THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 73 OF 2021

(Originating from Tandahimba District Court in Criminal Case No. 26 of 2021)

KHALIDI AHMAD KONJOWE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 28/2/2022
Date of Judgment: 27/4/2022

LALTAIKA, J.:

The appellant **KHALIDI AHMAD KONJOWE** was charged in the District Court of Tandahimba at Tandahimba with two counts *to wit:* the 1st count: Rape contrary to Section 130(1)(2)(e) and 131(1) and the 2nd count: Unnatural Offence contrary to section 154(1)(a) of the Penal Code [Cap. 16 R.E. 2019]. He was convicted for both counts and sentenced to serve a jail term of thirty (30) years for each count, running concurrently.

In brief, it is common ground that the appellant and the victim, an eight-year-old girl (we shall henceforth refer to her simply as "HIN" or

PW1 as referred to by the trial court, to protect her privacy and dignity) lived in the same village of **Tukuru, Tandahimba District in Mtwara Region.** HIN knew the appellant in person as a member of her village and would refer to him by his first name, Khalidi.

It was the prosecution case that on the 26th of March 2021 the appellant, allegedly, went to a place where HIN and her younger sister were playing. It is alleged further that the appellant scared the young girls that the police were coming to arrest them. Terrified, the victim and her younger sister took cover to a nearby bush. The appellant, allegedly, took advantage of such a situation to forcefully have carnal knowledge with "HIN" against the order of nature.

He allegedly inserted his penis in HIN's anus causing severe damage to the extent that the tissue separating the vagina and anus (the perineum membrane) was shuttered. The appellant scared the victim that if she screamed, he would kill and burry her in one of the graves in the nearby cemetery.

HIN went back home where she narrated the ordeal to her mother. She was taken to a health facility where medical examination proved that she was raped and sodomized. The appellant was later arrested and taken to the police. Upon completion of investigation, the appellant (then accused) was arraigned in court. The charge was read over and explained to him and he pleaded not guilty to both counts. Consequently, for the prosecution to prove the allegations levelled against the appellant, the matter had to go to full trial.

Armed with four witnesses the victim (PW1), her mother (PW2) a Medical Doctor (PW3) and a Police Officer who had arrested the appellant (PW4) and one documentary exhibit (PF3) the prosecution managed to

establish a *prima facie* case against the appellant. It can be gleaned from the proceedings of the trial court that another documentary exhibit namely the Cautioned Statement of the Appellant couldn't pass the test of cross examination and was expunged by the trial court from the court records. As the defence case commenced, the appellant was the only witness and had no any exhibit to tender.

Having been satisfied that the prosecution had proved the case beyond reasonable doubt, the learned trial magistrate convicted the appellant of both counts and sentenced him to a thirty years' jail term as alluded to above. Aggrieved by both conviction and the sentence, the appellant has preferred this appeal by way of a petition of appeal. The petition is comprised of nine (9) grounds as follows: -

1. *The prosecution side didn't prove the case beyond reasonable doubt.*
2. *That, there was no watertight evidence of the appellant identification.*
3. *That the manner in which the proceedings at the trial court were conducted, was irregular or/and improper.*
4. *That, the evidence adduced by PW1 is totally fabrication (sic!) for the purpose of connecting the appellant to the crime.*
5. *That, the trial Magistrate did not comply with the mandatory provision of section 127 (2) of the Tanzania Evidence Act,1967.*
6. *That, the appellant never confessed to have committed the alleged offences.*
7. *That, the trial court having failed properly to examine, evaluate and analyse evidence in record.*
8. *That, there was no proof of penetration in respect of the alleged offence.*
9. *That, the fact that the little sister (Mwasiti) of the PW1 was not summoned to support the evidence testified by her sister creates doubts as to whether the appellant was a prime suspect/culprit of the alleged offences.*

When the appeal came up for hearing, the appellant appeared in court under custody while enjoying legal services of Mr. Alex Msalenge, learned Counsel. The respondent Republic, on the other hand, was represented by Ms. Faraja George, learned Senior State Attorney.

