**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 4 OF 2021**

**(C/F DISTRICT COURT OF MONDULI AT MONDULI, CRIMINAL CASE NO. 8 OF 2020)**

**PAUL S/O JULIUS MAGANGA.....APPELLANT**

**VERSUS**

**THE D.P. P .....RESPONDENT**

# JUDGMENT

18/2/2022 & 13/07/2022

## ROBERT, J:-

The appellant, Paul s/o Julius Maganga is currently serving life imprisonment upon conviction by the District Court of Monduli (the trial court) for committing unnatural offence contrary to section 154 (1)(a) and (2) of the Penal Code, Cap 16 R.E 2002. Aggrieved by the decision of the trial Court, he preferred this appeal challenging the conviction and sentence imposed by the trial Court.

In a charge filed against the appellant, the prosecution alleged that, on 16th day of October 2019 at Lolkisale area, Monduli District in Arusha

Region the appellant did have unlawful carnal knowledge against one A s/o/ S against the order of nature.

On the material date, when the victim's grandmother (PW1) returned home from collecting firewood, the victim (PW2) ran to her and told her that the appellant had sexual intercourse with him "amenitombatomba". At first PW1 did not pay attention to her but when she saw him finding it hard to sit properly, she decided to examine him and realized that he was hurt. She informed her husband and the mother of the child about the incident. Thereafter, they reported the incident at the Police station where they were given a PF3 and took the victim to Monduli Hospital for medical examination. The victim (PW2) was examined by PW4 (a doctor) who noted some bruises on the victim's anus and filled the PF3. The accused was arraigned before the court of law for the offence charged. During the trial PW2 identified the appellant as the one who had carnal knowledge of him against the order of nature.

In his defence, the appellant denied to have committed the offence charged. He informed the court that on the day of his arrest he thought he was being arrested for fighting with PW1 who accused him of committing unnatural offence against the victim. After the hearing, the trial court convicted and sentenced the appellant to life imprisonment.

Aggrieved, the appellant filed this appeal armed with eight grounds of appeal which reads as follows:-

1. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond any reasonable doubt and to the required standard by the law.*
2. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing an accused, now the Appellant, by failing even to address an accused now the appellant items (sic) of section 231 of CPA R.E.2002, when the magistrate found an accused with the case to answer. This is miscarriage of law.*
3. *That, the learned trial magistrate grossly erred both in law and fact by failing to note that, the victim (PW2) was very young of only 3 yrs who had no sufficient possession of intelligents (sic) and he could not have enough knowledge and capacity of understanding to tell the truth or the lies although he (victim) promised to tell the truth before the court, due to PW2 (victim)'s age the trial court should not put into consideration his evidence.*
4. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant basing on weak incredible and unreliable prosecution evidence, as the trial magistrate failed to grasp the fact that the evidence of PW3 police investigator was unrequired to the standard of law and settled law (P.G.O) ESPAECIALLY is recording caution statement and victim's statement, thus raises some doubts to the prosecution case. Date of recording*
5. *That, the learned trial magistrate grossly erred both in law and fact by failing to note that the measurements (procedures) used by a doctor to examine a victim to determine penetration was poor and*

*unscientifically, as the evidence of the doctor before the court did not describe penetration, but in re-examination by the Court, the doctor said he used only his opinions to discover that, the penetration slight was done, thus left some crucial matter unresolved since wrongly conviction and sentence to the Appellant.*

6. *That, the learned trial magistrate grossly erred both in law and fact in failing to draw an adverse inference to the prosecution side. After failing to summon the Accused's parents who alleged to be informed the material accident at earliest by PW1 Victim's grandmother, whom from their connection with the transaction in question were able to testify before the court to the material facts, thus wrongly conction and sentencing to the appellant.*
7. *That, the learned trial magistrate grossly erred both in law and fact in conducting case in hand in un-camera which caused the appellant found guilty consciousness (fair) thus failed even to am make cross-examination to the prosecution witnesses, thus raises doubts and wrongly conviction and sentence to the Appellant.*
8. *That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant in failing to consider the appellant's defence.*

At the hearing of this appeal, the appellant appeared in person without representation while Ms. Eunice Makala, learned State attorney represented the respondent.

