THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 134 OF 2021

(Originating from the District Court of Chunya at Chunya in Criminal Case No. 50 of 2021)

Between

MKAPA EDWARD ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 6th July, 2022

Date of judgment:9th August, 2022

NGUNYALE, J.

The appellant was arraigned in the District Court of Chunya with an offence of unnatural offence contrary to section 154(1)(a) of the Penal Code [Cap 16 R: E 2019] now R: E 2022 in Criminal Case No. 50 of 2021. It was alleged that on 11th March, 2021 at Mapogoro village within Chunya District in Mbeya Region the appellant had carnal knowledge of PW1 a child of ten years old against the order of nature (name withheld to conceal identity). The appellant pleaded not guilty. To prove the charge

the prosecution paraded three witnesses, PW1, Juma Kungu Nilimu (PW2 and father of PW1) and Moris Msongola Mdoe (PW3 a doctor) and one exhibit, PF3. The appellant defended oneself.

Briefly, it was the prosecution case that on 11th March, 2021 PW1 went missing, during night PW1 on his way home met the appellant on the road who told him to go to his home. They went and slept together. Afterward PW1 was told to undress and was sodomized by the appellant entering his manhood on the anus. PW1 stayed with the appellant for four days until of 15th March when he met his father at the market and taken home. PW2 alleged that PW1 disappeared at home on 11th March, 2021 and was found on 15th March, 2021 upon being asked he told him he was with the appellant and narrated that he had been sodomized. The matter was reported to village leaders and police where PF3 was issued. PW3 examined PW1 and discovered that he had signs suggesting sodomy. The result was filled in PF3 exhibit P1.

In defence the appellant denied any involvement and spending any day with the victim. He admitted to know each other with the victim for they are neighbours.

The trial court upon full trial found the prosecution had proved the charged beyond reasonable doubt, consequently the appellant was

convicted and sentenced to thirty years imprisonment. Aggrieved the appellant filed the petition of appeal consisting of nine (9) grounds which can be paraphrased as;

1. *That the appellant was convicted on evidence of the victim without any corroboration;*
2. *That that the appellant's conviction was based on evidence of family members;*
3. *That the disappearance of PW1 was not reported to village leaders and police;*
4. *That PW2 did not notify the village leaders that PW1 had been found;*
5. *That PW1 did not escape or raise an alarm for all four days he was sodomized;*
6. *That conviction and sentence was based on liar evidence that the appellant's sister went to apologize;*
7. *That evidence of a doctor was not elaborative on cause of bruises on the anus;*
8. *That age of the victim was not proved;*
9. *That the prosecution did not call Khalid, Juma, Hamlet Chairperson and police officer as witnesses. Hence the case was not proved to the standard required by the law.*

When the appeal came for hearing the appellant appeared in person while the respondent Republic appeared through Ms. Zena James, State Attorney. When the appellant was called to cement his grounds of appeal, he had nothing to add and left the matter to be decided by the court.

On part of the respondent, they opposed the appeal. Submitting on first ground of appeal the State Attorney stated that PW1 proved that he was sodomized, evidence of penetration was corroborated by doctor. She added that evidence of the victim only can ground conviction.

Regarding complaint on evidence of family member, she submitted there is no law which prevents witness from the same family provided that they are credible. She cited the case of **Robert Andundile Komba v DPP**, Criminal Appeal No. 465 of 2017 to support the argument.

On not calling Khalid Juma, hamlet chairperson and police as witness, Ms James submitted that under section 143 of the Evidence Act there is no limit number of witnesses, what matter is credibility and weight of evidence. He cited the case of **Goodluck Kyando v R** [2006] TLR. She added that what matter is the ability of a witness to mention the culprits immediately. She cited the case of **Nelson Tete v R,** Criminal Appeal No. 419 of 2013.

On not reporting the disappearance of PW1, she submitted that the matter was reported to police and the appellant arrested.

