THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRIC REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 85 OF 2021

(Originating from criminal Case No. 01 of 2020 of the District Court of Rungwe)

Between

OSEA JOHN TALA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

31 May & 27 June 2021

NGUNYALE, J.

The appellant was arraigned before the District Court of Rungwe at Tukuyu in Criminal Case No. 1 of 2020 in which he was indicted for trial to the unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap 16 R: 2002] now 2019. It was the case for the prosecution that, on 29/12/2019 at Unyamwanga Village within the District of Rungwe in Mbeya Region, the appellant did have carnal knowledge of the victim a boy of 15 years old against the order of nature. The appellant maintained

his innocence when the charge was put to him. In this appeal, for the purposes of concealing the identity of the victim I shall refer him as PW1 or victim.

In an attempt to establish its case, the prosecution called four witnesses to testify namely; the victim (PW1), Petro Pascal Mwakalinga (PW2), Donatha Pascal (PW3) and Justine Malekela (PW4). The evidence of the prosecution witnesses was supplemented by two documentary exhibits PW1's clinic card exhibit P1 and PF3 exhibit P2. On his part in defence, the appellant relied on his sworn testimony.

Briefly, it was PW1's story that he knows the appellant they live together at Unyamwanga Village. On the fateful day the appellant told him there was a job to do, he took him to the bush near Unyamwanga dispensary where he accused him to have stolen his birds. Then he was beaten and told to loosen/undress his trouser and drop down. Then the appellant took his penis and penetrated it to PW1's anus and mouth. Upon completing the mission, the appellant left, the victim walked to his home where he revealed the ordeal to his grandmother and uncle Masoud. PW2 said he was called by his mother where upon reaching he was told by PW1 that he was sodomized then the victim narrated what befallen him. He reported the matter to the village chairman who examined PW1 and

advised them to go to hospital. Militiaman arrested the appellant. PW3 the victim's mother narrated that the victim was born on 16/11/2003 and produced PW1's clinic card exhibit P1. PW4 was the assistant medical officer who on 30/12/2019 examined PW1 and observed that the victim was penetrated in his anus by a blunt object, he then filled PF3 exhibit P2.

On his part the appellant defence was general denial that on 29/12/2019 was at Isyonje upon reaching at his place the chairman called him and was instantly arrested and taken to Kiwira Police station.

After a full trial, the appellant was convicted and sentenced to life imprisonment, hence the present appeal. In the self-crafted amended petition of appeal, the appellant raised seven grounds of appeal which are conveniently summarized into;

1. *The trial court erred to convict and sentence him based only on evidence of the family members.*
2. *The trial court erred to rely on evidence of the doctor whose findings was that there was penetration without bruises.*
3. *The trial court erred in law to believe evidence of PW1 without there being corroboration.*

4. *That the trail court erred in law when it convicted and sentenced the appellant without calling police who investigated the case or a chairman to whom the matter was first reported.*
5. *The trial court erred in law for sentencing him to excessive sentence contrary to Minimum Sentence Act cap. 90 R: E 2002.*
6. *That the case was fabricated against him based on evidence of PW3 who stated the victim was born On 16/11/2003 while actually he was aged 20 years old.*
7. *That the charge against the appellant was not proved to the standard required.*

During hearing of the appeal the appellant appeared in person, he had no legal representation while the respondent Republic was represented by Ms. Rosemary Mgenyi learned State Attorney who appeared against the appeal. When the appellant was called to make submission on his grounds of appeal, he opted the respondent to start first and reserved his right to make rejoinder.

On the first ground Ms Mgenyi submitted that every witness is competent to testify under section 127(1) of the Evidence Act unless there is health problem, old age or being a minor. She contended that what matter is credibility of a witness and in the appeal at hand PW4 was not a family member.

Submitting in the second ground she stated that evidence of PW4 was that after examination he observed that the victim was penetrated by a blunt object to the anus.

On the third ground Ms. Mgenyi submitted that PW1 was a credible witness without any corroboration and in fact her evidence was corroborated by PW4. She added that PW1 knew the appellant and the offence was committed in the morning.

Ms. Mgenyi submission in fourth ground was that under section 143 of the Evidence Act there is no certain number of witnesses required to prove certain fact. It was her submission that the witnesses called were key witnesses and evidence of the chairman had already been testified by the victim.

On whether the appellant was excessively sentenced, Ms. Mgenyi submitted that offence was committed to a boy of 15 years hence properly sentenced as per section 154(1)(a)(2) of the Penal Code.

In sixth ground on age of the victim it was submitted that PW3 testified that the victim was born on 16/11/2003 and in 2020 he was 15 years. She added that although there was slight deference it did not exonerate the appellant from commission of the offence.

On whether the prosecution proved the case to the hilt, Ms. Mgenyi submitted that in sexual offences the best evidence comes from the victim. Based on this submission she prayed the appeal to be dismissed.

In rejoinder the appellant submitted that the prosecution case was grounded on evidence of family members. On the second ground he said rape cannot be established in absence of bruises. In third ground he submitted that PW1's evidence was not corroborated and cited the case of **Charles Deo v R [**1987] TLR 134. In fourth ground he submitted that the chairman was not called to corroborate evidence of family members and the one who issued PF3. On the remaining ground he restated the grounds of appeal as appears in his amended petition of appeal. In conclusion he prayed the appeal to be allowed and be released.

I have considered the records of appeal and submission for and against the appeal I think the grounds of appeal will be addressed in seriatim. Starting with the issue of only family members being called as witnesses. Certainly, it is not the law that evidence of relatives or family members cannot be relied upon by the trial court to ground conviction of the accused. Section 127 of Evidence Act is very clear on this in that every person is a competent witness. The important thing to consider is the credibility of the respective witness. That evidence must be weighed as

required by law as was stated in the case of **Mustafa Ramadhani Kihiyo v, The Republic** [2006] TLR 323, that;

> *'The evidence of relatives is credible and there is no rule of practice or law which requires the evidence of relatives to be discreditedd. unless there is ground for doing so.'*

In the present case, I am satisfied that the evidence of PW2 and PW3 cannot be discredited as there is no indication that they teamed up to promote a fake story. For instance, PW2 just said he was called by his mother to hear from the victim story and took initiative to report the matter to chairman and send the victim to dispensary and police, while that of PW3 was only to prove age of the victim. From those evidence there is no indication that it implicated the appellant.

The second ground on evidence of Medical Officer, I have gone through such evidence and observed that the appellant misinterpreted it. PW4 account was that he observed that the anus of the victim was penetrated by a blunt object and never testified if bruises was found. It has to be noted that unnatural offence just like rape is not proved by presence of bruises rather penetration however slight it proves the offence. See the case of **Manyinyi Gabriel @ Gerisa v The Republic**, Criminal Appeal No. 594 of 2017, CAT at Mwanza (Unreported) that;

'We entirely share the same view for if bruises are to be the natural and probable consequences of sexual intercourse women would better opt to completely abstain from it. Crucial in cases of this nature is penetration however slight it may be and the person better placed to tell is the one on whom it is practiced which is in line with the Swahili saying "maumivu ya kukanyagwa anayajua aliyekanyagwa.'

In the present appeal it was not important for PW4 to state that he observed bruises, as he had already stated that there was penetration by the blunt object. Therefore, this ground is without merit.

Third ground is on evidence of the victim PW1 not being corroborated. Under section 127(7) of the Evidence Act corroboration is not mandatory in cases involving sexual offences, so long as the trial court is satisfied that the witness is telling the truth. In this case PW4 corroborated evidence of PW1 that he was penetrated. This being sexual offence the best evidence is that of a victim. This ground is devoid of merits.

The appellant's complaint in fourth ground is failure of the prosecution to call the investigation police and chairman to whom the matter was first reported. In this point the State Attorney submitted that no particular number of witnesses is required to prove certain fact. The appellant was of the view that their evidence was necessary to corroborate family members' evidence.

In terms of section 143 of the Evidence Act, no specific number of witnesses is required to prove the fact at issue, what is important is the witness's credibility and reliability. The above rule has exception especially where the prosecution fails to call material witness in such circumstance the court is empowered to draw adverse inference. This was well stated in the case of **Boniface Kundakira Tarimo vs. Republic**, Criminal Appeal No. 350 of 2008 (unreported) where the court held that;

> *'It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible.'*

What the court has to consider now is whether the said investigator and chairman were the material witness. In addressing this question, the prosecution evidence needs to be revisited so as to identify the missing link in the prosecution case and value of their evidence had they testified. As for now I leave the point pending, I will address it later in the seventh ground of appeal.

Turning to the fifth ground where the complaint is that the appellant was sentenced to excessive sentence not provided under the Minimum Sentence Act [Cap 90 R: E 2019]. The State Attorney submitted that sentence imposed was in accordance with section 154(2) of the Penal Code while the appellant maintained that it was excessive.

On my part the offence of unnatural offence is created under section 154 (1) (a) of the Penal Code and the punishment is set at subsection 2 of section 154 of the same Act. It reads;

> *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.*

The appellant after being found guilty and formally convicted the trial court sentenced him to life imprisonment. Unnatural offence is not a scheduled offence to Cap. 90. Even reading the Minimum Sentences Act under section 10(1)(a) it permits the court to impose maximum sentence if it is prescribed by the law creating the offence. To that end this complaint is dismissed.

Complaint in ground six is on the exactly age of the victim, the appellant submitted that the victim was recorded to be 17 years while actually he was 20 years old in reply the State Attorned admitted that there is slight difference in the age of the victim but she maintained that it did not exonerate the appellant from being perpetrator of the offence.

