IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 108 OF 2020
(Originating from Criminal Case No. 267 of 2016, District Court of Ilala at Samora Avenue)

MATIKU S/O THOMAS ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

17th August, 2022 & 16th September, 2022

MASABO, J.:-

The Appellant was charged with and convicted by the District Court of Ilala of an unnatural offence contrary to Section 154 (1), (a) and (2) of the Penal Code (Cap. 16 R.E.2019). During trial, the prosecution alleged that on 29th July, 2016 at Banana area within Ilala District in Dar es Salaam Region the Appellant carnally knew **MO**, (true identity concealed), a 13-year old boy, against the order of nature.

The incidence came into light after Msisiri Primary School, the school where the victim was studying as a standard seven pupil, raised concern over his truancy and inquired on his whereabouts. In the response, the victim's uncle (PW2) and his grandmonther (PW3) went to the school to discus the matter. When cornered on his truancy, the victim revealed that on his way

to school he stops at Banana area at the Appellant's shop where he remains for the rest of the day helping the the Appellant on his business. He told the court that, the Appellant used to give him sweets and biscuits and in return he guards his shop. He revealed further that, the appellant has been knowing him against the order of nature when he slept over at the shop. According to PW1, he was carnally known by the Appellant on four different occassions and prior to the act, the Appellant would apply some oil on his anus. The matter was reported to police. PW1 led the police to the Appellant's shop where he was arrested and charged with this offence.

The Appellant denied to have committed the offence. In his defence he claimed that he was arrested at his home on the allegations that he owed a certain woman Tshs. 300,000/= but later on the allegations was changed and he was charged of unnatural offence. He also claimed that PW1 identified his culprit as Baba Juma which is not his name. After a full trial before Kihoya, RM (trial magistrate), the Appellant was found guilty of the offence and was sentenced to serve life imprisonment.

The appellant is aggrived by conviction and the sentence passed against him by the trial court. He has preferred this appeal armed with thirteen grounds some of which carry the same substance. During the hearing of the appeal which proceeded in writting, the appellant summarised and consolidated his grounds into the following seven grounds. *First*, the trial magistrate erred in law and fact in failing to comply to section 210 (3) of the Criminal Procedure Act, [Cap 20. R. E. 2019]. *Second*, the trial

magistrate erred in law and in facts in convicting the Appellant based on unreliable evidence of the victim which was procured in the absence of a *voire dire test*. *Third*, Exhibit P1 was tendered by the public prosecutor. *Fourth*, the trial magistrate erred in law and in facts in convicting the Appellant while he was not properly identified. *Fifth*, the victim's age was not proved. *Sixth*, Appellant was convicted on the defective charge and *lastly*, the Appellant was convicted while the case against him was not proved to the required standard.

Hearing of the appeal proceeded in writing. Supporting the 1st ground the Appellant who was self-represented submitted that section 210 (1)(a) and (3) of Criminal Procedure Act [Cap 20 RE 2019] was not complied with as the trial magistrate failed to read over the transcription of testimony of each witness. He argued that, the above provision enjoins the presiding magistrate to avail every witness an opportunity to have his evidence read over to him after it is recorded and to note down whatever comments the witness makes. As this was not done the trial court offended the law.

On the 2nd ground, he argued that, the evidence of PW1 was unreliable as it was taken without *voire dire* test contrary to section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019] which sets out the procedure to be adhered before taking evidence of a child of a tender age. He argued further that PW1 was not truthful as he did not promise to speak the truth and the questions asked by the trial magistrate clearly shows that he did not understand his duty of speaking the truth hence his entire evidence was

improperly received. To cement his argument, he referred the court to the cases of **Joseph Damian @ Savel Vs. The Republic**, Criminal Appeal No. 294 of 2018 and **Kimbute Otiniel Vs. The Republic**, Criminal Appeal No. 300 of 2011 (both unreported) which emphasizes on consequence of mis-application of section 127(2).

Still pressing on unreliability of the victim's testimony, the Appellant argued that the he was unreliable as he never disclosed the offence at the earliest opportunity. Even when he was asked by his grandmother as to where he slept, he lied that he went to his father's place at Kinondoni. Such lies make him unreliable witness who could only attract anxiety rather than confidence. In the foregoing, he argued that PW1's evidence should be disregarded and he proceeded that, if this evidence is disregarded the conviction will crumble as without PW1's testimony the remaining testimonies are merely hearsay and insufficient to warrant any conviction. He reminded that in sexual cases the best evidence must come from the victim as held in the cases of **Weston Haule Vs. The Republic**, Criminal Appeal No. 504 of 2017 CAT at Mbeya (unreported) and **Selemani Makumba Vs. The Republic** [2006] TLR 379. As the victim in this case was unreliable, his testimony is not the best evidence and the conviction can, therefore, not stand.