Submitting on the first ground, the appellant informed the court that, the trial court convicted and sentenced him despite the weak

evidence from the prosecution as the charge was not proved to the required standard.

In response to this ground, Ms. Makala submitted that, the charge against the appellant was proved to the standard required under section 154 (1)(a) and (2) of the Penal Code, Cap. 16 (R.E. 2019). She maintained that, penetration was proved by PW2 who explained how the appellant penetrated his penis in his anus which caused him pain. The said evidence is supported by the testimony of PW4 (a doctor) who saw bruises on the victim's anus which proved the he was penetrated by a blunt object. She referred the Court to the case of **Selemani Makumba vs Republic,** (2008) TLR 379 where it was held that, the best evidence in sexual offences comes from the victim.

This Court is aware that, in criminal cases the prosecution is duty bound to prove the charge against the accused person beyond reasonable doubt and the burden of proof never shifts. In the present case, to prove the charge against the appellant, the prosecution called four witnesses including the victim who testified as PW2. This Court examined the evidence adduced by PW2 and is satisfied that PW2 having promised to tell the truth proceeded to give an incriminating description of how the appellant had carnal knowledge of him against the order of nature. Given

that the best evidence in sexual offences comes from the victim of the offence subject to it passing the test of credibility under section 127(6) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016, this Court is satisfied that the prosecution managed to prove the case against the appellant.

Coming to the 2nd ground, the appellant faulted the trial Court for its failure to comply with section 231 of the Criminal Procedure Act when it found him with a case to answer.

Responding to this ground, Ms. Makala argued that, section 231 of the CPA was complied with and the appellant was informed by the court how he intended to defend himself.

Having gone through the trial court records at page 13, this court is satisfied that after the trial court had delivered its ruling that a case had been made against the appellant to require him to present his defence, the court dutifully addressed him on his rights and manner to present his defence in terms of section 231 of the Criminal Procedure Act. Records indicate that the appellant was recorded to have replied to the court that "Accused: I will call 1 witness and produce no exhibit". So, this ground too fails.

Coming to the third ground, the appellant alleged that the trial court erred in law and fact to consider the evidence of PW2 while he was still young (3 years old) and it was impossible for the child to remember the things which happened 8 months prior to the hearing of the case and he could have been lying despite his promise to tell the truth.

In response to this ground, Ms. Makala submitted that, section 127 (2) of Cap. 6 allows the evidence of a child to be taken, therefore, she maintained that there is no merit on this ground.

Section 127 (2) of the Evidence Act, Cap. 6 provides that:

> "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.*"

Guided by the cited provision, it is clear that a child is allowed to testify upon giving a promise to tell the truth, the argument by the appellant that the child could have forgotten the incident which happened long time ago is not supported by evidence. As long as the child promised to tell the truth, he was legally qualified to tell the truth. Thus, to rebut what he stated in his testimony the appellant needed evidence to the contrary. Therefore, I find the appellant's argument in this ground of appeal to be untenable and wanting in merit.

On the fourth ground, the appellant submitted that, the prosecution evidence at the trial court was weak due to the fact that the appellant's cautioned statement was recorded by PW3 before the victim gave his statement which is contrary to the PGO and the law. The PGO requires the victim's statement to be recorded when he reports the matter at the police station thereafter the accused's statement (caution statement) follows. Thus, the act of recording the appellant's statement first imposes a lot of questions.

I reply, Ms. Makala submitted that, the appellant was not prejudiced by recording of his statement prior to the victim's statement. She maintained that, the appellant's cautioned statement was not tendered as evidence in Court. Further to that, the alleged incident of unnatural offence was reported by PW1 and not the victim. She maintained that this ground of appeal has no merit.

This court will not be detained by the argument raised in this ground. The complaint in respect of this matter was reported by PW1 and not the victim (child). Thus, there was nothing wrong for the appellant to be interviewed in respect of allegations raised by PW1 against him. This Court agrees with the learned counsel for the respondent that the

appellant was not prejudiced by the recording of his statement prior to the victim's statement. That said, I find no merit in this ground of appeal.

