

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

DC. CRIMINAL APPEAL NO. 78 OF 2021

*(Originating from Criminal Case No. 491 of 2020 in the Resident
Magistrate's Court of Kilimanjaro at Moshi)*

SIMON SILVESTER MOSHI..... APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Last Order: 13TH June, 2022

Date of Judgment: 18th July, 2022

JUDGMENT

MWENEMPAZI, J.

The appellant was charged in the District Court of Moshi District for committing Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap. 16 R. E. 2019. It was alleged that on the 13th day of November, 2020 at Msaranga Area within the District of Moshi in Kilimanjaro Region the appellant did have carnal knowledge of one "BJ" a girl of 8 years of age, against the order of nature. When the charge was read over and explained to him, he denied to have committed the offence. The prosecution had to parade six (6) witnesses in order to prove the



charges against the appellant and at conclusion, the trial Court found the appellant guilty of the offences charged. The appellant was convicted and sentenced to serve a term of life imprisonment in jail.

The appellant is aggrieved by the findings, conviction and sentence. He has thus filed this appeal against the whole Judgement and sentence. The appellant raised nine (9) grounds of appeal. The said grounds of appeal hinge on challenging identification of the appellant, the manner of admission of evidence of the child of tender age in that it was received against the provisions of section 127(2) of the Tanzania Evidence Act, Cap. 6 R. E. 2019 and contradictions on the part of the evidence by the prosecution.

At the hearing the appellant was being represented by Mr. Pius Ndanu, learned advocate and the Respondent was being represented by Ms. Mary Lucas, learned State Attorney.

The facts of the case allege that on the 13th November, 2020 the victim went to school as usual. She was a student at Majengo Primary School. Normally, she goes to school under escort of one of the relatives among the elder members at her home and would come back alone by boarding bodaboda or Bajaji (tricycle). That is according to PW1 Sia Joseph Njuu, who testified to that effect, during cross examination. On the material date the victim went home late. Her sister, PW1 asked her as to what had happened. She replied to her that she was told to remain at school by her teacher. Later, on the same date it was discovered that she had faeces on her pants. The next day her sister went with the victim to the school

teacher in a bid to seek explanation. The teacher told the sister that on the material date the victim left for home at the same time with other students. That is when they teamed with the teacher to inquire in a friendly way what had happened. The victim told them that on the previous day as she was coming from school, while waiting for transport, she met the appellant who was then a Bajaji driver. Together they went to a certain house where the said driver had sexual intercourse with her against the order of nature.

According to her testimony, the Babaji driver (the appellant) asked her where she was going. The victim (**BJ**) told the Bajaji driver that she was heading for Msaranga. The driver told her to board on the Bajaji (tricycle) pretending they are going to Msaranga but he drove to unknown place. At first they stopped over at an unknown garage at Rau. They changed the transport. The Bajaji was left at the garage and they now used a motorcycle. They went to the house which is at Rau, Moshi.

It is in the account of the victim that at the house, the appellant gave her water to drink, and then asked her if she wants to go to the toilet to urinate. When she answered in affirmation, the assailant waited for a little while then followed. In the toilet the assailant (appellant) told the victim to hold the wall and bend, then he had sexual intercourse against the order of nature. According to the victim, she never knew the assailant (appellant) before. But her description was that the person was wearing headphones in his ears, had a bracelet on his hand with colours 'yellow, green and black'.

D. J. Geni

The victim's sister and school teacher took the victim child to the police for reporting the event and Mawenzi hospital examination. On the same day, 16th November, 2020 the victim's father knew of the story about her daughter. He was informed by PW1 while she was at the police gender desk. When the victim's father went at the police station, he was told that they have gone to Mawenzi hospital.

Once they came back home, he asked the victim if she knew the name of the victim. What the victim told the father is that she knows the assailant by facial look. She said he likes to wear headphones, the man has somehow light skin (**maji ya kunde**) and he has hair which are short and spiral (**nywele zimejisokota**).

