IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO: 26 OF 2021

(Arising from the judgment of the Resident Magistrates' Court in Criminal Case No. 446 of 2018)

DICKSON S/O RAYMOND MAKALIUS ..... 1ST APPELLANT

SADAMU S/O HAMIS MIANO ..... 2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

17/2/2022 & 6/6/2022

ROBERT, J

This is an appeal against the decision of the Resident Magistrates' Court of Arusha in Criminal Case No. 446 of 2018. The two appellants were charged and convicted each with one count of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap. 16 (R.E. 2002). After the hearing, the trial Court sentenced each of them to life imprisonment. Aggrieved, they preferred this appeal against the judgment and sentence of the trial Court.

In both counts, the prosecution alleged that on 25th day of November, 2018 the two appellants did have carnal knowledge of one Junior s/o

Fulgence, a boy aged 4½ years old against the order of nature. The event took place at Majengo chini area within the city of Arusha.

The prosecution led evidence to establish that on the fateful day the two appellants took the victim to the first appellant's home, put him in bed and undressed his trousers and underpants. Thereafter, the first appellant started to have carnal knowledge of him against the order of nature and then the second appellant did the same thing. The victim felt pain then the two appellants opened the door and asked him to go home. Later on that day his brother saw him discharging some waste through his anus and asked him what had happened, he told his brother and his mother what the two appellants did to him. Thereafter he was taken to police station and then to hospital where the Doctor examined him and reported that there was evidence of anal penetration with a blunt object. The trial Court made a finding that the prosecution managed to prove the case against the appellants beyond reasonable doubt and proceeded to sentence them.

Aggrieved by the decision of the trial court, the appellants have preferred this appeal armed with six grounds of appeal as follows:-

1. *That the Honorable Magistrate erred in law and in fact in meting out sentence of life imprisonment to the Appellants contrary to the express*

provision of section 171 (1) of the Criminal Procedure Act (chapter 20 RE 2019) which required such sentence to be scrutinized and confirmed by the High Court.

2. *That the Honorable magistrate erred in law and in fact in completely disregarding the evidence of the Defence witnesses including that of DW-1, DW-2 and DW-3 and consequently failing to fair and impartial valuation of the evidence on record as a whole.*
3. *That the Honorable magistrate erred in law and in fact in acting on the hearsay evidence of PW-2 and PW-3.*
4. *That the Honorable magistrate erred in law and in fact in treating the uncorroborated evidence of PW-1 as gospel truth without fully satisfying itself how the said witness was capable of identifying the Appellants including the status of the room in terms of lighting thereby acting on the evidence of visual identification contrary to established laws and principles.*
5. *That the Honorable magistrate erred in law and in fact in convicting and sentencing the appellant on the offence of unnatural offence while the prosecution did not prove their case beyond reasonable doubt as require by law.*
6. *That the Honorable magistrate erred in law and in fact in convicting and sentencing the appellant while the Voir Dire procedure were not fully followed and complied with as required by law.*

At the request of parties, the Court allowed parties to argue the appeal by filing written submissions whereby the appellant's submissions were drawn and filed by Mr. Wilbard John Masawe, learned cousel

whereas the respondent's written submissions were drawn and filed by Ms. Eunice Makalla, State Attorney.

Starting with the first ground, Mr. Masawe submitted that since the sentence imposed by the trial Court was beyond the permitted limit under section 170 of the Criminal Procedure Code, it ought to have been confirmed by the High Court as required under section 171(1) of the Criminal Procedure Act, Cap. 20 (R.E.2002). There being an omission to that requirement, he implored the Court to uphold this ground and nullify the sentence given.

To support his argument, he made reference to the case of **Godfrey Kennedy @ George vs the Republic, Criminal Appeal No. 115 of 2020,** HC – Bukoba, (Unreported) where the Court held that any term of imprisonment beyond the prescribed statutory limits warrants the case file to be transmitted to the High Court for confirmation before the sentence is executed.

Responding to the first ground of appeal, Ms. Makala submitted that the sentence of life imprisonment is the minimum sentence for the offence of unnatural offence under section 154(1) and (2) of the Penal

Code, Cap. 16 (R.E. 2002). She maintained that, section 5(d) of the Minimum Sentences Act, Cap. 90 (R.E.2002) provides that where a person is convicted of any sexual offences specified under chapter XV of the Penal Code the Court is required to sentence the person convicted for a term prescribed under that chapter.

Therefore, there was no need for the sentence given by the trial Court to be confirmed by the High Court as required under section 171(1) of the Criminal Procedure Act.

This Court is aware that where a subordinate Court presided over by a District Magistrate convicts a person who is required to receive a sentence greater than the Court has powers to impose it shall commit a person so convicted to the High Court for sentence in accordance with section 171 of the Criminal Procedure Act. A sentence of imprisonment for a scheduled offence which exceeds the minimum term of imprisonment under the Minimum Sentences Act cannot be executed until it is confirmed by the High Court. However, in the present case the Court is in agreement with the state Attorney since the sentence of life imprisonment is the minimum sentence for the offence of unnatural offence under the Minimum Sentences Act, there was no need for the

sentence given by the trial Court to be confirmed by the High Court as required under section 171(1) of the Criminal Procedure Act. I therefore find no merit on this ground of appeal.

