to the appellant's home, he used that chance to stop the victim, he took her in a bush with long grasses, undressed her and undressed himself then inserted his penis into the victim's vagina and ravished her. It was told that the habit repeated for four times on which other dates of the incidences were not remembered by the victim. However, the victim remarked the 5th day of August, 2019 when the appellant raped her and sodomised her. On that day the victim's brother saw the victim coming from the appellant while looking tired and had stool discharge in her clothes. The story was told to the victim's mother who decided to help the victim to bath. When bathing her, the victim's mother also saw stool discharge still coming from her anus.

Upon being asked what was the problem with her, the victim decided to narrate the whole story of what used to be fallen her by the appellant. The matter was reported to police station, they were issued with a PF3. The victim was taken to Ifisi Hospital for medical examination. It was discovered that the victim was penetrated in both orifice (i.e her vagina and anus). Then the appellant was arrested, charged as above, tried and finally convicted and sentenced as above.

Aggrieved by the conviction and sentence, the appellant preferred this appeal. His petition of appeal based on the following eight grounds of appeal:

1. That the trial court erred in law and fact in acting upon the hearsay evidence of PW2, PW3 and PW4.
2. That the trial court erred in law and fact by acting on the contradictory and inconsistence evidence of the prosecution witnesses.
3. That the trial court erred in law and fact by wrongly relying on Exp 1 (clinic card) as it was not read out before the trial court after being admitted in evidence.

4. That the failure of PW1 to report the incident of rape and name the rapist at the earliest opportunity vitiated her credibility.
5. That the trial court erred in law and fact for the memorandum of undisputed facts was neither read out nor explained to the accused person as required by the law, section 192 (3) of the CPA (Cap. 20 R.E 2019).
6. That the life sentence passed upon the appellant is excessive and contrary to the law.
7. That the trial court failed to note that the prosecution side did not prove its case beyond reasonable doubts.
8. That the trial court erred in law and fact by acting upon the evidence of PW1 as the voire dire examination was not properly conducted.

Owing to these grounds of appeal, the appellant prayed for this court to allow the appeal, quash the conviction and set aside the sentence and set him free. The respondent objected the appeal.

When the appeal was called on for hearing the appellant appeared in person, unrepresented vide virtual court while in

Ruanda prison. The respondent/Republic appeared through Ms. Sarah Anesius, learned State Attorney who was physically present.

The appellant prayed for the State Attorney to begin while he reserved his right to rejoin.

In opposing the appeal, Ms. Anesius submitted against all the grounds of appeal as follows:

On the first ground of appeal the learned State Attorney argued that the appellant's conviction based on the victim's evidence which was credible and the victim was consistent in her testimony. She narrated how the appellant used to rape her and how he sodomised her. The complained hearsay evidence of PW2, PW3 and PW4 only corroborated the victim's evidence Ms. Anesius argued.

As to the 2nd and 3rd grounds of appeal, Ms. Anesius contended that there was no any contradiction between PW1 and PW5. On the complaint that Exhibit P1 was not read after being admitted. She conceded, but argued that the same did not prejudice the appellant since its content was already narrated during PW3 testimony about when the victim was born and that

he new the content of the exhibit, Ms. Anesius cited the case of **Chrizant John v. Republic, Criminal Appeal No. 313 of 2015, CAT at Bukoba** (unreported).

Regarding the 4th ground of appeal, Ms. Anesius argued that the victim was 10 years old, the appellant used to give her cassava at school. He also promised to marry her after her study. Under the circumstances and the age of the victim she could not report the incidence, Ms. Anesius argued.

On the 5th ground of appeal, the learned State Attorney argued that, the record is clear that the appellant signed undisputed facts which shows that they were read and explained to the appellant. However, she argued in other way that even if the same was not actually ready, the same was not fatal since the intention of the procedure under section 192 of CPA is to expedite trials. To buttress her argument, she cited the case of **Benard Masumbuko Shio & another v. Republic**, Criminal Appeal No. 213 of 2007 CAT at Arusha, (unreported).

In regard to the 6th ground of appeal, Ms. Anesius argued that the appellant was sentenced according to the law. As to the 7th ground of appeal, she contended that the prosecution proved

the case at the required standard through the evidence of the victim. Further, in sexual offences, the best evidence comes from the victim of offence as stated in the case of **Selemani Makumba v. Republic**, and **section 127 (6) of the Evidence Act, Cap. 6.**

As to the 8th ground of appeal, Ms. Anesius argued that the voire dire test is no longer a requirement of law since 2016, through **the Written Law (Miscellaneous Amendment) No. 2 of 2016.** The law now requires the evidence of the child to be received after the child promised to tell the truth. Ms. Anesius therefore urged this court to dismiss the entire appeal for lack of merits.

In his rejoinder submission, the appellant prayed to adopt his grounds of appeal. He added that all witnesses gave hearsay evidence. That there was no DNA test which was conducted. Other contentions were just a repetition of his grounds of appeal. He reiterated his previous prayer.

I have carefully read the grounds of appeal, the submissions by the learned State Attorney for the respondent, the record and the law. I find it apt to start with grounds of appeal which are legal issues i.e grounds 3, 5 and 8. Then I will combine and determine

together grounds 1,2,4 and 7 since they all relate to the complaint that the case was not proved beyond reasonable doubt. Lastly, I shall address the issue the legality of sentence.

Starting with ground 5 of appeal, the appellant complained that the memorandum of undisputed facts was not read and explained according to **section 192 (3) of CPA**. The law i.e subsection 3 of section 192 provides that:

> "(3) At the conclusion of a preliminary hearing held under this section, **the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.**"

When I perused the record to ascertain the complaint by the appellant, the proceedings in conducting preliminary hearing (PH) by the trial court recorded that:

*"**Court:** the written memorandum of facts supplied to this court by the prosecution side is hereby admitted to form part of the proceedings.*

Signed
Dated

MEMORANDUM OF UNDIPUTED FACTS

Your honour I heard the facts and I admit the following;

1. *Fact no. 1*
2. *Fact no. 2*
3. *Fact no. 17*
4. *Lastly fact no. 18*

That is all

Signed by

1. *Accused.....sgd*
2. *Mr. Kihaka SA.....sgd"*

When I further perused the record, I found the said memorandum of facts written in form of unnumbered paragraphs, but simply separated paragraphs which can be counted and

makes a total of 18 paragraphs. The paragraphs said to have been agreed by the appellant just included the facts that he was charged with two counts, the appellant's personal particulars, that he was arrested and interrogated, and that he was arraigned to the court to answer the charge against him.

That being the case, I found nothing was conducted contrary to the law. Indeed, in whatever the case, the appellant was not prejudiced any how since there was no any fact among the agreed facts which was used to convict the appellant. Hence this complaint has no bases I thus, dismiss it.

As to ground 3 of the appeal, that Exhibit P1 was not read out after being admitted; indeed, it is settled law that whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it can be read out - see the cases of **Rashid Kazimoto & Another v Republic,** Criminal Appeal No. 458 of 2016 CAT (unreported) and **Hassan Said Twalib v Republic**, Criminal Appeal No. 95 of 2019, CAT at Mtwara (unreported). It is also a rule of the thumb that where any document is tendered and admitted in court as an exhibit without being shown or read out loud in court in order to

afford the accused chance to know its contents, such omission is fatal and may attract the court to expunge it from the records - see the **John Chrizant Case** (supra), and **Robinson Mwanjisi & Others v. Republic [2003] TLR 218**.

In the circumstance of the instant case however, I agree with Ms. Sarah that the evidence of PW3 (the victim's mother) capitalized on **exhibit P1** because she explained that the victim was born on 20/02/2009 at Idiga- Songwe Dispensary. So even if exhibit P1 could be expunged from the record, oral testimony of PW3 would suffice to prove the age of the victim. This ground of appeal therefore, lacks merit and I hereby dismiss it.

Regarding the 8th ground of appeal, I hastily hold that the appellant's complaint was a misconception of the law. As correctly argued by the learned State Attorney, voire dire test is no langer a requirement of the law. The current law i.e **section 127 (2) of the Evidence Act R.E 2019**, and the decisions by the CAT in the cases of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, CAT at Bukoba (unreported) and **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018, CAT at Mtwara (unreported); is that the child of tender age like the victim in the

instant case is required to give evidence by only making a promise to tell the truth and not lies. However, the promise is made after a presiding magistrate ask some questions to ascertain if the child understand the nature of oath.

According to the record at pages 7 and 8 of the typed proceedings, the learned trial Magistrate observed the law and the victim was recorded to have promised to tell the truth and not lies. This ground of appeal thus, is dismissed for lack of merits.

Having decided on the grounds of appeal of legal nature, now, I will determine grounds 1, 2, 4 and 7 together, this is because all of them constitute the complaint that the prosecution did not prove the case beyond reasonable doubts. The appellant complained that the trial court convicted him relying on hearsay and contradictory evidence. According to him the victim was not a credible witness since she failed to report the incidence at the earliest stage.

As correctly argued by Ms. Anesius, in sexual offence like one under consideration, the best evidence is that of the victim of offence. This is according to **section 127 (6) of the Evidence Act** and the CAT decisions in a number of cases like the **Seleman**

Makumba v. republic (supra) and the case of **Edward Nzabuga v. Republic, Criminal Appeal No. 136 of 2008, Court of Appeal of Tanzania at Mbeya** (unreported) just to cite few of them.

However, it is not only a matter of the victim to give evidence, the same evidence should be believed to be true evidence and a witness should be credible; see the CAT observation in the case of **Mohamed Said v. Republic,** Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported).

It is upon this court thus, to scrutinize the evidence adduced by the victim and decide whether it was true or not. The victim testified as PW1, she testified that she was 10 years old born on 20/2/2009. She was a standard V pupil at Songwe II Primary School. That after school hours she and her brother one David Ramadhani Kombo used to be sent by their mother to sell firewood. The appellant was their customer i.e he was buying firewood from them but he was also selling cassava at their school. The appellant used to buy firewood of Tshs. 500/= but was not paying instantly. He used to ask the victim to carry firewood to his home. On the way they passed near Roman Catholic Church, somewhere ahead there was electric poles and long grasses. The

appellant was pulling her in that area with long grasses then undress her and undressed himself, took his penis and inserted into her vagina and ravished her.

She testified further that at the area there were neither people passing through nor a house nearby or a road. She explained that when he ravished her, she felt pain and when she tried to cry for help, he covered her mouth. He used to give her some money Tshs. 500/= and 700/= as a payment for firewood and for herself. The appellant also used to give her cassava at school. The victim also testified that she was raped four times. The last time was on 05/08/2019 when the appellant raped her and sodomised her. Due to the act of being sodomised that day the victim returned home from the market while stool discharge coming from her anus. She narrated a whole story to her mother. She was taken to police station; there she was issued with a PF3. Her mother took her to hospital, examination was conducted and the results showed that she was actually penetrated in both her vagina and her anus.

From that evidence of the victim, I am confident to say that it was a water tight evidence. Though I could not observe the

demeanour of the victim as the trial court did, the evidence left no stone unturned. This is because, the victim knew well the appellant as their customer and seller of cassava. She also explained how the appellant used the chance of her carrying firewood to his home to accomplish his evil acts. When the appellant cross-examined her, she answered that he (the appellant) was threatening to slaughter her if she would tell her mother about the incidents. The victim also answered that she could not remember the other dates when he raped her but she repeated that he raped her four times and the last time was on 5/08/2019.

Nevertheless, the complaint by the appellant that the conviction based on hearsay evidence is not tenable. This is because, PW2 evidence for example, was to the effect that the victim was carrying firewood to the appellant's home. That she used to return late and she was looking tired. On 5/08/2019 he saw the victim with stool discharge which he told their mother that the victim was sick. He also explained that the appellant was not paying instantly when he bought firewood. Further that the appellant was selling cassava at their school. This piece of

evidence is not hearsay, but direct evidence since PW2 testified what he saw and observed. His evidence therefore, corroborated the testimony of the victim.

Not only that, the evidence of PW3, the victim's mother also was not hearsay. This is because, she saw stool discharge coming from the victim's anus and the victim narrated what was befalling her. PW3 also was the one who took the victim and reported the matter to the Police station. She then took the victim to hospital. PW3 evidence corroborated the victim's evidence.

Additionally, the testimony of PW5 also was not hearsay. PW5 (doctor) testified what he observed when he examined the victim. His evidence only proved that the victim was penetrated in her vagina and her anus. He also tendered PF3 which shows that, the victim's hymen was perforated and muscles of her anus could not close properly. PW5 evidence therefore corroborated the victim evidence that the appellant raped and sodomised her.

According to the evidence of the appellant, he said he was arrested on 07.08.2019 while at home with his family preparing for the next day business. He denied to have committed the offence I find no difficulty in disbelieving him because if at all he was

arrested on 07.08.2019 while with his wife, he would have called her to prove that fact. More – so, the prosecution evidence is so concrete and leaves no reasonable doubt to prove the offence.

Owing to all witnesses' testimonies, and according to the evaluation of evidence I have made above as a first appellate court; I am certain and confident to hold that the prosecution proved the case beyond the shadow of doubts. The above combined grounds of appeal are thus lacking merits. I therefore dismiss them.

I have left with one ground i.e the 6th ground of appeal. The appellant was convicted with the two offences. He was sentenced to a life imprisonment on the second count of unnatural offence. The law on unnatural offence provides that:

"154.- (1) Any person who-

(a) has carnal knowledge of any person against the order of nature; or

(b)Not applicable

(c) Not applicable

(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.***"

From the above quoted law, in connection with the case at hand, it is clear that the victim was a child of below eighteen years (i.e 10 years old). I have already held that the prosecution proved the case beyond doubts that it was the appellant who raped and sodomised the victim. The law gives one sentence of life imprisonment for the offender of unnatural offence committed to a child of below eighteen years. Therefore, the trial court did not err any how in sentencing the appellant for life imprisonment. This ground is also lack of merit; it is thus dismissed.

From the above background, I dismissed this appeal in its entirety for lack of merits.

Ordered accordingly.

R.A. Ebrahim

Judge

Mbeya

05.11.2021

Date: 05.11.2021.

Coram: Hon. P. D. Ntumo – PRM, Ag-DR.

Appellant: Present.

For the Republic: Miss Rosemary Mgenyi, State Attorney.

B/C: Gaudensia.

Court: Judgement has been delivered in open chambers in the presence of the appellant and miss Rosemary Mgenyi, learned State Attorney for the Respondent Republic this 5th day of November 2021.

P.D. Ntumo - PRM

Ag- Deputy Registrar

05/11/2021

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA