THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DSTRICT REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 2 OF 2022.

(Originating from Criminal Case No. 30 of 2019, In the District Court of Iringa District, at Iringa).

BRASIUS MGIMBA.....APPELLANT

VERSUS;

THE REPUBLIC..... RESPONDENT

JUDGMENT

20th July & 05 October, 2022.

UTAMWA, J:

The appellant, BRASIUS MGIMBA was charged with and convicted of unnatural offence by the District Court of Iringa District, at Iringa (The trial court) contrary to section 154(1)(a), and (2) of the Penal Code, Cap. 19 RE. 2002 (Now RE. 2022). The conviction followed the judgment of the trial court dated 28th May, 2020 (The impugned judgement). He was

sentenced to serve 30 years in prison. Believing that justice was not met, he has now appealed to this court against both conviction and sentence.

Before the trial court, it was alleged (according to the substituted charge dated 15th August, 2019) that, on the 30th of January, 2019, at Kihesa Kilolo within the Iringa District and Region, the appellant had carnal knowledge of a girl aged seven years against the order of nature. For the purpose of the victim's dignity, I will not refer her by her own name in this judgment. I shall only call her the victim or the PW.1 since she testified before the trial court as the first prosecution witness.

The prosecution case was essentially that, the appellant who is the stepfather of the victim, used to live together with the victim and her mother (DW.2). On 30th January 2019 while the victim was alone in her room, the appellant went there, undressed her and inserted his male organ in her anus. She cried for help, however the appellant covered her mouth and threatened to harm her if she disclosed the incident to anyone. The next day while in school, one of her teachers noticed that the victim had discomfort in walking, hence interrogated her. The victim then disclosed the incidence to the teacher. She was then taken to the hospital and the matter reported to the police.

The appellant's petition contained five grounds of appeal couched in the layman's language we are used to encounter in appeals lodged by unrepresented appellants. They are reproduced hereunder;

1. That, the trial court grossly erred in law and fact by basing conviction on merely cooked and planted testimonies of the prosecution

witnesses, This evidence on the truth that when victim was interrogated by teachers, it was the aunt of the victim who was called and not the DW2 who is the mother of the said victim this leaves a lot to desire,

2. That, the Doctor recommendation are null and void since the fact that it doesn't connection the appellant with the allegation crime. To find the fecal stains in the anus is a normal issue since the fact that the anus is the passage organ of feces
3. That, the prosecution side failed to establish their case beyond reasonable doubts since the evidence adduced by all prosecution witnesses are merely hearsay which is inadmissible.
4. That, the trial court erred in law and fact by failure to conduct the voire dire test since the age of the victim was plainly tender.
5. That, the trial court grossly erred in law and fact by not to put into consideration the testimony of the DW.2 (Sarah Mdegela-the accused's wife) who contended that her husband never ever sodomized the victim.

Due to the above grounds of appeal, the appellant urged this court to allow the appeal, quash the conviction and set aside the sentence. He further urged this court to order for his immediate release from prison.

At the oral hearing of this appeal, the appellant appeared in person and unrepresented. The respondent was represented by Ms. Blandina Manyanda, learned Senior State Attorney (The SSA).

The appellant adopted his grounds of appeal at the hearing. He added that, the victim was the only one who was medically examined while

the appellant was not. It is also not true that the doctor saw bruises on the anus of the victim. This is because the mother of the victim did not see the said bruises when she took the victim to school.

On her part, the learned SSA did not support the appeal on some reasons shown below. Regarding the first ground of appeal, she submitted that, the victim testified that she was sodomized by the appellant who is her stepfather. The appellant undressed her and sodomized her in a room. The appellant also threatened to hurt her if she disclosed the event. She then informed her teacher, one Julia Luvanda who testified as PW.2 and corroborated the victim's testimony. The SSA added that, the evidence of PW.5 (Dr. Huruma) supported the story of PW.1. The said PW.5 had examined the victim and concluded that, she had been penetrated in her anus. The learned SSA thus, prayed for this ground to be dismissed since in rape cases, the best evidence comes from the victim. She supported this legal contention by citing the decision of the Court of Appeal of Tanzania (The CAT) in the case of **Selemani Makumba v. Republic (2006) TLR 379**.

In relation to the second ground of appeal, the learned SSA contended that, the PW.5 (the Doctor) examined the victim and found that, her anus had faeces and the tissues were tender due to penetration by a blunt object. The doctor also filled a PF. 3 showing the results of the medical examination. This evidence supports the evidence of the victim and makes the second ground of appeal hopeless and liable to be dismissed.

It was also the submissions by the learned SSA on the third ground that, there was evidence from the victim which was from her own knowledge. The doctor who examined the victim also explained on what had been noted in the medical examination. This ground should thus, be dismissed as well.

The learned SSA further faulted the appellant's fourth ground of appeal on the ground that, the process of *voire dire* is not a legal requirement any more. This is because, section 127(2) of the Evidence Act, Cap. 6 as amended by Act No. 3 of 2016 (Now RE. 2022) only requires the child witness to make a promise to tell truth. She further submitted that, the victim made the promise according to the law (as shown at page 16 of the typed proceedings of the trial court). This ground therefore, should also be dismissed.

On the fifth and last ground of appeal, the learned SSA argued that, the trial court considered the evidence from both sides and properly held that the defence case did not shake the prosecution case. It added that, The DW.2 was also not at the scene of the crime at the material time. The trial court was thus, right. She prayed that this ground of appeal be dismissed too.

In totality she learned SSA prayed for the entire appeal to be dismissed and for this court to uphold the trial court's decision.

In rejoinder, the appellant had nothing substantial to add. He only insisted that his grounds of appeal be considered by this court.

I have considered the grounds of appeal, the records, the submissions by the parties and the law. In determining this appeal, I will be guided by the view that, thought the parties considered the five grounds of appeal separately, according to the anatomy of the petition of appeal, the grounds can be condensed into only one major ground of appeal which is apparently reflected under the third ground. Such major ground of appeal is this; the trial court erred in convicting the appellant thought the prosecution had not proved the case against him beyond reasonable doubts. The rest of the grounds were therefore, mere complaints which support the major ground of appeal. I will thus, proceed to consider them as complaints supporting the major ground of appeal. The major issue to be determined is therefore, *whether or not the prosecution proved the case against the appellant beyond reasonable doubts before the trial court.*

In determining the major issue, I will consider each complaint separately. In the first complaint, the appellant complained that the trial court erroneously relied on the cooked and planted prosecution evidence in in making the impugned judgment. This was for the reasons, *inter alia*, that, when the victim was interrogated by her teachers, the mother of the victim was not called. In my view, this complaint lacks merits as correctly submitted by the learned SSA. This is because, the victim testified before the trial court upon making a promise to tell the truth as required by section 127(2) of the Evidence Act. She testified that, on the material date and place, the appellant, her stepfather, found her in a room, undressed her and inserted his penis (which the victim called it *mdudu* in the childish

language) in her anus. She knew well the appellant since she lived with him and her own mother who was not at home at the material time. The appellant threatened to hurt her if she disclosed the event. She then informed her teacher, Julia Luvanda who testified as PW.2.

The PW.2 in fact, corroborated the victim's testimony. This is because, the record (at page 18-19 of the typed version of the trial court's proceedings) show that, she (PW.2, the victim's teacher, one Julia Luvanda), testified that, she interrogated the victim who told her that she had been sodomized by her stepfather. This followed the fact that, it had been noted that, while at school, the victim was moving with difficulties. The PW.2 also told the trial court that, she did not know the appellant before the event.

There is yet the evidence by PW.3 (Zaina Kibiki), the aunt of the victim. She also testified that, a day after the event, she also interrogated the victim upon being alerted by her teachers. The victim informed her that, her stepfather had sodomised her. She reported the matter to police station. The police officers provided them with a PF.3 for medical examination and she was accordingly examined. She also inspected the victim before she was medically examined and found her anus with faeces. The PW.3 also testified that, she did not know the appellant before.

Again the PW.5 (Dr. Huruma A. Mwasipu) testified in support of the prosecution story that, upon examining the victim it was discovered that, she had been penetrated by a blunt object in her anus. This was because, there were bruises and remaining faeces stain therein. The muscles of the

anus were so weak and not normal since they could not tight properly. The PW.5 felt the PF.3 to that effect. The PF.3 was in fact, admitted in evidence as exhibit P.1 without any objection by the appellant.

In his defence, the appellant did not deny the fact that he lived with the victim as his stepdaughter. He however, refuted the fact that he committed the offence at issue. He also told the trial court that, when he came home late at night, he did not find the victim home. He was informed by her mother (his own wife) that the victim had gone to aunt. When he talked with her aunt through a phone, the said aunt blamed him for destructing the victim and intimidated him that he would be arrested by the police soon thereafter. He was later arrested, hence this case. He also said in cross-examination that, he had no any grudges with the victim.

The DW.2 (Sarah Mdegela, mother of the victim and wife to the accused), basically testified that, she was at home at the material time, but the appellant was not there. He returned home late at 20.30 hours. He did not thus, sodomize the victim. In cross-examination DW.2 said that, she lives with the victim and the appellant. She inspected the victim on the 31st day of January, 2019, but she did not detect any problem with her. The victim was not in any grudge with the appellant.

The DW.3 (Emmanuel Ngulugulu) testified in essence that he knew nothing about the rape since he was not with the accused on the material time.

In my settled opinion, for the above narrated evidence the prosecution case could not be ranked as a cooked story as claimed by the

appellant. This is because, the evidence given by the PW.1, 2, 3 and 5 was tight and credible. They were all competent witness who testified on oath before the trial court. They all gave oral direct evidence as required by section 62(1) of the Evidence Act. PW.1 for instance, testified on what she had seen, i.e. what the appellant had done to her. Her evidence was not shaken in anyway during the cross-examination by the appellant. I also agree with the learned SSA for the respondent Republic that, this was vital evidence against the appellant since in law, the best evidence in sexual offences comes from the victim as per the **Selemani Makumba case** (supra).

As to the PW.2, she also testified on what she had heard from the PW.1 upon interrogating her. The PW.3 as well testified on what she had gathered from the PW.1 and what she had seen in her anus upon inspecting her. On the other hand, PW.5 testified on the result discovered from the medical examination.

Indeed, I do not entertain any doubt against the above narrated prosecution evidence given by the four prosecution witnesses. The law guides that, every witness is entitled to credence in his/her testimony and must be believed unless there are cogent grounds for not believing him or her; see the CAT decision in **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, CAT at Mbeya** (unreported). The appellant in the case at hand did not provide any reason for this court to disbelieve the four prosecution witness discussed earlier. The appellant also expressly testified that, he was not in grudges with the victim. This fact was corroborated by the evidence of DW.2. The appellant did not also cross-

examine any witness on the alleged fact that they cooked the story against him. It is also on record that, the PW.2 and 3 testified that, they did not know the appellant before the event. The appellant did not also dispute this particular fact. In my view therefore, for this undisputed fact it could not be possible for the two witnesses to cook a story against the appellant. This shows that, the complaint that the prosecution case was a cooked story is an afterthought that cannot help the appellant.

The appellant's defence did not also shake the prosecution case. It basically amounted to the defence of *alibi* as correctly considered by the trial court. This is because, the appellant claimed that he was not at the scene of crime (at home) during the material time. Nonetheless, the record does not show that he had given the requisite notice or particulars of the *alibi* to the prosecution as required by section 194(4) and (5) of the Criminal Procedure Act, Cap. 20 RE. 2019 (now RE. 2022), henceforth the CPA. This court is thus, entitled to neglect the defence, as it hereby does, under the auspices of section 194(6) of the same CPA. I also find that, the trial court also rightly rejected the defence of *alibi* for the contradiction of the evidence between the appellant and the DW2. In his defence, the appellant in fact, said that, when he returned home at night he did not find the victim at home since she had gone to her aunt. On the other hand, the DW.2 (wife of appellant) testified that, in the morning of the next day to the date of event, she escorted the victim to school from home. This implied that the victim was at home at the material night contrary to what had been maintained by the appellant. I therefore, consider the defence of the appellant as a helpless afterthought.

I have also considered the appellant's argument made in court during the hearing of this appeal, that it was only the victim who was medically examined and he was not subjected to the same process. In my settled opinion, this argument adds nothing to his case. This is because, there is no legal requirement for objecting a suspect for sexual offences to a medical examination. The appellant also mentioned none. What matters is evidence to support the charge, which said evidence was provided by the prosecution as shown above.

In conclusion therefore, I dismiss the first complaint by the appellant that the prosecution case was a cooked story.

In the second complaint, the appellant challenged the authenticity of the evidence given by the PW.5 (the doctor who examined the victim). Nonetheless, this challenge is untenable for the reasons shown above in considering the appellant's first complaint. The PW.5 was a competent witness and an expert who testified on the findings of the medical examination of the victim. The evidence by PW.5 was supported by the PF.3 which was admitted in evidence without any objection by the appellant. In fact, that evidence did not show that it was the appellant who had committed the offence. It only showed that, the victim's anus had been penetrated by a blunt object which caused bruises. A penis in my view, is among blunt objects which can cause such bruises found by PW.5 in the anus of the victim. The evidence by PW.5 was thus, useful for supporting the prosecution case to the extent that, the offence at issue had actually been committed against the victim. No wonder, it was observed by the CAT (siting at Mbeya) in the case of **Osward Kasunga v.**

Republic, Criminal Appeal No. 16 of 2017, [2019] TZCA 272, that, a medical report or the evidence of a doctor may help to show that there was a sexual intercourse, though it does not prove that there was rape.

Due to these reasons, I also disregard the second complaint by the appellant as against the evidence of PW.5.

Regarding the third complaint, I will consider it lastly since it reflects the major ground of appeal as hinted previously.

In relation to the fourth complaint, the appellant faults the trial court for not conducting the *voire dire* test in relation to the victim as a witness of tender age. However, I agree with the learned SSA that, such legal requirement is outdated. It suffices under the contemporary law on child evidence for a child of tender age to only make a promise to tell the truth to the court and not to tell any lies, before testifying in court. The promise is made upon the court making a brief inquiry on the witness so as to determine if he/she understands the meaning of oath; see section 127(2) of the Evidence Act, and as construed by the CAT in the decisions of **Wilson Musa @ Jumanne v. The Republic, Criminal Appeal No. 109 of 2018, CAT at Arusha** (unreported) and **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported). The PW.1 in the matter at hand was undisputedly aged 7 years. She was thus, a child of tender age as per section 127 (4) of the Evidence Act and the holding in the **Issa Salum** case (supra). The law regarding her evidence was thus, observed. I therefore, also dismiss the fourth complaint by the appellant.

Concerning the fifth complain by the appellant (in relation to the alleged failure by the trial court to consider the evidence of DW.2 who testified that the appellant did not commit the offence under discussion), I am of the view that, this complaint is not supported by the record. According to page 8 of the copy of the printed version of the impugned judgment, it is clear that, the trial court considered the entire defence of the appellant in evaluating the evidence. Such defence case included the evidence of DW.2. The trial court however, rejected the defence for the contradictions between the evidence given by the appellant himself and that given by the DW.2. Indeed, as I observed earlier, the trial court correctly held so for that reason. I also, previously discarded the entire *alibi* defence of the appellant for not following the provisions of section 194 of the CPA. I still underscore that position at this juncture. It is for these reasons that I also dismiss the fifth complaint by the appellant.

I now revert to the third complaint which also reflects the above mentioned major ground of appeal and is the basis of the major issue for determination. In fact, since I have turned down all the four complaints on which the appeal was based, it is clear that, the prosecution evidence could not be ranked to hearsay as claimed by the appellant. The prosecution therefore, according to the evidence adduced by PW.1, 2, 3 and 5 discussed earlier in considering the appellant's first complaint above, was strong enough to prove the case against him beyond reasonable doubts. The appellant's defence did not also raise any reasonable doubts for the reasons shown earlier (also in discussing his first complaint). I therefore, answer the major issue posed above affirmatively that, the prosecution

indeed, proved the case against the appellant beyond reasonable doubts before the trial court. I accordingly overrule the major ground of appeal which was also reflected under the appellant's third complaint.

The next aspect for consideration is the legality of the sentence of 30 years imprisonment imposed against the appellant. In his petition of appeal, the appellant urged this court to set aside the sentence. Nonetheless, the parties did not discuss on its legality during the hearing of the appeal. On its part, this court is obliged to consider that aspect irrespective of the parties' passiveness. This is because, this court being an appellate court, has the duty to ensure proper application of the laws of this land by the subordinate courts. Its role was emphasized by the CAT in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza**, (unreported).

The question here is therefore, whether the sentence of 30 years imprisonment imposed against the appellant was lawful. The offence of unnatural offence contrary to section 154(1)(a) of the Penal Code, Cap. 16 R.E 2019 which was in force at the time when the appellant committed it, is punishable under 154 (2) of the same statute. This is because, it was committed against the victim who was undisputedly aged 7 years old. These sentencing provisions guide that, where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment. The sentence of 30 years imprisonment imposed by the trial court was therefore, unlawful.

On the basis of the foregoing reasons, and having sustained the conviction against the appellant, I dismiss the entire appeal for want of merits. I also invoke my powers under Section 372(2) of the Criminal Procedure Act, Cap. 20 R.E 2022 and quash the illegal sentence of 30 years imprisonment imposed by the trial court as against the appellant. Instead, I substitute it with the mandatory sentence of life imprisonment as required by the law. It is so ordered.

JHK UTAMWA
JUDGE
05/10/2022.

05/10/2022.

CORAM; JHK. Utamwa, J.

Appellant: present (By virtual court while in Iringa prison).

Respondent: Mr. Matiku Nyengero, State Attorney (present physically).

BC; Gloria, M.

Court; Judgement delivered in the presence of the appellant (by virtual court while in Iringa prison) and Mr. Matiku Nyengero learned State Attorney for the respondent, this 5th October, 2022.

JHK UTAMWA
JUDGE
05/10/2022.