IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 237 OF 2020

(Appeal from the decision of Ilala District Court delivered by Hon. Haule RM on 6th March, 2019 in Criminal Case No. 560 of 2017)

OMBENI SAID @ NYOKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

4th February & 10th March, 2022

BANZI, J.:

Before the District Court of Ilala at Samora Avenue, the Appellant, Ombeni Said @ Nyoka was charged with unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap.16 R.E. 2002] ("the Penal Code"). It was alleged in the particulars of offence that, on 23rd October, 2017 at Stakishari area, within Ilala District in Dar es Salaam Region, the Appellant had a carnal knowledge against the order of nature of a girl of four years whom I shall refer as the "victim" or "PW3" to protect her identity. At the end of the trial, he was convicted and sentenced to life imprisonment.

Aggrieved with both conviction and sentence, the Appellant preferred this appeal with eight (8) grounds as hereunder:

1. *That, the learned trial magistrate misdirected herself to presume that the victim (PW3) being a child of tender age promised to tell the truth while in fact there was no voire dire test conducted to ascertain the alleged promise.*
2. *That, the learned trial magistrate erred in law and fact to excessively sentence the appellant in a case where the age of the victim was not proved beyond reasonable doubt as PW1 said she was five (5), charge sheet stated she was four (4) years while in her own testimony she said she is four years and yet there was no birth certificate or clinical card tendered during the trial to clear doubt.*
3. *That, the learned trial magistrate erred in law and fact to convict the appellant based on a floating charge as the time of offence is alleged to happen is not specified which prejudiced the appellant on preparation on his defence.*
4. *That, the learned trial magistrate erred in law and fact to convict the appellant based on incredible and implausible evidence of PW1 and PW3 as if: -*

(i) The victim (PW3) knew the appellant before why she failed to mention him at earliest when reporting the incidence to her mother (PW1).

(ii) The victim (PW3) knew the appellant's house why then did not they go or lead the police to his arrest the same day yet there is no evidence to suggest the appellant ran away after the said crime not there was a manhunt mounted to the said crime.

(iii) The mother's victim (PW1) truly new the appellant and his residence, then why didn't she lead police to his arrest immediately after he was mentioned by the victim.

5. *That, the learned trial magistrate erred in both law and fact by convicting the appellant in case that was conducted contrary to procedure laid to conduct a fair trial as she accepted to work under influence of a social welfare officer who was not an officer of the court to an extent of including her in the court coram which is contrary to judicial ethics.*
6. *That, the learned trial magistrate erred in her judgment when claimed that the appellant defence was an afterthought yet*

he questioned her (PW1) if she knew a woman by the name of Hawa and the case was being fictitious one.

7. *That, the learned trial magistrate erred in law and fact for failing to notice that the appellant was detained at police custody over the period of time prescribed in law before arraigned in court yet the prosecution evidence failed to adduce any reasonable cause for such delay which is contrary to procedure.*
8. *That, the learned trial magistrate grossly erred in holding that the prosecution proved its case against the appellant beyond the reasonable doubt.*

Before determining the merit or demerit of the appeal, it is pertinent to give the factual background leading to the conviction of the Appellant. On 23rd October, 2017, while the victim was going to her aunt to take Iqram, the Appellant grabbed and carried her on his back up to the valley. After reaching there, he undressed her underpants. Then he pulled down his trousers, took out his male organ and inserted it into her anus. PW3 felt pain. After quenching his desire, he dressed her and told her to go home. PW3 returned home but she looked worried. The victim's mother (PW1) who had gone to look for her, returned home where she was asked by her co-

tenant if she had assaulted the victim because she saw her in a state of fear. PW1 went and found her very dirty with faeces and sperms in her pants. Upon further examination, PW3 was found sexually assaulted through the anus. PW1 called her neighbours including PW2 whereby, after examining her and confirming that she was sexually assaulted, they went to report to Stakishari Police station where after given PF3, they took her to Amana hospital. On arrival, PW3 was examined by PW5 who found the evidence of penetration on the anus which was caused by a blunt object. Upon inquiry, the victim named the Appellant as her assailant. On the following day, the Appellant was arrested after being spotted at the shop located on the front part of the house where PW1 lives with the victim.

In his defence, although the Appellant did not categorically deny to have committed the offence, but he claimed to be framed up by PW1 who was his lover. According to him, PW1 framed him after realising that, she was married and decided to dump her by marrying another woman. After that, the said woman threatened him whereby, three weeks later, he was arrested and taken to police station. He stayed there until the fourth day when the victim came with his ex-lover (PW1) but the victim failed to identify him.

At the hearing of this appeal, the Appellant appeared in person and fended for himself, whereas the Respondent Republic had the service of Mr. Adolf Kisima, the learned State Attorney.

The Appellant, being a layperson did not have much to submit but merely prayed to the Court to adopt the grounds of appeal as part of his submission. In addition, he stated that, the prosecution failed to produce birth certificate of the victim. He further insisted that, the case against him was not proved beyond reasonable doubt and prayed to be set free by allowing his appeal.

On the other hand, Mr. Kisima firmly resisted the appeal. Starting with the first ground, he referred to page 16 of the proceedings and submitted that, the victim testified after compliance of requirement of the law concerning testimony of a child of tender age. As for second ground concerning the victim's age, he submitted that, the same was proved by her mother, PW1. In respect of the third ground, despite his admission, but he argued that, failure to state the time in the charge sheet did not prejudice the Appellant provided that, the date of incident was clearly indicated. Responding to the fourth ground, he argued that, according to testimony of PW1, the victim mentioned the Appellant at the earliest stage when they were in the hospital. Besides, it was not PW1's duty to arrest the Appellant.

Turning to the fifth ground he submitted that, it is the requirement of the law for social welfare to be present in the proceedings concerning children. Thus, her presence was in accordance with the law. So far as the sixth ground is concerned, he argued that, the record of the trial court does not reflect about PW1 being questioned in respect of the woman named Hawa or the case being fictitious. In that regard, the trial magistrate was right to hold the Appellant's defence as an afterthought. Concerning the seventh ground about being detained for long at police custody, he was of the view that, the same should be ignored because it was not raised at the trial court or during his defence. Concluding with the last ground, he submitted that, through the testimony of PW1, PW3 and PW5, the case against the Appellant was proved beyond reasonable doubt. Thus, he prayed for the appeal to be dismissed by upholding the conviction and sentence.

The Appellant had nothing to rejoin and left everything to Court while praying to be set free.

Having thoroughly considered the grounds of appeal and submissions by both sides in the light of evidence on record, the main issue for determination before this Court is whether the appeal is meritorious.

Starting with the first ground, it is a common knowledge that, in terms of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019] ("TEA"), it is permissible for a child of tender age to give unsworn testimony on a condition of making a prior promise to tell nothing but the truth. It is undisputed that, PW3 was a child of tender age in the meaning of section 127 (5) of TEA at the time she gave her testimony. In that regard, as required by law, before giving unsworn testimony, she was supposed to make a promise to tell the truth and not to tell lies. The complaint of the Appellant is that, the trial Magistrate did not conduct a *voire dire* test before she arrived into a conclusion that, PW3 promised to tell the truth. A thorough perusal of the proceedings of the trial court reveals that, before PW3 began to testify, the trial Magistrate recorded that, she promised to tell nothing but the truth. Although it is not reflected on the record how the trial court reached at that stage as directed in the case of **Godfrey Wilson v. Republic** (Criminal Appeal No. 168 of 2018) [2019] TZCA 109 at www.tanzlii.org, but in the view of this Court, such irregularity is not fatal considering the fact that, such promise is reflected on the record. In that regard, the first ground lacks merit.

Reverting to the second ground, it is a settled law that, birth certificate is not the only evidence which can prove the age of the victim. The same

can also be proved by the testimony of a parent. In the matter at hand, the age of the victim was proved by PW1 who is the mother of victim. Her testimony at page 9 of the typed proceedings shows that, the victim is five years old. Although the particulars of offence indicate the victim was four years old but that was a way back in 2017 when the offence of committed. On the other hand, PW1 gave her testimony in 2018. This in itself explains the disparity between the age mentioned in the charge sheet and the one stated by PW1 in her testimony. Apart from that, the testimony of PW3 does not contain the fact concerning her age as claimed by the Appellant but that fact was introduced by the Public Prosecutor when she was addressing the court about nature of witness. After all, the introductory remarks by the Public Prosecution do not amount to testimony of PW3. Therefore, since the age of the victim was proved by her mother to be below ten years, the sentence meted against the Appellant was neither illegal nor excessive under the ambit of section 154 (2) of the Penal Code. Thus, with this finding, I see no merit on the second ground.

Turning to the third ground, the Appellant contended that, the charge was defective for not mentioning the time of the incident. Section 132 of the Criminal Procedure Act [Cap. 20 R.E. 2019] ("the CPA") provides that and I quote:

> *"**Every charge** or information **shall contain**, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with **such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.**"*(Emphasis supplied).

Emphasizing the importance of contents of a charge, the Court of Appeal in the case of **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007 (unreported) stated that:

> *"**It is a mandatory statutory requirement that every charge in a subordinate court shall contain** not only a statement of the specific offence with which the accused is charged but **such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.**"*(Emphasis is mine).

What I gathered from the extract above is that, among other things, a charge sheet shall contain such particulars which gives reasonable information to the accused person as to the nature of offence charged. In the instant case, the particulars of offence contained the followings among other things:

"Particulars of offence

OMBENI SAID @ NYOKA, on 23rd day of October 2017 at Stakishari area within Ilala District in Dar es Salaam Region did have carnal knowledge of ..... a girl of 4 years old against the order of nature".

It is clear from the excerpt above that, apart from the name of the victim which I omitted to protect her identity, the particulars of offence contained all necessary information which explains nature of offence against the Appellant. Therefore, failure to mention time of incident did not affect the validity of the charge considering the fact that, the date and place of incident were clearly disclosed. Also, those particulars contained all necessary elements or ingredients of offence as required by law. Besides, it is not the requirement of the law under section 132 of the CPA for particulars to contain time of the incident. In that regard, the third ground also lacks merit.

Before determining the fourth ground which will be discussed jointly with the eighth ground, let me turn to fifth and seventh grounds. To start with the fifth ground, it is the requirement of the law under the provisions of section 99 (1) of the Law Child Act [Cap.13 R.E. 2019] that, a social welfare officer must be present in a proceeding involving an accused who is a child. It is apparent from the record that, the Appellant was not a child

when he committed the offence. Nevertheless, although it is not the requirement of the law but the social welfare appeared once in the course of testimony of PW3 who is the child. There is nothing on record to show that, her presence influenced the trial Magistrate. Apart from that, her appearance does not in any way vitiates the proceedings considering the fact that, the Appellant did not state how he was prejudiced by her presence. Besides, the record does not show if at all the Appellant was affected because he cross-examined the victim properly. Concerning the Appellant to be detained in police custody over a period prescribed by law, it is apparent from the record that, he was arraigned before the trial court two weeks after his arrest. Although section 32 (1) of the CPA requires the accused person to be arraigned within 24 hours or as soon as practicable, but still, such irregularity is not fatal because there is nothing in the proceedings to suggest that, the Appellant was prejudiced by such delay. Thus, both the fifth and seventh grounds lack merit.

Reverting to the fourth and eighth grounds, PW3 in her testimony explained in details how she was sexually assaulted against the order of nature. Although she did not mention his assailant immediately after she returned home but on the very date of incident while they were in the hospital, she mentioned the Appellant by his alias name of Nyoka as the one

who ravished her. According to the testimony of PW1 and PW2, the victim was asked about what happened to her, but she couldn't speak because she looked worried. This clearly explains why she did not mention the Appellant immediate after her return. Apart from that, PW1 said to have known the Appellant by the name of Nyoka for two years prior to the incident. According to PW4, the Appellant was arrested on 24th October, 2019 which was one day after the incident. Since the police were informed about the incident, it is apparent that PW1 had discharged her duty and the rest remained to the police.

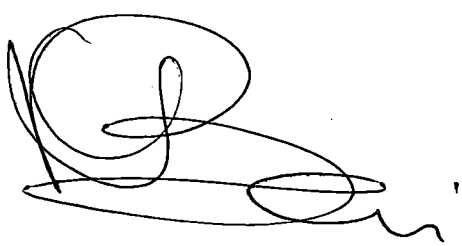
Moreover, the evidence of PW3 is corroborated with the testimony of PW1 and PW2 who examined her immediately after the incident and found the evidence of penetration. Although PF3 was not read after being admitted whose effect is to be expunged from the record, but the evidence of PW5, the doctor who examined her sufficed to establish penetration in support of the evidence of PW1, PW2 and PW3. From their evidence, there is no doubt that, the case against the Appellant was proved beyond reasonable doubt. Thus, the fourth and eighth grounds lack merit.

Concluding with the sixth ground, it is apparent on record that, during cross-examination, PW1 was asked a question about whether she knows Hawa. However, in his defence, the Appellant claimed to be framed by a

woman whom he disclosed later during cross-examination as PW1 after he dumped her. If what he claimed was genuine, he was expected to introduce the same in the course of testimony of PW1. But questions pertaining their break up as the cause of being framed up were not asked to PW1 during cross-examination. Conversely, he cross-examined her about a woman known as Hawa while there is no evidence to prove that PW1 is Hawa. In that regard, I join hands with the findings of the trial court that, the Appellant's defence is an afterthought and did not raise any doubt on prosecution evidence. Hence, the sixth ground also lacks merit.

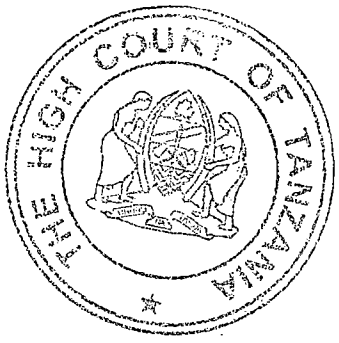
Having said so, I am satisfied that the Appellant was properly convicted and sentenced. Thus, I find no reason to fault the decision of the trial court. Consequently, this appeal is devoid of merit and is hereby dismissed in its entirety.

It is so ordered.



I. K. BANZI
JUDGE
10/03/2022

Delivered in the presence of Ms. Dhamiri Masinde, learned State Attorney for the Respondent, Republic and the Appellant in person. Right of appeal fully explained.



I. K. BANZI
JUDGE
10/03/2022