On the 3rd ground, the Appellant faulted admission of the PF3 (exhibit P1), which was tendered by the public prosecutor instead of PW4. In fortification, he cited the case of **Said Salum Vs. The Republic**, Criminal Appeal No.

499 of 2016 CAT (unreported) where the Court of Appeal observed that a public prosecutor is not a witness. He could not be cross-examined on the exhibit tendered. Thus, it was wrong for the public prosecutor to assume the role of a witness as his key duty is to prosecute the case.

Regarding the 4th ground, it was submitted that the Appellant was not positively identified as PW1 stated that the perpetrator is one Baba Juma who owns a shop situated at Banana area and did not give proper description of the appellant in terms of physique, attire, and height. The omission which clearly shows that the Appellant was a stranger to him. It was therefore crucial for the prosecution to conduct an identification parade to corroborate PW1's story and to eliminate the possibilities of mistaken identity as stated in the case of **Waziri Amani Vs. The Republic** [1980] TLR 250. Still insisting on identification, he argued that PW1 volunteered and consented to the sexual act and this is the reason he did not disclose the incidents to any person and did not name the suspect at the earliest possible opportunity.

Regarding the 5th ground on the age of the victim, the Appellant submitted that PW1's exact age was never substantiated as there is variance between the age in the charge sheet and the evidence of PW1, PW2, PW3, PW4 and PW5. According to the charge sheet, PW1 and PW3 the victim's age was 12 years old while according to PW2, PW5 and the trial court's judgment he was 13 years old. He argued that, such variance creates doubts as to the actual age of the victim. Taking into account that age has a bearing on the offence, the prosecution ought to have ascertained the victim's age. As to the 6th

ground, the Appellant argued that, as there are variances between the chargesheet and the prosecution's witness, it is obvious that he was convicted on a defective charge. Finally, the Appellant submitted that, he was convicted on the charge which was not proved beyond reasonable doubts as explained above. Thus, it is just that this court allow the appeal, quash the conviction, set aside the sentence and set him free.

Disputing the appeal, Ms. Cecilia Mkonongo, State Attorney submitted that the evidence of PW1, the victim, was properly procured in full compliance to section 127(2) of the Evidence Act. At page 11 of the proceedings, it is demonstrated that, the trial magistrate conducted the test and made findings that the child knew the meaning of oath and proceeded to affirm him. PW1's testimony was thus reliable as it was obtained under oath. To support his argument, she cited the case of **Hassan Kamunyu Vs. Republic,** No. 277 of 2016 (unreported) where the Court of Appeal observed that the testimony of a child of tender age is reliable and can warrant conviction even if not taken under affirmation or oath.

Regarding identification of the accused by the victim, the learned state attorney submitted that the victim was 12 years at the time of the incident which, according to the record, happened several times as the victim used to spend most time in the Appellant's shop. Thus, identification was water tight with no chances of mistaken identity as the two were familiar. Besides, PW1 was the one who led the police to the accused's shop and assisted in the identification of the accused. On the PF3, the learned State Attorney

submitted that, the same was tendered by PW2 and not the prosecutor as reflected at page 18 of the proceedings. Also, when tendered, the accused had no objection. Besides, the medical doctor explained the content of PF3 and had it explained to the accused as per page 31. As to the age of the victim Ms. Mkonongo submitted that the same was proved by the victim himself, PW2 and PW3. Regarding age inconsistence between the charge sheet and the evidence rendered, Ms. Mkonongo conceded on the alleged variance and argued that the same did not prejudice the Appellant as he knew very well that the victim was below 18 years. From the elaborate particulars in the charge sheet, it is vivid that the appellant understood the offence and had an opportunity to render his defence.

Ms. Mkonongo maintained the same position on compliance to section 210 of the Criminal Procedure Act. She submitted that much as the proceedings do not show if the same was adhered to, the Appellant has not shown how he was prejudiced. She lastly submitted that according to the case of **Hassan Kamunyu Vs. Republic** (supra) no corroboration on the victim's evidence was needed as his evidence sufficed to convict the appellant. She added that, although PW1's testimony was self-sufficient, it was supported by the evidence of PW2, PW3 and PW4. He prayed that the Appellant's appeal be dismissed and the trial court's decision be upheld.

In his brief rejoinder, the Appellant insisted on his innocence claiming that the record did not implicate him.

I have carefully considered the submission by the parties. This being a first appeal, I am duty bound to re-asses the evidence on record and draw a finding on whether the case against the Appellant was proved to the required standards. This ultimate question will be answered after I have examined the grounds of appeal starting with the fifth and sixth grounds. In these two grounds the appellant's major contention is that, the charge sheet shows that the victim was 13 years when the incident occurred but when he testified as PW1, stated that he was 12 years. His grandmother stated that the victim was 12 whereas his uncle stated he was 13 years old. Thus, the charges against him were based on a defective charge.

As per charge sheet, the appellant was charged under section 154 (1)(a) and (2) of the Penal Code [Cap 16 R.E. 2019]. The provision reads;

> 154.-(1) Any person who-
> (a) has carnal knowledge of any person against the order of nature; or
> (b) N/A
> (c) N/A,
> 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. [Emphasis mine].

Upon conviction he was sentenced to life imprisonment. As submitted by both counsels, the variance in the victim's age is too obvious such that it is not certain whether his actual age is 12 years or 13 years. The learned

counsel has argued that the defect is non-fatal hence curable under section 388 of the Criminal Procedure Act because, although the age of the victim has a bearing on the punishment, the charge sheet was clear and the appellant understood the charges against him. Section 388 of the Criminal Procedure Act under which the learned counsel has placed reliance states that:

> 388.-(1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable. [Emphasis mine]

From the provision above, the key issue for consideration is whether the error has occasioned any injustice to the appellant hence fatal and incurable. I have carefully scrutinised the records and the submissions to see whether the appellant was anyhow prejudiced by the variance but all ended in vain. As correctly argued by the learned State Attorney the Appellant did not show he was prejudice by the variation so as to backup his complaint. Besides, in my scrutiny of the charge sheet I have found it to have explicitly described the offence against which the appellant stood charged. It was crafted in such a way that it sufficiently informed the accused of the charges facing him.

Moreover, the evidence adduced by the prosecution was equally sufficient and allowed the appellant to know the case levelled against him. That, I am convinced that he knew very well that the charge against him was unnatural offence of a boychild below 18 years whose punishment in conviction is life imprisonment and he was able to mount his defence. The defect is, therefore, salvaged by section 388 of the Criminal Procedure Code. It is to be noted in addition, that it matters less whether the victim was 12 or 13 years as the threshold for life imprisonment is 18 years. Therefore, whether the victim was 12 or 13 years, there is nothing to fault his punishment as it was in conformity with section 154(2) above stated. The two grounds of appeal would have been fatal had it been shown that the victim was above 18. In the foregoing, the two grounds of appeal crumble as they lack merit.

Coming to the 2nd ground of appeal, the appellant has lamented that PW1's evidence was unreliable on two facets. *One*, it was procured in contravention of section 127 (2) of the Law of Evidence Act. *Two*, PW1's failure to name the appellant at the earliest opportunity. Starting with the first facet, section 127 (2) of the Evidence Act reads;

> "A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence"

Applying this provision in **Godfrey Wilson Vs. Republic,** Criminal Appeal No.168 of 2013, CAT (unreported), the Court of Appeal held that:

> "In our understanding, the above provision as amended, provides for two conditions, One, it allows the child of tender age to give evidence without oath or affirmation. Two, before

giving evidence, such child is m mandatorily required to promise to tell the truth to the court and not to tell lies"

In a subsequent decision in **Issa Salum Nambaluka Vs. Republic**, Criminal Appeal No. 272 of 2018 (unreported), it stated thus:

"From the plain meaning of the provision of sub-section (2) of S. 127 of the Evidence Act, which has been reproduced above, a child of tender age may give evidence after taking oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the 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.

In the present appeal it is on record at page 11 of the word-processed proceedings that the trial magistrate posed to the victim some questions as to his age, religion, where he studies and the like in order to test whether he was competent and possessed enough knowledge to understand the essence oath and importance of telling the truth. In the end, the trial magistrate made the following finding;

"Court: This court finds that; the witness knows the truth and affirmation. He will give an oath statement.

Signed: Hon Kihoya – RM

22/3/2017

Thereafter, the witness was affirmed and proceeded to testify. It is therefore clear that, PW1 gave a sworn testimony after the trial magistrate was satisfied that he knew the meaning of an oath and after being affirmed as he was a Muslim. From the authorities above, it would have been different

had PW1 gave an unsworn testimony in which case the trial court would have been obligated to lead him to undertake to tell the truth and not lies and to record his undertaking. By taking PW1's evidence under oath, the court offended no law because as held **Issa Salum Nambaluka Vs. Republic** (supra), section 127(2) permits the procurement of testimony of a child of tender age with or without oath and only in the latter case will the child be required to make an undertaking to tell the truth.

On the 2nd facet of this ground, credibility of PW1 is challenged on account of non-disclosure of the incident at the earliest opportunity. From the record, it is an undisputed fact that PW1 did not disclose the incident until when his uncle and grandmother made inquiry in respect of his truancy. Only then did PW1 reveal that the reason behind his truancy is that he used to help the appellant in his shop and sometimes help a certain lady to sell buns (vitumbua) and with regard to the unnatural offence, he named the appellant and another person by name of Mpemba, not part to this appeal, as perpetrators. Elaborating how the appellant sexually assaulted him, PW1 specifically stated that;

> "One day when I was sleeping in his shop, the accused also slept there. Then, the accused raped me on the anus. Before raping me, he rubbed (sic) me with some oil on my anus and on his penis. The penis is here (showing the pert (sic) of his private parts) after rubbing some oil, he then sodomized me. I always felt pain and I cried loudly. No body assisted me. He raped inside his shop. He raped me 4 times … When walking, I always felt pain in my anus, I walked in difficulty. I did return at home at night. My grandmother questioned me about where

> I slept, I informed her that I was at my father's place. My father lives at Kinondoni. I did not tell grandmother because I was worried..."

It is settled a position of law that save where there are good and sufficient reasons not to believe a witness, every witness is entitled to his credence and his testimony should be believed (see **Crospery Ntagalinda @ Koro Vs. R**, Criminal Appeal No. 312 of 2015, CAT at Bukoba (unreported). Much as the delayed disclosure of the incidence is a sufficient reason to worry about, in sexual offenses, the delay disclosure is to be objectively weighed as stated in **Abilahi Mshamu Mnali Vs. R***,* Criminal Appeal No. 98 of 2010, CAT at Mtwara (Unreported). In this case, the Court of Appeal stated that in cases where an incident of rape/sexual offence was not timely reported the reasons for delay should be weighed objectively to avoid myths or preconception. In particular, the court must be sensitive and responsive to the plight of victims and be free of any myths or preconception.

In the present case, the only reason advanced by PW1 was that he was worried. In my objective view, being a 12/13 years old boy when sexually assaulted, PW1 obviously knew that what was done to him was wrong. Thus, he might have been shameful and embarrassed. Apart from that, he missed school for a while. Thus, he knew he would be punished had his grandmother knew the reason for his truancy. Besides, the extracted part of the proceedings above and the rest of the record vividly demonstrate that the victim clearly elaborated how the appellant abused him. His evidence was coherent and narration was clear and was corroborated by PW2 his

uncle, PW3 his grandmother and PW4 the medical doctor who examined him and found his sphincter muscles loose. Also, apart from the delay and the fact that he lied to his grandmother, the defence did not cast any reasonable doubt on PW1's credibility. In the foregoing reasons and guided by the authority above, I decline the invitation to fault the trial court which found him credible and reliable. The 2nd ground of appeal consequently fails.

The first ground of appeal to which I now turn, concerns compliance with section 210 (3) of Criminal Procedure Act which reads;

> "(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence"

The Appellant has challenged the trial court for non-compliance with this provision. Looking at the record, it is obvious that this requirement was not complied. However, as correctly argued by the learned State Attorney, much as the use of the word 'shall' entails mandatory compliance, jurisprudence regards the omission as non-fatal and curable section 388 of the same Act save where the aggrieved party has demonstrated that she/he has been prejudiced. This position has been stated in numerous authorities. In **Richard Mebolokini Vs. Republic** [2000] T.L.R 90, this court while dealing with a similar issue stated that: -

> "when the authenticity of the record is in issue, noncompliance with section 210 may prove fatal."

Cementing this position in **Jumanne Shabani Mrondo Vs. Republic**, Criminal Appeal no 282 of 2010 (unreported), the Court of Appeal held thus:

> In **Richard Mebolokini v. Republic** [2000] TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, noncompliance with section 210 may prove fatal. We respectfully agree with that observation. **But in the present case the authenticity of the record is not in issue, at least, the applicant has not so complained.** In the circumstances of this case, we think that non-compliance with section 210 (3) of the CPA is curable under section 388 of the CPA.

And, in **Flano Alphonce Masalu @ Singu Vs. Republic**, Criminal Appeal no. 366 of 2018 (unreported), it held that:

> " ...in our earlier decision in **Jumanne Shabani Mrondo Versus Republic**, Criminal Appeal no 282 of 2010 (unreported) where we confronted an identical irregularity; we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice."

Since the Appellant in the present case has not demonstrated how he was prejudiced, I do not see the substance of his complaint as his silence on this point presupposes that he suffered no miscarriage of justice as a result of the omission. This ground lacks merit and is disallowed.

Regarding the 3rd ground, the Appellant has argued that, the PF3, Exhibit P1 was tendered by the public prosecutor. I entirely agree with him that tendering of exhibits by prosecutors is not legally permissible. In **Thomas**

Ernest Musungu @ Nyoka Mkenya Vs. R, Criminal Appeal No. 78 of 2012 CAT at Arusha (Unreported), the Court of Appeal underscored this principle and held that a prosecutor cannot assume the role of a prosecutor and a witness at the same time. In the case at hand, the complained illegality is reflected in page 30 of the trial court's proceedings. Proceedings in this page show that, having testified the finding of the medical examination he conducted on PW1, PW4, the medical doctor who examined PW1, prayed that the PF3 in which he documented the findings be admitted as exhibit. Subsequent to this prayer, the public prosecutor cemented it which is prayer for the same thing. Thus, basically, there were two prayers. The first made by the witness and a cementing prayer by his counsel. Under the circumstance I am of the firm view that much as the prayer by the public prosecutor constitutes an irregularity, the irregularity is not fatal as the prosecutor's prayer was preceded by PW4's prayer. The irregularity would have been fatal and incurable had the public prosecutor's prayer been the sole prayer. In my firm view, the preceding prayer by PW4 is a cure to the defect. For these reasons, the third ground of appeal fails.

I may also add here that, even if I was to agree with the appellant that the anomaly was fatal and justifies the expungement of the Exhibit P1 and consequently expunge it as prayed, the expungement would not have yielded much as it would have left intact the testimony of PW4 which was not anyhow faulted by the appellant. Since the testimony of this witness is the oral version of the report contained in the PF3, there would have been obviously no significant change to the findings of the trial court.

On the 4th ground of appeal, the Appellant has claimed that he was not properly identified by the victim and he cited the case of **Waziri Amani Vs. R**(supra). With due respect, I will not allow myself to be detained by this point. The argument and the authority in **Waziri Amani Vs. R**(supra) were both misconceived as mistaken identity was not at issue. The victim knew the Appellant. He had been going to his shop for two weeks and used to help in shop business and they sometimes slept together in the shop. PW1 is the one who led the police officers to the Appellant's shop and identified him hence his arrest. Under these circumstances, it is unimaginable why the identification parade would be required and what purpose, if any, would it serve. This ground fails.

Turning to the ultimate question which is the gist of the 7th ground of appeal as to whether, the case against the appellant was proved at the required standard. The law is certain that in rape and natural offences, the main ingredient is penetration however slight. In the present case, as the self-explanatory extract above vividly demonstrate, penetration was adequately proved. As held in **Selemani Makumba Vs. The Republic** [2006] T.L.R. 379, **Godi Kasenegala Vs. The Republic**, Criminal Appeal No. 10 of 2008, CAT; **Galus Kitaya Vs. The Republic**, Criminal Appeal No. 196 of 2015, CAT and **Jilala Justine Vs. The Republic**, Criminal Appeal No. 441 of 2017, CAT (all unreported) and numerous other authorities, it is a trite legal principle that in sexual offences, the best evidence comes from the victim. If found reliable, it can be relied upon to convict the accussed even in the

absence of any corroborating evidence. In the present case, the victim's evidence case was reliable hence self-sufficient to ground a conviction. Moreover, it was strongly corroborated by the evidence of PW4 and Exhibit P1 both of which proved that PW1 was penetrated. Also, in the light of the above analysis and authorities, there was no doubt that the appellant was sufficiently implicated for the offence. He was was known to the victim and for two weeks they used to spend a long time together at the shop thus there was no room for mistaken identity.

In the upshot of the foregoing, I find no ground to fault the conviction and sentence metered by the trial court. Accordingly, the appeal is dismissed in its entirety. The conviction and sentence are upheld.

Dated at Dar es Salaam this 28th September, 2022.

X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE