IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 10 OF 2022

(Originating from decision of the District Court of Bagamoyo at Bagamoyo, Criminal Case No. 281 of 2020, before Hon. Mbafu- RM dated 05/10/2021)

ATHUMAN SEIF OMARY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 27th June, 2022

Date of judgment: 05th August, 2022.

E.E. KAKOLAKI. J:,

This is the first appeal in which the appellant is challenging conviction and sentence of life imprisonment meted to him by the District Court of Bagamoyo at Bagamoyo on 05/10/2021, in Criminal Case No. 281 of 2020, on the charge of **Unnatural Offence**; Contrary to Section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E 2019]. It was prosecution's case that, on 10th September, 2020 at about 1600 hrs at Kidongo chekundu Nianjema Ward within Bagamoyo District, Coast Region, the appellant did have carnal knowledge of a girl aged 3 years old (whose name is withheld) against the order of nature.

When the charge was placed before him for plea, the appellant flatly denied any involvement, as a result the prosecution paraded six (6) witnesses in court and relied on two (2) exhibits in a bid to establish the accused guilty. On his party, appellant relied on his own testimony and tendered no exhibit. After full trial the court was convinced that, the prosecution had proved its case beyond reasonable doubt, henceforth found the appellant guilty and convicted him as charged before he was sentenced to serve the mandatory sentence of life imprisonment, as the child sodomised was a minor. It is the said decision that discontented the appellant and prompted him to prefer this appeal equipped with five grounds of appeal as reproduced hereunder:

1. That the trial court misdirected itself in convicting the appellant relying on the evidence of the victim of tender age while it was recorded contrary to section 127(2) of TEA, Cap 6 RE 2019) as the victim was not asked simplified questions as the record is silent whether; she understands the nature of an oath and whether the evidence was taken with/without affirmation, she had ability to answer questions during trial and she was asked to promise to tell the truth.

2. That the trial court erred in law and fact to convict the appellant without noting that the trial was required to be conducted by the assistance of the welfare social who could realize that the act of the child crying indicated that she was forced to tell what is not true and never happened to her.
3. That the trial court erred in law and fact to convict the appellant without considering contradiction between witnesses dented the prosecution case as PW1 stated the rape incident occurred in the cow shelter while the same were not in the banda, PW2 said were in and PW5 said the incident happened in the unfinished house.
4. That the trial Magistrate erred in law and fact to convict the appellant for not appreciating defence evidence as it raised reasonable doubts why the child was crying, whether because she slip and fall down as the area he was cleaning was slippery and his employer (PW2) was intending not to pay him as he discovered that he was stingy person.
5. That the trial court erred in law and fact to convict the appellant in a prosecution case that was not proved beyond reasonable doubts as those who arrested him were not procured to clarify he

was caught while escaping or just seated at his place of work (the cowshed).

On account of the above grounds of appeal, the appellant is praying this Court to allow the appeal, quash the conviction, set aside the sentence meted on him and set him free.

Hearing of appeal the proceeded orally, whereas the appellant appeared unrepresented while respondent was fended by Ms. Elizabeth Olomi, learned State Attorney. In his brief submission in support of the appeal the appellant informed the Court that, being illiterate, meaning unable to read and write, he had trust with the Court that it will consider his grounds and revisit the evidence. He therefore left the matter to the Court to consider his grounds of appeal and allow the appeal by quashing the conviction and set aside the sentence against him.

On her part, Ms.Olomi for the Respondent from the outset indicated to support both conviction and sentence imposed onto the appellant. Responding to the first ground of appeal on non-compliance of section 127(2) of the Evidence Act before the evidence of PW6 (victim) could be recorded and relied on by the trial court to convict him, she submitted that

reasons stated at page 35 of the typed proceedings as the witness was a child of four years only who could not promise to tell the truth, hence her evidence was taken without oath. Further to that she said the reason of relying on such evidence was also expressed by the trial court at page 7 and 8 of the judgment that, the witness was credible and her credibility was impeachable hence reliable. According to her the trial court was satisfied that, what she told the court was nothing but the truth as her evidence was not challenged by the appellant anyhow. To substantiate her argument Ms.Olomi referred this court to the case of **Wambura Kiginga Vs.R,** Criminal Appeal No.301 of 2018(CAT-unreported) at page 15. She therefore prayed the Court to dismiss the ground. In rejoinder the appellant had nothing useful to add apart from reiterating his prayers.