Admittedly, there is variation about age of the victim as stated by PW1 and in the charge and that testified by PW3 the victim' mother in exhibit P2. In the charge sheet the age of the victim is indicated to be 15years, when PW1 particulars was being recorded by the trial court he said to be 15 years old which is also reflected in exhibit P2, PF3. When PW3 was

testifying she said PW1 was born on 16/11/2003 which of course is reflected in exhibit P1.

It is the law that the age of the victim shown in the charge sheet and in the recording of the personal particulars of the victim witness before he/she testifyy in court is not proof of the age. See the case of **Jafari Musa v DPP**, Criminal Appeal No. 234 of 2019, CAT at Mbeya, **Tano Mbika v Republic,** Criminal Appeal No. 152 of 2016 and **Andrea Francis v Republic**, Criminal Appeal No. 173 of 2014 (Both Unreported). In **Andrea Francis** case cited in **Jafari Musa** the court held that;

> *'It is trite law that the citation in the charge sheet relating to the age of an accused person is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age.'*

Applying the above principle in this appeal proof of age of the victim came from PW3 the victim's mother who stated that he was born on 16/11/2003 the age which is also reflected in exhibit P1. Given the above evidence when the offence was committed to PW1 in 2019 he was 16 years old and in 2020 when testifying in court was still 16 year old the age which is still below 18 years old. In fact, the appellant never cross examined PW1 and PW3 regarding the age which implies

that he admitted the truth of their evidence raising it at this stage is an afterthought.

Next is whether the charge was proved beyond reasonable doubt. It is evident on the record that, the conviction of the appellant was mainly based on credibility of the victim as found by the trial court. I am aware that, sitting as a first appellate court still the court can subject the entire evidence to proper scrutiny and arrive at a different conclusion including assessing credibility of the victim when compared with the evidence of other witnesses. This is crucial considering that every witness is entitled to credence and must be believed and his testimony accepted unless the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See the case of **Goodluck Kyando v Republic**, [2006] TLR 363. Equally it is settled law that, in sexual offences the best evidence must come from the victim and if he/she gives a truthful account, stands out to give direct testimony to prove the fact in question as to what actually transpired on the fateful incident.

In the case at hand, the victim clearly stated how the appellant took him to the bush where he was beaten and forced to loosen the trouser and buttocks, then the appellant inserted hi penis in the anus and

mouth. The victim's account was not shaken during cross examination by the appellant. The victim's account was further corroborated by PW4 who documented observation in PF3 showing that the victim's anal area was penetrated. This cements PW1 account that there was actual penetration in the anus of the victim and proves that the victim was sodomised.

The defence evidence was general denial which could not shake the prosecution case. It has to be noted that PW1 in his evidence testified that he knows Osea as they live in the same village. Evidence that they are living in the same village also came from PW2. The appellant did not cross examine these two key witnesses on the issue of being known by them. During defence the appellant when he was cross examined by public prosecutor denied to know the victim before seeing him in court. Subjecting to proper scrutiny this piece of evidence it goes without saying that PW1 knew well the appellant. This is coupled with the fact that the offence was committed in the broad day.

Resuming to the issue of failure to call chairman and investigating officer, upon objectively analysing of evidence in record I find that evidence of the investigating police was of no assistance, because PW1, PW2 testified that the accused was arrested instantly without

assistance of police. For that reason, what the police could testify was already covered by PW1 and PW2. Regarding the chairman it is in record that PW2 testified that upon being told by the victim that he was sodomized by the appellant he went to the village chairman to whom PW1 narrated what befallen him and mentioned the accused. To that extent I find that evidence of the said chairman could not have differed with that of PW2.

It is commonplace that, the truth is not discovered by a majority of votes. One solitary credible witness can establish a case beyond reasonable doubt provided that the court finds the witness to be cogent and credible. The fact that the evidence of the victim of sexual offences alone can ground conviction under the best evidence rule was laid down in the celebrated case of **Selemani Makumba v Republic** [2006] TLR 379.

In this appeal the appellant was charged with the count of unnatural offence contrary to section 154(1)(a) of the Penal Code. For such an offence to stand, there must be proof of penetration, however slight into the anus, with or without consent see the case of **Joel s/o Ngailo v The Republic**, Criminal Appeal No. 344 of 2017 (unreported). Evidence of penetration came from the victim who narrated how he

was sodomized by the appellant which was corroborated by a medical officer PW4. The evidence on record clearly established penetration on the anus of the victim which is the essential ingredients of unnatural offence contrary to section 154(1)(a) of the Penal Code. Taking into account the appellant's defence leaves no doubt that he was the perpetrator of the offence I am satisfied that the prosecution proved the case to the hilt against the appellant.

Accordingly, the appeal is dismissed to its entirely.

DATED at MBEYA this 27th day June, 2022

THE HIGH COURT OF TANZANIA

D.P. NGUNYALE
JUDGE
27/06/2022