Coming to the fifth ground, the appellant alleged that the doctor (PW4) did not use scientific methods to determine that the victim was penetrated, he simply used his opinion to make that determination which is a poor and unscientific way of conducting examination.

In response to this ground, Ms. Makala submitted that, the Doctor's (PW4's) testimony at page 20 and 21 of the proceedings explains how he did his examination to make a determination on what happened. She maintained that the Doctor had more than twenty (20) years' experience as a Doctor.

Having revisited the trial court proceedings, particularly the evidence adduced by PW4, this Court noted that at page 11 of the proceedings PW4 testified that he examined the victim based on the guidelines provided in the PF3. After that, he wrote his opinion that the victim was penetrated by a blunt object in the anus, he clarified that when something is inserted in the anus bruises appear because the anus is made in such a way that it removes things from inside to the outside of the body. Since there is no evidence to contradict the findings of the Doctor, I find no reason to fault the Doctor's findings in this matter.

Coming to the sixth ground, the appellant argued that the trial magistrate failed to draw an adverse inference to the prosecution's failure to call the parents of the victim who allegedly informed PW1 about this incident at the earliest.

On this ground, Ms. Makala responded that, according to section 143 of the Evidence Act, there is no specific number of witnesses needed to prove a particular fact. Thus, she maintained that, the prosecution found no need to call the victim's parents to the court as witnesses since the evidence of those who testified was sufficient to establish the case against the appellant.

From the testimony of the victim's grandmother (PW1), she was the one who observed the victim's condition and informed the victim's parents. Her testimony was important in explaining how the appellant was connected to this offence. However, evidence indicates that the victim's parents were not present during the commission of the alleged crime as they were just informed about it by PW1. Thus, their testimony was not key in proving the case against the appellant. Hence, the Court cannot draw any adverse inference due to the prosecution's failure to use them as witnesses.

Further to that, evidence presented by the prosecution was considered by the trial Court to be sufficient to establish the offence charged against the appellant therefore, there was no necessity of bringing more evidence to that effect. As rightly argued by the learned counsel for the respondent, there is no particular number of witnesses which is required to prove any fact (see section 143 of the Evidence Act).

On the seventh ground, it was the appellant's contention that, it was wrong for the trial court to conduct the case in an open court as the appellant had the guilt consciousness and became afraid to cross-examine witnesses.

Responding to this ground, Ms. Makala argued that there was no need to conduct the matter in camera and the appellant was given a chance to ask questions and he choose to ask only PW2, PW3 and PW4.

This Court finds it hard to find any legal substance in this ground. Evidence indicates that the appellant was of the age of majority which means the trial Court was not required to conduct the trial against him in camera. Further to that, the appellant did not address the trial Court about this concern which makes it appear as an afterthought. In the circumstances, this Court finds no merit in this ground.

With regards to the second ground, the appellant submitted that, his evidence was not considered hence, he was convicted unjustly.

In response to this ground Ms. Makala admitted that, the appellant's evidence was not properly considered however, this being the first appellate court, the court is allowed to evaluate the appellant's evidence and arrive in its own decision. She made reference to the case of **Athuman Mussa vs Republic**, Criminal Appeal No. 4 of 2020 (CAT-unreported) at page 17 -18.

To determine this ground, this Court sought guidance from the case of **Mkulima Mbagala vs Republic.**, Criminal Appeal No. 267 of 2006 (unreported) where the CAT observed that:

> "*For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case.... is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at.*"

This court agrees with the submission of Ms. Makala that the trial Court's failure to properly evaluate the appellant's evidence can be addressed by this Court's evaluation of the appellant's evidence on record

as adduced in the trial Court. Having closely examined the evidence of the trial court particularly the evidence of DW1 (appellant), this court is satisfied that despite the trial court's failure to consider the appellant's defence, such defence was simply a denial of him participating in the alleged offence. In the circumstances, this Court finds no evidence which can alter the findings of the trial Court in the offence charged. Accordingly, I find no merit in this ground as well.

In the light of the foregoing, this Court is satisfied that the trial court rightly convicted and sentenced the appellant on the weight of evidence which proved the case to the standard required. As a consequence, I find no merit in this appeal and I hereby dismiss it in its entirety.

It is so ordered.


K.N.ROBERT
JUDGE
13/07/2022