IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 108 OF 2021

(Original Criminal Case No. 277 of 2020 of Geita District Court at Geita)

MAYANI ZELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

06/10/2021 & 18/03/2022

F.K. MANYANDA, J.

The Appellant, Mayani Zele, was charged and convicted by the Court of the Resident Magistrate of Geita with an offence of unnatural offence, contrary to section 154(1)(a) and (2) of the Penal Code, [Cap. 16 R. E. 2019].

The particulars of the offence read that Mayani Zele on 14/06/2020 at Iyenze village within the District and Region of Geita, against the nature, had carnal knowledge of a victim, whose name, for the purposes of

protecting his identity in this judgement, will be referred to by a pseudo name of "EJ" or simply "the victim".

Distressed by the conviction and sentence, the said Appellant has come to this Court in an appeal against both the conviction and sentence of life imprisonment meted on him, he has raised ten grounds of appeal as follows: -

1. *That, the evidence of PW1, the victim, who alleged to be a star witness, his evidence was doubtful, uncredible (sic), not straight enough for the trial court to attach to it much weight to convict the appellant;*
2. *That, the trial magistrate grossly and incurably erred in the matter of law for failure to note that the age of the appellant was juvenile who did not in the first place deserve the punishment imposed;*
3. *That PW3, the Justice of Peace who recorded the appellant's extra judicial statement did not comply with paragraphs (v) and (vi) of the Guide in respect of paragraphs 5 and 8 (iii) of the extra judicial statement, this it was recorded in contravention of the law;*
4. *That, the identification evidence of PW1, the victim, against the appellant was not properly identified at the "locus in quo" by the victim;*

5. *That, the layman and indigent appellant was neither represented by a lawyer/counsel under the Legal Aid Act No. 5 been informed of the right in the hearing and police station.*
6. *That, the judgement of the trial court was defective for failure to pass the sentence to the appellant after being heard (sic) both complainant and accused person and their witnessed and evidence which is contrary to section 235(1) of the Criminal Procedure Act, [Cap 20 R. E. 2019];*
7. *That, penetration as on essential ingredient was not elaborated by the victim also the prosecution failed to carry out the DNA test to prove the alleged offence which put the evidence of PW5 and its PF3 in question;*
8. *That, the trial of the appellant was marred with total irregularity provisions (sic) of the Law of the Child Act, sections 4(1) and 97(1) and (2) and 99(1)(d) and (f) of the Act;*
9. *That, the defence of the appellant was not properly evaluated and considered, the appellant's conviction was based on the weakness of the appellant defence rather than the strength of the prosecution witnesses who failed to prove the case to the standard required; and*

10. That, the trial magistrate erred in law to act on the evidence of PW1 the victim of tender age without having initially complied with section 127(2) of the Evidence Act.

The background of this appeal is that the victim who, in the evening of the incident day, 14/06/2020, while in the bush searching for lost cows he was looking after, met the appellant whom he asked if he had seen them. The Appellant replied in affirmative and promised to show them only after having carnal knowledge of him against the order of the nature. The victim refused, but the Appellant took hold of him, undressed and sodomised him. The victim reported the incident immediately after arriving at their home stating that he identified the Appellant and colud show him in case he sees. However, the Appellant got arrested about two months later on 05/08/2020 as he was untraceable after the incident; he was subsequently arraigned before the trial court which. After full trial he was convicted and sentenced to life imprisonment. He is aggrieved by both conviction and sentence, hence, the instant appeal.

At hearing of the appeal, the Appellant appeared unrepresented through audio teleconference after been dully introduced to this Court by B. 4383 Ssgt. Peter, a prison Officer of Butimba prison and the

Respondent/Republic was represented by Maryasintha Lazaro, Senior State Attorney, also through audio teleconference.

The appellant had very little to submit in support of the appeal. He simply argued on the second ground that he was wrongly tried and sentenced because at the time of commission of the offence he was under the age of 18 years, he ought to be tried in a juvenile court and the custodial sentence was unlawfully meted on him. Then, he requested the Senior State Attorney to submit and he would rejoin thereafter.

Ms. Maryasintha Lazaro, Senior State Attorney, submitted opposing the appeal. She combined grounds number one (01) and ten (10), also grounds two (02) and eight (08) then, she argued the rest seriatim. Submitting against the complaint in grounds one and ten, the Senior State Attorney argued that the testimony of PW1 was taken after the trial court following the procedure for taking testimony of a child of tender age as provided by section 127(2) of the Evidence Act, [Cap. 6 R.E. 2019]. The Attorney submitted that the trial court was satisfied that PW1 understood the duty of telling truth not lie after finding him incapable of understanding the nature of oath.

