IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 138 OF 2021

(Appeal from the Decision of the District Court of Kilosa at Kilosa)

in

Criminal Case No. 191 of 2020

YOHANA BERNARD@ MATESO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

6th July, & 13th October, 2022

CHABA, J.

The appellant, Yohana Bernard @ Mateso was arraigned before the District Court of Kilosa, at Kilosa (the trial court) in Criminal Case No. 191 of 2020 and charged with the offence of unnatural offence contrary to section 154 (1) (a) (2) of the Penal Code [Cap. 16 R. E, 2019] now [R. E, 2022]. He was convicted and sentenced to life imprisonment. Aggrieved, the appellant filed this appeal.

As regards to the offence, it was alleged by the prosecution that on the 31st day of March, 2020 at Mbigiri village within Kilosa District in Morogoro Region, the appellant did have carnal knowledge of AB (name withheld) a young girl of seven years old against the order of nature.

Briefly, the background of the matter which led to the appellant's conviction is as follows: On the material date on 31st March, 2020 during evening time, at Mbigiri village within Kilosa District in Morogoro Region, the victim (PW2) sent by her mother (PW1) to buy cooking oil and sardines. She went at the first shop to buy cooking oil, and thereafter moved to the second shop, to buy sardines. Unfortunately, she forgot to take the cooking oil at the first shop. Then, she went back to take cooking oil at the first shop. When she passed near a certain milling Mashine, suddenly the appellant ran toward her, he caught her and took her to the bush. While in the bush the victim testified that the appellant undressed and sodomized her. She further testified that, the appellant inserted his penis into her vagina and anus, and she felt very painful.

To rescue herself, she asked the appellant to go for a short call and promised him that she will return soon. The appellant believed her words. Instead, the victim went home crying and she told her mother PW1 (Anna Maria Gerald Mhando) and her grandmother. Thereafter, her grandmother told her father what transpired to her child. Later, they reported the matter to (PW4) the Village Chairman. Upon receiving that information, PW4 reported the matter at Dumila Police Station. D/CPL Betty (PW5) investigated on the incident. Dr. Omary Abdallah Kusaga (PW3) medically examined the victim and observed that there were bruises outside and inside her anus and it was open at that time. He realized that the victim had been carnally known against the order of nature. In his remarks, (PW3) concluded that, the victim had been sodomized, since it was indicated that something blunt penetrated or passed through her anus. Thereafter, (PW3) filled the PF3 which was admitted and tendered as (Exhibit PE.1).

The appellant in his defence, denied that he did not commit the offence, but he prayed the court to help him. In his judgement, the trial magistrate was persuaded by the evidence of the victim (PW2) as the same was corroborated by the evidence of PW.1, PW.3, PW.4, and PW.5 and the medical report, herein Exhibit PE.1. Thus, the appellant was found guilty of the offence of unnatural offence contrary to section 154 (1) (a) (2) of the Penal Code whereby he was sentenced to serve life imprisonment. In this appeal, the appellant has fronted six grounds of appeal in his memorandum of appeal, as follows:

1. *That, the trial magistrate erred in law and fact when totally failed to adhere to the requirement of section 127 (2) of the Evidence Act [Cap. 6 R. E. 2002) as amended by Act, No. 4 of 2016 now (R. E. 2019) (Evidence Act) before recording the evidence of PW2 as one of the prerequisites of the law the two findings were supposed to be in the court proceedings as follows; -*
    i. *If PW2 possessed of sufficient intelligence to justify the reception of her evidence, and*
    ii. *PW2 was required to give promise to tell the truth to the court and not lies the thing that was not done. When you see Pages 09 & 10 of the court proceedings, PW2 adduced her evidence in contravention of the above-mentioned provisions and absence of this two finding make the evidence of PW1 valueless.*
2. *That, your hon. Jugde, the appellant was convicted basing on contradiction of the evidence of the prosecution witness especially PW2 & PW3 as to the reasons that PW2 address the court that the rapist raped and sodomized the victim while PW3 in his testimony he checked the victim in her vagina and nothing was found. If it was true that the rapist penetrated forcibly the doctor could detect*

anything else as the act was not normal.

3. *That, if the learned trial Magistrate carefully examined the evidence before him, he could have discovered that there was a very higher possibility for the appellant to be implicated by the case.*
4. *That, your hon. Judge, the trial court erred in law and in fact when convicted the appellant without considering that there was no evidence which established proper identification due to the time after the alleged offense was committed.*
5. *That, your hon. Judge, the trial court erred in law and in fact when convicted the appellant without first addressing the issue of the age of the victim as there was no evidence given in court like birth certificated or even the victim's mother to address court when the victim was born, See: the case of* ***Mathayo Kingu vs. The Republic, Criminal Appeal No. 589 of 2015, CAT Dodoma****. It was held inter alia that:*

   > *"The age of the victim was important to be mentioned and proved to ascertain as to whether real the victim was girl aged between 18 years to constitute the offence of statutory rape."*

6. *Tthat, your hon. Judge, the trial court erred in law and fact when convicted the appellant while prosecution case did not prove their case beyond all reasonable doubts.*
7. *That, your hon. Judge the trial court erred in law and fact when did not warn itself that a person can be convicted on the strength of the prosecution case and not weakness of the defence side.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, while the Respondent / Republic was represented by Ms. Theodora Mlelwa, learned State Attorney.

On being invited to elaborate his grounds of appeal, the appellant chose for the Respondent / Republic to respond to them first. On her part, the learned State Attorney commenced by supporting the trial court conviction and sentence. On the first ground, she contended that section 127 (2) of the Evidence Act [Cap. 6 R. E, 2019] was properly complied with and the victim did promise to tell the truth and not lies. She referred the court at page 10 of the trial court proceedings.

In response to the 2nd ground, the learned State Attorney submitted that as far as this complaint is concerned, there is no any contractions on the evidence adduced by PW2 and PW3 as the appellant stand firm for offence of unnatural offence and not raped.

As regards the 5th ground of appeal which touches the age of the victim, the learned State Attorney submitted that, the age of victim was proved as the victim age was 7 years old. She cemented this argument by citing the case of **Makenji Kamura vs. The Republic,** Criminal Appeal No. 30 of 2018, where the court held that, persons who were supposed to prove the age of the victims are parents, close relative, medical practitioner and birth certificate. In this appeal, the age of the victim was proved, she so argued.

Lastly, in response to the grounds 3, 4, 6 and 7 respectively, the learned State Attorney contended that the prosecution side proved the offence on the standards required by law. As regard to the offence of unnatural offence, Ms. Mlelwa underlined that the prosecution side proved all ingredients of penetration, age and identification. The medical report proved that PW3 checked on her anus and he found bruises outside and inside. PW3 testified further that his findings indicated something blunt

object penetrated or passed through the victim's anus, thus suggested that the victim was sodomized. On the question of identification, Ms. Mlelwa submitted that the victim did explain how the appellant had carnal knowledge against the order of nature as she testified further at pages 22-23 of the typed trial court proceedings that she knew the appellant before the incident occurred and it was the second time to saw him at Mashineni.

In rejoinder, the appellant had nothing material to remark rather than asking for the mercy and sympathy of the court as he had already been in prison for quite a long time.

Having heard and considered the arguments advanced by Ms. Mlelwa and the appellant who appeared in person, unrepresented, the grounds of appeal and upon carefully read and closely examined the trial court records and the judgment of the court delivered on 8/12/2021, the question for determination is whether this appeal has merit. Before determining the grounds of appeal, it is the position of the law that usually the trial court is best placed to determine the credibility of witnesses (See: **Augustino Kaganya Ethanas Nyamoga and William Mwanyenje vs. R,** (1994) TLR 16 (CA). This is specially so, where the decision of the case is wholly based on the credibility of witnesses such as the present one (See: **Ali Abdallah Rajabu vs. Saada Abdallah Rajabu and Others** (1994) TLR 132. However, it is also settled law that the duty of the first appellate, is to reconsider and evaluate the evidence and come to its own conclusions bearing in mind that it never saw the witnesses as they testified (See: **PANDYA V. R,** (1957) EA 336.

As regard the first grounds, the appellant's complaint is that section 127 (2) of the Evidence Act (Supra) was not complied with and PW2 did

not promise to tell the truth, Ms. Mlelwa submitted that at page 10 of the typed trial court proceedings, PW2 did promise to tell the court the truth and not tell lies, a procedure which was conducted by the trial magistrate. The provisions of section 127 (2) provides that:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence,* ***promise to tell the truth to the court and not to tell lies."***

Interpretation of the above provisions of the law was well articulated by our Apex Court in **Godfrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018, where the Court held *inter-alia* that:

> *"Section 127 (2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age."*

As garnered from the trial court record, it is quite clear that the requirement under section 127 (2) of Evidence Act was complied with. As hinted above, the trial magistrate had an ample time to ask the victim simplified questions to check her intelligence. The Court of Appeal in **Godfrey Wilson vs. R** (Supra) underscored that since section 127 (2) of the Evidence Act laid conditions precedent before reception of the evidence of a child of a tender age, but it is prudent to lay a foundation on how the

trial magistrate or judge can ask the witness of a tender age such simplified questions, which might not be exhaustive depending on the circumstances of the case. These questions may include but not limited to:

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

As a model, the above simplified questions are also reflected well in the trial court proceedings: -

"Questions:
Mahakama; *nyumbani unakaa na nani,*
Mtoto; *mama na bibi,*
Mahakama; *huwa unaenda kusali kanisani?*
Mtoto; *ndiyo,*
Mahakama: *Kudanganya ni dhambi au siyo dhambi?*
Mtoto; *Ni dhambi.*
Mahakama: *Baba na mama ukisema uongo wanakuchapa au hawakuchapi?*
Mtoto: *wananichapa.*
Mahakama; *Mtu muongo aneenda mbinguni au motoni?*
Mtoto: *Motoni.*
Mahakama: *Mtu mkweli, anayesema ukweli anaenda wapi akifa?*
Mtoto: *Mbinguni.*

***Mahakama**: Kwa hiyo unaahidi kusema ukweli au uongo?*

***Mtoto**: Naahidi kusema ukweli na si uongo.*

***Court**: The child promised to tell the truth and not lie.*

Now coming to the second ground of appeal, the appellant's complaint is that there is contradictions of evidence in particular the evidence of PW1 and PW3. On her part, the learned State Attorney contended that there is no iota of contradictions of evidence as claimed by the appellant. She highlighted that it is on record that the appellant was arraigned before the trial court with the offence of unnatural offence and not rape. I agree with the learned State Attorney. This ground has no merit.

As to the fifth grounds, Ms. Mlelwa submitted that the age of the victim was proved by PW1 (mother of the victim) and PW3 (A Medical Doctor) a fact which is backed up by the evidence available. As correctly accentuated by Ms. Mlelwa, the age of victim was proved by the mother of the victim to the effect that the victim's age was 7 years old. She cemented this argument by citing the case of **Makenji Kamura vs. The Republic,** Criminal Appeal No. 30 of 2018, where the court held that, persons who were supposed to prove the age of the victims are parents, close relative, medical practitioner and birth certificate. In this appeal, the age of the victim was proved, she so argued. This ground also has no merit.

Arguing in respect of the 3rd, 4th, 6th, and 7th grounds of appeal, the learned State Attorney submitted that the prosecution proved that the

appellant committed the offence of unnatural offence to the victim. She highlighted that the crucial ingredients of the offence of unnatural offence were fully established by the prosecution witnesses. These ingredients are penetration, age of the victim and identification of the appellant and the medical examinations conducted by the medical doctor, herein featured as (PW3) one Omary Abdallah Kusaga. During testimony, PW3 told the trial court, as unveiled at page 14 of the typed trial court proceedings that:

> *"It is hard to insert even one finger in the anus when one has not been through such act but with the child one could insert two to three fingers."*

From the above excerpt of the evidence adduced by PW3, it signifies that there was penetration of a blunt object onto the victim's anus. Since it is a trite law that, the best evidence in sexual offence is that of the victim of the offence as it was expounded in case of **Seleman Makumba vs. R, [2006] TLR 379,** in the present appeal, I am satisfied in my mind that the victim advanced true testimony and rightly linked the appellant with the offence he stood charged. Her evidence is credible and watertight. Indeed, the appellant is the one who carnally known the victim against the order of nature. Her evidence is corroborated by the testimonies of PW1, PW3, PW4 and PW5. Further, PW3 told the trial court that upon conducted a medical examination, he revealed that PW3 proved that there were bruises in or just around the anus. In the case of **Hamis Masanja vs. R,** Criminal Appeal No. 160 of 2011, CAT (Unreported] the Court held inter-alia that:

"it is proved by entry of a male organ into the private parts of the victim however slight it may be".

As regard to the question of identification of the appellant, the typed trial court proceedings at pages 9-12 clearly shows that the victim did manage to identify the appellant at the scene of crime, and she explained how she knew him before occurrence of the incident. The trial court proceedings portray as hereunder shown at pages 9-12:

"Kabla ya siku ile huyu kuniingizia mdudu nilishawahi kumuona. Mimi na mama tulienda kusaga mashineni, siku ile ilikuwa mara ya pili mimi kumuona. Huyu (mtoto anamuonyesha kidole mshitakiwa) hakunivua nguo zangu nyingine sketi aliipandisha juu".

From the above observation and finding of this court, there is no doubt that the evidence of the victim (PW1) is worth of credit as she gave a clear testimony, and she explained the condition that she had soon upon being sodomized by the appellant. Her testimony shows that she felt very pain following penetration of the male organ by the appellant into her anus, the evidence, which was supported by PW3, the medical doctor who proved that the victim's anus was able to allow penetration of two to three fingers at once. This fact truly suggests that the victim was carnally known against the order of nature. It is on record that upon medical examination, it was revealed that the victim sustained bruises into her anus and that was a

clear indication that she had been sodomized by the appellant. These pieces of evidence cannot be taken lightly without taking legal measures to prevent girls from brutality and cruelty of the heinous acts.

In the upshot, I am satisfied that the prosecution proved the case beyond reasonable doubt. Without hesitancy, I hereby upheld the decision of the trial court and sustain conviction and sentence meted by the trial court. The appellant's appeal is hereby dismissed for lack of merits.

It is so ordered.

DATED at MOROGORO this 13th day of October, 2022.

M. J. Chaba

Judge

13/10/2022