Submitting on behalf of the appellant, Mr. Msalenge commenced his submission in chief with the fifth ground of appeal. He submitted that Section 127(2) of the Evidence Act [Cap. 6 R.E. 2019] requires that before taking evidence of a child of tender age, that person must promise to tell the truth and not to tell lies. Mr. Msalenge argued further that in fulfilling this requirement (of obtaining the promise of the child to tell the truth), a court of law is supposed to be led by questions in order to extract the required information.

To fortify his argument, the learned Counsel referred this court to the case of **Godfrey Wilson v Republic,** Crim Appeal No 168 of 2018 CAT at Bukoba. In that case, at page 13 to 14 the Court proffered a sample of questions that needed to be asked by the trial court. Mr. Msalenge elaborated further that the Court had proposed three questions namely **one**: on the name and religion the witness professes **two:** understanding of the nature of the oath and **three:** whether or not the child promised to tell the truth and not to tell lies.

Driving the point home to the present case, Mr. Msalenge submitted that when the evidence of PW1 was being adduced during trial, the court made an inquiry by asking the questions related to her name, where she was schooling, who provided for her school needs and only then, PW1 promised that she would speak the truth and not lies. In the light of that submission, the learned advocate argued that the trial court did not comply with **Section 127(2) of the Evidence Act** since the records of

the trial court particularly at page 4 of the typed proceedings, had no indication on what the court did to arrive to the promise of the child not to tell lies.

Mr. Msalenge argued further that it was unclear from reading through the proceedings who had asked the questions to PW1 was it the prosecutor, the court or the accused? The learned Counsel submitted that he presumed that the words were written by the court but he still kept wondering what circumstances led the trial court to arrive to such a conclusion.

Mr. Msalenge concluded this part of his submission by an assertion that the trial court did not fulfil the legal requirement. He thus, prayed this court to disregard the evidence of PW1 since, as a child of a tender age she could give evidence without oath or affirmation.

Having exhausted ground number five, Mr. Msalenge moved on to the **first ground** centered on proof of the prosecution case beyond reasonable doubt. The learned Advocate submitted that the testimony of the prosecutrix was crucial and should have been analyzed with extreme caution. To cement his point the learned counsel cited the case of **Nelson s/o Onyango vs. Republic**, Crim. Appeal No. 49 of 2017 at page 9. Applying the case law to the matter at hand, Mr. Msalenge asserted that the appellant was accused of two offences namely rape and unnatural offence.

It is Mr. Msalenge's submission that nowhere had PW1 testified that she was raped. To substantiate his argument, Mr. Msalenge referred this court to **page 4 of trial court's typed proceedings** particularly in the examination in chief and quoted an entry therefrom thus: "thereafter he

pulled his penis and inserted in my anus. I experienced pain but I did not raise alarm for help."

In view of that submission the learned Counsel argued that the victim did not testify that she was raped. It is only the evidence of PW3 who at page 8 testified that she examined both the vagina and anus and saw bruises on both vagina and anus.

The learned counsel is of a strong view that the victim PW1 never told the court that she was raped but the evidence of PW3 was to the effect that the victim was raped. Mr. Msalenge opined that such contradiction weakened the prosecution case in its entirety. To fortify his argument, the learned counsel cited the case of **Nelson s/o Onyango vs. Republic** (supra) submitting that the best evidence in sexual offences comes from the victim. It is Mr. Msalenge's submission that the offence of rape was merely raised by PW3 and not the victim. In the light of that submission, Mr. Msalenge asserted that the first count was not proven beyond reasonable doubt.

Moving on to the second count, the learned counsel submitted that the same was not proven beyond reasonable doubts either because **one,** the presence of the discrepancies on the evidence of PW1 and PW2 in the sense that while PW2 testified that PW1 had told her that she was raped PW1 testified that she was sodomized. Mr. Msalenge averred that in her opinion, such evidence pointed to two different things. Mr. Msalenge called this court to disregard such contradictory evidence.

In his further attempts at faulting proof of the case beyond reasonable doubt, the learned counsel averred that the prosecution had failed to call a material witness who was present during the occasion (Mwasiti, a

younger sister to the victim) It is Mr. Msalenge's submission that the evidence of this person would have removed any doubt. The learned counsel submitted further that as a result of failure to summon the material witness, the court would be invited to take a negative inference against the prosecution that had the witness been called, she would have given evidence contrary to the party's interest.

To buttress his submission the learned counsel referred this court to the case of **Tanzania Electric Company versus Mariam Robert Mbinda @ Mariam Edward Silah and 2 others,** Civil Appeal No. 13 of 2019 HCT Mbeya at page 4 where this court cited the case of Aziz **Abdalla vs R** [1991] TLR 71, a criminal case. The learned counsel further cited the case of **Amour Mbaruck versus the Republic,** Criminal Appeal No. 226 of 2019 CAT.

Moving on to the third ground, Mr. Msalenge submitted that the manner in which the trial court conducted its proceedings was irregular and improper especially how it admitted PF3 as reflected at page 8 of the typed proceedings when PW3 was testifying. The learned counsel asserted that the trial court improperly admitted exhibit P1 since PW3 had read it out loud in court prematurely. Nevertheless, the learned counsel asserted further, the trial court admitted the PF3 and marked it P1. To substantiate his argument the learned Counsel referred this court to the cases of **Thomas Pius vs Republic,** Criminal Appeal No. 245 2012 CAT, **Geoffrey Isidory Nyasio vs R.,** Criminal Appeal No. 270 of 2017, **Jumanne Mohamed and Others vs Republic**, Criminal Appeal No. 543 of 2015.

In view of the above argument, Mr. Msalenge submitted that the remedy of improper admission of an exhibit is to expunge it from the court records. He opined that if this court undertook to expunge the exhibit as per his prayer, the only remaining evidence to establish the offence would be the testimony of PW1 which he previously submitted that it should be disregarded as it was marred with contradictions.

Mr. Msalenge's submission took him further to the issue of visual identification. The learned counsel asserted that in her testimony PW1 had mentioned only one name of Khalid whom she knew. The learned counsel asserted further that PW2 had testified that she went to the scene of crime where she saw the appellant 30 meters away. It is Mr. Msalenge's submission that such a testimony brought about doubts since, in the view of the learned counsel, a distance of 30 meters was short enough and wondered why PW2 did not scream out so that the appellant could be apprehended.

In the light of that submission the learned counsel invited this court to compare the testimony of PW1 whose age was not proven anywhere in court though referred to as a child to that of PW2 (PW1's mother). Mr. Msalenge stressed that PW1 had testified that she never screamed when she was being raped and that she went home on her own after the incidence.

In connection to the above submission, the learned counsel also wondered why the appellant was arrested a day later while his residence was known to PW1 and PW2 since they lived in the same village. To that end, the learned counsel maintained that the evidence of PW1 be removed from the court records. He prayed further that in the same line

of reasoning, **PW3's evidence namely the PF3 report be expunged**. In view of that submission, the learned counsel prayed that the appellant be acquitted.

It was time for counsel for the republic to respond. Ms. George commenced her submission by indicating that she was not supporting the appeal. She supported the conviction and the meted sentence of thirty (30) years' imprisonment.

The learned Senior State Attorney, like her counterpart, opted to start responding to the fifth ground of appeal which she averred, straight away, that it had no merit. However, before making her submission, the learned Senior State Attorney appreciably took the court through a historical backdrop to amendment of Section **127(2) of the Evidence Act.**

Ms. George submitted that before the current amendment the practice was administration of the ***voir dire examination*** whose purpose was twofold namely **first;** testing whether the witness knew the duty of telling the truth and **second**; whether the witness knew the rationale of affirmation. Ms. George went on to submit that the **amendment via Act No. 4 of 2016** empowered the court to take the evidence under oath or without oath provided that the child promised to tell the truth.

Driving the point to the present case, the learned Senior State Counsel referred this court to page 3 to 4 of the typed proceedings of the trial court where PW1 testified after the court had considered the dictates of section 127(2). Ms. George amplified her argument by pointing out that there were some questions asked by the learned trial Magistrate and to

that end PW1 testified and **she was quoted "I promise this court that I will speak the truth but not lies".**

On the same ground, Ms. George further argued that although the entry on the question could not be seen in the records, it was her presumption that there was a question as to whether the child promised to tell the truth and not lies that is why the child ended up promising as it had been recorded.

The learned Senior State Attorney went further and submitted on the second issue as to how PW1 ended up affirming before the trial court. She stressed that the affirmation was insistence that PW1 would tell the truth before the trial court. Ms. George opined that the current position of the law after the amendment is that the child is not restrained from affirmation. It was Ms. George's submission that the law had widened the horizon by ensuring that a child could testify without affirmation as long as he/she promised to tell the truth. To cement her argument, Ms. George referred this court to the case of **Godfrey Wilson (supra)** particularly at page 11 where, it was stated, a child of tender age could give evidence without taking an oath provided that she promised to tell the truth.

The learned Senior State Attorney moved on to the second ground whereupon **she conceded with the appellant's Counsel** that the victim had never testified about the issue of rape. In view of that, the learned Senior State Attorney submitted that it was not easy for any other witness to speak about it. To that end, Ms. George prayed that the first count against the appellant be dropped. However, the learned Senior State Attorney averred that the second count namely Unnatural offence remained unshaken.

In view of that, Ms. George argued that the offence of unnatural offence was proven beyond reasonable doubt by the victim PW1 as it was reflected at page 4 of the proceedings whereby, PW1 testified how the appellant went to the place where PW1 and her younger sister were playing, scared them that the police were coming to arrest them, took PW1 to a nearby bush, removed her clothes by force and inserted his penis in her anus.

The learned Senior State Attorney, Ms. George submitted further that PW1 had explained that she didn't scream because the appellant had scared her that he would kill her. The evidence which, Ms. George averred, was corroborated by that of PW2 as per page 5 of the typed proceedings of the trial court. Ms. George was on the lookout for the finest details to buttress her arguments. To that end, with the leave of this court, she read out loud a considerably large part of PW2's testimony as recorded in the trial court proceedings.

In concluding this part, the learned Senior State Attorney argued further that the evidence of PW1 was also corroborated by that of PW3 who examined PW1 and testified on the presence of bruises in both her (PW1's) anus and vagina.

Responding to procedural irregularities in the trial court as asserted by counsel for the appellant, Ms. George conceded with Mr. Msalenge that the tendering of the medical report was occasioned by procedural irregularity since it was read out loud before being admitted. The learned Senior State Attorney insisted that as a result of such irregularity, the exhibit could not stand in the eye of the law. To that end, the learned Senior State Attorney prayed that the PF3 or exhibit P1 be expunged. Ms. George was quick to point out however that even if the same were to be

expunged, the prosecution remained with the oral evidence of PW3 which this court could rely upon without the documentary evidence.

Responding to the assertion on contradiction among witnesses, Ms. George submitted that in her opinion, there was no any contradiction that went to the root of the case. To fortify her argument, she referred this court to the testimonies of PW1 and PW2 as recorded by the trial court arguing that in her opinion, their evidence corroborated each other. Ms. George maintained that such was a minor contradiction that couldn't be considered capable of ruling out whether the offence was committed or not.

Ms. George is of a firm view that the case of **Amour Mbaruck's** cited by her learned colleague was distinguishable from the present case because the contradiction in the case was on the bruises whereas in the instant matter, the contradiction was on the time of reporting the matter at the police station.

Ms. George moved on to the issue of failure of the prosecution to call the material witness, the younger sister to PW1 (Mwasiti) as asserted by counsel for the appellant. The learned Senior State Attorney boldly submitted that by virtue of Section 143 of the Evidence Act, the prosecution was not obliged to bring any number of witnesses to prove its case. She stressed that even if Mwasiti was not summoned, Ms. George was insistent that the prosecution had proved the case beyond reasonable doubt through the evidence of PW1, PW2 and PW3.

On the same point, the learned Senior State Attorney insisted that Section 127(6) of the Evidence Act was to the effect that in sexual offences the best evidence comes from the victim. It is Mr. George's submission that the trial court had reasons to rely on the evidence of the

victim even in the absence of the eye witness. To that end, Ms. George submitted that the ground had no merit and should be thrown out.

Moving on to the issue of identification, Ms. George was quick to point out that the ground had no merit. The learned Senior State Attorney stressed that reading through page 4 of the typed trial court record, PW2 had testified that "when we were playing with my sister, Khalidi came". Ms. George averred that the same connotated that PW1 knew the appellant in person.

Responding to the issue on whether the mother of the victim should have screamed out when she saw the appellant, Ms. George submitted that such an argument was baseless and the trial court could have proceeded even without any other evidence. The learned Senior State Attorney took this court back to the cross examination of the victim at the trial court where the appellant did not ask even a single question. To that end, Ms. George argued, the appellant had conceded with what PW1 had testified.

Before leaving the podium, the learned Senior State Attorney argued on sentence meted to the appellant. In view of that, Ms. George reminded the court that the offence of rape had been dropped and what was left was **Unnatural offence contrary to Section 154(1)(a) and (2) of the Penal Code.** That being the case, Ms. George opined, since the offence was committed to the victim who is under 18 years of age, it was her considered view that the appellant **ought to be sentenced to life imprisonment.** Ms. George therefore, prayed this court to change the sentence from thirty (30) years imprisonment to life imprisonment as per the law.

In a rejoinder, Mr. Msalenge submitted that when the Senior State Attorney was going through the sentence, he discovered that the section used to convict the appellant does not exist in the statute. He argued that in the judgement it appears as **Section 154(2)(a) of the Penal Code** which was used to convict the appellant but while analyzing the evidence, the learned Magistrate had cited **154(1)(a).** The learned Counsel submitted further that in the trial court judgement the learned magistrate had argued on section **154(2)(a)** but the trial court did not prove the age of PW1 with whom the appellant allegedly had carnal knowledge.

With regards to contradictions, he had previously alluded to, it is Mr. Msalenge's submission that the contradictions were fatal because they were used in arriving to the judgement. Mr. Msalenge averred that the learned trial Magistrate had raised two issues the second issue being whether the accused did rape and sodomize PW1.

On application of Section 127(2) of the Evidence Act, Mr. Msalenge submitted that he was in agreement with the interpretation of the learned Senior State Attorney but insisted that in the instant matter, the section had not been adhered to by the trial court. Mr. Msalenge averred that even in her submission, the learned Senior State Attorney confessed that the question aimed at finding out whether PW1 was going to tell the truth did not appear in the typed proceedings but she maintained that the same was there. To that end, Mr. Msalenge argued that it was safer to rely on the trial court records.

Having dispassionately considered submissions by counsels for both parties, gone through the records of the trial court and grounds of appeal, the ball is now upon my court to decide whether the appeal has merit or

not. In dealing with this main issue namely determining the merits or demerits of the appeal I will confine myself to issues argued for or against by the learned counsels, which issues are important for arriving at my decision. Those that I consider less important in the overall decision making will also be considered albeit more briefly.

Mr. Msalenge forcefully submitted that the prosecution case was not proven beyond reasonable doubt because, going through the entire record of proceedings of the trial court, nowhere had the victim mentioned that she was raped. The learned Senior State Attorney conceded with her learned colleague but opined that the second count namely unnatural offence remained unshaken.

I am immensely flabbergasted if not utterly bewildered and somehow astonished to see the kind of precision that the learned counsels expected from the testimony of an eight-year-old. I have tried to employ my imagination to the fullest state and nowhere does it appear logical to me to assume that an eight-year-old could make a clear distinction between rape and unnatural offence. Even when I think in Kiswahili the language that was used in court, I cannot see an eight-year-old neatly explaining the difference between *kubakwa*, *kulawitiwa*, *kunajisiw*a, and related terminologies.

Several approaches have been employed by courts throughout the world with the aim of devising better ways on how to engage children in testifying in court. See ***Preparing Children for Court: A Practitioner's Guide*** (US Department of Justice: Justice Program 2000). Nowhere is it suggested that what children say in courts should be spotless in the eyes of a judge, magistrate, defence attorney or anyone else interested in the

analysis of their evidence. In my opinion, the more precise the testimony of a child reads, the more likely it was doctored.

I have gone through the charge sheet and the proceedings of the trial court and in my opinion, it was clear throughout the trial that the appellant was charged with two counts namely rape and unnatural offence. Nevertheless, the only pathway left for me is to consider whether or not the count on unnatural offence was proved as required by law. I can not go back to the first count since the learned counsels argued no further upon learning that the same never came through the lips of the victim.

Nevertheless, I feel obliged to remind the learned counsels that in our jurisdiction, although the best evidence in sexual offences is that of the victim, an accused person may be convicted irrespective of absence of testimony of the victim of the offence. See the following unreported Court of Appeal decisions: **Issa Ramadhani v. Republic,** Criminal Appeal No. 409 of 2015, **Fuku Lusamilla v. Republic,** Criminal Appeal No 12 of 2014 and **Khamis Samwel v. Republic,** Criminal Appeal No 320 of 2010.

This brings me to yet another ground aimed at faulting proof of the case beyond reasonable doubt. This time onwards, the case here means having carnal knowledge against the order of nature as the offence of rape had been dropped. The learned counsel for the respondent contended that the prosecution had failed to call a material witness. It is Mr. Msalenge's reasoning that failure of the prosecutor to summon Mwasiti (a younger sister to the victim) established a gap in the prosecution case and called upon this court to make a negative inference.

Ms. George, on her part, was of a considered view that the prosecution was not bound to call any particular witness nor reach a certain number of witnesses to be considered to have proved a particular case. I agree with the learned counsel for the respondent. Besides, I just argued a while ago that both counsels had astonished me for expecting so much from the evidence of an eight-year-old. If the evidence of the victim had not passed the threshold of the learned counsels what about that of her younger sister? Besides, the learned counsel has not made any convincing arguments as to why, in addition to all other witnesses, that of Mwasiti would have painted a different picture. To this end, this ground of appeal hereby fails.

The third ground of appeal centered on improper admission of an exhibit by the trial court. It is Mr. Msalenge's admission that the exhibit was read out loud before it was admitted and that, the law required the opposite. Responding, the learned Senior State Attorney conceded arguing that such an exhibit could not stand the test of our adjectival law. The learned counsel was quick to announce that even in the absence of such an exhibit, the oral testimony of the victim sufficed to warrant conviction. Based on the reasoning of the learned counsels, I uphold this particular ground of appeal. The exhibit, P1 (PF3) is hereby expunged from the court records.

It should be noted however that in our jurisdiction in cases on sexual offences PF3 is not the only evidence. In **Saidi Bakari v. R.** Crim. App. No 295 of 2021 CAT at Mtwara the Apex Court proffered thus "...a PF3 is not the only evidence to prove that the [sexual] offence was committed,

other evidence on the record can as well do so." See also **Ally Mohamed Mkupa v. R** Criminal Appeal No 2 of 2008.

This brings me to the second ground namely identification. It is Mr. Msalenge's submission that the appellant had not been properly identified. His reasoning is that the victim had called him simply by his first name Khalid and that when the mother of the victim saw the appellant thirty meters away, she didn't scream. The learned counsel for the defendant doesn't buy this idea. She is of a firm view that the accused had been properly identified adding that the fact that he was referred to by his first name was indicative of the fact that the victim knew him personally.

I am totally in agreement with the learned counsel for the respondent. Besides, I have been asking myself where exactly does the issue of identification of the accused come from? This case does not fall under criminal incidences happening at night or in some obscure location with more than one possible perpetrator. See the case of **Waziri Amani v. R** (supra) This, in my view, is a straightforward allegation that has been hipped onto the appellant in the absence of any room for mistaken identity. Although one is free to reach out to any safety valve that they think could save oneself from the wrath of the law, I see absolutely no connection between the defence of mistaken identity in criminal procedure law generally and the issue at hand. This ground has no merit and it collapses.

As for inability of PW2 to scream when she saw the appellant 30 meters away, I equally see no logic in this argument. There is more than just one reaction upon chancing a suspect. Screaming out for help isn't

the only option. Sometimes it could be counterproductive as the suspect could attack the person who had screamed or run even far from the arm of the law. To this end, I see absolutely no merit on this ground of appeal and I hereby dismiss it.

In his rejoinder, the learned counsel for the appellant brought in my attention a very important aspect namely the section of the law upon which the appellant was convicted on the count of unnatural offence. Admittedly, the learned counsel managed to arouse my keen interest since, as it is well known in criminal procedure law of our jurisdiction, a defective charge has, time and again, been declared fatal and incapable of sustaining conviction.

It is upon such indirect invitation by the learned counsel that I took a keen interest and had another look on the charge sheet. It is my finding that the appellant was properly charged. The charge sheet was correctly formulated and disclosed the offence clearly. I am alive to the fact that a detective charge can not sustain conviction. See the case of Abdallah Ally vs Republic, Criminal Appeal No.253 of 2013CAT (unreported)

The judgement and to a larger extent the proceedings, however, contain occasional errors that do not go to the route of the charge. In addition to the judgement, I also went through the proceedings of the trial court. I have made an analysis of the discrepancies therein and it is my finding that the same are normal discrepancies which do not go to the root of the charge. See the Court of Appeal decision in **Dickson Elia Nsamba Shapatwa and Another v. R.** Criminal Appeal No 92 of 2017.

In this case the court of appeal quoted the following passage from the highly acclaimed author Sarkar on Evidence 16th Ed; 2007

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."*

The last part of the submissions of the learned counsels that I am inclined to analyze happens to be the first one during submission in chief by the learned counsel for the appellant. This is on compliance with Section 127(2) of the Evidence Act. On this point, Mr. Msalenge submitted the section was not adhered to by the trial court in the sense that the proceedings of the trial court didn't show anything to the effect that the child (PW1) was asked whether she promised to tell the truth and not lies. Mr. Msalenge averred that even in her submission, the learned Senior State Attorney confessed that the question aimed at finding out whether PW1 was going to tell the truth did not appear in the typed proceedings but she maintained that the same was there.

On her part, Ms. George opined that the amendments to the law whose backdrop she had expounded in this court had widened the horizon by ensuring that a child could testify without affirmation as long as he/she promised to tell the truth. I agree with Ms. George that even in the absence of a specific formulation in the form and content proposed by Mr. Msalenge, the sum total of the entry leaves no doubt that section 127(2)

of the Evidence Act had been complied with. I have been wondering how on earth could a child of tender age state "I promise to tell the truth and not lies" as quoted in the court proceedings without being asked? The quoted passage from Sarkar has been instrumental in enabling me making a distinction between normal and material discrepancies. This ground of appeal is clearly devoid of merit and it is hereby dismissed.

There is one more point that I feel the urge to comment on before I conclude this judgement. It may be recalled that the learned counsel for the appellant kickstarted his submission in chief by faulting the way the evidence of PW1 was obtained. The learned counsel alleged that such a procedure contravened section 127 of the Evidence Act since PW1 was a child. Somewhere towards the end of his submission, Mr. Msalenge pointed out that the age of the victim had not been proven anywhere in the proceedings of the trial court.

At this juncture, admittedly, the pragmatist in me is crying out. I do not delight in theorizing of so remotely connected issues just for the sake of an argument. I would have understood this argument perfectly if the victim was a teenager. Factual errors could make a great argument where a nineteen-year-old has been mistaken for an eighteen or even sixteen-year-old. In the matter at hand, the victim is eight not eighteen years old! In any case, pragmatist or not, the law in our country requires that the age of the victim in statutory rape be proved. How is that done? The next paragraph sheds some light.