In regard to grounds number 02 and 08, the Senior State Attorney submitted that the Appellant was not a child within the meaning of the law, he was aged 18 years old at the time of commission of the offence, therefore not covered by the Law of the Child, [Cap. 13 R. E. 2019] which defines a child as a person who is under the age of 18 years.

The Senior State Attorney was of the views that the Appellant could not be tried in the juvenile court established under section 97(1) of the Law of the Child Act; equally a social welfare officer was not required to be present at his trial because he was an adult.

Regarding ground three (3), the Senior State Attorney argued that the trial court correctly admitted in evidence the cautioned statement of the Appellant which he repudiated. It was admitted after an inquiry known as "trial within trial" and the same was found admissible. The Senior State Attorney argued that the cautioned statement is corroborated by the evidence of PW1 therefore good evidence.

The Senior State Attorney argued ground four (4) submitting that the Appellant was well identified by the victim because the incident took place at broad day light at about 18:00 hours; by that time there was enough sun light to enable identification.

The Senior State Attorney added that the victim reported immediately after the incident on 14/06/2020 and unhesitatingly pointed at him on 05/08/2020 as he still had enough memory of the identification of the Appellant. The Senior State Attorney was of the views that the victim had ample time to identify the Appellant because the incident took some time about one and half an hour in a day light.

Supporting ground five (05), the Senior State Attorney submitted that legal aid is not automatic in this country, it has to be applied for. The Senior State Attorney went on stating that there is no evidence on record that the Appellant did ever apply for legal aid and was denied. Moreover, the Senior State Attorney argued that the offence with which the Appellant was charged is not among which the accused are assisted by provision of free legal aid by the Government. Such offence which free legal aid is provided are serious ones involving capital sentences and others which are triable by the High Court.

In respect of ground six (06), the Senior State Attorney argued that the impugned judgement is proper and good in law; it is not defective merely because it gave a sentence which bemused the Appellant. The Senior

State Attorney went on arguing that the impugned judgment contains the facts as evidence, analysis, points for determination and reasons for findings, it entered a verdict of guilty and convicted the Appellant. After conviction, the Appellant was given opportunity to mitigate before it proceeded on to pronounce the sentence.

In regard to ground seven (07) where the complaint is that since there was no DNA test, then there was no proof of penetration. The Senior State Attorney submitted that there is ample of evidence that the victim was penetrated. The evidence comes from the victim himself and corroborated by the cautioned statement. Moreover, there is evidence of the doctor and PF3, the Senior State Attorney argued.

The complaint in ground nine (09) that the defence evidence was not considered, the Senior State Attorney argued that the trial court well considered the evidence of both sides before coming to make the findings. The Senior State Attorney argued further that, the fact of misunderstandings between the victim's father and Appellant's mother in which the latter accused the former of witchcraft, hence the victim likely was used as a hook to frame up the Appellant with the case, was dully

considered by the trial court, but found unreliable and not weighty compared to the evidence of the prosecution.

Then, the Senior State Attorney prayed the appeal to be dismissed in its entirety.

When called to rejoin, the Appellant had nothing to add other than leaving it to the court to decide in his favour.

I will also determine the grounds of appeal in the same arrangement the Senior State Attorney has done.

The complaint of the Appellant in grounds one and ten of the appeal is that the evidence by PW1 is doubtful, incredible and unreliable, the trial court erred to believe it and found a conviction. The Senior State Attorney in defending the evidence of PW1 argued that it was credible because it was taken after following the procedure under section 127(2) of the Evidence Act, [Cap. 6 R. E. 2019] and got satisfied that though he didn't understand the nature of the oath, he promised to tell the court truth, not lies.

From my visit of the record, I found that it is conspicuous that PW1, the victim, testified after the trial court was satisfied that he didn't understand the nature of oath, whereas PW1 stated in response to the questions put to him by the court as follows: -

> *"I don't know the meaning of oath, but I promise to tell the truth, and nothing but the truth"*

It is my opinion that the trial court rightly asked some questions pertinent to the capacity of the witness to understand the nature of oath and whether he promised to tell the truth.

