IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 236 OF 2020

JUMA SAID DARAJA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Mkuranga at Mkuranga]

(Hon. K.P. Mrosso RM)

dated the 18th day of May,2020
in
Criminal Case No. 162 of 2018

JUDGMENT

26th August, 2021 & 2nd May, 2022.

S.M. KULITA, J.

Juma Said Daraja, referred to as the Appellant in this appeal, was charged in the District Court of Mkuranga for Unnatural Offence contrary to the provisions of section 154(1)(a) and (2) of the Penal Code [Cap. 16 RE 2002]. It is in the particulars of offence that, on the 9th day of August, 2018 at Kisemvule Village within the District of Mkuranga, the Appellant

had carnal knowledge of "AB" a boy of eleven (11) years old against the order of nature.

The case of the prosecution as unfolded by the evidence of PW1, father of the victim is that, on the 8th day of August, 2018 the victim went missing. He decided to report the matter at Vikindu Police Station. He added that, after the victim had returned home on a third day, he told him that he had slept at the Appellant's residential premise, in his room. On that, the victim (PW2) told the court that, he fled away from home for fear of two people he had met them on the way back home when he was coming from playing. He added that, with the help of his friend (PW3), he was received with the Appellant who agreed to accommodate him.

The victim narrated that, while asleep at the mid night, the accused (Appellant) awoke him and sodomized him. PW6, a Doctor who filled the PF3 (Medical Examination Report), verified the sodomy act to have been done against the victim. Following that finding, the Accused was arrested. PW5 (Police Officer) investigated the case and lastly, he instituted the case at the District court for trial.

On his part, the Appellant who testified as DW1 agreed to have received the victim and accommodated him a shelter after he was chased

away from their home. He stated that though they slept together he never committed the offence.

At the conclusion of the trial, the Appellant was accordingly found guilty, and upon conviction, he was sentenced to a life imprisonment. That was the 18th day of May, 2020.

Aggrieved with that decision, the Appellant preferred the instant appeal on eleven grounds which may be summarized as follows: **One**, as the victim was above 10 years of age, it was wrong for him to be sentenced a life imprisonment, **two**, it was wrong for a trial court to base its judgment on the evidence of PW1 and PW2 whose testimonies where taken before the charge was substituted, **three**, it was wrong to base conviction on the evidence of PW2 which was taken contrary to the requirement of section 127(2) of the Evidence Act, **four,** the evidence of the victim is full of lies worth not to be acted upon, **five**, the prosecution case is fabricated with full of contradictions and inconsistencies, **six**, the Prosecution wronged for not conducting an identification parade, **seven,** it was wrong for the trial court not to accord any weight on the defense evidence, **eight**, the Magistrate who wrote a judgment never had an opportunity of listening and observing demeanor and credibility of the

witnesses, **nine,** the prosecution case was not proved at the required standard.

The Appeal was heard on 12th of May, 2021 whereby the Appellant appeared in person while the Respondent (Republic) had the service of Ms. Monica Ndakidemu, learned State Attorney who resisted the appeal.

Submitting in support of appeal, the Appellant decided first to adopt his grounds of appeal as part of his submission.

Concerning the first ground of appeal the Appellant submitted that, as the victim's age is above 10, then it was not proper for the trial court to award him the life imprisonment sentence.

On the second ground of appeal, the Appellant stated that, it was not proper for the trial court to rely on the testimonies of PW1 and PW2 whose evidence were taken before the charge was substituted. To him, after the amended charge was substituted, it was mandatory for him to be asked whether the said witnesses should be recalled or not.

In respect to the third ground, the appellant submitted that, as the victim is a minor, *voire dire* examination was to be conducted or that said witness had to promise to tell the truth. To him, this was not done and

that even when they resumed, the court did not warn the said witness (victim–PW2) that he was still under oath.

On another move, the Appellant condemned the victim to have testified a lie. He explained the same that, the victim testified that his hands were tied, yet he testified again to have touched wet thing on the anus after the Appellant had ejaculated. He was thus questioning as to how the hands that were said to have been tied enabled to touch the said wet thing over there. To him this was a lie.

Again, the Appellant stated that, his conviction stems as he decided to stay with the victim after he was expelled from their home. He lamented that; this truth was disregarded.

The Appellant went ahead stating that, there was a need to conduct an identification parade, but it was not done. He submitted that, the trial court did not take into account the testimonial contradictions between PW1 and PW4 who testified that on the material date the victim was sent to buy a match box while the other said that the victim was out to play.

While still fending for his innocence, the Appellant submitted that, the testimonies of all witnesses are hearsay, as neither of them had seen him committing the offence. He added that, the charge sheet bears the

date of incident being 9th May, 2018 while the victim stated it being 8th May, 2018. With this, the Appellant submitted that, the charge and the evidence were at variance.

The Appellant went on stating that, at page 4 of the judgment it is clear that, the victim denied to have been sodomized and later on he accepted. To him this is a doubt.

On another move, the Appellant submitted that it was wrong for the Magistrate to use two different PF3s and that it was not the Doctor who tendered the said PF3s.

The Appellant lastly condemned the trial Magistrate for not considering the defense evidence.

In reply Ms. Monica Ndakidemu, State Attorney submitted that, section 127(2) of the Tanzania Evidence Act was complied with. She referred us to page 12 of the proceedings to prove the same. She added that, there was no session adjournment save for a ten minutes short adjournment as the victim was crying. To her, there was no need for the witness (victim) to take another oath.

As for the amendment of the charge, Ms. Monica Ndakidemu submitted that page 15 of the typed proceedings verifies that the

Prosecutor prayed to add the skipped provision. She added that, in doing so, facts of the case were not affected at all. She went ahead that, as the witnesses were called to witness facts, she was of the opinion that, the said amendment of the charge sheet without recalling the witnesses who had already testified had not affected the appellant.

As for the issue of PF3 Ms. Monica Ndakidemu stated that, PW1 after he had realized that the victim was sodomized, he took him to police, then to hospital where PF3 was filled. She went ahead showing that, as a custodian, PW1 was right to tender the said PF3 to court. Insisting the same, Ms. Monica stated that, the Doctor (PW6) appeared in court and identified the said PF3 as the one that he had filled.

Concerning the allegation that the victim was telling lies on the possibility of touching his anus while he contended that his hands were tied, Ms. Monica replied that the said ground is hopeless as the victim had a chance to touch himself after he was released by the Appellant.

As for identification parade the Counsel stated that, there was no need for it to be conducted as the Appellant was well known to the victim before the act. He added that, even the victim's mother testified to have known the Appellant before, and that page 7 of the proceedings verifies that the victim pointed to the Appellant prior to his arrest.

As for the number of days that the victim had spent away from home, the State Attorney conceded that there is contradiction, yet she was quick to submit that, the same does not go to the root of the case, as long as it is evident that on the material date the victim came back home from the Appellant's residence and that the interrogation revealed that he was sodomized by the Appellant. She cited the case of **Eliah Bariki V. R, Criminal Appeal No. 321 of 2016 CAT at Arusha** which held to the effect that, contradiction is something unavoidable, it should be skipped if it does not go to the root of the case. She went ahead stating that, in sexual offences the victim only can be in a position to state the exact things.

Again, Ms. Monica was of views that, it is not strange thing for the victim who is a child to deny and then admit that he was sodomized. She added that, the trial Magistrate was satisfied that, the victim was telling the truth. She referred the court to page 6 and 7 of the typed proceedings. She insisted that, for sexual offences like this one the law allows the Magistrate to convict the accused of Rape or Sodomy even by considering the victim's testimony only.

On the issue of victim's medical examination, Ms. Monica submitted that the Doctor (PW6) testified that he examined the victim on 10/8/2018

and found him sodomized in 72 hours back. The Counsel cemented that, it is within that time the victim was with the Appellant.

On the issue of oath Ms. Monica submitted that, as for the child of 14 years the law requires him to take oath. But for the victim with 11 years the law requires him to promise to speak the truth. To her, what the court has done was right.

Submitting on the issue of non-citation of subsection in the conviction, the State Attorney Monica stated that it is a minor error. She added that, it is the charge and not the provision that lead to conviction.

As for the issue of sentence, Ms. Monica submitted that, it was right for the Appellant to be sentenced a life imprisonment. She gave the reason that, the victim was under 18 years of age. She referred us to section 154(2) of the Penal Code to justify her argument.

Finally, Ms. Monica submitted that, the Appellant admitted to have slept with the victim. She said the Appellant had evil mind as he could have taken the victim to the local government authority for assistance. She thus prayed for the appeal to be dismissed.

In rejoinder the Appellant stated that, the victim neither stated that he was released the ropes nor did he say that he led to the arrest of the

Appellant. He added that, the short adjournment of the case for 10 minutes creates doubts. He reiterated that, the date of the commission of the crime in the charge differs from what the prosecution witnesses have testified. This was the end of both parties' submissions.

I have taken into consideration on both parties' submissions, the referred authorities, available records and the rival issues as well. I am now going to determine the grounds of appeal as hereunder;

In my analysis I prefer to start with the second ground of appeal. With regard to it the records show that, it is true that PW1 and PW2 were not recalled to testify after the charge being substituted. This fact was admitted, by the Respondent's counsel. However, the records reveal that the substituted charge did not change the facts but only added subsection (2) on the provision against which the appellant was charged with. That led it to be read section 154(1)(a) and (2) instead of section 154(1)(a).

Thus, as rightly submitted by the State Attorney that PW1 and PW2 testified on facts. Since the substitution of the charge sheet did not involve change of facts, there is no way that the Appellant was prejudiced for the PW1 and PW2 not to be recalled. The said subsection (2) was added by the prosecution as it prescribes for a punishment for the offence charged under section 154(2)(a) of the Penal Code [Cap 16 RE 2002]. In other

words, the added subsection in the substituted charge could not change the facts the said witnesses had testified. I find this ground of appeal unmeritorious, hence failed.

Concerning ground of appeal number three, the record at page 12 of the proceedings transpires that, the victim (PW2) stated that he was of 12 years of age as I hereby quote; -

> *The child promises to tell the truth nothing but the truth and he is sworn (as he understands the meaning of oath)*

Section 127(2) of The Evidence Act provides that; -

> *(2) 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 any lies.*

With the above quoted words, I am firm that, section 127 (2) of the Tanzania Evidence Act [Cap 6 RE 2002] was rightly adhered to by the trial Magistrate. The victim having promised to tell the truth, nothing but the truth, it is clear that he had meant that he was not going to tell lies but the truth.

The records further reveal that, the court took short adjournment of 10 minutes to give room for the victim (PW2) to calm down as he had started crying while testifying. It is equally true that, when he resumed, he was not warned that he was still under oath. Can it be termed fatal? I am of settled mind that this was not fatal. I am so saying because the session was not adjourned, further, a ten minutes pose was a short pace to allow the victim cooling down and continue from where he had ended up in testifying. Therefore, the promise of speaking nothing but the truth that the victim had made of remained intact. With the above discussion I find the Appellant's third ground of appeal lacks merits.

Concerning the fourth ground the Appellant lamented that the victim was unreliable for telling lies that he had managed to touch watery thing on his anus while he alleged that his hands were tied during the crime. The records at page 13 of the proceedings read that; -

> *……I felt severe pain. He did such act repeatedly. I later felt like some means like fluid being poured onto my anal area. I touched my anal area and felt such discharge.*

What do those words suggests? Putting in mind that, the records provides that the victim then managed to get out of the Appellant's residence and

went back home. Actually the records transpire no clarification but from the above statements of the victim, it appears that he was thus released from the tying or he cut them by himself. Back to the quoted paragraph, as rightly submitted by the State Attorney, it appears that the victim's hands were tied when he felt some fluid like thing being poured onto his anal area, but when he got released from the ropes he managed to touch his annul area to confirm it. On account of the foregoing discussion, I am of views that, this ground of appeal also lacks merit.

In respect of grounds number five and seven collectively, the State Attorney admitted that, there are some contradictions concerning the days that the victim was missing and the purpose of him getting out of their home on the material date. But she was quick to reply that, the same do not go to the root of the case and urged this court to disregard them for being issues outside of the scene.

It is true that, whether the victim returned home after 2 or 3 days and whether the victim was sent to the shop or was chased from home, those facts do not waive the facts that on the material date the victim went missing and that he slept with the Appellant, in his residence and the Appellant does not dispute this at all. With this situation, I find that, the contradictions are minor, do not go to the root of the case and should

be disregarded. See, **Eliah Bariki** (supra). With this finding, I am of firm that, these grounds of appeal lack merits.

Concerning the sixth ground of appeal that identification parade was not conducted I have this to say; as PW2 (victim) and PW4 (victim's father) testified to have known the Appellant prior to the commission of the offence, and, as long as PW2 pointed him during the arrest showing PW1 as to who the Appellant was, then, as rightly submitted by the State Attorney that, there was no need for conducting identification parade. Page 14 of the proceedings verifies that the victim showed PW1 who actually the Appellant was. On that account, this ground of appeal fails as well.

On account of ground number eight of appeal that the case is fictitious as it intends to punish the Appellant for helping the victim who had been punished by his parents, it is my comment that, whether it is to be taken that the parents had ill intention against the Appellant for helping their child, yet the parents were only PW1 and PW4. The question remains that, were the remaining prosecution witnesses had ill intention too? On this, see particularly the testimony of PW5 who is the Investigator of the case and that of PW6, the Doctor who examined the victim and filled the PF3. Under that circumstance no one can conclude that there was an ill

intention against the Appellant. Taking into consideration that the PF3 shows that the victim was sodomized on the material date, then the Appellant's allegations are mere afterthought.

In other words, if the parents were angry for their child that has been saved from their punishment, but they had then the victim into their hands and they had many days at their disposal to choose a suitable punishment to inflict upon him. If that was so possible, why should they unnecessarily deal with the Appellant? This ground of appeal too fails.

Concerning ground of the appeal number ten, the Appellant lamented that it is wrong for the Magistrate who did not listen and assess conducts and credibility of the witnesses to write a judgment that has convicted him. Section 214(1) of the Criminal Procedure Act provides as hereunder;-

> *"214.-(1)* ***Where any magistrate, after having heard and recorded the whole*** *or any part of the evidence in any trial or conducted in whole or part any committal proceedings is* ***for any reason unable to complete the trial*** *or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time,* ***another***

magistrate who has and who exercises jurisdiction may take over and continue the trial *or committal proceedings, as the case may be,* ***and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor*** *and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings."*

*(**Emphasis is mine)***

With the above quoted provision of the law, it is allowed for a Magistrate to act on the evidence that has been recorded by a predecessor Magistrate to write a judgment. As the typed proceedings of the lower court show at page 45 that the trial Magistrate, Hon. Kaswaga RM had got a transfer while the Appellant still had a witness to call. In that sense there was no way that the predecessor Magistrate could have invoked section 214(3) of the Criminal Procedure Act to go and write a judgment. However, as per section 214(2), as long as the Magistrate who formulated a judgment, Hon. Mrosso RM, as a successor Magistrate did it upon considering the evidence that have been recorded, I am firm that the Appellant was not prejudiced in anyhow.

As for the grounds of appeal number nine and eleven, I have the following; the defense evidence from DW1, DW2 and DW3 was to the effect that, the Appellant slept with the victim when he went missing at their home. The additional is that, the Appellant did not commit the offence. At page 6 of the judgment, specifically at the last but one paragraph, the trial Magistrate is seen to have considered the Appellant's evidence.

However, taking into account that, when the victim went missing on 8th to 9th of August, 2018, it was testified by the Prosecution witnesses and admitted by the Appellant that the victim slept with him on the same bed for the whole night. Also, when taking into account that, the medical examination that was conducted on 10th August, 2018 as testified by PW1 and PW6 shows that the victim was sodomized and the act that was done in 72 hours back. As long as the said 72 hours falls within the time the Appellant had the victim in his custody, it therefore falls that the Appellant is the one who sodomized the victim (PW2) as the victim himself testified in court. With this stand, I am settled in mind that, the prosecution case was proved to the required standard. On that account, these grounds of appeal also fail.

Back to ground number one in which the Appellant alleges that it was wrong for him to be sentenced a life imprisonment while the victim was above 10 years of age. It is not in dispute that the victim is a minor under the age of 18. It is also undisputable that the Appellant was charged and convicted of Unnatural Offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16 RE 2002]. Actually subsection (2) of section 154 provides for the penalty of life imprisonment for the convict of Unnatural Offence who has been proved to have committed the said crime against the child under the age of 10 (ten) years. Subsection (1) provides a penalty of 30 years imprisonment for the convict who commits it against the child whose age is between 10 (ten) and 18 (eighteen) years.

The victim herein was 11 years old when the crime was committed against him. The trial court ought to have sentenced the Appellant under the Revised Edition 2002 which provides a minimum sentence of 30 (thirty) years imprisonment as per section 154(1) of the Penal Code. It was wrong to sentence him the life imprisonment under the RE 2019 while by the time the crime was committed in 2018 the said Revised Edition 2019 had not yet come into operation.

The relevant statute which is the **Penal Code [Cap 16 RE 2002]** provides at **Section 154** as follows;

"(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) of this section is ***committed to a child under the age of ten years the offender shall be sentenced to life imprisonment."***

(Emphasis is mine)

Unlike the Revised Edition 2002, the current statute, Revised Edition 2019 provides for the Life Imprisonment to the convict who commits Unnatural Offence against any child under the age of 18 (eighteen). It was therefore un-procedural for the trial Magistrate to rely on the Revised Edition 2019 in sentencing the convict of the crime committed a way back in 2018, before the statute he relied on was enacted.

In that sense, I hereby substitute the penalty of life imprisonment into 30 (thirty) years term of imprisonment from the date of sentencing at the District Court which was 18/05/2020.

In upshot, save for reducing the sentence from life imprisonment into 30 (thirty) years imprisonment, the appeal is hereby marked dismissed.

S.M. KULITA

JUDGE

29/04/2022

DATED at **DAR ES SALAAM** this 29th day of April, 2022.

S. M. KULITA

JUDGE

29/04/2022