IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
CRIMINAL APPEAL NO. 23 OF 2020
(C/F Criminal Case No. 45 of 2021 before the District Court of Hai at Hai)

MBARAKA ELIENEZA MSANGI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 6TH February 2023
Judgment: 20th February, 2023

MASABO, J.:-

Before the trial court, the District Court of Hai, the appellant was found guilty and convicted of unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code, Cap 16. He was subsequently sentenced a prison term of 30 years. The charges against him were that on 15th February 2021 Machame Nkuundoo village within Hai District, Kilimanjaro region, he unlawfully knew the victim, a girl child aged 13 years, against her order of nature. The prosecution's case was based on a PF3 admitted as Exhibit P1, and oral testimonies rendered by 5 witnesses, that is, the victim's father who testified as PW1; the victim (PW2); the victim's sister, (PW3), her grandmother (PW4) and a doctor who examined her and found out that she was known against the order of nature (PW5).

From these witnesses, it was established that on the fateful evening the victim was with her sister (PW3) at their home doing homework and

preparing to go bed. She then told her sister that she was going to a toilet outside the house. As she was still there, PW3 who had remained inside the house noticed that PW2 was calling her and when she went outside in response, she saw the appellant and the victim coming from the servants' bedroom. She asked what was going on, PW2 who appeared to be crying disclosed that the appellant has molested her ("*baba Helena amenifanyia tabia mbaya").* The incident was reported to PW1 and later on to PW4. On the next day, PW2 was taken to hospital where she was examined by PW5 who established that her sphincter muscle was loose suggesting that she was penetrated against the order of nature. Testifying in court, PW2 explained how the appellant molested her. In the end, the prosecution evidence was held to have proved the offence beyond reasonable doubt.

The appellant is dissatisfied by the conviction and sentence. His appeal to this court is predicated on nine grounds of appeal which I will summarise as follows: **one**, there was a major variance on the victim's actual age. The charge sheet asserted she was 13. Her father, PW1, testified that she was 14 while she testified that she was only 7 years. Hence, the charge was not proved. ***Two,*** the procedure provided under section 127(2) of the Evidence Act was not complied with as PW2 gave irrational answers to questions posed against her. PW2 was aided by PW1 and the social Welfare Officer (SWO) to respond to questions thus her answers were not reliable and cannot be regarded as best evidence. **Three,** the doctor's evidence was unreliable as it was totally based on information relayed to

him by laypersons who accompanied the victim to hospital. **Four,** the prosecution evidence was weak, tenuous, contradictory, inconsistent and unreliable. **Five,** the appellant's defence casted reasonable doubts on the prosecution's case. And, **six,** the charges against him were not proved beyond reasonable doubt.

Later on, he prayed and was granted leave to file additional grounds of appeal. His additional grounds were four and more less similar to the grounds of appeals already raised. They are summarised as follows: the evidence of PW2 (the victim) was received in contravention of the law; evidence of PW3 was received in contravention to section 127(2) of the Evidence Act; there was no sufficient and credible evidence against the appellant and last, his conviction was erroneous as no investigation was conducted by police. In both memoranda, the appellant prayed that the court allows his appeal, quash the conviction and set aside the sentence and let him at liberty.

During the *vivavoce* hearing of the appeal, the appellant had no representation. He fended for himself whereas the respondent was represented by Ms. Mary Lucas, learned State Attorney.

In his submission in support of the appeal which followed no defined order, the appellant submitted that there is a variance between the age of PW2 indicated in the charge sheet and the one adduced in evidence. According to the charge sheet, the victim was 13 years but, PW1, her

father testified that she was 14. In further variation PW2 told the court that her age was 7 years. He argued that the age of the victim is crucial and ought to have been proved but the same was not proved. He proceeded that, the testimony of PW2 should not be trusted as it was not procured freely. Throughout the trial she was aided by her father and a SWO who was around in court. Thus, it is obvious she was taught what to say by PW1. Elaborating his argument, he reasoned that had the court property directed its mind on this fact it would not have convicted him as in law the testimony of the victim is the best evidence. Since the testimony of PW2 which was regarded the best evidence was procured contrary to the law there was no sufficient evidence to convict him.

He also argued that that the prosecution's evidence against him was fabricated as it was marred by irregularities and material contradictions. For instant, PW1 stated that he was notified of the incidence by PW3 but he did not bother to interrogate PW2 to find out what has transpired. Another contradiction was between PW1 and the PW2. In his testimony PW1 stated that PW3 informed him of the incident but PW2 said she is the one who reported the incident to PW1. All this shows that the case was a mere fabrication. Lastly, as regards compliance with section 127(2) of the Evidence Act, it was submitted that, there was noncompliance to section 127(2) of the Evidence Act [Cap 6 R.E 2019]. PW2's promise was ambiguous. She only promised to tell the truth but did not promise not to tell lies. Having made these arguments, the appellant rested his

submission and prayed that the appeal be allowed, the conviction and sentence be quashed and set aside and he be set at liberty.

On the respondent's side Ms. Lucas, objected the appeal. Submitting on the first ground of appeal, she argued that, the appellant was charged of an unnatural offence of a girl under 18 years. To prove the case the prosecution was duty bound to prove penetration by the appellant and that the victim was under 18. But, PW2 missed her actual age due to being autistic while her father testified that she was 14 years. As per the learned State Attorney, this contradiction was immaterial as it did not prejudice the accused hence curable under Section 388 of the Criminal Procedure Act [Cap 20 RE 2022]. She added that, much as the age of the victim is important, its relevance is in the determination of the punishment. Also, the age bar under section 154(4) is 18. Thus, it is immaterial whether the victim was 7, 13 or 14 years. The 1st ground lacks merit.

On grounds number 2, 3, 4, 5, 6, 7, 8 and 9, Ms. Lucas submitted that the respondent argued that the case was proved beyond reasonable doubt. The discrepancies and doubts if any are all minor and do not go to the root of the offence. She submitted further that assessment of the credibility of the witness lies on the trial court as held in **Goodluck Kyando v R** [2006] TLR 263 where it was held that every witness is entitled to credence. She submitted further that, much as the victim was an autistic, she was competent to testify as, under section 127 (3) of the

Evidence Act, a person of unsound mind is competent to testify save where he does not understand questions posed at him. In the present case PW2 was found competent by the trial court and her evidence was properly recorded. During her testimony she was able to clearly state how the appellant molested her and her evidence remained intact even during cross examination. Ms. Lucas added that, the best evidence in sexual offences is that of the victim and cited the case of **Selemani Makomba v Republic** TLR [2006] 380 in support of her argument that PW2's testimony was the best evidence.

The learned State Attorney argued that PW2's evidence was well corroborated by PW3 who saw the victim and the appellant coming from the house which was the scene of the offence and when she interrogated the victim, she stated that the appellant has molested her. Further corroboration was from the doctor who stated that through a medical examination she observed that the victim was known against the order of nature. As regards compliance with Section 127 (2) of the Evidence Act, Ms. Lucas argued that it was duly complied with as PW2 was asked a set of questions to which she provided rational answers as shown in proceedings. To this end, Ms. Lucas concluded that the case was proved beyond reasonable doubt and prayed that the appeal be dismissed.

Upon considering the grounds of appeal, the submission in support and in opposition of the appeal and the trial court's record, I will now determine the appeal. Primarily, the task ahead of me is to reassess the

evidence on record and make a finding on the grounds of appeal and ultimately answer the key question as to whether the case against the appellant was proved beyond reasonable doubt. Starting with the first ground, the appellant has complained that the age of the victim was crucial in convicting and sentencing the appellant. As per the particulars of the charge and the record it is crystal clear that the appellant was charged under section 154(1)(a) and (2) of the Penal Code for unlawfully knowing the victim aged 13 years old against the order of nature. This section provides that;

> 154.-(1) Any person who-
> (a) has carnal knowledge of any person against the order of nature; or
> (b) n/a
> (c) n/a
> (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**. [emphasis added]

Therefore, as correctly argued by both parties, for purposes of sentence, the prosecution was duty bound to prove the victim's age as life imprisonment can only be imposed in cases where the victim's age is below 18 years. In my scrutiny of the record, I have observed that the alleged discrepancy is too conspicuous. Whereas the charge sheet filed on 1st April 2021 shows the victim was 13 years the victim's father while testifying on 7th June 2021 as PW1 stated that PW2 was 14 years old and PW2 stated that she was 7 years. In my further reflection, I have noticed

that while the discrepancy between the charge sheet and PW1 is not glaring the discrepancy between the charge sheet and PW1 on the one hand and PW2 on the hand is glaring. The appellant has argued that the variance is fatal and incurable whereas the learned State Attorney takes a view that it is minor because PW2 is autistic. Thus, she might have inadvertently missed her actual age. She has in addition asked the court to rely upon the age relayed by PW1 who being the father is one among those who can prove the age of the child.

Section 114 (2) of the Law of Child [Cap 13 of 2019] states the following as regards proof of age of a child.

> Without prejudice to the preceding provisions of this section, where the Court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person".

From this provision and a plethora of authorities from the Court of Appeal and this court, it is now settled that proof of age of the victim can come from the victim, relative, parent, medical practitioner and, where available, by the production of birth certificate (See **Issa Reji Mafita Versus Republic,** Criminal Appeal No. 337 of 2020 (CAT)**; Bashiri John vs Republic,** Criminal Appeal No.486 of 2016 (CAT) and **Isaya Renatus v R,** Criminal Appeal No. 542 of 2015, CAT. Therefore, in the present case, proof of the victim could have reliably come from PW1, PW2, PW3

and PW5. Considering the victim's autism, I find merit in the State Attorney's submission that it is mostly likely that she confused her age. And, out of that confusion, she told the court that she was 7 years while at the same time she stated she was born in 2004 which would suggest she was 17 years and not 7 years. Under the circumstances, I take the age relayed by PW1 to be the victim's age.

Having resolved the first part of this ground of appeal, the next question for determination is whether this defect is fatal and incurable. Section 388 of the Criminal Procedure Act [Cap 20 RE 2022] states that the finding, sentence or order of the court shall not be reversed on appeal or revision on account of any error, omission or irregularity in the charge save where the omission or irregularity complained has occasioned a failure of justice. Guided by this provision, I have carefully scrutinised the records to see whether the appellant was anyhow prejudiced by such omission. In the end, I was unable to discern any prejudice on his part. The statement of the offence explicitly described the offence against which the appellant stood charged. The charge sheet was crafted in such a way that it sufficiently informed the accused of the charges facing him and enabled him to prepare his defense. The appellant knew that the charge against him was defilement of a girl child aged 13 years and who was well known to him as, according to his evidence when testifying as DW1 and as per the evidence of other witnesses, the appellant was working for PW2's grandfather and he used to cook and take care of PW2 and her sister.

In any case, as intimated earlier on and as correctly argued by the learned State Attorney, unlike in statutory rape where the age of the victim is crucial in proving the offence, in the present case, the age of the victim is only relevant in assessing the punishment not the conviction. The sentence of life imprisonment under Section 154 (2) of the Penal Code is mandatory in unnatural offences committed against children below 18 years. Thus, it is immaterial whether PW2 was 7 years, 13 years, 14 years or 17 years. In the foregoing, I take a firm view that the anomaly is salvaged by section 388. The first ground of appeal is, to that extent, found to have no merit and is hereby dismissed.

The 2nd, 3rd, 4th and 5th ground of appeal as well as the 1st additional ground attack the credibility of PW2's testimony. There are three complaints: **one,** being autistic, she was an incompetent witness; **two**, her evidence was procured in contravention of section 127(2) of the Evidence Act; and **three** her evidence ought not to be believed as at all material times during her testimony she was aided by PW1 and a SWO.

As regards point number one, section 127(1) of the Evidence Act states thus:

> 127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

The appellant has argued that PW2 was of an unsound mind hence her evidence ought not to have been acted upon. From the record, there is no dispute that PW2 is an autistic child. All the witnesses agree that she has autism. Whether this means she is of unsound mind is debatable as autism (also referred as autism spectrum disorder (ASD) is considered a developmental disorder not a mental illness and much as persons with autism are regarded to have a great risk of mental illness, not every autistic person has a mental illness. This would mean that, in the context of section 127(1) of the Evidence Act, PW2 falls under the category of persons with 'similar condition' impairing the capacity of a witness to understand the questions put to him or giving rational answers to those questions.

Assuming that autism is a mental illness as argued by the appellant and that PW2 was of an unsound mind, was her evidence properly procured and relied upon by the trial court? Section 127(5) of the Evidence Act states thus:

> (5) A person of unsound mind shall, unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them, be competent to testify.

Interpreting this provision (then section 127(6) of the Evidence Act) in **Fadhili Makanga vs Republic** (Criminal Appeal 458 of 2017) [2020] TZCA 270 (at TanzLII), the Court Appeal stated thus:

> Therefore, this provision clearly highlights the fact that unsoundness of mind shall not by itself invalidate the

> competency of the witness to testify in court. To that effect, meaning that where there is a witness of unsound mind, the court must satisfy itself that the witness is prevented by his/her condition from understanding the questions put to him and giving rational answers (page 6).

It further stated thus:

> [we are of the view that the trial court upon becoming aware that the victim was mentally retarded, ... it was duty bound to address this issue of the mental status of the victim and especially the competency and reliability of her evidence within the lines of section 127 (6) of the Evidence Act in an endeavor to ensure the trial against the appellant is fair. Failure to do that has left doubts on the competency of the victim to testify against the offence charged (page 8).

Applying this authority, Utamwa, J (as he then was) in **Peter Mlelwa vs Republic** (Criminal Appeal 99 of 2020) [2021] TZHC 3900 (at TanzLII) held that:

> A witness of this nature can testify only if the trial court considers him/her as capable of understanding the questions put to him/her or of giving rational answers to those questions and/or he/she is not prevented by his/her condition from understanding the questions and giving rational answers to them. It follows thus, that, whenever a trial court is alerted through evidence that a witness is of unsound mind, it must follow the procedure guided by the CAT in the Fadhili Makanga case (supra). Failure of that, the evidence of that witness will have no

> value. The procedure envisaged in **the Fadhili Makanga** case is that, upon a trial court receiving evidence that a witness before it is of unsound mind, the court is enjoined to address the issue of the unsoundness of the witness's mind and make a finding on his/her competence and reliability.

In the present case, this procedure was complied with as shown in page 11 of the trial court proceedings. Before receiving PW2's testimony the trial court asked her a set of simple questions. After recording the questions and the answers, the trial court made a finding that the victim was autistic but she was able to answer the question put to her and having procured her promise to tell the truth, it proceeded to record her evidence. In my considered view, the findings catered for both, the requirement under section 127(2) and 127(5). The complaint that she was incompetent by reason of unsound mind is, therefore, devoid of merit. I similarly dismiss the argument that she did not undertake not to tell lies as the undertaking not to tell lies is implicit in her undertaking to tell the truth.

Equally unmeritorious is the complaint that PW2's was not the originator of her testimony as all what she said in court came from PW1 and the SWO who were couching her what to say. No doubt, the complaint is an afterthought as it contradicts with what the appellant himself stated when testifying as DW1. In his testimony in chief, he stated that:

> "I heard Neema (PW2) when she was testifying; she spoke lies."

And in the course of cross examination, he stated that:

> "I heard Neema when she was testifying, she said I 'm the one who had carnal knowledge with her against the order on nature. **I didn't saw a person teaching the victim what to tell the court."** [emphasis added].

Under no circumstances can such a precise and self-evident statement given by the appellant under oath be discredited by mere lamentations fronted by the appellant from the bar in the course of his appeal. Moreover, even if this was possible, the appellant's lamentation would still attract no weight as it would undoubtedly be intriguing as to when did the appellant learn or notice that PW2 was being coached. Had PW2 been coached as claimed, the appellant would have said so in his testimony but to the contrary he confirmed to the court that PW2 testified on her own. Hence a material contradiction with his lamentation. In the foregoing, the 2nd, 3rd, 4th and 5th grounds of appeal fail.

Turning to the remaining grounds, there are three issues to be determined. **One,** whether the procurement of the evidence of PW3 complied with the requirement of section 127(2). This question is answered affirmatively. This witness who was of the age of 13 at the material time undertook to tell the truth after she was asked a set of questions to which she gave rational answers. In any case, even if her evidence was found to have been wrongly procured it would not have much impact to the case because, save for the fact that she saw the victim and the appellant coming from the room at which the offence was

committed and that she was the first to encounter PW2 after the offence, she was not an eye witness to it.

The second regards the testimony of PW5, the doctor who examined PW2. The appellant's lamentation is that PW5's testimony was based on what she was told by laypersons who accompanied the victim to hospital. I am unable to fault the procurement of the testimony of this witness and the veracity of her evidence as my attempt to comprehend the appellant's lamentation ended in vain. What PW5 testified in court is her observation following the medical examination she conducted on PW2. She ably stated that in her examination she observed that PW2 had bruises in her anus and a loose sphincter muscle suggesting she was known against her order of nature. This observation is also contained in the PF3 admitted as Exhibit P1. That said, the appellant's lamentation in regards to this point which is contained in the 6th ground of appeal fails for want of merit.

The last four grounds of appeal, that is, the 7th, 8th and 9th ground of appeal and the last additional ground of appeal allege that the prosecution evidence was contradictory, weak, tenuous as it did not prove the case beyond reasonable doubt. It is my firm view that, the contradictions spotted are too minor. Apart from the contradictions on age which I have extensively dealt with, other contradiction spotted by the appellant is on whether it was PW2 or PW3 who told PW1 about the incident. This is contradiction is too trivial and incapable of discrediting the evidence. Needless to emphasize, it is now trite that not every

contradiction will cause the prosecution's case to flop. As stated in **Kavula William & Another vs Republic**, Criminal Appeal No.119 of 2020 CAT and **Moshi Hamisi Kapwacha v R,** Criminal Appeal No 143 of 2015, CAT, only fundamental discrepancies which go to the root of the case can cause the prosecution's case to flop. Minor discrepancies can be disregarded. Since the discrepancies in this appeal are minor, they are hereby disregarded.

Having reassessed the evidence as a whole, I am of the considered view that the prosecution evidence was neither weak nor tenous as complained. Rather, it was strong, credible and ably proved the offence to the required standard. As correctly argued by Ms. Lucas, two things ought to have been proved, namely penetration however slight and that the perpetrator of the offence was none other than the appellant. PW2, ably proved the two elements when she narrated to the court what befell her on the material date. In particular, she told the court that the Appellant whom she referred as Baba Elly molested her. She stated:

> "Baba Elly alinifanya mbaya"....
> "Alinifanyia tabia mbaya huku nyuma. Aliingiza dudu lake".

The record show that, to confirm what she meant, she pointed at her buttocks where the said 'dudu' penetrated and at the lower part of the appellant's body at which his male organ is located. Her demonstration entertains no doubt that when she said 'dudu' she was referring to the appellant's penis. As, other than an anus, there is no opening at the buttocks in which a penis can enter, I entirely agree with the trial court's

finding that, PW2 statements above meant only one thing that she was carnally known by the appellant against her order of nature. Considering her age and cultural limitations, the explanation above suffices as proof of penetration. It would have been overly demanding and inconsistent with the law prevailing in our jurisdiction to demand that PW2 should have named the appellant's male organ by its name or graphically explained with far better particulars how the appellant's male organ penetrated her. Besides, the testimony by the doctor and PW3 corroborated her story as regards penetration.

The second element was similarly established as PW2 ably implicated the appellant who was very familiar to her before the incidence and her evidence was corroborated by PW3 who saw them coming from the room which was the scene of the crime. All these demonstrate that the prosecution evidence was not weak as claimed by the appellant.

Needless to add, as correctly submitted by the appellant and supported by the learned state Attorney, it is a trite legal principle that, in sexual offences, the best evidence is from the victim while other prosecution witnesses may give corroborative evidence. Thus, even if there is no other evidence in corroboration, the evidence of the victim of sexual offence, if found credible, can by itself meter a conviction (see section 127 (6) of the Evidence Act, Cap 6 R.E. 2019, **Selemani Makumba v. Republic**, [2006] T.L.R 379, **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008, CAT and **Galus Kitaya v. The Republic,**

Criminal Appeal No. 196 of 2015. In the present case, as demonstrated above, the evidence of PW2 was sufficiently corroborated by other witnesses including PW3 and PW5.

Before I pen down, let me add that as held in **Jilala Justine v R,** Criminal Appeal No. 441 of 2017 CAT and in **Goodluck Kyando v. R,** Criminal Appeal No. 118 of 2003 (unreported), it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing him/her. Accordingly, the testimony of every witness should be deemed true unless his veracity is otherwise doubted for reasons of misrepresentation of facts or material contradictions in his evidence. Also, as correctly argued by the learned state Attorney, the assessment of credibility of a witness is in the domain of the trial court which, as stated above, found PW2 credible. Besides, even if such assessment was in the domain of this court, the coherence in PW2's evidence and the coherence between her testimony and that of other witnesses leaves no room for discrediting her it demonstrates no suspicions in her testimony. In spite of being autistic, PW2 named the assailant at the earliest opportunity and maintained consistency in her testimony that the appellant had carnal knowledge of her against the order of nature.

Based on the above, I am convinced that the prosecution's case was proved beyond reasonable doubt. Accordingly, I find the appeal without merit and I dismiss it in entirety. The conviction is hereby upheld.

Regarding the sentence, as demonstrated above, the offence against which the appellant stood charged provides mandatory sentence of life imprisonment but the appellant was sentenced to 30 years imprisonment which entails that the sentence was illegal. To correct the anomaly, I invoke the revisionary powers of this court, quash the sentence of 30 years imprisonment and substitute for it the mandatory sentence of life imprisonment. Accordingly, the appellant shall serve a life term in prison. It is so ordered.

Dated and delivered at Moshi this 20th day of February, 2023.

X

Signed by: J.L.MASABO

J.L MASABO
JUDGE
20/2/2023