With regard to PW1 that he did not escape for all those days, it was submitted that it was due to his age.

On whether the age of the victim was proved, Ms James submitted that it was not at issue in the trial court hence cannot be raised in this appeal. She cited the case of **George Mail Kemboge v R,** Criminal Appeal No. 327 of 2013. She added that the appellant did not cross examine about age.

I have considered the submission and grounds of appeal. Starting with the complaint that evidence of the victim was not corroborated. In cases involving sexual offences the best evidence is that of the victim, sole evidence of the victim can be safely relied upon by the court to sustain a conviction. This is well articulated under section 127(6) of the Evidence Act which provides that;

> *Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.*

In all sexual offences like the present one, the best evidence as to what happened has to come from the victim of the unnatural offence. However, emphasize is that, the court cannot base its conviction solely on the evidence of a child of the tender years or the victim of the crime unless it satisfies itself that, the same is credible and probable as to leave no reasonable doubt. See the case of **Fahadi Khalifa v Republic**, Criminal Appeal No. 573 of 2020, CAT at Dodoma (Unreported). Therefore,

evidence of a child need not necessary be corroborated, by itself is sufficient to ground conviction. The first ground is dismissed.

The second complaint is about the evidence of PW1 and PW2 which is regarded by the appellant as evidence of family members. I have considered submission of the learned State Attorney and indeed there is no provision of the law which prevents a relative or family member from testifying in cases involving relatives. This is derived from ancient principle of law that every person, who is a competent witness in terms of the provisions of section 127(1) of the Evidence Act is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not be believed. See, for example the case of **Goodluck Kyando v Republic** [2006] TLR 363.

In this appeal three witnesses were paraded by the prosecution, PW1 and PW2 being son and father respectively, therefore family members but PW3 a doctor who examined PW1 was not a family member. It is not true that conviction was based only of evidence of PW1 and PW2, the trial court also considered evidence of PW3 which corroborated that of PW1 about penetration. In fact, the appellant was convicted on evidence of PW1 which the trial court found credible. This ground is therefore dismissed.

On failure to call Khalid, Juma, hamlet chairperson as witnesses. Ms James submitted that no particular number of witnesses is required to prove a particular fact. I entirely agree with the learned State Attorney that under section 143 of Evidence Act no specific number of witnesses is required to prove a case and that what is important is the credibility of the witness, see **Yohanis Msigwa v Repulic** [1990] TLR 148. However, the rule is not absolute, if a person who is unreasonably not called as a witness is a material witness, the prosecution is bound to produce him and if not, the Court may, draw an adverse inference for the omission. See **Aziz Abdallah vs. Republic** [1991] TLR. 71.

In this appeal PW1 and PW2 stated that they went to in-law Khalid where PW1 narrated the incident and then to hamlet chairperson which led to apprehension of the appellant before being sent to police station. Unfortunately, Khalid, hamlet chairperson and police officer were not called as witnesses. In the case of **Boniface Kundakira Tarimo v Republic,** Criminal Appeal No. 350 of 2008 (unreported) 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.'*

The next question is whether these persons material witnesses, this issue will be dealt upon later.

With regard to failure to report disappearance to leaders and school. I have perused evidence of PW2 and indeed no where he testified to have reported that PW1 was nowhere to be seen. Although PW2 was emphatic that PW1 was missing for four days but the matter was not reported to either village leaders, his school or police. I am not in per with State Attorney that the disappearance was reported to police. The only issue laid to police was after the appellant being arrested in connection with the offence and not missing of PW1. It has to be noted that during preliminary hearing this fact was disputed by the appellant, but the prosecution did not call such witness to which the disappearance was reported. I

Another complaint is that the appellant's sister did not go to seek forgiveness. This need not take much time, the allegation was not substantiated by the prosecution, it was not part of the facts which the prosecution intended to rely on. This is clearly shown during preliminary hearing where it does not feature.

