IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 194 OF 2021

(Originated from Criminal Case No. 45/2020 of the District Court of Temeke at Temeke by Hon. Y Kingwala RM)

NASSORO MWALAMI KUGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

23rd April & 5th August 2022

ITEMBA, J;

In the District Court of Temeke, Nasoro Mwalami Kuga was charged and convicted of the offence of unnatural offence contrary to section 154(1)(a)(2) of the Penal Code Cap 16 [R. E. 2019]. A sentence of life imprisonment was imposed to him.

Brief facts of the case are that, a victim, who testified as PW1 is a 10 years old boy and a son of Hajira Jafari (PW1). On 25.10.2021, PW2 was washing her son's clothes and was disturbed by the sight of faeces in his under pants. PW1 questioned PW2 who did not disclose anything regarding

the faeces. Anxiously, PW1 took PW2 to a nearby private hospital and later to Mbagala Zakiem hospital for examination. At Mbagala Zakiem Hospital, she was advised to first find a PF3 at Makoroboi Police Station of which she did. At the police station, PW2 was interrogated by the police officers and disclosed that he has been sexually assaulted by the appellant who was known as 'kapteni', a football captain in a nearby football ground. Investigation commenced which led to the arrest, prosecution, conviction and sentencing of the appellant.

The appellant is aggrieved and has filed the present appeal loaded with eight grounds as follows:

1. *That, the learned trial Magistrate grossly erred in law by holding to the inadmissible evidence of PW2 (victim) which was obtained contrary to section 127(2) of the Evidence Act as Amended by Act No. 4 of 2016 as there are no findings on record to show that PW2 promised not to tell lies in Court Contrary to the procedure of law.*
2. *That, the learned trial magistrate erred in law and fact by relying on the evidence of PW1, PW3 and PF3(Exh.P2) which were unreliable and with material inconsistences whose story failed to corroborate the PW2's story against the appellant.*
3. *That, the learned trial RM erred in law and fact to convict the appellant relied on improper and unprocedural visual identification and/or*

recognition by PW2(victim) who failed to give any unique description on his assailant such as morphological appearance, colour, name etc hence there was no any identification parade conducted nor called witness from musuma football ground to prove whether or not the appellant was the said captain.

4. *That, the learned trial RM erred in law and fact to convict the appellant based on discredited and untenable evidence of PW2(victim) who alleged that the appellant once cut him with a knife when his mother did not testify the same hence no any treatment card nor PF3 was tendered to prove the same.*

5. *That, the learned trial RM erred in law and fact to convict the appellant based on the prosecution evidence which was not cogent and watertight to establish and/or link the appellant with the unnatural offence he is charged with.*

6. *That, the learned trial RM erred in law and fact by misdirecting himself for not analysing, evaluating, weighing and considering the appellant's affirmed defence evidence which raised reasonable doubt on the prosecution evidence.*

7. *That, the learned trial RM erred in law and fact by not cogitating the scrutinizing properly the evidence from both sides as a result he reaches a wrong conclusion.*

8. That, the learned trial RM erred in law and fact to convict the appellant in a case which was not proved to the hilt by the prosecution.

Before the High Court, the appellant appeared in person, unrepresented while Ms Masue, SA. State Attorney represents the DPP. This appeal was heard through written submission following prayer by the appellant. Both parties complied with the schedule of filing submissions.

In his submissions, the appellant stated that the whole prosecution evidence was anchored on the evidence of the victim, PW2, who is the child, nonetheless, the said evidence was admitted contrary to section 127(2) of the Evidence Act as the victim did not promise to tell the truth and not to tell the lies. He argued that if PW2 did so, the same would have featured at page 22 of proceedings. The appellant adds that, the court did not record the age and religion of PW2. In respect of his identification, the appellant explained that, PW2 could not have identified the appellant properly as none of the prosecution witnesses knew the appellant before either by his name or appearance and that the Court of Appeal has established that for the identification to be proper, there must be description of clothes, voice, height of the accused, before an Identification Parade is done. That; in his testimony PW2 did not give description of the appellant's apart from only

stating that he was a captain. That, the victim mother PW1, could not prove who told him that the captain's name is Chollo. That there was a need for conducting an ID parade because at the football ground, there were two captains. He stressed that there should have been more direct circumstantial evidence to link the appellant with the offence charged and that no one from the football pitch came to testify.

