IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 178 OF 2021

(Originating from Criminal Case No. 47 of 2019 in the District court of Kigamboni before Hon. L. M. Mutua, RM dated 31st January, 2020).

ALLY SELEMAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

24th November 2021 & 27th January 2022

ITEMBA, J.

Before the District Court of Kigamboni, the above-named appellant was charged with two counts of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code Cap 16 R.E 2002. After a full trial, he was convicted with both counts and sentenced for life imprisonment.

It was prosecutions' case that; on 19/2/2019 at Mwongozo area within Kigamboni District in Dar es salaam the appellant had carnal knowledge of two children against the order of nature. The said children are JA who testified as PW2 and ED who testified as PW3. PW1 who is the father to PW2 stated that on the fateful day, there were three children, playing outside; his son PW2, PW3 and AX who was not called as a witness. The said children live in the same neighborhood. While at his house he saw the appellant through the window, talking with the children,

the appellant was carrying a bag and he gave something to the children. Later on, the children were missing at the place where they were playing. PW1, his wife and neighbors started a search, dividing themselves, PW1 went straight to the ocean while his neighbor went up to river Ngawa. Sometimes later, one person named Happy called PW1 explaining that his son is already at home, but the rest of the children are still missing. PW1 was directed by the said Happy to pass through Kokoni area before going back home. After arriving at Kokoni, PW1 and his fellows found the rest of the children, half naked. The children were examined and PW3 was found to have bruises in his private parts. PW1's wife examined PW2 and he as well, was found to have bruises and semen in his private parts. The children explained that "*babu alitupa ubuyu akawa anasema twende baharini*" meaning the old man gave us baobab seeds and said that we should go to the ocean. The children were taken home by their mothers, while PW1 went on with the search of the accused. PW1 and others crossed the river following some footprints and they were informed by a certain woman that the appellant 'Kiswabi' was seen crossing a river and he was selling pumpkins. PW1 and his neighbor informed the chairman that it was the appellant who was seen along the ocean. The chair told PW1 to go back home because the assailant has been finally identified. PW1 later took the victims to the hospital.

The Appellant was arrested by PW6 after being introduced by the village executive officer. An identification parade was conducted by PW8 whereas all the three victims identified the appellant.

During the trial, both victims identified the appellant and referred him as Kiswabi. PW2 stated that he knows the appellant as Kiswabi because he brought firewood at their home. On the incidence day, the appellant found PW2 and at mama Neema's place. He gave them baobab seeds commonly known in kiswahili as 'ubuyu' and asked them to 'compete with rings' and later he asked them to go to the bush 'twende machakani' and he added that "alitubaka matakoni" meaning he penetrated him through his anus. That appellant warned them if they scream, he will cut them with a knife. PW2 corroborated the evidence of PW1 that on the incidence day, the appellant was together with other children PW3 and AX. He was specific that the appellant undressed the other 2 boys but he (PW2) undressed himself.

In his testimony, PW3 stated that on the incidence day the appellant found them at mama Neema's place and took them to Kokoni, undressed them and penetrated them. "*aliiingiza mdudu matakoni*". A medical doctor, PW4 who was working at Vijibweni hospital, testified that he received the three victims PW2, PW3 and AX, all were full of mud, wrapped with Khanga. He examined PW3's anus and found that he had bruises in the outer part. The spinster muscles were intact. Likewise, PW2 was found with bruises and lot of mud in his anus, he was crying a lot hence pain killers were prescribed to him. The bruises appeared as if there is a penetration of a blunt object. Both PW2 and PW3 tested negative to sexual transmitted infections.

In his defence, the appellant totally denied the charge against him. He denied knowing neither the victims nor their parents. He stated that he

met PW1 and the victims before the court for the first time. He was however convicted and sentenced as mentioned in the 1st paragraph herein.