This is what the Court of Appeal of Tanzania said in the case of **Issa Salum Nambaluka vs. Republic,** Criminal Appeal No. 272 of 2018 (unreported) where it stated as follows: -

> *"In a situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 of the evidence Act is however silent on the method of determining whether such child my be required to give evidence on oath or affirmation, or not"*

Since there is no fast and hard method on how to ascertain the ability of a child witness to understand the nature of oath and promise to tell truth not lie, the Court of Appeal went on to give guidance as follows: -

"Where a witness is a child of tender age a trial court should at foremost ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, be required to promise to tell the truth and not to tell lies"

The Court of Appeal followed its earlier decision in the case of **Geoffrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018 (unreported) where it observed as follows: -

"We think, the trial magistrate or judge can ask the witness of a tender age such specified questions, which may not be exhaustive depending on the circumstances of the case as follows:-

1. *The age;*
2. *The religion which the child professes and whether he/she understands the nature of the oath; and*
3. *Whether or not the child promises to tell the truth and not lies."*

In this matter, from the string of authorities above, it is my conserved finding that the trial court, rightly did what the law requires.

A question now becomes whether PW1 evidence is credible. My answer to this question is in affirmative. I say so be because PW1 who was 11 years at the time of testifying, gave clear explanations on how he encountered with the Appellant in the bush. That he was in search of their lost cows when he met the Appellant. It was a about 18:00 Hours. That the victim asked the Appellant if he had seen any of the cows he was looking for. The Appellant answered in affirmative and promised to show him the said cows because he had seen them. The witness in his own words stated at page 3 of proceedings as follows: -

> *".....while in search of cows, I met this accused person. I asked him if he had seen my cows. The accused told me that he had seen them. The accused then told me if I want him to show the cows to me, he had to sodomize me. Then the accused held my hand and took me into the bush and undressed my short and I remained with a shirt only. Then the accused also undressed and remained naked and then he took his saliva and applied if to his penis and he also applied others on my anus and then he inserted his penis in my anus. He started sodomizing me for about half an hour. Then he went away and left me. When he sodomized me he held my neck. After he went away, I went home walking with difficult while I spread my legs."*

As it can be seen, PW1 narrated all what happened. The witness also was not shaken during cross examination where he maintained his testimony. As regard to identity of the Appellant, PW1 testified that he reported the incident to his mother on the same day upon arriving at home. It was on 14/06/2020 and the Appellant was arrested on 05/08/2020. PW1 accounted for that delayed arrest in cross examination by stating at page 4 of the proceedings as follows: -

> *"You sodomized me away from home. After you sodomized me, you allowed me to leave. It took long time to arrest you as we were looking for you. I have not been taught to fix you I have not mistakenly identified you"*

The Senior State Attorney argued that this witness, PW1, is credible and reliable. I think she is right. I say so because the evidence of PW1 is corroborated by PW3, John Masunga, to whom PW1 narrated the incident immediately after arriving at their home and stated to him that he recognized the Appellant. On 05/08/2020 the victim pointed the Appellant at Nyakagwe Market and got arrested. The appellant confessed to PW2, Bahati Makoye, the village Executive Officer and Exhibit P1, the extra judicial statement which was admitted after an inquiry.

I agree with the Senior State Attorney that the testimony of PW1 is credible, the trial court was correct to rely on it.

It is trite law that once the evidence of a victim of a sexual offence is believed to be credible, a court can convict basing on that evidence alone without necessarily to be corroborated.

Section 127 (6) of the Evidence Act provides as follows: -

> *"127 (6) Notwithstanding the preceding provision of this section where in criminal proceeding 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 offence on its own merits, notwithstanding that such evidence is not corroborated proceed to convict it for reasons to be recorded in the proceeding; the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth.*** *"*(emphasis added).

The Court of Appeal discussed the application of this provision of the Evidence Act in the case of **Jamali Ally @ Salum vs. Republic**, Criminal Appeal No. 52 of 2017 (unreported) where when dismissing the appeal it stated as follows: -

"The record of appeal shows that the trial and the first appellate courts made a concurrent finding of fact that the evidence of PW1 proved the offence of rape beyond reasonable doubt. The first appellate judge went further, by referring to section 127(7) of the Evidence Act to reiterate the position of the law that the evidence of a 12-year-old PW1 did not require corroboration to sustain the conviction."

The first and tenth grounds have no merit.