Regarding the contents of the judgment, the appellant states that it was just a summary of prosecution witnesses' testimony without analysis as the trial court believed that the appellant was named "kapteni" without any sufficient evidence, thus according to the appellant, the judgment was defective.

Ground 2,4,5,7, and 8 were argued jointly that prosecution evidence was "insufficient, incredible and unreliable" that the testimony of the Medical Doctor PW3 differed from the PF3 as regard the anal pain and discharges and that it was not proved if PW2 was cut by knife by the appellant. The appellant denied to have ever played football and that the names of Kapteni and Chollo are not his. He cited the case of **Filbert Alphonce Machalo Vs Republic** Criminal Appeal 528/2016 (unreported).

In reply the learned State Attorney stated that page 22 of proceedings shows that section 127(2) of the Evidence Act was compiled with as the victim promised to tell the truth she reiterated PW'1 testimony in support of her argument.

In respect of the second ground, the learned state attorney argues that there is nowhere in record which shows inconsistences of PW1, PW2 and PW3 because at page 16 to 17 of the typed proceedings it was PW1 who told the court that she noticed the faeces in her son's underpants, asked her son (PW2) about it and he did not reply and she decided to take him to the hospital where it was revealed that he was sodomised. That; at page 28 of proceedings, the medical Dr. (PW3) testified that he examined PW2 and found that his anus had bruises, was swollen and expanded, had pus and he felt pain upon touch and he produced a PF3 (Exhibit P3) in support of his testimony. She added that PW2 explained how he would usually go to watch football and the appellant would take him in his 'bajaj' to an unfinished house, penetrated his anus after drop kicking him.

Regarding the 3rd ground which was about identification of the appellant, the respondent referred the court to page 24 of the proceedings that the victim (PW2) and the appellant knew each other before as the appellant used to

take PW2 in his 'bajaj' and sodomised him during day time therefore there cannot be any mistake of identity. That the victim knew the appellant by his nick name 'captain' and that the two were living in the same street and that at the police station, the victim stated that he knew the appellant by face.

The learned state attorney added that during the arrest it was the victim who pointed out the appellant to his mother and other 4 men. She argued that the identification parade was not relevant because the victim knew the appellant before and that even though the victim did not mention the appellant's name that is not an issue because someone's name can change but not the appearance.

As regards to proof of the offence of unnatural offence the learned state attorney argued that the evidence of PW1, PW2 and PW3 proved the offence as the victim stated that he felt the thing penetrating him and he felt pain into his anus this means there was penetration. She referred the cases of **Tumaini Mtayoba v R** Criminal Appeal No. 217 of 2012 (unreported).

In arguing grounds 6 and 7 the respondent stated that the trial magistrate weighed and analysed the evidence properly and that at page 14 of the judgment the court arrived into a conclusion that it was the accused who sodomised the victim. That; there wasn't much from the defence to be

analysed. She also stated the act of the appellant denying the name 'Kapteni' cannot exonerate him from liability because there is no dispute that the appellant and the victim knew each other.

The appellant's rejoinder was to the extent that Section 127(2) TEA was not complied with as *voire dire* test was not conducted. He cited the case of **Hassan Yusufu Ally Vs Republic** Criminal Appeal No. 462/2019. He also insisted that there was contradiction and no corroboration between PW1, PW2 and PW3 he reiterated that it was important for an Identification Parade to be conducted for proper identification of the appellant.

Having gone through both parties' submissions the issue is whether the appeal has merit.

In these 8 grounds, basically, the appellant is challenging (1) the admissibility of evidence of PW2 who was a child (2) inconsistence of prosecution witnesses (3) poor identification of the appellant by the victim (4) non consideration of defence evidence by trial magistrate (5) lack of proof of the offence of unnatural offence.

In tackling this appeal, among others, I will be guided by section 154(1)(a) and (2) of the Penal Code which creates the offence of unnatural offence and provides the sentence thereof. The section states that:

'(1) Any person who-

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

(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.'