The appellant being aggrieved with the conviction and sentence he filed this appeal with the following grounds:

1. *That, the learned trial magistrate erred in law and fact by convicting the appellant relying on the unprocedurally procured evidence of Pw2 and Pw3;*
    i. *Pw2 didn't promise to tell the court the truth and not to i.e contrary to section 127(2) T.E.A CAP 6 R.E. 2019.*
    ii. *No simplified question were asked by the trial magistrate to establish that both Pw2 and Pw3 didn't know the nature of an oath.*
    iii. *Age of Pw3 was not recorded by trial magistrate before recording evidence and the evidence on record didn't establish Pw'3 age.*
2. *That, the learned trial magistrate erred in law and fact by holding that there was strong circumstantial evidence against the appellant while.*
    i. *Pw1 failed to state the attire the appellant wore on that fateful day, the length of time he had him under observation the distance between him and appellant while he was observing him.*
    ii. *One HAPPY was not summoned to establish that Pw1's son was found at home naked and to also establish where she received the information that the other boys were in KOKONI.*
    iii. *One unknown woman was not summoned to establish that the man she allegedly saw crossing a river while carrying luggage is the same person as the appellant.*

iv. *The mother of Pw2 who allegedly inspected Pw2 and found sperms in his anus was not summoned to testify before the court.*

3. *That, the learned trial magistrate erred in law and fact convicting the appellant in a case where none of the children mentioned the name of the appellant of the appellant ´" ALLY SELEMAN" as the perpetrator of the alleged crime and neither did they describe him (physical features, complexion, special mark, facial features) prior to his alleged arrest.*

4. *That, the learned trial magistrate erred in law and fact by convicting the appellant relying on the incredible, implausible and contradictory evidence of the prosecution witness, such as;*

   i. *It defeats normal human reasoning that Pw2 and Pw3 would be sodomized yet fail to scream when the same was being done to them.*

   ii. *Pw3 stated that all 3 children were sodomized yet the doctors (pw4) evidence shows that one of the children was not sodomized and there was no penetration into the anus of 2 of the them.*

   iii. *Pw1 stated that his wife inspected Pw2 found sperms in his anus yet the doctor (Pw4) failed to state whether he saw the same during his examination of Pw2.*

   iv. *Pw1 stated that the victims told him that 'While Pw2 stated they were told twende machakani.*

   v. *Pw1 stated that the appellant allegedly met the victim's state that the appellant met them at one NEEMA'S house.*

5. *That, the learned trial magistrate erred in law fact by convicting the appellant in a case where there was variance between the charge sheet and evidence*

on records as there was failure to amend the charge sheet contrary to procedure of law as;

i. *The Particulars of offences shows the appellants name is ALLY SELEMAN while the evidence on record states that the alleged perpetrator of the crime is one "BABU" or "KISWABI".*

6. *That, the learned trial magistrate erred in lawn and fact by convicting appellant in a case where the appellant was allegedly searched without a search warrant contrary to police general order (P.G.O) 266 paragraph 1(a – c) and no receipt was issued to him contrary to section 38(3) CPA (cap) 20RE 2019) hence raising serious doubts regarding the alleged search.*

7. *That, the learned trial magistrate erred in law and fact by convicting the appellant relying on the unprocedurally conducted identification parade and EXHP5 (3) (PF 186) white:-*

i. *The appellant was allegedly not a stranger to his victims.*

ii. *The parade constrained PGO 232 Paragraph2(c) (k),(o) (e), (t)*

iii. *None of the children (PW2 or Pw3 3) or Pw1 stated that there was an identification parade conducted in which they attended.*

8. *That, the learned trial magistrate erred in law and fact by convicting the appellant relying on the incredible evidence of Pw4(doctor) as;*

i. *Pw1 stated that they took the victims (Pw2 and Pw3 to KISIWANI HOSPITAL while Pw4 stated he works at VIJIBWENI HOSPITAL.*

ii. *He didn't state whether the alleged bruises saw on the victims where fresh or old.*

iii. *His evidence has no link to the appellant.*

9. *That, the learned trial magistrate erred in law and fact by convicting the appellant in a case that the prosecution evidence was un corroborated, incredible and contradictory and failed to establish the case against the appellant beyond reasonable doubt.*

10. *That, the learned trial magistrate erred in law and fact by convicting the appellant in a case where he disregarded the defence evidence and failed to draw and adverse in inference on the prosecutions failure to tender the alleged confessional statement illegally recorded by PW6 (investigator) hence raising serious doubts regarding the authenticity of the alleged offences.*

At the hearing of the appeal, the appellant lamented to be a layman, he asked the conviction and sentence against him to be set aside and that he believes the court will do justice to him. Upon being probed on explaining his grounds of appeal, he stated that, one of the victims PW2 was contradicting himself because he testified to have been found at the bush, alone, but his fellows were naked how did he know that the other were naked if he was found alone? That way, he ended his submission.

In reply, Ms. Masue supported conviction and sentence against the appellant. Responding to the 1st ground she explained that section 127 (2) of the Evidence Act was complied with because at page 11 of proceedings PW2 stated "I have come to say the truth" and PW3 stated "I promise to tell the truth". Concerning the age of the victims, the learned state attorney explained that at page 19 of the proceedings PW4 who is a medical doctor, proved the age of PW3. She supported her argument with the case of **Isaya Renatus v Republic** Criminal Appeal No. 542/2015 which states *inter alia* that age can be established by a medical doctor.

As regard the second ground of appeal, Ms. Masue stated that PW1 was not at the scene that is why he did not state the color of the appellant's clothes and the time of the incidence. However, the victims could properly identify the appellant.

Replying to the 3rd ground, Ms. Masue, commented that absence of 'Happy' and another unknown woman who saw the victims crossing the river, as a witnesses, did not weaken prosecutions' evidence she relied on section 143 of the Evidence Act.

Coming to the 4th ground which refers to the contradictory prosecution's evidence and that PW2 and PW3 were supposed to scream if at all they were carnally known Ms. Masue explained that the victims testified to have been threatened, that if they screamed the appellant will cut them with a knife.

As for the evidence which establishes penetration Ms. Masue stated that PW2 said "*alitubaka kwa kutumia hiki cha kukojolea, alitubaka mimi na ED na AX*" and PW3 at page 12 of proceedings stated "*alituingizia mdudu wake matakoni*" ..... "I use '*mdudu*' to urinate..... I was hurt" that these words which generally translates that he raped us, he penetrated us through the anus" as stated by the victims proved penetration. She cited a case of **Hassan Kamunyu v R** Criminal Appeal no. 277/2016 where the court directed that in proving penetration, victims do not necessarily need to explain graphically on a penis to enter the vagina. She strengthened her argument that evidence on penetration was corroborated by the PW4's

evidence as he tendered PF3 which showed that the victims were penetrated.

On the issue of the identification parade Ms. Masue stated that the ID parade register was properly admitted as exhibit P5 and even if it will appear to be wrongly admitted the evidence of PW2 and PW3 can still be reliable to convict the appellant.

In the last ground, Ms. Masue stated that the trial magistrate considered the appellant's defence and stated further that the appellant failed to raise a reasonable doubt to weakens PW2, PW2 and PW3's evidence. She insisted that the appeal be dismissed for lack of merit.

Having earnestly considered the detailed submissions by both parties, and records of this appeal, the issue is whether this appeal has merit. Starting with the 1st ground, I have gathered that, key witnesses in this matter were children PW2 and PW3. At page 11 of the typed proceedings, it shows that both PW2 and PW3 testified on 28th June 2019. By then, the relevant provisions which catered for evidence of a child of tender years was section 127 (2) as amended by Act No.4 of 2016 which states:

> "(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 lies***". (Emphasis supplied)

At page 11 of the typed proceedings, the court recorded PW2 as follows:

> **PW2: JAK, 5 years, Christian**

"I have come to say the truth"

XD by SA

PW3 was recorded as follows:

PW3: EDM, Christian.

"I promise to tell the truth"

Looking at these words stated by PW2 and PW3, and being guided by the case of **Godfrey Wilson v Republic** Criminal Appeal No. 168/2018, (unreported) which explained the importance of a child witness to promise to tell the truth and the duty of the trial court to record the same, it is my opinion, PW2 and PW3 promised to tell the truth before the court and their evidence was properly taken. As to the age of the children. The age of PW2 was well established by his biological father PW1, who also tendered the Birth Certificate which showed that PW2 was 4 years old. PW1 also stated that all children were agemates. The age of PW3 was established by a medical doctor PW4 who examined PW3 and tendered a PF3 (exhibit P2) which showed that PW3 was 4 years. Therefore, as correctly stated by the learned state attorney, the victim's ages were proved and section 127 (2) of the Evidence Act was complied with. Hence, the first ground has no merit.

