IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 122 OF 2020

(C/F Criminal Case No. 41 of 2020 in the District Court of Babati at Babati)

DANIEL AMOSI.....APPELLANT

Vs

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order:7-6-2022

Date of Judgment:28-6-2022

B.K.PHILLIP,J

In the District Court of Babati at Babati the appellant herein was charged with unnatural offence contrary to Section 154 (1) (a) (2) of the Penal Code (Cap 16 R.E 2019).He was found guilty and sentenced to life imprisonment. Particulars of the offence were as follows; That on 7/2/2020 at Imbilili Village, within Babati District in Manyara Region Daniel Amosi (appellant) did have carnal knowledge of "SD" (not her actual name) , a girl of four (4) years against the order of nature.

It is the prosecution's case that on 7/2/2020 the victim (herein referred as a "SD") was left at home alone. The appellant went to SD's home and asked her if there was any body in the house. SD replied that she was alone. The appellant dragged her into the house up to the bedroom, lied her on the bed. He undress her underpants and undress his trouser, thereafter he took his penis and insert into SD's anus. Due to severe pains SD screamed. Mwanaidi Kungya (PW1) who was at her farm nearby SD's home, heard SD screaming. She

quickly went into the house only to find SD coming out from house with her underpants below her knees. She was bleeding from her anus and faeces coming out as well. When she asked her what happened, SD replied that "Daniel amenipiga na kunifanyia tabia mbaya na amekimbia" which by literal translation means that Daniel (appellant) beat her, did something bad to her and run away. PW1 took SD to a neighbouring house and then made efforts to convey the message on what had happened to SD to her parents. Finally ,SD's parents got the information as well as the Village Executive Officer (PW 7). SD was taken to police station, then to the hospital and was examined by a doctor (PW6) who found her with bruises in her anus. In proving its case, the prosecution brought a total of seven (7) witnesses and two exhibits (PF3 and appellant's extra judicial statement). The appellant testified as DW1 and did not bring any witness.

At the end of the prosecution case the trial Magistrate ruled that the appellant had case to answer. The appellant's defence was to the effect that on 7/2/2020 at 10:00 a.m. he was at their farm. He saw one male person coming towards him. He beat and arrested him. He screamed and many people came to witness what was going on. He was taken to the Village Executive Office (VEO). Furthermore, he alleged that he did nothing wrong. He was in conflict with the person who arrested him.

In determination of this case the trial Magistrate framed two issues, **one,** whether 7/2/2020 there was anything bad done by an accused person on to SD and **second,** whether the case against accused person was proved beyond any reasonable doubt. After analysis of the

evidence adduced by both sides the trial Magistrate was convinced that the charge has been proved against the appellant beyond a reasonable doubt. She convicted the appellant and sentenced him to life imprisonment. Aggrieved by the decision the trial Court, the appellant lodged this appeal against both conviction and sentence on the following grounds;

i) That a trial Magistrate erred in law and in fact convicting the appellant (teenager) with life sentence while the evidence in record was not water tight to warrant life sentence.

ii) That the trial Magistrate grossly erred in law and in fact when it put the appellant into conviction without *voire dire* test.

iii) That the trial Court grossly erred in law and fact for failure to notice and evaluate the uncorroborated evidence of PW1,PW2, PW4, PW6 and PW7.

iv) That the learned trial Magistrate erred both in law and in fact by not complying with the mandatory provisions of section of 231 (1) of Criminal Procedure Act Cap 20 R.E 2019.

v) That the learned trial Magistrate erred in law and in fact in that he did not consider and evaluate the appellant's defence.

vi) That the purported judgement of the trial Court lacks essential ingredients of judgement as required by the law.

I ordered the appeal to be disposed of by way of written submissions. The learned Advocate Edmund R. Ngemela, filed the submission for the appellant whereas the learned Senior State Attorney Felix Moses Kwetukia, filed the submission for the respondent.

In his submission Mr. Ngemela abandoned grounds of appeal number 2 and 6. Submitting on 1st and 3rd grounds, the Counsel Mr. Ngemela argued that trial Magistrate sentenced the appellant to life imprisonment basing on weak and contradictory evidences. None of the prosecution witnesses testified that was at the scene of crime. SD (PW4) at home alone.All other witnesses were told stories . He argued that among the inconsistencies and contradictions in the prosecution evidence can be seen at page 13 of the typed proceedings where it indicates that PW1 testified that PW4 told her that *"Daniel amenipiga na kunifanyia tabia mbaya"* while at page 15 of the typed proceedings PW2 said that PW4 told her that *"Daniel amenifanyia tabia mbaya"* the word *"kupiga"* is not there. Other contradictions alleged by Mr. Ngemela are; That PW1, PW2 and PW3 testified that SD was bleeding from her anus and faeces coming out while the Doctor (PW6) said that upon examining SD he found bruises in her anus. He did not say that SD was bleeding from her anus and faeces were coming out. Moreover, Mr. Ngemela contented that SD's testimony is contradictory to the testimony of PW2 since PW2 testified that on the fateful day she went to her farm. SD and her son aged 2 years namely Abdallah Mohamed remained at home whereas SD testified that she was at home alone. Mr. Ngemela insisted that the contradictions he has pointed are fatal. To support his stance, he cited the cases of **Mohamed Said Matula vs Republic 1995 TLR 3** and **Syprian Justine Tarimo vs Republic, Criminal Appeal No. 226 of 2007** (CAT) ,(unreported).In conclusion Mr. Ngemela contended that the words " Tabia mbaya" are contradictory in themselves and renders SD's testimony doubtful.

On the 4th ground Mr. Ngemela submitted that trial Magistrate did not adhere to the provisions of section 231 (1) of the Criminal Procedure Act (CAP 20 R.E 2019) (hereinafter to be referred as "CPA"). After trial Magistrate had made a ruling that the appellant had a case to answer he did not inform the appellant his fundamental right to call witnesses, which amounts to denial of his right to be heard. To cement his argument, he cited the case of **Mwita Gise @ Josephat and Maige and Maige Mwita Vs Republic, Criminal Appeal No. 196 of 2006** (CAT),(unreported).

With regard to the 5th ground of appeal, Mr. Ngemela submitted that the trial Magistrate did not consider and evaluate the defence evidence before arriving at his decision. He only considered prosecution's evidence and reach at a conclusion that the appellant was guilty. That amounted to breach of fundamental rule of nature justice, contended, Mr. Ngemela. To bolster his argument, he cited the cases of **Athuman Hassani vs The Republic, Criminal Appeal No. 292 of 2017** ,(CAT), (unreported) and the case of **Jafari Ally vs Republic, Criminal Appeal CAT No. 170 of 2016,** (unreported).

In rebuttal, Mr. Kwetukia submitted as follows; That there is neither contradictions nor inconsistences in the prosecution evidence. The evidence of SD (the victim) was never challenged by appellant. The appellant did not cross examine PWI, PW4 and PW7 when giving incriminatory evidence against him and this means he accepted that evidence. To bolster his argument, he cited the case of **Nyerere Nyague vs The Republic, Criminal Appeal No. 67 of 2010** (CAT at Arusha), (unreported) . He further argued that the evidence of PW4

was corroborated by the evidence of PW1 and PW6. He insisted that the trial Court is in better position to assess the credibility of a witness than appellant Court. To strength his arguments he cited the case of **Ally Abdallah Rajabu vs Saada Abdallah and Others (1994) TLR, 132 and Omary Ahmed vs Republic (1983) TLR. 52.** He was of the view that even if there are discrepancies in the prosecution evidence, the same do not go to the root of the matter and also this Court has powers to consider the appellant's defence.

Responding to the submission made by Mr. Ngemela in respect of the 4th ground, Mr. Kwetukia argued that the typed proceedings in pages 34 and 38 show that the trial Magistrate complied with requirements provided in section 231 (1) of the CPA . To cement his arguments he reproduced some parts of the typed proceedings in page 34 where the appellant stated as follows *"I will defend on oath. I pray for time to prepare my defence. I do not have witness"* and page 38 where the appellant said following *"I do not have any witness. I pray to close my case".*

With regard to the submissions made in support of the 5th ground Mr. Kwetukia conceded that trial Magistrate did not considered the appellant's defence. However he contended that this Court being the first appellant Court is duty bound to consider the appellant's defence at this level. He cited the case of **Athuman Hassan vs Republic, Criminal Appeal No. 292 of 2017** (unreported) to strengthen his argument.

However, in addition to the above, Mr. Kwetukia submitted that appellant's defence was afterthought since it contains allegations made

during the cross examination. He contended that the appellant's defence cannot shake the prosecution case.