Having considered both parties submission on the first ground, I find the issue for determination by this Court is whether the trial court erred in relying on evidence of PW6 allegedly recorded in contravention of section 127(2) of Evidence Act. It is worth noting before I embark on determination of the above issue, that this Court being the first appellate Court is entitled to revisit the evidence and come up with its own findings if need be particularly where there is *no evidence to support a particular conclusion, or if it is shown that*

the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong. See the cases of **Watt Vs. Thomas** [1947] AC 484 when quoted with approval in the case of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported). It can also interfere with the lower court decision where the law has been infracted or wrongly applied. See the cases of **Marwa Mahende Vs. Republic** [1998] T.L.R. 249 and **Adelina Koku Anifa & Another Vs. Byarugaba Alex**, Civil Appeal No. 46 of 2019 (CAT-unreported). It was held by the Court of Appeal in the case of **Demaay Daat** (supra) on the powers of the appellate Court to review evidence of lower court thus:

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."*

Trading on the above principle of the law I no move to consider the first ground of appeal. It is gleaned from Ms. Olomi's submission which I entirely subscribe to that, truly the trial court proceeded recording the evidence of PW6 (the victim) and relied on it, without complying with the provisions of

section 127(2) of the Evidence Act. However, such infraction of the law was with good and sufficient reasons assigned. It is undisputed fact that, at the time of giving her evidence PW6 (a victim) was four 4 years old, therefore a child of tender age as provided under section 127(4) of the Evidence Act. Therefore under section 127(2) of Evidence Act, the trial court ought to have conducted inquiry to establishing whether the witness was promising to tell the truth and not lies before giving her testimony. The said section 127(2) of Evidence Act reads:

> *127 (2) 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.*

As to what failed the trial Court to conduct inquiry in accordance with the law before recording PW6's evidence the answer is provided at page 35 of the typed proceedings as rightly submitted by Ms. Olomi, where the the trial magistrate expressed her struggle to comply with the law, the efforts which became futile as the child was crying. To let her speak through the record, I find it imperious to quote the excerpt from page 35 of the typed proceedings:

> *"**Court**: Due to the victim age, this court had struggled to get the victim's promise to tell the truth as required under section*

127(2) of the Evidence Act, Cap 6 R.E 2019 but we could not manage to get it as the child was crying when asked question. Therefore, she testifies without oath."

In view of the efforts shown by the learned trial magistrate in the above excerpt which I commend, I tend to disagree with the appellant lamentations that, the trial court erred to rely on PW6's evidence for being taken in contravention of the law. Having learnt that the only independent evidence was of the child witness of tender age and who equally does not possess sufficient intelligence, understanding and capacity to promise telling the truth to the court and not lies, I hold the trial magistrate was justified to receive PW6's evidence under section 127(6) of the Evidence Act. The said section 127(6) of Evidence Act provides that:

(6) 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.

Notably, having lawfully received evidence of PW6 the trial magistrate went on assessing her credibility and satisfied that the witness was credible and her credibility was impeccable hence reliable. It is this witness who testified on how she was hurt by the appellant when inserted his ”dudu” penis inside her anus after calling her when she was going to call her sister and that, she told her mother before she was taken to the hospital and prescribed medicine. This witness also mentioned the appellant by name soon after the incident hence an assurance to the Court that she was known to him very well even before the incident date. Her evidence being unsworn evidence for failure to conduct inquiry as per section 127(2) of Evidence Act, I hold the trial court was justified to rely on it to base its conviction having received it under section 127(6) of the Evidence Act and satisfied that, what the witness was telling the court was nothing but the truth. Similar stance was held by the Court of Appeal in the case of **Kimolo Mohamed @Athuman Vs. Republic,** Criminal Appeal No. 412 Of 2015 (Unreported), where the Court had this to say:

"In any case, for the sake of argument, even if the testimony of PW1 was to have been taken as unsworn testimony for

failure to conduct proper voire dire, still in terms of section 127 (7) nothing would have prevented the court from arriving at a conviction if it believed that the child was telling the truth."

The above not withstanding PW6's evidence was corroborated by PW1 her mother who told the court on how she heard her crying and how on responding to the scene of crime found the appellant restoring his penis in his trousers, before he pleaded her and PW3 to forgive him and later on ran away, only to be arrested and surrendered to the police. Another piece of evidence is the PF3 exhibit P1, which proved the victim (PW6) to have bruises on the anal area hence proof of penetration. It is from that evidence I am satisfied that the trial court rightly found the prosecution case was proved beyond reasonable doubt. In view the above findings and in absence of any contrary convincing grounds or reasons by the appellant warranting this court's interference, I do not find any justifiable reason to interfere with such sound finding of the trial Court. I so find having in mind the principle that assessment of demeanour and credibility of the witness is in the monopoly of the trial Court, as it was well stated by the Court of Appeal in the case of **Roberty Sanganya Vs.The Republic** (Criminal Appeal No.363 of 2019)[2022]TZCA 18 (10 February 2022);www.tanzlii.org when held that:

"In assessing the credibility of a witness, it is limited to the extent of demeanour and is the monopoly of the trial court."