In his first ground of appeal the appellant is complaining regarding the evidence given by the victim, PW2, a child of 9 years being taken contrary to section 127(2) of TEA. That there was 'a promise to tell the truth' and "not for ease of reference said section stated 127(2) to tell lies."

Proceedings at page 22 reflected that: -

> *"PW2, (name withheld), I am living at Mbande, I'm studying standard 3 at Mbande Primary School, 10 years old, Muha,*
>
> ***Court:*** *The PW2 is addressed if he knows the meaning of the oath and if he know the duty to speak truth, or not.*
>
> ***PW2:*** *I don't know the meaning of the oath. I know the meaning of speaking the truth is to tell true and not untrue, I promise to speak the truth.*
>
> ***Court:*** *The PW2 is a child, he does not know the meaning of the oath, but he knows the meaning of speaking truth and he promised to speak the truth. Therefore, PW2 will testify without oath."*

Section 127(2) of the Evidence Act R.E (2019) states 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.'

Based on the above part of proceedings, it is very clear that the PW2, victim who was a child, stated he did not know the meaning of an oath but he knew the meaning of speaking the truth and he promised to speak the truth. Records show that PW2 gave his evidence without oath but he promised to tell the truth.

It is true that PW2 promised to tell the truth but he did not promise "not to tell lies" however PW2 promise does not disqualifying his evidence because PW2 intended to tell the truth and technically when one promise to tell the truth, one promise not to tell lies.

The case of **Hassan Yusuph Ally v R** (supra) referred by the appellant is distinguished from the present because in that case A child of tender age gave her evidence on affirmation but the records were silent on how the trial court reached to the conclusion that the said child (PW1) possesses sufficient intelligence to justify the reception of her evidence upon affirmation of which as explained above, it is not the situation in this case. As mentioned above,

page 22 of the typed proceedings show it was recorded that PW2 knows the meaning of speaking the truth and he promised to speak the truth.

It was also argued by the appellant, the religion of PW2 does not feature in the proceedings, however, as one of the purposes of recording the religion is to know in which manner should an oath be made and as PW2 did not testify under oath, I find that the omission to record PW2's religion is not fatal and does not affect PW2's evidence. Thus, this ground has no merit.

Regarding identification, the appellant has invested a lot in challenging his identification by PW2 and PW1. He states that **One,** PW2 identified him as 'Kapteni' while at the said playground there were 2 people by the name of 'Kapteni' **Two,** PW2 did not mention his assailant at the earliest opportunity. **Three,** PW2 did not give any graphic description of his assailant. **Four,** the prosecution did not call the said youth who directed PW1 to the appellant and stated that the appellant's name was 'Kapteni'. The prosecution had countered this argument and stated that, identification was proper as the incidence used to occur during day time meaning that mistake of identification cannot arise. If we refer to the words by PW2 at page 23 of proceedings he told the court that the one who penetrated his anus was the kapteni who was at the football ground, that kapteni took him

at his bajaji (tricycle) up to unfinished house where he tied PW2's legs and hands, covered his eyes, drop kicked him and penetrated his anus. He then dressed him and uncover his eyes and took him back to the football ground. At page 24 of the typed proceedings, PW2 testified that this act was done during day time, several times, mostly after class hours and that kapteni warned PW2 never to tell anyone otherwise he will slaughter him.

It is trite law that the evidence of visual identification can be solely relied as basis for founding a conviction against an accused person, however if the Court wants to rely on that kind of evidence, it must be sure that such evidence is watertight and leaves no possibility of mistakes in identification. A landmark case of **Waziri Amani v R** [1980] TLR 250, had long established the principle of identification. The same principle has been reiterated and expounded in several cases including **Scapu John and another vs. Republic**, Criminal Appeal No. 197 of 2008 (Unreported) the supreme Court of the land among other things, mentioned the said conditions which have to be complied for exclusion of all possibilities of mistaken identity. The court stated the following:

> *"Water tight identification, in our considered view, entails the exclusion of all possibilities of mistaken identity. The court should, inter alia, consider the following; How long the witness had the accused under observation, What was the estimated distance between the two, If the offence took place at night which kind of light did exist and what was*

it's intensity, Whether the accused was known to the witness before the incident,

Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration."