On the 17th November, 2020 the victim's father and the victim went at the bus stand, Bora area looking for the assailant. On this instance, the victim child described the assailant to have *'curly hair, he used to put on headphone in ears and he likes to wear bracelet mixed with white, blue and green colours.'*

It is therefore testified that on the date, the victim and her father stayed at the bus stand morning up to 12:00 noon time and later the victim pointed at what she had described to be the black Bajaji whose driver was said to be a white person, used to wear headphones in his ears, wears a bracelet with mixed colours which are white, blue and green. On the strength of the account of the victim child, PW6 arrested the Bajaji driver (the appellant this case) with the help of other people and took him to Moshi Police Central.



The prosecution also led the evidence of the doctor who examined the victim. It is PW3 Edna Ranjia Mushi, a doctor at Mawenzi Hospital. She confirmed that the victim was sodomized and her anal sphincter muscles were loose to the extent the victim could not control faeces coming out. In the testimony of the doctor, which also it is important to note, the victim was used to sexual intercourse against the order of nature. She testified using the following words, I quote: -

"The victim told me that she had been having sexual intercourse against the order of nature more than once."

On the proof of sodomy, the appellant has not said anything. His concern is to delink himself with the commission of the offence. The respondent however has submitted that the evidence of penetration has also been corroborated by the testimony of PW3, a doctor who examined the victim. She narrated clearly on what she observed and found on the victim's anus and the same has been proved by the PF3 which shows clearly that the victim's anus has been penetrated. Hence there was commission of the offence of unnatural Offence as provided for under section 154(1) of the Penal Code, Cap. 16 R.E. 2019.

I don't think there is any doubt to the carnal knowledge against the order of nature in respect of the victim. Under the circumstances, there is no doubt that the victim was sodomized more than once. The only question is who is the person who has been sodomizing her?



In the circumstances of the present case, it is only the evidence of the victim child which may reveal the identity of the person who sodomized her. In the testimony of PW1 Sia Joseph Njuu, her sister the first person to discover that something was wrong with the victim, she testified as follows:

"I asked the victim if she knew the accused person, she said she can identify him by face. He is somehow white "Maji ya kunde nyele zimejisokota. He also likes to use headphone and to wear slippers."

In the testimony of the victim herself, who testified as PW2, she testified how the event took place. The words of the victim may help to grasp the events as they happened.

"When I was in standard two at Uhuru Primary School, I went at the Stand waiting for tricycle heading for Msaranga it was after school I wanted to go home, so tricycle driver came while driving the tricycle, he was a man wearing headphone into his ears, he was wearing bracelet 'kidani' on his hand (which is) yellow, green and black... the man was wearing a grey Tshirt and (a) pair of trousers, I cannot remember the trouser colour..."

The child in her testimony, testified that when she arrived home on the date of the event, she met her sister Anna but she did not tell her anything because that man threatened to kill her if she tells anybody what

happened. On another day she was taken to the police station she told them as follows:

"that man is white 'Ni maji ya kunde nywele zilikuwa zimejiviringisha viringisha kama kipilipili'

She testified that when the man was arrested, she was present. They went at the bus stand, her father told her to show him that tricycle. Later the same tricycle which they boarded on the date of event, according to the victim's evidence, came and she pointed at it to show her father. The latter arrested that man. On the date he wore slippers bracelet "kidani rangi zilezile" and headphone his hairs were still in the same way. That part of testimony is as follows:

"later on, the same tricycle came and I pointed at it while showing my father, my father followed it and arrested that man on that day when arrested he was wearing slippers, bracelet 'kidani rangi zile zile' and headphone "nywele zake zilikuwa bado zimejisokota, zimejiviringisha kama siku ile" the accused had a curly hair, he used to put on headphone into ears and he likes to wear bracelet mixed with white, blue and green colour when he sodomized me , there was a light and it was before darkness."

This evidence was the basis of the arrest made by the victim's father on the 17th November, 2020 when they went downtown at the bus stand to



look for the assailant. The father of the victim testified on the aspect of identity of the assailant as follows:

*"I asked her if she knew a person who sodomised her she told me yes. She said that man is a tricycle driver and his tricycle is black (Bajaji is black), I asked her if she knew him by names, she said she knew him by his face. He likes to wear bracelet "kidani" and also like to put a headhone. she also told me that the man is somehow white "Maji ya kunde na nywele zake zimejiviringisha(zimejisokota sokota") she told me she can identify that man. So next day on the 17/11/2020 I and victim went at the bus stand at Bora area we stayed there since morning to 12:00 noon hours, the victim showed to me the said bajaji we followed him and failed. We decided to wait at the stand when he came back, we followed him on motorcycle up to double road he took another customer, when we arrived at Mbosho areas Majengo his customers left so we followed him and since I had the RB, I stopped him. I asked the victim if he was the man she said yes. The accused had put on the headphones, he wears his bracelet "kidani" and his slippers **"nywele zake zilikuwa zimejisokota vilele"** so with help I brought him at Moshi Central police."*

Therefore, from the account above, the appellant (accused in the lower court) is the one who was arrested and arraigned for committing unnatural

offence Contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E.2019.

The question however is whether with the evidence at hand the appellant is the person who committed the offence in this case. We are told from the accounts of witnesses, especially, the child victim who testified as PW2 that it was daylight when the event took place and she was able to identify the appellant at the Bus stand.

As it may be recalled, I made the finding herein above that from the facts and evidence available, there is no doubt that the victim has had sexual intercourse against the order of nature more than once. Due to that she has sustained a serious damage to her anal orifice which has resulted into her failure to control discharge of faeces, as the sphincter muscles have loosened. That has been confirmed by PW1 who is her sister and PW3 Edna Ranjia Mushi, the medical doctor who examined the victim when she was taken to the hospital. The only question is who is responsible for the damage done to the victim.

The trial magistrate was convinced by the description of the assailant by the victim and that the same matched with the appearance of the appellant. In her reasoning, she has confirmed the identification on account that it was afternoon and the victim had that chance to observe the person who had sexual intercourse with her clearly.

On the identification, the counsel for the appellant has submitted that the identification of the appellant was not water tight and cannot be said it was



proper since the identification as testified is too general and it left many questions unanswered. In the opinion of the counsel for the appellant, since the victim never knew the assailant before, an identification parade ought to have been conducted. He also challenged the mode of arrest where the police investigator was not involved. As to the place the event took place the owner of the house would have been called to testify and failure to call him or her, the court ought to have drawn an adverse inference that if the witness was called would have given evidence contrary to the prosecution's interest. He referred the court to the case of **Hemed Said Vs. Mohamed Mbilu** [1983] T.L.R. 113

The Respondent has submitted that in this case the best evidence is that of the victim herself. She narrated clearly on how the appellant committed the offence and he identified him very well, by his appearance and clothes he was wearing on the date. When the witness testified in court the appellant did not cross examine her, on the appearance of the tricycle he used to drive as well as the place the event is alleged to have taken place. It is the respondent's counsel argument that by implication, the appellant admitted to what have been testified by the prosecution. The learned state attorney submitted that it is a cardinal principle of law that, failure to cross examine amount to admission as it was held in the case of **Nyerere Nyague Vs. Republic, Criminal Appeal No. 67 of 2010, Court of Appeal of Tanzania**(tanzlii). In that case the court of appeal held that:

"as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to



accept that matter and will be stopped from asking the trial court to disbelieve what the witness said."

In the case of **Raymond Francis V Republic** [1994] TLR 100 (CA) it was held that:

"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance;"

It is very open to anyone that the description of the assailant is too general to warrant a certain trap of the person who may have perpetrated the sodomy to the girl. **First**, the child mentioned features which are trending to most youngmen around the town who would like to show themselves as part of the modern youngmen such as wearing hair in braids and wearing bracelets. In this case, the assailant is said to have been wearing bracelet with colours yellow, green and black. This is a common apparel in cultural shops and almost every person of the sort would like to put it on. **Second**, the child testified that the assailant was driving a black tricycle. The account of the event shows they changed mode of transport at an unknown garage somewhere at Rau as the child says she read a post. The account also shows she was not taken back by the assailant. It is PW5 who took her from the place near the scene of crime. How are we sure that the person who was the driver of the Babaji and the assailant was not just a mechanic who went on testing a tricycle and then he left it at the garage? It is not safe to take the black bajaji as an identification feature given that

they are many and we have not specific registration number. At least the child would have taken the registration number which would have been utilized to trace who used it on the date and verify by identification parade. **Third**, the circumstances must have been terrifying to the child as she even could not tell her sister Anna when she came back home despite of the fact that now she was at home and the assailant could not hear what she would be telling her sister. In my view, even the observation must have been impaired by the fear she had.