In response to grounds two and eight, the Senior State Attorney submitted that a complaint by the Appellant that he was a child under 18 years old at the time of commission of the offence, therefore, he was a juvenile; the trial court erred on trying a case involving a juvenile and sentence him to life imprisonment is an afterthought and unfounded. The Senior State Attorney argued that the evidence shows the Appellant was 18 years old at the time of commission of the offence, hence not covered by the definition of the term "child" under section 4 of the Law of the Child, [Cap. 13 R. E 2019]. However, the Senior State Attorney didn't point out such evidence on the record.

My visit of the evidence has failed to find any piece of evidence showing that the Appellant was aged 18 at the time of commission of the offence. What is available is "a particulars of the accused sheet" which reads that Mayani Zele was 18 years old on the day he was arraigned in court. However, the said sheet of the particulars of the accused is neither part of the charge sheet nor evidence.

On record, there is also a statement before the testimony of the Appellant which shows that the Appellant was 18 years on the day he testified before the trial court. However introductory notes by the trial magistrate before the witness is sworn is also not part of the evidence. In the case of **Rutoyo Richard vs. Republic,** Criminal Appeal No. 114 of 2017 (unreported) the Court of Appeal of Tanzania following its earlier decision in **George Claude Kasanda vs. DPP**, Criminal Appeal No. 376 of 2017 (unreported) stated as follows: -

> *"Before we proceed, we find it opportune to remind the courts below and the prosecution that preliminary answers and particulars given prior to giving evidence are not part of the evidence as the same are not given on oath (see* ***Simba Nyangura vs. Republic****, Criminal Appeal No. 144 of 2008 (unreported). Instead, they serve as general*

*information (see **Nalogwa John vs. Republic**, Criminal Appeal No. 588 of 2015 (unreported).*

In this matter as I have states above, the evidence before the trial court prima facie points a guilty finger at the Appellant; at the same time, the Appellant has raised a pertinent issue of his age which is not resolved by the available evidence. Had the age of the Appellant was proven to be under 18 years old, this court would have resolved the doubt as to age in favour of the Appellant, however, the issue of age of the Appellant was not put before the trial court. I am of a strong conviction that had the same was raised before the trial court it could have found otherwise, let say the same was positively established, then, the trial could have rectified the proceedings by making a necessary order accordingly.

In such circumstances, I find that the appropriate way forward is to invoke the provisions of section 369 (1) of the Criminal Procedure Act, [Cap. 20 R. E. 2019] to order additional evidence on the age of the Appellant at the time of commission of the offence. The reason is as I have explained above first the evidence points a guilty finger at the Appellant, secondly the issue of age was not put before the trial court for it to determine the Appellant's age and hence assess its jurisdiction to try the case.

Age may be proved by the Appellant, parent or any other person capable to testify as such or by medical evidence. In **Rutoyo Richard's case** (supra) the Court of Appeal of Tanzania, as far as proof of age is concerned stated at page 16 as follows: -

> *"We reiterate that cogent evidence relating to age of the victim, parent, close relative, close friend, teacher in which she is schooling or any other person who knew well the victim was required."*

By analogous reasoning, proof of the age of the Appellant at the commission of the offence may be by any of the pieces of evidence listed in **Rutoyo Richard's case** (supra) and I may add one more, it is also by medical examination.

The additional evidence will be taken by the trial court to be specific the Court of the Resident Magistrate of Geita at Geita which tried the case. After taking the additional evidence, it shall certify the same under section 369 (2) of the CPA. The Appellant or his advocate will be at liberty to attend at the time of taking such evidence.

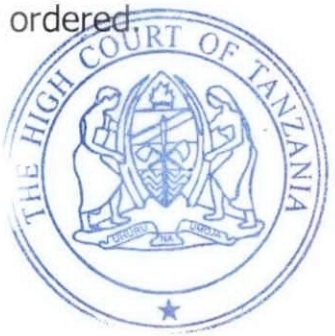
Consequently, for clarity, I do hereby make the following orders: -

a) This file be remitted back to the trial court, that is, the Court of the Resident Magistrate of Geita at Geita for it to take the additional evidence on the age of the Appellant under section 369(1) of the CPA;

b) The Appellant and his advocate, if any, may be in attendance at the hearing during taking of the additional evidence, the same to be taken as if it were evidence taken during the trial by any of the pieces of evidence mentioned above; and

c) The trial court to certify the evidence after taking it and bring the file to the High Court at Mwanza for it to re-scrutinize the evidence and make a finding.

It is so ordered.



F. K. MANYANDA,

JUDGE

18/03/2022