Looking at the evidence which has been explained above versus the criteria laid down in **Waziri Amani**, it is clear that PW2 pass the test of identification that he properly identified the appellant. The incidences occurred several times, during daytime after football match, therefore PW2 has ample time to observe the appellant. PW2 knew the appellant before by his nickname 'kapteni'. PW2 further explained that the football ground was known as Musuma and the appellant team was named 'wahuni' team. That the appellant had a red bajaj with music. And when they entered into unfinished house PW2 will give the bajaj to someone else. Even if there were 2 people named 'kapteni' as the football team, PW2 had further explained that the appellant is the one who had a red bajaj with music. PW2 properly identified the appellant at the dock.

As mentioned by the appellant, it is true that PW2 did not mention the appellant's proper name at the earliest opportunity but as rightly argued by the respondent, PW2 identified the appellant by his appearance and by his nickname which was sufficient to know the appellant.

In respect of inconsistency of prosecution witnesses, the appellant is alleging, there is a contradiction between PW3 testimony and contents of PF3 regarding pain and discharge, that it was not proved that the PW2 was cut with a knife as there was no PF3 and kapteni is not his name and he never played football. I have gone through the prosecution evidence and looking at page 28 of proceedings it shows that PW3 testified that when he examined PW2, his anus had bruises, the size has expanded and pus and that PW2 could feel pain when he touched him and that PW2 tested negative for veneral diseases. Meanwhile, the PF3 reads 'anus tenderness, multiple bruises, loose sphincter muscles and swell'. In short, I do not see any discrepancies between the testimony of PW3 and a PF3. As regards the scar, at page 24 of typed proceedings PW2 showed the court the scar of where the appellant had cut him.

The next ground refers to the trial magistrate failure to consider the appellant defence. The appellant complains that the trial magistrate just summarized the evidence instead of analysing it. I have gone through the judgment and it is true from page 2 to 10 there is a detailed narration of prosecution and defence evidence. At the same page 10, the trial magistrate raised 4 issues and started to respond to them one by one. At page 16 the

trial magistrate considered the accused total denial of his name being kapteni and being involved with PW2 and found that still there is sufficient evidence to convict the accused. To me that was a proper consideration of the accused's defence and this makes the related ground non meritorious.

The last ground is regarding lack of proof of the offence of unnatural offence. Section 154 (1)(a) (2) of the Penal Code provides that:

> *154.-(1) 'Any person who-*
>
> *(a) has carnal knowledge of any person against the order of nature;*
>
> *commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(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.'*

The main elements in this offence are 'carnal knowledge' and 'against the order of nature'. According to Black's Law Dictionary 4th Edition, the word carnal knowledge is interpretated as:

'*coitus; copulation; the act of a man in having sexual bodily connection with a woman; sexual intercourse.'*

Based in the evidence in record PW2 stated that the appellant undressed him, and before he penetrated him, he would tie his legs and hands, cover his eyes with a cloth. PW2 could not know what penetrated him but he felt it and it was painful. I am of the firm view that with this evid ence there is no dispute that PW2 was penetrated by the appellant but it is not established whether such penetrated amounted to carnal knowledge. Therefore, in the absence of proof of an ingredient of carnal knowledge, it cannot be said that the offence of unnatural offence was properly established. Nevertheless, considering the situation in the present appeal and being guided by the decision in **Burundi Deo v R** Criminal Appeal No. 33 Of 2010, CAT, Mwanza (Unreported), I am satisfied that there is sufficient evidence on record to prove the cognate offence of grave sexual abuse contrary to section 138C (1)(b) (2)(b) of the Penal Code.

For the above reasons, the appeal is partially allowed. I quash the conviction of the appellant for unnatural offence and set aside the sentence of life imprisonment. In terms of section 366(1) (a)(ii) of the CPA, I substitute therewith a conviction of Grave Sexual Abuse contrary to section 138C (1) (b) (2) (b) of the Penal Code and sentence the appellant to twenty (20) years

imprisonment and payment to the victim of compensation amounting to TZS Five Hundred Thousand (500,000) for the injuries caused to him.

Order accordingly.

L. J. Itemba

JUDGE

5/8/2022

DATED at **DAR ES SALAAM** this 5th day of August, 2022

L. J. Itemba

JUDGE