In view of the above analysis of evidence that lead to the finding that appellant's guilty was proved beyond reasonable doubt hence his conviction and sentence, I find the first ground of appeal is devoid of merit and dismiss it.

Next for determination is the 2nd ground of appeal on failure of the trial court to conduct the proceeding with assistance of the social welfare officer who could have helped it to understand that she was forced to testify hence wrongly convicted relying on such evidence. It was Ms. Olomi's response on this complaint that, presence of social welfare is not the requirement of the law during testimony of child witness rather when the accused is a minor and is tried in the Juvenile Court as provided under section 99(1)(a) of the Law of the Child Act, [Cap 13 RE 2019]. On the assertion that, the child (PW6) was crying when testifying hence forced to testify, she countered that was the appellant's own interpretation as it was not based on Court's finding since she might have afraid to meet or see the appellant face to face. I think this ground need not detain this Court much as I am at one with Ms. Olomi's proposition that, it is mandatory requirement of the law for Court to sit with

social welfare officer only when the child offender is being prosecuted but not when the child witness is adducing evidence. This settled position of the law is expressed under section 99(1)(d) of the Child Act and Rule 7(2) of the Law of the Child (Juvenile Court Procedure) Rules, GN. No. 182 of 25/08/2016, where the law crystal clear stated that the social welfare officer shall be present in Court to replace the parent of the child offender and not otherwise. Section 99(1)(d) of the Child Act provides that:

> *99.-(1) The procedure for conducting proceedings by the Juvenile Court in all matters shall be in accordance with rules made by the Chief Justice for that purpose, but shall, in any case, be subject to the following conditions –*
> *(d) a social welfare officer shall be present;*

And Rule 7(2) of the Rules reads:

> *7(2) When a child is being tried for a criminal offence, the Court shall be arranged in the following manner:*
> *(h) the social welfare officer shall sit at the end of the table, opposite the magistrate, save that where the child does not have parent, the social welfare officer shall take a seat of the parent.*

As regard to the allegation by the appellant that, absence of social welfare officer denied the court with opportunity to discover that the child was forced

to testify on something which was not true, I also find the same to be without any justification. As already stated above it was not imperative for the said officer to be present in this matter as it is the Court which is vested with powers and discretion under section 127(2) to conduct inquiry and make findings on the possibility of child witness to tender evidence or not and on what mode, which powers and discretion were exercised judiciously. In so doing as quoted in the above excerpt from the trial court's judgment when discussing the first ground, the reason for PW1 to cry was stated to be due to her age and not be forced to testify on untruth evidence as the appellant would want this Court to believe. In light of the clear position of the law and factual evidence demonstrated above, I can safely conclude that, the second ground of appeal has no merit too.

Coming to the third ground where the appellant faulted the trial Court for convicting him basing on evidence of PW1, PW2 and PW5, without considering the fact that contradictions between them dented the prosecution case. In this ground, the appellant's major complaint is that PW1, testified that when rape incident occurred in the cow shelter and the said cows were not in their banda while PW2 said they were inside the shelter and PW5 stated was told by PW6's mother that the incident took place in

unfinished house. It was Ms. Olomi's response to the complaint that, there was no contradiction at all and if any was minor not going to the root of the case. She referred the court to page 10 of the proceedings where PW1 told the court that, when the act was committed cattle were not in in the kraal and that PW6 was called by the appellant to go and see the cattle that were not in the Kraal. According to her submission that, there was no any contradiction whatsoever as PW2 and PW5 were not at the scene of crime since their evidence on the presence of cattle in the kraal or not was a mere hearsay. Having revisited the record I am inline with the learned State Attorney that, there was no contradiction going to the root of the case. I so find as amongst PW1, PW2 and PW5's evidence, only PW1's evidence is considered to be direct/primary evidence for calling at the scene of crime immediately after PW6 cried for help. PW2 and PW5 were not eye witnesses so their evidence on whether the cows were in the shelter or not when the crime was perpetrated remains a hearsay as PW2 was at his shop by then and PW5 got the report from PW1, when the incident was reported at police. In any case even if there was any contradiction between the trio which is not the case, still I could have held that, the same did not go to the root of the matter which is whether PW6 was carnally known against the order of