Case law in our jurisdiction has established that information on the age of the victim may come from and proved 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. See: **Andrea Francis vs Republic,** Criminal Appeal No.173 of 2014 (unreported). An entry in the trial courts proceedings provides as follows: *"PW1: HI.8 yrs of age, Mdimba, I am a student at standard four (4) at Mnyoma Primary School. Muslim."*

Since the victim had already told the trial court that she was 8 years old when she was providing her personal particulars, it is my finding that the prosecution had proved the age of the victim. Hence, Mr. Msalenge's quip on the age of the victim dies a natural death. I call it a quip if not a cutting jest because it came in the middle of submissions on other points when there was no time on the side of the other counsel to address it.

Based on the above discussion, it is my considered view that the second count on unnatural offence has been proven beyond any reasonable doubt. The conviction on unnatural offence contrary to Section **154(2)(a) of the Penal Code** is hereby sustained.

Having sustained conviction, I cannot escape making a decision on the proper sentence. Ms. George had prayed that since the appellant had committed the unnatural offence to a person bellow the age of 18, the sentence ought to be life imprisonment and not thirty years' imprisonment. I think this is the correct position of the law. For avoidance of doubt, I wish to reproduce the relevant section of the law as hereunder:

> *154.-(1) Any person who-*
> *(a) has carnal knowledge of any person against the order of nature; or*
> *(b)....*
> *(c) .....commits an offence...*
> *(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.*

In spite of the above crystal-clear position of the law, it can be noted that the trial magistrate convicted the appellant under section 15(1)(a) and 15(2) but ended up sentencing him to 30 years in jail. There is no explanation given. I must admit that this has exercised my mind quite a bit. It should not have been an issue if the learned magistrate had exercised his ingenuity to arrive to a sentence that suited a particular situation. Unfortunately, there is no such room where a minimum or specific sentence has mandatorily been provided by a statute. At this juncture, I recall the wisdom of the Court of Appeal in **Katinda Simbila @ Ngw'aninama v. R.** Crim. App. No 15 (Unreported) thus:

> *"The sentencing process is one of, if not the most intractable and delicate tasks in the administration of justice,* ***especially where the law has not fixed a minimum sentence. This is where ingenuity and wisdom work together in order to lead us to substantial justice*** *as no two cases are identical in all circumstances. This is all because there is no common yardstick or denominator for measuring the sentence which will match every crime"*

In our case at hand, the law has provided for the minimum and maximum sentence namely 30 years jail term and life imprisonment respectively. It has gone even further at section 15(2) by providing for a mandatory sentence of life imprisonment where the offence is committed to a person bellow eighteen years. The keyword used is SHALL.

Now, should I go by the way proposed by the learned Senior State Attorney of replacing the sentence of 30 years with that of life imprisonment? My path is illuminated by a recent Court of Appeal Case **Saidi Bakari v. R** Crim Appeal No 295 of 2022 CAT, Mtwara. In this case, the Apex Court reiterated its previous position in **Marwa Mahende v.**

Republic [1998] TLR 249 where it emphasized that the superior courts have additional duties of ensuring that the laws are properly applied by the courts bellow including substituting improper sentences with correct ones. In the upshot, this appeal is partly successful. The conviction on Rape Contrary to Section 130(1)(2)(c) of the Penal Code Cap 16 RE 2019 is hereby quashed and the sentence of 30 years imprisonment is set aside.

The lower court's conviction on Unnatural Offence Contrary to Section 154(1)(a) of the Penal Code Cap 16 RE 2019 is hereby upheld. The sentence of thirty (30) years is hereby substituted by a sentence of life imprisonment.

Court:

Right to Appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE

27.04.2022

Court

This Judgment is delivered under my hand and the seal of this Court on this 27th day of April 2022 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney, Ms. Acrala Blanket, Counsel for the appellant and appellant.

E. I. LALTAIKA

JUDGE

27.04.2022