IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 08 OF 2022

(Originating from Kinondoni District Court Criminal case no 387 of 2018 before Hon F. L. Moshi – PRM)

JOSEPH HAIDAN MOYO ..... APPELLANT

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2022
Date of Judgment: 10/10/2022

BADE, J.

The appellant, JOSEPH HAIDAN MOYO was charged and convicted of two offences namely, Rape contrary to section 130(1) (2) e and 131(1) of the Penal Code (cap 16 R.E 2002) and unnatural offence contrary to section 154(1) (a) and (2) of the Penal code (cap 16 R.E 2002) by the District Court of Kinondoni at Kinondoni and sentenced to serve 30 years imprisonment for both offences. Aggrieved, he now appeals to this Court.

Briefly, the facts of the case are that the appellant together with his wife, and children one of whom was a step child, lived together. On the fateful Sunday, PW1 mother was around visiting with them and was left behind while she attended church. The appellant is said to have gone to work, when

he suddenly returned, gave money to the younger children to go get themselves some sweets and called the victim inside the bedroom. On her return she found her mother crying questioning why the appellant was inside their bedroom with PW2 who is also referred to as (LK) {to protect her identity} who was his step children, while he has sent the other children to the shops. It was said by PW2 that he would do these acts in many occasions where the mother is away where he would put his penis into her anus and sodomized her, as well as rape her. He threatened her that that he would stab her with a knife and be killed if she ever tells. PW2 related further that he was raping and sodomizing her at any time there was no one around including following her to the washrooms.

So they got found out upon the younger children coming back from the shop where she kept knocking and their grandmother came knocking as well. This is when the appellant came out wearing a short, meanwhile calling PW2 from inside the room wearing a piece of cloth (khanga); who upon being asked what she was doing inside, responded that she was helping to hold the door, facts which were replicated by the appellant. PW3 the grandmother waited while crying until PW1 came back and reported the incident.

When PW1 confronted the appellant about these allegations it is said he admitted and asked for her forgiveness. She took the victim of the offence to Goba Dispensary for checkup, and later to Sinza Palestina Hospital, where it was confirmed that she was raped and is HIV positive. At this point the appellant was arrested by the police who were around the dispensary that PW1 and PW2 attended.

The prosecution brought forth five witnesses, while the defense comprised of two witnesses.

The appeal was ordered to be argued by way of written submissions where both parties filed timely. The appellant was unrepresented, while the respondent had the services of Ms Nura Manja, State Attorney from the NPS while the appellant self-represented himself.

The appellant filed seven grounds of appeal for consideration by this Court as follows and later on supplemented his such grounds with 5 more:

1) That there are procedural irregularities that led to unfair conviction of 30 years imprisonment.

2) That the trial magistrate failed to note that there was jealousy between the appellant and PW1 and that the case was framed against the appellant.

3) That the medical report admitted in trial was not read over and explained in court, and thus I was unable to properly cross examine the witness

4) That the age of victim is inconsistent.

5) That victim had sexual acts with other men and there is no eye witness in the said allegations that witness appellant raping the victim.

6) That PW3 who cried before the door was opened by victim portrayed that appellant did sexual acts to victim something which is not true.

7) That testimony of PW1, PW3, PW4 and PW5 are all hearsay thus inadmissible. PW4 never saw appellant raping the victim (PW2).

The supplementary grounds are as follows; -

1) That the conviction was based on incredible, improbable and contradicting evidence of PW2 who:

i) failed to report incident to her mother or grandmother on time

ii) failed to state whether she was bruised, could not control her faeces, and could not walk properly following the incident.

iii) how many times she was raped and sodomised, whether four or five times.

2) Evidence of PW1 and PW3 is doubtful as they failed to state if they inspected the victim for any signs of being raped or sodomised

3) That the defense evidence was not considered by trial magistrate as appellant had grudges with PW1 and PW3.

4) The evidence was recorded contrary to section 210 (3) of the Criminal Procedure Act (Cap 20 R.E 2019)

5) That conviction was found on testimony of PW3 whose evidence was based on suspicion.

As rightly put by the learned State Attorney ground 1, 2, 6 and 7 of petition of appeal and ground 2, 3 and 5 of supplementary petition of appeal can be looked at jointly as they all relate to the legal principle that the prosecution case was not proved beyond reasonable doubt.

It is evidenced from the proceedings that parties are closely related in that PW1 is the wife of DW1, that the victim of the offence (PW2) is PW1's biological daughter, while a step daughter to DW1, and PW3 is the grandmother who was at the scene of alleged offence at the material date.

Also it is established that on the date of incident PW1 took PW2 to the clinic following allegations by her own mother (PW3) that she found appellant and victim alone in the room. Having heard what her own mother was alleging, PW1 acting reasonably in my opinion, took PW2 to the clinic where she could be examined by an expert, and a doctor proved to her that indeed PW2 was raped and sodomised.

On another note, PW3 also testified that on the date of the incident she went to PW1's house but the door was locked and when she knocked on door it was appellant who appeared wearing shorts and seconds later PW2 appeared wearing khanga (a piece of cloth), this raised doubt to PW3 because when she asked them what they were doing, they had no reasonable answers. PW5 who is a doctor confirmed that indeed PW2 was sodomised and raped.

Basing on these highlighted grounds of appeal, in my view these pieces of evidences are hinging more on circumstantial evidence. I think the issue for determination then becomes whether the appellant was convicted on the basis of circumstantial evidence, and if that is so, it was done fairly and as per the legal requirement. Also with it is the issue if the case against the appellant proven beyond reasonable doubt.

I would straight dive into looking at the principles that are supposed to guide conviction on circumstantial evidence and see if it fits the evidence against the appellant. The case of **Sadiki Ally Mkindi vs The D.P.P. Criminal Appeal No. 207 Of 2009 (Arusha February, 2012)** enunciated and put in perspective the eight principles on the general rules regarding

circumstantial evidence in criminal cases as elucidated in **SARKAR ON EVIDENCE, Fifteenth Edition, Reprint 2004 at pages 66 to 68.** These are:

> "1. That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.
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> 2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.
>
> 3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.
>
> 4. Where circumstances are susceptible of two equally possible inferences the inference favoring the accused rather than the prosecution should be accepted.
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> 5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the

innocence of the accused, and the chain must be such human probability that the act must have been done by the accused.

6. Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

7. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.

8. If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive."

In essence, these principles guide me to reevaluate the chain of evidence to see if they bring us to the conclusion of guilt of the appellant through the circumstances as found by the trial court.

PW3 became suspicious after she arrived at the appellant's house and found everyone gone, and in a moment, the other kids came back and started to knock on the bedroom of the appellant because thy were sure that they left them behind when they all left to go get the sweets for which the appellant sent them for. Upon opening the door, both the appellant (wearing a short – which was reported as such because it is inferred that it is not characteristic of a person who just came back home to be in such piece of garment); and the victim of the offence (who was in a 'khanga' – a piece of clothing which is worn loosely). In my view the mentioning of these pieces of clothing is not

coincidental but rather points to the circumstances that were found to create the suspicion that something was going on. Further, both DW1 and PW2 coming out of the room, and PW2 responding that she was helping to hold the door for DW1 did not sail through because they had to knock vigorously for the door to be opened to start with. These incidents were all pointing to a suspicious circumstance, and as soon as PW1 came back from Church, she found PW3 who did not bulge and was crying and demanding an explanation. Also, she found PW2 sleeping. At this point, PW3 demanded that DW1 explain why he locked himself in with the child; while PW2 stated that she was afraid to say why. DW1 had asked for forgiveness from the family as per Pg 7 of the proceedings. PW2 narrated what has been happening to her to PW1, who took it upon herself to take PW2 to the clinic where it was proven that the Victim of the offence was sodomized and raped by PW4 who tendered PR1 in exhibit.

It is my considered finding that this evidence suffices the principles on circumstantial evidence through which the prosecution was able to prove its case. I hold that grounds 1, 2, 6 and 7 of petition of appeal, and grounds 2, 3 and 6 of supplementary petition of appeal are all without any merits and they must fail. I am fortified in my holding so by guidance from the Court of Appeal in **Saidi Bakari vs R; Criminal Appeal No 422 of 2013 (unreported)** where it was said:

> *It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centered on circumstantial evidence, a proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances*

established by the evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances.

The defense by the appellant that the case was concocted against him due to his grudges with PW1 and PW3 on matters to do with jealousy is highly improbable and it hinges on it being an afterthought as the appellant never raised that issue during cross examination of PW1, PW2 or PW3, which would have been the opportunity to raise these doubts against the prosecution case. In the case of **Ridhiwani Nassoro Gendo vs Republic, Criminal Appeal No. 201 of 2018** (unreported) at page 21: it was held that it is trite law that a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth"

This has been the position also in **Cyprian Athanas Kibogoyo vs Republic, Criminal Appeal No. 88 of 1992** and **Hassan Mohamed Ngoya vs Republic, Criminal Appeal No. 134 of 2012 (both unreported).**

In the circumstances, I see no reason to differ with the lower court's findings in respect of the evidence adduced by the prosecution witnesses.

The allegations by the appellant that the victim did not report the matter on time is unfounded because the victim clearly states that the appellant used to threaten her with a knife not to tell anyone. As the appellant was a step-father to the victim, it is probable that she could not narrate this ordeal to her own mother for fear of being stabbed to death.

There was also a complaint by the appellant that the victim of the offence was inconsistent about whether she was raped, that she was raped and sodomised four or five times. This is merely a minor contradiction which does not cause the prosecution case to flop. In the case of **Mzee Ally Mwinyimkuu @ Babuseya vs Republic, Criminal Appeal No. 499 Of 2017** (unreported) at page 14 it was held that "the court has been firm that minor contradictions, inconsistence or discrepancy in evidence from the prosecution will not dismantle its case...

Another point of contention by the appellant is that the victim did not state if she had uncontrolled feaces or could not walk properly following unnatural offence done to her; which in my view is baseless. I must agree with the learned state attorney and find it unconscionable and irking that it is demanded that this fate should have begotten the victim. There is nowhere in the Penal code where in the offence of unnatural offence, the state of the sodomy victim should be such that she experiences uncontrolled feaces or become unable to walk properly.

On ground 3 of the grounds of appeal with regard to PF3 not being read before the court, this ground of appeal need not detain me much as the learned state attorney conceded to the facts as recorded. Indeed it is true that PF3 which was tendered by PW4- who was the medical doctor that examined PW2 at pg 27 of proceedings was admitted as exhibit PR1. However the same was not read over in court. It is the requirement of the law that once exhibits are cleared for admission, they must be read to the accused, and failure to read the same is fatal. The consequence is to have the unread piece of exhibit expunged from the record. And I so hold as I

find merit on this ground. Be that as it may, however, the testimony of PW4 remains intact, with all its credence.

I find support in this stance in the case of **Issa Hassan Uki vs Republic, Criminal Appeal No. 129 of 2017** (Unreported), which was also quoted by the State Attorney holding that" exhibits which are not read out in court can be submitted by oral evidence describing the content of such exhibits by a witness."In the testimony of PW4 at page 27 of the proceedings she stated that the victim was not virgin, had bruises on her genitalia, her annus sphincter was loose, meaning that a blunt object had been to her vagina and anus. This meant the medical doctor's testimony was received directly, the report would have supplemented what was said in court forming part of the record.

In any case, a closer look to the pointed discrepancies seems to be trifling and minor, the same cannot corrode the evidence adduced and shake the version of the prosecution case. The testimony of PW2, the best evidence in this case, that she was carnally known by the appellant against the order of nature was well corroborated by the testimony of PW4 who medically examined PW2's private parts and found that her anus had bruises, was without her hymen, and her sphincter muscles were loose. On another hand, the testimonies of PW1, PW2, PW3 and PW4 gave a credible detailed account on how the appellant committed the offence albeit circumstantially. All these witnesses, in my considered view, proved the prosecution case and thus, the issues forming the grounds of appeal are devoid of merits.

In another ground, the appellant state that there was discrepancy on the age of the victim making it inconsistent. PW1 who is the mother of the victim (PW2) stated that the victim is 16 years old, PW2 herself stated that she is 16 years old and PW3 stated that the victim is 15 years old. And in all fairness, she was 15 at the time she was being violated. All the three witnesses proved that the victim is below 18 years old, thus a child.

Admittedly, It is important to establish the age of the victim in sexual offence. In the case of **Mzee Ali Mwinyimkuu @ Babuseya vs Republic, (Supra)** On Page 17 which approvingly quoted the case of **Andrea Francis vs Republic, Criminal Appeal no 173** of **2014** (unreported) where the court held that" ...under normal circumstance evidence relating to victim's age would be expected to come from any or either of the following - the victim, both of her parents, or at least one of them, a guardian, a birth certificate, etc"

PW1 and PW2 proved that the victim was under 18 years old, and thus a child. As such, this ground lacks merit and it fails.

It is the appellant's contention on the third ground of appeal, that there were no eye witness who saw him raping or sodomising the victim and the victim had other men that she used to practice sex with. Evidence on record does not testify to this allegation at all, as the victim clearly stated that it was the appellant who violated her repeatedly and no one else. Like it was countered earlier on, the appellant could have cross examined the witness at the trial, but that was never the case.

The victim's evidence is what is best witness in the sexual offence cases as she is the one who knows exactly what ordeal she went through. Moreover, the appellant failed to prove that he had grudges with PW1 therefore PW1 and PW2's testimony is credible and reliable. I find no reason not to believe their testimony and the finding of the lower court.

On ground 4, 3 and 1 of the grounds of appeal both supplementary and original ones, the appellant complains on several procedural irregularities and I shall now look at all of those together but severally.

There is a ground that the conviction is based on defective charge sheet as section 234(2) (b) of the Criminal Procedure Act (cap 20 R.E 2019) was contravened.

Section 234 (2) (b) reads:

> *"the accused person may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross- examination "*

The original charge sheet contained one offence of unnatural offence and by the time the charge was substituted PW1 had already testified in court to the fact that the appellant had raped and sodomised PW2 the victim when the charge was substituted and a new count of rape was added, the appellant did not pray for PW1 to be recalled. The main question to ask is whether this prejudiced the appellant? In this case the answer is no because PW1 had already testified with regard to both counts even before the

amendment of charge was done. Recalling her would have been of no use this instance as it would have been a repetition of what she states earlier. I find support on this position in the case of **Samwel Paul V Republic, Criminal Appeal No. 312 Of 2018 (Unreported)** while faced with a somewhat similar situation, it was held that ....under the circumstance, we find that failure to recall witness is curable since the substitution of the charge sheet did not in any way affect the substance of the evidence given by PW1 and thus did not occasion any injustice on part of the appellant..."

Therefore, I do agree with the learned state attorney that this ground lacks merit and needs not detain us further.

On ground 3 of the grounds of appeal, the appellant contends that his defense was not considered. The appellant on his defense stated that when he was found with the victim in the bedroom, they were carrying iron sheets and that the case was framed against him due to jealousy with his own wife PW1 and mother in law PW3. Reading the judgement, the trial magistrate did summarize the evidence of both prosecution and defense case. He further went on to evaluate the evidence by establishing the essential ingredients of offence of rape and unnatural offence. Going through pages 15 and 16 of the judgment he made a consideration of the defense evidence and weighed it against that of prosecution and found that the same failed to challenge the credibility of evidence produced by the prosecution side.

In the case of **Amiri Mohamed vs Republic (1994) TLR 38** it was held that "Every magistrate or judge has his or her own style of composing a

judgment and what vitally matters is that the essential ingredients shall be there and these include critical analysis of both the prosecution and defense"

It is my view that the defense case was in fact considered and found to be wanting still. I find this ground lacks merit.

The other issue on irregularity lies with contravention of section 210(3) of the Criminal Procedure Act (Cap 20 R.E 2019) on ground 3.

The Section provides:

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

Further on procedural irregularities, It is the appellant's contention that section 214(1) of the Criminal Procedure Act (Cap 20 R.E 2019) was also contravened.

This section relates to trials heard partly by one magistrate and partly by another. The proceedings show that the case was heard by F.L. MOSHI-SRM who recorded the evidence of PW1, and then the matter was reassigned to S.S MSHUMBUZI -RM who in fact addressed the appellant in compliance with Criminal Procedure Act (Cap 20 R.E 2019) and went on to record the testimonies of PW2, PW3, PW4 and PW5 and then the file was re-assigned back to F.L MOSHI-SRM who recorded testimony of PW6 as well as the defense evidence. F. L. MOSHI did not assign reasons for taking the case back from S. S. Mushumbuzi.

The section provides that the magistrate so taking over, may recall witnesses if he thinks necessary. And Subsection (2) provides that the appellate court may set aside conviction if it is of the opinion that the appellant was prejudiced by such omission of compliance of section 214(1).

One of the issues in these procedural irregularities has always been whether the appellant has been materially prejudiced by such omission. It is not apparent how either the taking over or omission to explain the taking over by S.S Mushumbusi RM has in fact prejudiced the appellant. If it did, then the sentence by such irregular trial would be quashed. But to obtain to that, some conditions have been set by the Court of record. I would agree with the learned State Attorney that the appellant only mentioned and quoted how the case was re-assigned to the other magistrate, not how the same has prejudiced him in a way. Also notable is the fact that none of his right were infringed upon during the trial, including his right to cross examine all the witnesses who testified before both magistrates. I find this not to be the case going by the record of the trial proceedings because he was never denied this right and made use of it.

The conditions to be satisfied are set by the court of record in the case of **Bwanga Rajabu vs Republic, Criminal Appeal No. 70 Of 2018** (unreported) where it was observed on page 17 "...that before the High Court decides to quash a conviction, It must be satisfied on the existence of two conditions, first, that the appellant convictions were vitiated by non-compliance with section 214 (1) of Criminal Procedure Act (CAP 20 R.E 2019); and second, and perhaps the most critical one, the appellant must

have been materially prejudiced by the conviction by reason of the evidence not wholly recorded by the successor magistrate"

My scrutiny of the records found none of these problems neither by act nor by any necessary implication. This ground of appeal too must fail.

At this point and before I conclude I am inclined to look at the point raised by the learned State Attorney on the issue of the sentence meted out to the appellant after being convicted of both offences as charged. She charges that the sentence with regard to the count of unnatural offence was not proper. She reasoned that since the victim is a child of 16 years old and was actually 15 when she was violated, and the Law of Child Act, cap 13 R.E 2009 Section 185 provides that '*The principal Act is amended in section 154 by deleting the word "ten" and substituting for it the word "eighteen".* It follows then that, a person who has carnal knowledge against the order of nature of a child below 18 years shall be sentenced to life imprisonment. She thus urge this Court to invoke section 366(1)(a)(ii) of the Criminal Procedure Act, Cap 20 R.E 2019 to invoke this Court's powers and mete out the deserving sentence for such offence which is life imprisonment. Section 154 of the Penal Code is categorical as such:

(1)Any person who
(a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her 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.** (emphasis mine)

Subsection 2 is couched in mandatory terms, and accordingly I accept the invitation by the learned State Attorney to uphold the requirements of law as quoted above.

This Court being the first appellate Court, I have given due consideration to the evidence adduced in court during the trial and satisfied myself as expounded by the learned State Attorney that the appellant ought to have been sentenced as per the requirements of section 154 of the Penal Code as charged particularly because the victim is a child.

Consequently, and on final analysis, I find the appeal has no merits. It is wholly dismissed.

I also set aside the previous conviction of 30 years imprisonment as meted by the trial court, and substitute it with the conviction for unnatural offence against a child C/S 154 (1) (a) (2) of the Penal Code Cap 16 RE 2019 which is a sentence of life imprisonment.

It is so ordered. Right of Appeal explained

Dated at Dar es salaam this 10th day of October, 2022.

A. Z Bade,

JUDGE
10/10/2022

Court: Judgment delivered in the presence of Appellant in person and Ms. Nura Manja, learned State Attorney for the Respondent this 10th day of October 10, 2022

X

A. Z. BADE
JUDGE
Signed by: Aisha Bade

October 11, 2022