In rejoinder, Mr. Ngemela reiterated his submission in chief and insisted that the contradictions he pointed out are fatal because the conviction of the appellant was based on the witnesses whose testimony were contradictory.

Having analyzed the rival arguments made by learned Counsel for the appellant and the learned Senior State Attorney for the respondent, as well as perused the Court's record let me proceed with the determination of the grounds of appeal.

With regard to the 1st and 3rd grounds of appeal, Counsel for the appellant submitted that evidence relied upon by the trial Magistrate in convicting the appellant was not water tight, full contradictions and inconsistencies. However, the Court's records do not reveal any fatal or serious contradictions or inconsistencies on the testimonies of the prosecution witnesses. To the contrary it reveals that the prosecution proved the offence charged against the appellant beyond reasonable doubt. For instance the argument raised by the appellant's Counsel that SD testified that she was alone at home and none of the prosecution witnesses were at the scene of the crime, but were told stories in misconceived since sexual offences are normally committed in secret. It is no expected that someone could be a witness to such an offence. SD testified that the appellant asked her if there was anybody around. He asked her that question for an obvious reason, that is, he wanted to be sure that no one was around to witness what he wanted to do. Similarly, that fact that SD did not mention that he was left at

home with his brother Abdallah Mohamed is not contradictory to the testimony of PW2 (SD's mother) as argued by Mr. Ngemela because at the time the appellant went there SD was alone. Again Mr. Ngemela's contention that what SD narrated to PW2 is different from what was explained by PW1 in her testimony is misconceived because the main message that SD narrated to PW1 and PW2 by SD is the same. What is important is that SD explained to both PW1 and PW2 that the appellant did something bad to her and PW1 and PW2 both testified that SD was bleeding from her anus and the Doctor testified that she had bruises in her anus which is a clear indication that something bad was done unto SD as she said it herself. In short the contradictions alleged by Mr. Ngemela are so trivial to shake to prosecution case.

Also, Mr Ngemela's contention that the words " Tabia mbaya" are contradictory and left the evidence doubtful is not correct. The words " Tabia Mbaya" coupled with the testimony of PW1 who went to rescue SD and found her underpants bellow her knees, bleeding from her anus and faeces coming out gives a very clear picture and message that the appellant had carnal knowledge of the SD against the order of nature. It is the finding of this Court that contradictions of the prosecution witnesses alleged by Mr. Ngemela are minor and do not go to the root of the matter.

With regard to the 4th ground of the appeal, Mr. Ngemela's contention that the trial Magistrate did not adhere to the procedures provided for under section 231 (1) of CPA after making a ruling that the appellant had a case to answer and thus denied the appellant his right to be heard is misconceived. As rightly submitted by Mr. Kwetukia the

proceedings show that the trial Magistrate did comply with section 231 (1) of CPA though he did not write down that section. At page 34 of the typed proceedings the appellant made the following reply to the Trial Magistrate "I will defend on oath. I pray for a time to prepare my defence. I do not have witness".The above response shows clearly that the trial Magistrate explained to the appellant his right as stipulated in section 231 of the CPA.Thus , it is not true that the appellant was denied his right to heard or defend his case.The requirements stipulated in section 231 of the CPA were complied with. In my opinion in the circumstances of this case whereby the proceedings indicate clearly that the requirements stated in section 231 of the CPA were complied with, the omission to write down in the proceedings that the provisions of section 231 of the CPA has been complied with is not fatal. It is the finding of this Court that this ground appeal has no merit.

With regard to 5th ground of the appeal, upon perusing the court's record I noted that appellant did not make any defence which could be considered by the trial Court and this Court apart from denying that he did not commit the offence he was charged with .When he was called upon to defend himself the appellant only narrated how he was arrested. In short, the trial Magistrate cannot be faulted for not considering the appellant's defence because there was none. I agree with Mr Kwetukia that this being a first appellate Court has powers to re-evaluate the evidence adduced at the hearing and can consider the appellant's defence. However, I have find out that there is no any defence made by the appellant worth the consideration of this Court. As alluded early in this judgment, the appellant just narrated that how he was arrested at their farm.

Having said above, it is finding of this Court that prosecution proved the charge against appellant beyond reasonable doubts. In the upshot, this appeal is dismissed.

Dated this 28th day of June 2022

B.K.PHILLIP

JUDGE