**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IRINGA SUB REGISTRY)**

**AT IRINGA**

**DC CRIMINAL APPEAL NO. 68 OF 2022**

*(Original Criminal Case No. 7/2022 of the District Court of Ludewa at Ludewa before Hon. I. Ayeng'o, SRM.)*

**JAMES MARCUS UHAULA** ..... **APPELLANT**

**VERSUS**

**REPUBLIC** ..... **RESPONDENT**

**JUDGMENT**

*22nd May & 9th August, 2023*

**I.C MUGETA, J:**

The appellant was arraigned before the District Court of Ludewa charged with unnatural offence contrary to sections 154 (1) (a) & (2) of the Penal Code [Cap. 16 R.E 2019]. He was sentenced to life imprisonment. The prosecution alleged that on 23rd January 2022 evening hours, at Amani village within Ludewa District in Njombe Region the appellant had carnal knowledge of the victim, aged 5 years old against the order of nature.

The facts giving rise to the appellant's arraignment and conviction can be briefly stated as follows:

On 23/2/2022 at around 17:00hours, the mother of the victim, who testified as PW1, was at church with the victim. Noticing that the victim was feeling sleepy, she told her to go home. On returning home, PW1 did not find the victim she, thus, went to the appellant's home to look for her. At the appellant's home, the door was locked. She heard the victim crying from inside the house. She pushed the door and saw the appellant inserting his fingers in the victim's anus and vagina. The victim, a 5 year old girl who testified as PW2, said that the appellant inserted his penis into her vagina. On cross examination she said he inserted fingers in her private parts.

The victim was medically examined by PW3, Sara Mdemi. In her findings she observed that the victim's anus and vagina had bruises and lacerations caused by a blunt object. She then filled in a PF3 which was admitted as exhibit P2. PW4, E. 4278 D/Sgt Donald (PW4) recorded the accused's cautioned statement (exhibit P3). In his caution statement, the appellant allegedly, confessed to have committed the charged offence.

The appellant in his defence made a general denial and challenged the testimonies of PW1, PW3 and PW4. He also alleged that there exists bad blood between him and the victim's grandfather who has failed to pay

him for machine repair services rendered by the appellant. He admitted the victim was at his residence but not inside the house, that they were seated at the bench outside the house.

His appeal to this court against both conviction and sentence is based on eight grounds. Their substance comprise one major complaint that the charge was not proved beyond reasonable doubts. The grounds making up the major complaint are that: **one**, that there are contradictions on the date the incident occurred and when the victim was examined. **Two**, that the victim's evidence was recorded contrary to the law. **Three**, that PW3 was not a qualified doctor to examine the victim. **Four**, PW1 is not credible as she did not raise an alarm when she saw the appellant performing the charged offence. **Lastly**, that his caution statement was recorded contrary to the law as no friend, relative or advocate was present when it was recorded.

During the hearing of the appeal the appellant appeared in person. The respondent was represented by Radhia Njovu, learned State Attorney. The appellant being a lay person, prayed for the respondent to begin. He reserved his right of rejoinder.

Ms. Radhia supported the appeal. She submitted that the charge was not proved beyond reasonable doubts as the evidence of the victim was recorded contrary to section 127 (2) of the Evidence Act [Cap. 6 R.E 2022]. Consequently, she urged the court to expunge the victim's evidence from the record as it does not show that after inquiry the witness promised to tell the truth and not lies.

The learned State Attorney also faulted the admission of the appellant's caution statement as it was read before it was admitted. This, in her view violated the principle set in **Robinson Mwanjisi & 3 Others v. Republic** [2003] TLR 281 where it was held that exhibits ought to be read after admission. She prayed the caution statement to be expunged too.

The learned State Attorney contended further that after expunging the victim's evidence and the accused's caution statement, the remaining evidence of PW1 and PW3 cannot ground conviction on the charged offence. This is because, she submitted, PW1 testified that she found the victim inserting his fingers into the victim's vagina and anus, a fact which was corroborated by PW3 who testified that the victim's anus and vagina had bruises which were a result of being penetrated by a blunt object. On



Mageta

account of this evidence, the learned State Attorney submitted, the appellant ought to have been charged with grave sexual abuse and not unnatural offence. for the foregoing, the learned State Attorney urged the court, under section 300 (2) of the Criminal Procedure Act [Cap. 20 R.E 2022], to substitute the charged offence with the offence of grave sexual abuse contrary to section 138 C (1) (a) and 2 (b) of the Penal Code. On sentence she prayed, under section 366 (1) (a) (iii) of the CPA, the court to substitute the life imprisonment sentence with 20 years imprisonment.

In his rejoinder, the appellant supported the submissions by the learned State Attorney. He said he is not interested to argue with the Republic. I am going to determine his complaint one after another.

The appellant complained that PW3 was not qualified to examine the victim. The learned State Attorney did not address her mind to this complaint. The record shows that PW3 is a clinical officer with 5 years work experience at the time of the incident. It is now settled that a clinical officer is a qualified and authorized medical practitioner to conduct medical examinations. This was the holding in **Ridhiwani Nassoro Gendo v. Republic**, Criminal Appeal No. 201 of 2018, Court of Appeal – Dar es Salaam (unreported). This complaint has no merits.

Next for consideration is whether the evidence of the victim was properly recorded. The victim was aged 5 years old, therefore, a child of tender age. Evidence of a child of tender age ought to be recorded in compliance with section 127 (2) of the Evidence Act. According to the said section, a child of tender age may give evidence with or without taking oath or affirmation. A child of tender age giving evidence with or without taking oath must, however, make a promise to tell the truth and not lies. He/she who takes oath must do so upon a court's finding that she/he understands the nature of oath.

In the present case, the victim's evidence was not taken under oath. Therefore, she was supposed to promise to tell the truth and not lies. However, the witness did not promise to speak the truth in her own words. The court just recorded that *"the witness promises to speak the truth"* while that promise is not on record. Therefore, her evidence was taken contrary to the law. It, as a result, lacks evidential value. I, consequently, expunge the victim's testimony from the record.

The learned State Attorney contended that the appellant's caution statement was admitted contrary to the law. However, I find the submission misconceived. The record shows that PW4 firstly, sought to



Mugeta

tender the appellant's caution statement. It was cleared for admission then it was admitted. After admission its contents were read out in court by the trial magistrate. On this flow of procedures, the appellant's caution statement was properly admitted in evidence.

However, I see one problem with the caution statement. While the appellant was cautioned that the statement concerned unnatural offence, therein, when responding to a question, whether he sodomised the victim, he said:

> *"Ndio ni kweli nilimchezea mbele na vidole halafu (nyumba) nyumba (sic) nikafanya naye mapenzi".*

Translated in its context, the appellant said *"it is true he caressed with fingers the victim's vagina and made love to her at home".* I presume the word *"nyumba"* refers to *"nyumbani"* otherwise the sentence loses meaning which makes the statement problematic as its central theme cannot be established. From the above sentence, it is unknown whether the appellant confessed to just caressing the vagina or that he had carnal knowledge of her considering that the caution before his statement was recorded concerned unnatural offence.

Another part of the caution statement reads:

*"Hata hivyo siku ya kumlawiti nilimuita akaja ndani kwangu".*

This can be translated as *"on the day I sodomized her I called her and she came into my house".* If this can be considered as a confession, then it contradicts instead of corroborating the evidence of the mother (PW1).

In my view, reading the whole caution statement generally it is hard to make meaning out of it. A caution statement which is unclear cannot be used to convict the accused particularly where the alleged confession is capable of being assigned different meanings. This is because its central theme cannot be established. In this case, the caution statement ought to be treated with circumspection. I disregard it.

On the complaint that there are contradictions on the date the incident occurred between PW1 and PW3, the record shows that it is only PW1 who stated that the incident occurred on 23/1/2022. PW2 did not testify on the date the incident occurred. Therefore, there is no contradiction. Further, PW2's evidence is no longer on record, hence incapable of contradicting other evidence. The fact that the clinical officer

testified that she examined the victim on 24/1/2022 does not amount to contradiction with the incident date.

Having expunged the evidence of the victim and disregarded the caution statement, the only remaining evidence on record incriminating the appellant is that of PW1 who testified to have witnessed the victim naked and the appellant inserting his fingers in the victim's vagina and anus. PW1's evidence is supported by that of PW3 who examined the victim and found bruises and lacerations on her anus and the vagina. She opined the same to be caused by a blunt object. Therefore, penetration was proved. However, this evidence does not support the charge of unnatural offence where a penis must be involved. Consequently, I agree with the learned State Attorney that the evidence on record does not prove the offence the appellant was charged with.

The learned State Attorney suggested that the appellant can be convicted of a lesser offence of grave sexual abuse under section 300 (1) and (2) of the CPA which provides:

> *"300.-(1) Where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a*

*complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*

*(2) Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

From the above cited provision, substitution of a charge is possible only when the offence to be substituted is cognate and minor to the offence the appellant was previously charged with. In the case of **Robert Ndecho & Another v. Republic** [1951] 18 EACA 171 the defunct East African Court of Appeal held:

*"In order to make the position abundantly clear we-state again that... where an accused is charged with an offence, he may be convicted of minor offence, although not charged with it,* ***if that minor*** *offence* ***is of a cognate character, that is to say of the same genes and species***. [Emphasis mine].

The issue for my determination is whether grave sexual offence is cognate offence to unnatural offence and it carries a lesser punishment. The answer is in the affirmative because both of them are sexual offences

and it carries a lesser punishment. However, for the appellant to be convicted of a cognate offence that cognate offence must be proved.

As I have held, evidence against the appellant is that of the mother of the victim. She said that she found the appellant in the house seated on the chair sexually abusing the child. That it was dark inside and she forcefully opened the door as it was locked. The defence of the appellant is that he was with the child outside at the bench where he could not have done what is alleged against him. When asked questions for clarification by the trial magistrate he said:

> *"The child came at home but did not enter inside. Her mother come (sic) and found her playing at the veranda and picked her and left".*

It is my view that this defence raises a reasonable doubt in the prosecution's case. If, indeed, the door was locked, the force used to open would have alerted the appellant and the mother could not have found him in the act considering her evidence that inside the house *"there was no shining light except for rays of the sun penetrating in spaces between bamboo ...)".*

This makes the defence of the appellant that they were outside probable. The appellant in his evidence complained that if, indeed, the mother found them in the act, she ought to have invited independent witnesses at the scene by yelling to attract attention of other people. I agree with the appellant. In the ordinary order of things the mother was expected to have yelled for help. Her evidence that she just picked the child and the appellant's phone and left for their home presents unusual scene. Her conducts makes the defence of the appellant that the case is a fabrication as there is bad blood between him and the victim's grandfather also probable.

In her evidence, the victim's mother said the victim told her the appellant was showing her pictures on his phone which she picked away. The same was tendered as exhibit P1. However, the concerned pictures were not displayed which renders the evidence in that phone, if any, meaningless.

For the foregoing, I find and hold that the cognate offence of grave sexual abuse was not proved.

In the event, I allow the appeal. I quash the appellant's conviction. His sentence is set aside. He is to be released from prison unless held for another offence.

**I.C. MUGETA**

**JUDGE**

**9/8/2023**

**Court:** Judgment delivered in chambers in the presence of Muzzna Mfinanga, State Attorney for the respondent and the appellant in person.

**Sgd. I.C. MUGETA**

**JUDGE**

**9/8/2023**