The second ground is vague and tends to challenge both identification of the appellant and failure to call some of the witnesses. In dealing with this ground, it is in evidence that PW1 neither explained the attire which the appellant was wearing on the incident day nor the length of time which PW1 observed the appellant with the victims. I think in this

case there was favorable conditions to enable identification of the appellant. PW1 knew the appellant before and he identified him by his name Kiswabi which is a better description than that of clothes. PW1 did not state which time of the day it was, but PW6 the investigator, stated that she started her investigation at around 1600hrs (on the incidence day) that means the incidence occurred before 1600hrs. As mentioned by PW1, the appellant was seen together with the victim shortly before the victim's disappearance. PW1 states that the appellant was carrying a bag and gave something to the children. It came later to be told by the victims that the appellant gave them "ubuyu". Therefore, this evidence shows that PW1 had ample time to observe and properly identify the appellant.

As regards the witnesses who were not summoned one 'Happy" and another unknown woman, I am convinced that these were not key witnesses. The evidence of these people was important but not necessary to prove the offence of unnatural offence against the appellant. The prosecution witnesses PW1, PW2, PW3, PW4 were solid enough. I will agree with the state attorney that section 143 of The Evidence Act requires no particular number of witnesses to prove any fact and that absence of these witnesses does not weaken the prosecution case. Therefore the 2nd ground is devoid of merit.

The 3rd and 5th grounds are answered jointly as they are similar. The appellant complains that neither of the victims mentioned his name Ally Selemani, as it appears in the charge sheet. I have revisited the charge sheet; indeed, it shows the name of the appellant as Ally Selemani, however, almost all the witnesses PW1, PW2, PW3 and PW5 refers the

suspect as "Kiswabi". These 2 names might have contradicted the prosecution evidence. However, the contradiction if any, is cleared by PW6, **WP 10208 DC Lucina** who is the investigator of the case. At page 27 of proceedings, she states that:

> *"the accused person was introduced to us by village executive officer as Ally Selemani a.k.a (also known as) Kiswabi".*

The description of the appellant made by PW6 was clear that Ally Selemani and Kiswabi are one and the same person. Similarly, during trial, the appellant did not seem not to understand his name when he was referred to as Kiswabi. Therefore, there was no injustice occasioned to the appellant for failure to include his other name in the charge sheet. This ground has no merit. Nevertheless, it should be noted that, it is important in future for the charge sheet to include all the names which the appellant (accused) is identified with.

In the fourth ground, although I must say, whether the victims screamed or not, does not affect the prosecution evidence, I agree with the state attorney that the evidence shows that the victims were warned by the appellant that if they scream, he will cut them with a knife. Therefore, the victims could not have possibly screamed.

With regard to the number of victims in this case, the evidence shows that the victims were three; PW2, PW3 and one AX who was not called as a witness. Additionally, it is the fact that the medical doctor, PW4 examined 3 children but he established penetration against only 2 victims

(PW2 and PW3) and the charge sheet is clearly reflecting that the appellant is charged with 2 counts against 2 children only.

As to the issue of penetration, the medical doctor did not mention about noticing sperms in PW2's anus but he mentioned to have witnessed bruises which also presupposes penetration. The said PW1's wife who is allegedly to have noticed sperm, did not even testify before the court so the only available evidence is that of PW4 a medical doctor which showed bruises in the victims anus which corroborates the element of penetration. It should be noted that in proving sexual offences there is no requirement of establishing presence of suspect's sperms in the victim's private parts. It is a long-established principle of law that penetration, however slight, is sufficient to constitute the sexual intercourse necessary to establish a sexual offence. See section 130(4)(a) of the Penal Code, Cap 16, R.E 2019 and also case of **NYEKA KOU v REPUBLIC** Criminal Appeal No. 103 of 2006 (unreported).

The contradiction on what exactly the appellant stated when he was with the victims is noted but considered minor thus it should not deter me as it does not go to the root of case. Therefore, the fourth ground lacks merit.

The 6th ground refers to search procedures. First, it should be noted that search without warrant is permissible under emergency circumstances, as provided for in section 42 (1)(b) of the CPA. It is not vivid in this case that search was done under emergency especially that it was done on 20/2/2019 which was a day after the arrest. However, after the search, a

certificate of seizure, exhibit P3 was prepared in the presence of the accused, his uncle and the Ward Executive Officer, which was descriptive of what transpired during the search. Referring to the case of **MARCELINE KOIVOGUI v REPUBLIC** Criminal Appeal No. 469 OF 2017 where it was held inter alia that: "*documentation is not the only requirement in dealing with an exhibit and it will not fail the test merely because there* was no documentation", I think under these circumstances the appellant was not prejudiced by absence of the search warrant. To me, this ground has no merit. Either way, even in the absence of the search warrant, the evidence of PW1, PW2, PW3, PW4 and PW6 remain strong against the appellant. The evidential value of the said search is that the appellant was found with the baobab seeds *'ubuyu'* a fact which corroborates the evidence of PW1, PW2 and PW3 that the appellant gave the victims the said *'ubuyu'* before the children disappeared.

In the 7th ground the appellant is attacking the procedure used to conduct the Identification parade. Before going into the details and correctness of the said procedure, I would like to point out that as mentioned earlier on, the victims knew the appellant and identified him as Kiswabi, that he is a person who used to sell firewood. Hence, as the witnesses were not strangers to the appellant identification was properly made and I believe there was no need for an ID parade to be conducted. Therefore, identification of the appellant remains unquestionable and the 7th ground has no merit.

The 8th ground refers to contradiction about the name of the hospital which PW4 did his examination, whether it was Kisiwani or Vijibweni

hospital. It is in evidence that at page 10 of proceedings that PW1 mentioned to have taken the victims at Kisiwani hospital, while at page 19, PW4, the medical doctor states that when he did the examination, he was working at Vijibweni hospital. However, having checked the victims PF3's (exhibit P2) they are both signed by Gama Gregory, who is PW4 and they bear a stamp of "*Mganga Mkuu hospitali ya Vijibweni*" who is the Chief Medical Doctor, Vijibweni Hospital. This means the medical examination was done at Vijibweni hospital. The mention of Kisiwani by PW1 is a contradiction which does not affect the prosecution case considering PW4's evidence and the PF3 of the victims which both states Vijibweni Hospital, hence this ground has no merit.

The 9th ground is generally challenging the prosecution's evidence that it was unreliable, contradictory and uncorroborated. Having gone through the judgement, I agree with the trial magistrate in the following; **One**; the testimony of two victims PW2 and PW3 established penetration as an ingredient of offence as per section 154(1) (a) (2) of the Penal Code. **Two;** the evidence of PW2 and PW3 is in compliance with section 127 (2) (6) of the Evidence Act and it well corroborated by that of PW1 who shortly before the incidence saw the appellant with the same children (PW2, PW3) before they disappeared. **Three**; further corroboration is from the medical doctor who noted that PW2 and PW3's anus had bruises. **Four**; there was no mistake of identity of the appellant both children (victims) knew the appellant before by his name "Kiswabi". Therefore, the prosecution successful proved the two offences of unnatural offence against the appellant without doubt. The 9th ground has no merit.

As for the last ground, the judgment, shows that the trial magistrate considered the appellant's defence, and he found it not worthy of value. As part of his analysis, he states that

> "*On the whole evidence I am of a considered view that cumulative effect of all the above fully proved circumstances are consistent only with the hypothesis of the guilty of the accused person and no one else and are totally inconsistent with his innocence. There are no co-existing circumstances which easily weakens the inference of guilty.*"

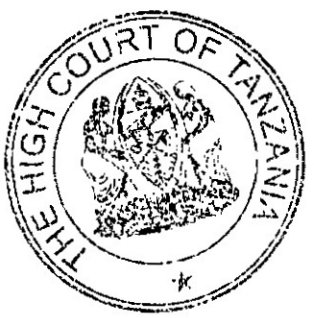
Based on this, the last ground, as well, lacks merit.

Having said that, the issue raised is answered in the negative. Hence, I find no reason to fault the finding of the trial court's magistrate.

In the conclusiveness, the appeal lacks merit, I dismiss it in its entirety.

It is so ordered.

Dated at Dar es salaam this 27th day of January 2022.



L. J. Itemba

JUDGE

27th /01/2022