nature by the appellant, the issue which is already determined in the first issue that the offence was proved to the hilt. I so conclude as the complaint by the appellant on contradiction of prosecution witnesses on availability or otherwise of the cattle in the kraal as per evidence of PW1 and PW2 and whether the incident occurred in unfinished house or not as per PW5, did not and could not in any way affect the solid evidence of PW6 corroborated by PW1, PW4 and PF3 exhibit P1, on the fact that she was abused by the appellant whom she mentioned and identify soon after the incident. I therefore dismiss this ground too for want of merit.

Turning to the 4th ground of appeal, it is the appellant's assertion that, his defence evidence that the child was crying because she slipped and fell down in the slippery area he was cleaning and not because of being he abused her and that, his employer (PW2) being stingy person framed him up in this case so as to avoid paying him his salary, was not appreciated by the trial Court hence his conviction was improperly arrived at. In her response Ms. Olomi was very specific that the trial court religiously considered both sides evidence and satisfied that defence evidence was weak to create any doubt to prosecution evidence. As regard to the allegation that the victim was crying because she fell down the learned counsel was adamant to accept the

assertion. She said, as per PW1's evidence when PW6 was asked as to why she was crying, she responded was hurt by the appellant in her anal area and not because she had fallen down. In view of that evidence she invited the Court to disregard that complaint.

Going through the trial court records on the appellant testimony from page 39 to 43 of the typed proceeded it is unearthed that, the appellant denied to have committed the offence accusing PW2 (victim's father) fabricated this case following the dispute between the two emanating from his claims of his salary to a tune of Tshs.220,000/=. He averred when reminded of the debt, PW2 promised to teach a lesson, in which he successfully framed him with this case. On the reasons of the child to cry the appellant was silent in his defence.

Having a keen perusal of the impugned judgment, I am satisfied as rightly submitted by Ms. Olomi that, the learned trial magistrate considered both sides evidence and more particularly appellant's evidence before it was satisfied that the same did not in any way create doubt to the prosecution case. To let the trial court speak in its judgment at page 10, I find the pleasing to quote its excerpt which reads:

> *"....The defence case tried to show that there is misunderstanding between the victim's father(PW2) and the accused person (DW1).That DW1 owed PW2 some debt which culminated to a misunderstanding between the two. However, since there is no evidence to prove the accused's accusations against PW6's parents therefore, the accused defence is weak and incredible."*

As alluded to above and basing on the quoted excerpt above it is crystal clear that, the appellant's defence was considered and given less weight for being weak. As earlier on stated the appellant never testified as to why the child was crying nor stated in his defence that, PW6 cried at the alleged scene of crime for falling down because of slippery surface. As regard to the the contention that PW2 fabricated the case due to his claim of salary I find the defence to an afterthought as when PW2 was testifying he never cross examined him on those claims. It is a trite law that, failure to cross examine connotes nothing than admission of the evidence adduced. This sound principle of law is stated in plethora of authorities some of which are **Nyerere Nyague Vs. R,** Criminal Appeal No. 67 of 2010, (CAT-unreported), **Jaspini s/o Daniel @Sizakwe Vs. DPP,** Criminal No. 519 of 2019, (CAT-unreported) and **Hatari Masharubu @Babu Ayubu Vs. R,** Criminal appeal No. 590 of 2017[2021]TZCA 41 www.tanzlii.org/tz/judgment. It was held by

the Court of Appeal in the case of **Nyerere Nyague** (supra) on failure of the party to cross examine on important matter that:

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

Applying the said principle in this matter, since the appellant failed to cross examine PW2 on the issue of claim of salary which could have drawn an inference that he was framed up with such serious allegation of sodomy of PW6, like the trial court I disbelieve that piece of defence. The trial court having believed and satisfied with the evidence of PW1 which was corroborated by PW1 (her mother) and PW4's evidence (doctor) who examined her as well as the PF3 exhibit P1, I hold appellant's defence was rightly rejected and therefore his conviction was rightly entered. Accordingly, the fourth ground of appeal falls apart.