I have an opinion that since the victim did not know the assailant before, it was necessary to give a detailed description of the assailant so as not to have a mistaken identity. In the case of **Mohamed Alhui v Rex [1942] 9 EACA 72** it was held that:

"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

In the present case, the features relied upon are common to many not specific to the appellant. They may be identified to many among the bodaboda or Bajaji drivers which may not guarantee that there won't be any mistaken identity. This point brings me to the observation that even the child herself, while at first, she said the event took place in the toilet

which is outside the main house, when she went at the scene of crime with the investigator, PW4: WP 1049 D/C Helena she showed the room and not the toilet. The testimony of investigator PW4 is as follows:

"I visited the scene of crime and the victim was the one who brought me to the scene of crime. It was a big house we knocked the door and a woman opened the door. The victim showed us the room used when sodomised but it was closed. That woman told us that she was the maid and she was still stranger to that house, but the victim insisted that it was the same house."

This evidence shows there was uncertainty even to the location of the event, unless the child was speaking lies earlier on when she said she was made to go to the toilet and there was followed by the assailant, who ordered her to bend so that he could sodomize her. It is not clear therefore, whether the event took place in the toilet or in that big house in the room which was not opened. It is unfortunate; however, the investigator did not insist for the room to be opened so that they can check whether there is any clue as to what happened in there. Or maybe she insisted but did not testify so in court.

Also, it is not shown whether they called the owner of the house to know who are the persons with access to the house, specifically the room pointed out to the investigator and may be the assailant is one of them.

Spiffers

In my view the evidence tendered in respect of the identification is more wanting. In the case of **Yassin Maulid Kipanta And Two Others V Republic [1987] TLR 183**

"Where evidence against the accused person is solely that of identification, such evidence must be absolutely water tight to justify a conviction;"

Under the circumstances I find the evidence leading to the appellant is still wanting.

If we assume the evidence tendered is water tight, whether the complaint that the same was taken against the requirement of the law is valid. The Counsel for the appellant has argued that the trial court erred in law and in fact by according weight to the testimony of the victim who is a child of tender age without corroboration. The counsel submitted that the record shows that the victim is a child of tender age, the law requires that before taking and giving weight to her testimony, the trial court had to conduct the voire dire examination as per the guidance of the court of appeal in the case of **Mohamed Sainyeny vs. Republic, Criminal Appeal No. 57 of 2010**(unreported) at page 8-10 and **Edward Nyegela vs. The Republic, Criminal Appeal No. 321 of 2019**(unreported). What transpired at the trial court was as follows (quoted at page 19 of the proceedings):

SSA: PW2 is a child.



Question- what is your names

Answer- Beatrice Joseph Njuu

Question- Are you studying?

Answer- Yes, in class three

Question – Do you know what lies is?

Answer- Yes, at the Church, they taught us not to tell lies, I promise to tell the truth before this court not lies.

Court: the child promised to tell the truth in court not lies. S. 127 of the Evidence Act, Cap. 6 R. E. 2002 C/W hence

Sgd. B.T. MAZIKU-PRM

5/11/2011

I see no need to be detained at the point, indeed the directives in the case cited by the counsel for the appellant were not complied with in taking the evidence of the child. No *voire dire* test was conducted; and the truthfulness of the testimony was not scrutinized enough to verify the content of testimony relied upon in convicting the appellant. Even if it would have been taken, still with the finding above, the evidence was not that much free of doubt to warrant a firm conviction of the culpability of the appellant.

For the reasons and the findings herein above, I find the appeal has merit and proceed to quash the judgment and conviction of the appellant. The



sentence is set aside and the appellant should be released forthwith from prison unless otherwise he is lawfully being held. It is ordered accordingly.

Dated and delivered at Moshi this 18th day of July, 2022.



T. M. Mwenempazi
T. M. MWENEMPAZI

JUDGE

Judgement delivered in Court in the presence of the appellant and Mr. Pius Ndanu, his advocate and Ms. Mary Lucas, learned Senior State Attorney for the Respondent.

T. M. Mwenempazi
T. M. MWENEMPAZI

JUDGE