With regard to PW1's failure to escape and raise alarm. I have scanned evidence of PW1 and found that no where he testified to have been threatened or locked in for purpose of not escaping. When cross-

examined he replied that at afternoon he was hanging at the market area, they were meeting the appellant at night and that the doors were not being closed. State Attorney submitted that it was due to his age that could not escape. This line of argument seems attractive but taking circumstance of what happened to him, prudence dictates that he could not have returned to appellant's house again and again but the important thing is that PW1 proved that he was penetrated against the order of nature and the evil act was done by nobody else but the appellant. Even if he was happy with the habit, it remains that it was illegal for the appellant to do so. The argument that he was returning there now and then has no merit provided the offence was being committed.

On evidence of doctor on source of bruises, just like rape, for the offence to unnatural offence under section 154(1)(a) of the Penal Code to stand, there should be proof of penetration, however slight into the anus, with or without consent. See the case of **Joel s/o Ngailo v Republic,** Criminal Appeal No. 344 of 2017 (unreported). In this case PW1 narrated that the appellant penetrated his penis into his buttocks not at once. When PW3 examines PW1 he found bruises, swelling and was feeling pain which led to conclusion that he was penetrated by blunt object. Although PW3 evidence is that on an expert and not binding on the court, it corroborated

evidence of PW1 that he was penetrated in his anus. Hence the ground is devoid of merits.

The next complaint is that the age of the victim was not proved. Ms. James submitted that it was not raised in the trial and was not at issue. I agree this to be a position of law but in this case the age of PW1 was proved by evidence of PW2 his father who testified that PW1 was born on 15/11/2010 and that he was a standard five pupil at Mapogoro Primary School. This evidence was never controverted by way of cross examination. It is the law that evidence as to proof of age can be given by the victim, relative, parent medical practitioner, or where available, production of birth certificate, this principle was stated in the case of **Isaya Renatus v Republic,** Criminal Appeal No. 542 of 2015 (unreported). In this appeal evidence of age of the victim came from his father who by computation by the time, when incident occurred the victim was aged ten years, the age also indicated in the charge. That said, the ground collapse.

The last ground is whether the prosecution proved the charge beyond reasonable doubts. It is an elementary position of law that, in criminal cases, the burden to prove the allegation beyond reasonable doubt is on the prosecution. Where a reasonable doubt arises, it is also the law, it has

to be applied in favour of the accused person. In this case, the victim of the rape is alleged to be a child of tender age though under section 127(6) of the Evidence Act, conviction may be based on the sole evidence of the child of tender age if the court is satisfied that she is credible. In the present case the court is satisfied that PW1 was a credible witness to ground conviction. The witness of tender age may not be relied if he is not credible or truthfulness.

This position was stated, in the case of **Mohamed Said v Republic,** Criminal Appeal No. 145 of 2017 (unreported) where it was observed as follows;

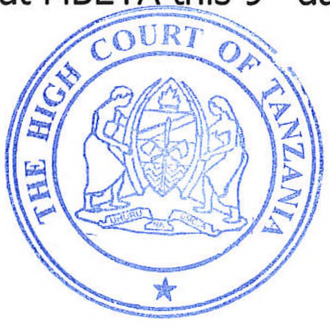
> *'We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127(7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases.'*

In this case the witness PW1 was able to narrate what happened to him immediately after he was found by PW2 and his stance that he was penetrated by the appellant was corroborated by PW3. The circumstance suggests that the offence of unnatural offence was proved beyond all reasonable doubt as analysed hereinabove. PW1 was a truthful witness

was reliable to ground conviction as relied by the trial court. The alleged potential witness who were not called would have not changed anything.

By way of conclusion, the offence of offence of unnatural offence contrary to section 154(1)(a) of the Penal Code [Cap 16 R: E 2019] now R: E 2022 was proved beyond all reasonable doubt before the trial Court. The appeal is hereby dismissed for want of merit.

DATED at MBEYA this 9th day of August, 2022.



D.P. NGUNYALE

JUDGE