On the second ground, counsel for the appellants faulted the trial Court for disregarding the evidence adduced by defence witnesses particularly, DW1, DW2 and DW3 which led to lack of a fair and impartial evaluation of the evidence on record.

He submitted that, the evidence of Cosmas Dismas (DW3) which raised the defence of alibi for the first appellant was not properly dealt with or considered in the impugned judgment. He made reference to the case of **Pia Joseph vs Republic (1984) TLR 161** where the Court of Appeal held that "it is the duty of the Court to direct its mind properly to any alibi set up by a prisoner".

He invited this Court to intervene and reconsider the evidence adduced by the defence witnesses in order to come to its own findings.

In response, the learned counsel for the Republic conceded that the trial magistrate overlooked the defence evidence in his judgment. However, she maintained that this Court can intervene and consider the

defence evidence. To support her argument, she made reference to the case of **Athumani Musa vs Republic**, Criminal Appeal No. 4 of 2020, CAT at Kigoma, (unreported) at pages 17 – 18.

This Court is mindful of the fact that evaluation of evidence is primarily the function of the trial Court. However, where the trial Court fails to evaluate evidence properly the first appellate Court can interfere and evaluate the evidence. I will therefore proceed to examine the evidence adduced by the defence witnesses against the charges filed against the appellants.

The proceedings of the trial Court shows that the defence had three witnesses (DW1, DW2 and DW3). However, in the impugned judgment the trial Court made an evaluation of the testimony of DW1 and DW2 only. The evidence adduced by DW1 and DW2 was generally a denial that they didn't commit the offence charged. DW1's testimony was simply as follows:-

> *"It is not true I committed the offence. On the mention date I was at the bush cutting grasses"*

Similarly, DW2's defence was simply that:-

"I didn't commit the offence"

I find it equally convenient to reproduce the testimony of DW3 which the trial Court is faulted to have ignored in his evaluation of evidence, since I find it relatively brief. The proceedings indicate that DW3 testified that:

> *"On the same date I was with Dickson Raymond, we went to cut grass at Kisongo, when we went there we sleep there until next date. We came back on the following date around 7.00 am. Later I was called and told that he was arrested and taken to police station."*

The learned counsel for the appellants argued in particular that, the testimony of DW3 which raised the defence of alibi was not considered. The testimony of DW3 sought to establish that on the date of the alleged offence the first appellant and him were not at the scene of crime as they went to cut grasses at Kisongo and slept there until the following day. However, having looked at the proceedings of the trial Court it is clear that the first appellant did not furnish a notice of his intention to rely on the defence of alibi before the hearing of the case as

required under section 194(4) of the Criminal Procedure Act. Hence, the trial Court had the discretion to accord no weight of any kind to the defence under section 194(6) of the Criminal Procedure Act. Looking at the evidence adduced by both DW1 and DW3 it is apparent that it doesn't indicate the time at which they went to Kisongo to cut grasses so as to determine if it was indeed the time when the alleged offence took place. In view of the glaring shortcomings, I find the testimony on the defence of alibi as adduced by the aid witnesses to have no evidential value to cast any doubt to the prosecution case. Consequently, this ground is found to have no merit.

Coming to the third ground, appellants' counsel faulted the trial court Magistrate for acting on the hearsay evidence of PW2 and PW4. He made reference to the reasoning of the trial magistrate at page 4 of the impugned judgment where she made reference to the testimony of PW2 that she was told by her son that his son junior was playing and he was smelling waste. He argued that this was a witness disgorging what she heard from someone who had in turn heard it from someone else.

He maintained that, the trial magistrate was influenced by the hearsay testimony of PW2 and PW4, mother and brother of the victim

respectively, in arriving at her decision. He argued that, hearsay evidence is of no evidential value and cannot ground conviction. To support his argument, he made reference to the case of **Balole Simba vs Republic, Criminal Appeal No. 525 of 2017,** CAT (unreported). He invited the Court to expunge the evidence of PW2 and PW4 from records for being hearsay and valueless.

In reply, Ms. Makala maintained that the trial Magistrate did not act on hearsay evidence, he acted on the evidence of the victim (PW1) which was corroborated with the testimony of PW2, PW3 and PW4 to convict the appellant. She clarified that the trial Magistrate did not advance his decision at page 4 of the impugned judgment as stated by the counsel for the appellant but he was analyzing evidence adduced by witnesses. This Court is in agreement with the learned state attorney that in considering whether the prosecution managed to prove their case the trial Court, at page 7 to 10 of the impugned judgment, relied heavily on the testimony of PW1 which was not hearsay evidence. As a consequence, I find no merit on this ground as well.

Coming to the remaining grounds of appeal, counsel for the appellants consolidated the fourth, fifth, sixth and seventh grounds and

prayed to supplement them with the eighth ground to the effect that the trial Magistrate failed to evaluate the evidence on record.

He submitted that the consolidated grounds raise issues in respect of the identification of the appellants as per the evidence of PW1 and PW4, missing evidence on the age of the victim, failure of the victim to name the appellants at the earliest opportunity, contradictions between the testimony of the medical officer (PW3) and the medical examination report (exhibit P1) on the alleged injuries to the victim, and failure to call other children who were playing with the victim to testify on how he was abducted when he was playing as alleged by PW1.

On the age of the victim, he submitted that proof of age was necessary considering that the offence was committed to a child and the resultant sentence was meted out on that understanding. He argued that, while such evidence could come from parents, the victim's parent (PW2) was not led in any way conceivable to furnish such evidence. The only place where the age of the victim surfaced by way of mentioning was at page 10 of the typed proceedings of the trial court where it was mentioned as five years. It was again mentioned as four and a half by the trial magistrate at page 11 of the impugned judgment when meting

out a sentence. Again, it was stated in the PF3 (exhibit P1) tendered by PW3 which he argued that need to be discounted because it is not a proof of the child's age in itself as evidence of age is to be established beyond reasonable doubt, with independent cogent evidence.

He made reference to the case of **Robert Andondile Komba vs DPP, Criminal Appeal No. 465 of 2017**, CAT (unreported) where the Court of Appeal held that in cases of statutory rape, age is an important ingredient of the offence which must be proved. Citing of the age of the victim is not the same as proving it.

The other point on consolidated grounds is the manner in which the trial magistrate treated the evidence of PW1 with trust without warning herself as to the danger of that. He argued that, no investigation officer was called to testify on whether the victim identified the accused person and described them to the police officers and no evidence was led to establish if the victim identified the accused persons in the light of guidelines for visual identification set out by the Court of Appeal considering that PW1 did not know the first appellant prior to the alleged offence. Lastly, having mentioned fundi, there was no evidence to establish that it was the same person as the second appellant herein.

He made reference to the case of Chiku salehe vs Republic (1987) TLR No. 193 where the Court decided that before basing conviction solely on evidence of visual identification such evidence must remove all possibilities of mistaken identity and the Court must be satisfied that the conviction is watertight.

On the failure of the victim to name the appellants at the earliest opportunity, he made reference to the case of **Wangiti Marwa Mwita and others vs Republic (2002) TLR 39** where it was observed that the ability of the witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability.

He submitted further that, although it is a settled law under section 127(7) of the Evidence Act, Cap. 6 (R.E.2002) that a conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim, it was never intended that the word of the victim of the sexual offence should be taken as a gospel truth but her or his testimony must pass the test of truthfulness.

He argued that, evidence of PW1 leaves a lot to be desired in terms of: One, it is highly unusual that the child was playing alone when

he was allegedly abducted only to be himself a witness; two, none of the witnesses who saw the child being abducted were summoned; three, no identification parade was carried out to test his memory; four, PW3 who examined the victim testified on PW1's inability to remember the last encounter.

On identity of the appellants, he argued that, PW1's pointing of the appellants could not be conclusive considering that, PW1 is on record telling the court he never met the first appellant. Considering this piece of evidence and the fact that there is a missing evidence of visual identification, leaves a lot to be desired which must be resolved in favour of the appellants.

He argued further that, PW4 was a child under the age of 18 but his testimony was accepted wholesale without voire dire examination contrary to section 127 of the Evidence Act as amended by the Miscellaneous Amendment Act No. 4 of 2016 (See Godfrey Wilson versus the Republic, Criminal Appeal No. 168 of 2018, CAT (unreported). Thus, he implored the Court to disregard the testimony of PW4 for offending the mandatory provisions of the law.

Another issue on consolidated grounds is the weight of the testimony of PW3. He maintained that, the testimony suffers the following shortfalls: One, exhibit P1 was not read over after admission and therefore it ought to be expunged. Secondly, it contradicts the evidence of the tenderer and the maker (PW3) which stated that the child didn't remember the last sexual intercourse and further that the child appeared normal without injuries. The contradictions ought to be resolved in favour of the appellants.

From the arguments of parties and records of this matter, this Court is in agreement with the submissions by the state attorney that, the victim's age was established through the evidence of the victim's mother (PW2) at page 12 of the proceedings who testified that the victim was 5 years old. Similarly, on the issue of identification, the Court agrees that since the incident occurred during the day and PW1 knew the appellant before the incident and addressed the appellants by name as he mentioned them to PW2 and PW4 the question of mistaken identification does not arise.

The Court is also in agreement that, PW4 does not fall in the definition of a child of tender age under section 127(4) of the Evidence Act as he testified that he was 17 years old.

Similarly, this Court agrees that, in the absence of exhibit P1, oral evidence of PW3 who testified on the medical condition of the victim of sexual offence can corroborate the evidence of the victim of crime. That said, I find no merit on arguments made in respect of this ground of appeal.

In the event, this Court finds no merit on all grounds of appeal raised by the appellants. Consequently, I dismiss this appeal for want of merit.

It is so ordered.

K.N.ROBERT
JUDGE
6/6/2022