Coming to the 5ht and last ground of appeal on the complaint that prosecution case was not proved beyond reasonable doubts as those who arrested him were not procured in court to clarify on how he was caught while escaping or just seated at his place of work, Ms. Olomi says the ground is baseless as PW2 was amongst the person who searched and arrested the

appellant. And that, there is no number of witnesses required under section 143 of the Evidence Act to prove a certain fact. It is true and I agree with Ms. Olomi that, the complained of fact was proved by PW2 and therefore the ground is devoid of merit. I shall explain why. As rightly submitted by Ms. Olomi that, it is well settled position of the law under the provisions of section 143 of Evidence Act, there shall be no particular number of witnesses required for the proof of any fact. So it was in the prosecution's discretion to determine how many witnesses are required to the prove a certain fact. The Court of Appeal in the case of **Rashid Issa Vs. R**, Criminal Appeal No. 210 of 2010 (CAT-unreported) when deliberating on the similar question had this to say:

> *"The law, however, does not prescribe the number of witnesses required to prove a particular fact.* ***It is normally in the discretion of the prosecution to determine the number of witnesses sufficient to prove a fact, depending on the circumstances of each case. This is the essence of section 143 of the Evidence Act****, Cap 6 R.E 2002 (the Act) which provides:-*
>
> > *"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact ." (Emphasis supplied)*

Similar views were aired in the case of **Bakari Hamis Ling'ambe Vs. Republic**, Criminal Appeal No. 161 of 2014 (CAT-unreported) where the Court of Appeal held that:

> *"It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (section 143 of Tanzania Evidence Act, Cap. 6). A Court of law could convict an accused person relying on the evidence of a single witness if it believes in his credibility, competence and demeanor."*

In this case it is in PW2's evidence that he was among the prosecution witnesses who being assisted with other two men searched for the accused and manage to arrest him after few minutes. This witness informed the court that while at the shop saw his wives PW1 running after the appellant while shouting that he had raped PW6, before he joined the chase only to arrest him later with assistance of two other fellows. His testimony is corroborated by PW1 that PW2 was so told of the appellant raping PW6 before he gave him a chase. In my assessment this witness was sufficient enough to prove to the court's satisfaction on how the accused was arrested and taken to the police before he was indicted before the trial court. It is from all that evidence

this court finds the complaint by the appellant to be unmeritorious, hence dismiss it.

All the appellant's grounds of appeal having been dismissed and before I pen off, let me quickly revisit the entire evidence relied upon by the trial court to convict the appellant. It is not in dispute that, the appellant was charged of Unnatural Offence, Contrary to section 154(1)(a) and 2 of the Penal Code, [Cap. 16 R.E 2019]. The section reads:

> *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.*

From the above provision the prosecution was duty bound to prove that, the appellant had carnal knowledge of the victim against the order of nature. In other words, the prosecution had to establish that the appellant caused his male manhood to penetrate the victim's anal orifice, however slight the

penetration might have been. See the case of **Omary Juma Lwambo Vs. R**, Criminal Appeal No. 176 of 2020 (CAT-unreported).

Briefly it was PW6's (the victim) evidence that on the fateful day was called by the appellant who hurt her by inserting his male organ (dudu) in her anus and that she told her mother (PW1) who took her to the hospital and was given medicine. PW1 the victim's mother corroborated the victim's testimony that when heard her crying near to the cattle kraal called there only to find the Appellant restoring back his penis in his trouser and was told by PW6 of the appellant's act of inserting his penis in her anus. This witness asked the appellant as why he did so, and the appellant pleaded for forgiveness before she reported it to PW3 and later on PW2 who gave a chase to the appellant who had ran away. PW3, the victim's step mother told the court on how she examined PW6 and observe the bruises, blood and sperms in her anus. Finally, it was PW4, the doctor who examined PW6 and testified under oath that, she noted the bruises in PW6 anus indicating that she was penetrated and exhibited her report in the PF3 exhibit P1, which also confirmed that the victim was penetrated in her anus. Be it as it may, the appellant's defence as demonstrated above did not in any way create any doubt to the prosecution case as his allegation of being framed up for claiming his salary

was not proved hence overruled when determining this 5th ground above. In view of the above I am satisfied that the prosecution proved its case beyond reasonable doubt and was justified to convict and sentence the appellant to life imprisonment, as there is no dispute also that the victim's age was below 18 years old.

In the upshot, I find the appeal to be without merit and dismiss it in its entirety.

Accordingly ordered.

DATED at DAR ES SALAAM this 05th day of August, 2022

E. E. KAKOLAKI

JUDGE

05/08/2022.

The Judgment has been delivered at Dar es Salaam today 05th day of August, 2022 in the presence of the Appellant in person, Ms. Dhamiri Masinde, State Attorney for the Respondent and Mr. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE
05/08/2022.