IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 28 OF 2022

(*Original Criminal Case No. 168 of 2020 District Court of Nyamagana District at Mwanza)*

JOEL DANIEL ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

10th November,2022 & 6th March, 2023

ITEMBA, J.

The appellant, Joel Daniel @ Uncle John was charged and convicted with the offence of Unnatural Offence Contrary to Section154 (1)(a) and (2) of the Penal Code. The charge which was laid on the appellant's door disclosed that; on 14/9/2020 at Nyamatale Buhongwa, within Nyamagana District he had carnal knowledge of a child of 3 years against the order of nature, the child's name is withheld, he will be referred as the victim. Upon full trial, he was sentenced to life imprisonment.

The prosecution case was built by seven witnesses and one exhibit. The victim himself testified as PW1, not under oath, though he promised to tell the truth. Being a child of 4 years at the time was testifying, his testimony was brief, it is worthy quoting as hereunder:

> *"PW1: My school Friend is Grey. I live with my mother and aunt. I love my mother because she is a good person. I know Uncle John he is here today (PW1 identified the*

accused person). Uncle John hurts me in my buttocks (aliniumiza matakoni), we were at home that day, he hurts me with sand (aliniumiza na mchanga). I told my mom that Uncle John hurts me. (The child is too young to understand and respond to the questions asked)."

This evidence was corroborated by that of his mother, Fadhila Abas Chuwa who testified as PW2. She told the court that she was a tenant at the house of DW2, the appellant's sister house. That, the appellant was living in the main house while she was living in the side house with her young sister and her son, the victim. There was another tenant named Araya. That, she is a teacher and her son is a nursery student at the same school where she is teaching. Her daily routine was that she will leave her home with her son in the morning and in the evening, they will come back together. That the landlady (DW2) told PW1 that she doesn't have to stay with her son at school until late. She offered to pick him once he is dropped off by the school bus and stay with him until the time when PW2 will come back. They agreed and the victim started to be dropped at the landlady's house at 1500hrs for about 2 weeks.

She told the court that, on the incidence day at around 1530 hrs, PW2 called the appellant and informed him to pick the victim when he comes back from school. The appellant agreed and informed PW2 that the victim is already home. PW2 came back at around 19:00hrs and found the landlady (DW2) and her children were sitting outside. The victim was

standing outside looking weak and sad. PW2 asked as to why the victim is in such situation, and the response was that he has just woke up. That, he took the victim inside their house and he said he wanted to use the toilet; when he started to pass the stool, he complained that his anus is painful. That, she tried to touch his anus and she touched blood. Upon asking the victim as to what happened, the victim mentioned that is the appellant "Uncle John" who hurt him in the room. She asked the landlady on whether the victim went outside the gate she said he didn't go outside that he was just in the sitting room and he fell asleep and they took him to bed. That, the landlady advised PW2 to take the victim to the nurse (PW3) living nearby, who examined the victim and advised them to report the matter to police. PW2 also asked the teacher and driver of the school bus if the victim had faced any situation, they both said he was fine at school and was dropped at his house later. That, she went to Buhongwa Police Station, got a PF3 and went to Butimba Hospital where the victim was examined and given some medication.

Upon cross examination, PW2 clarified that usually it was the appellant's sister named Joyce who picked the victim from school but on the incidence day, PW2 called the appellant because Joyce has no phone, also she explained that the victim told her that when he was sleeping, the appellant put sand in his anus. Dr. Athanas Buberwa who testified as

PW4, told the court that, he examined the victim and noticed that he had bruises and the outer part of the anus was swollen while the inner part was intact. He concluded that the bruises were from a blunt object which was forced to penetrate the anus from outside, because if the bruises were caused by hard faeces, the (bruises) would have been visible from inside. PW4 also tendered a PF3 which was admitted as **Exhibit P.1** to support his testimony.

It was evidence from **PW5 E 499 Ramadhani**, a Police Officer, that he recorded a cautioned statement of the appellant and other prosecution's witnesses. The victim's teacher PW6 told the court that on the incidence day the victim was physically fit and she handled him to his mother, who was also a co-teacher. The school bus driver testified as PW7 and informed the court that, on the incidence day, the victim was physically fit. He dropped off the victim at Furaha area together with other 2 students whose names are also withheld. That he does not know the victims' house as they are usually picked by a girl, but on the fateful day the girl was not there. The 7 witnesses enabled the prosecution to close its case.

The appellant defended himself under oath and he called (6) six witnesses. He explained that, he is a teacher by profession though unemployed. On the fateful day, he was at the scene but he was busy

cleaning the windows as he was instructed by his brother in law. That, he was up on the ladder and at 16:00hrs and he saw the victim coming home with his school mate named AX. They knocked the gate, he asked one Linda to open, she did. At around 18:30hrs one student named Elias came to ask for help with his studies, he helped him and at 19:00hrs PW2 came back home. That, at 20:00hrs when he was watching news, he received a text message from PW2 asking him to go at her place and while there, PW2 accused him of having carnal knowledge with the victim against the order of nature. The appellant he denied the allegations, he told the court that, being a teacher, he used to teach kindergarten children of same age as the victim and he has never done anything like that because he is ethical.

DW2 is the appellant's sister, the landlady who states that when the victim came home, her daughter Linda picked him, the victim slept on the sofa and DW2 asked Linda to take the victim to her (Linda's) bedroom. When the victim woke up, he joined them outside playing with DW2'other children. DW2 repeats the testimony by PW2 and that at first PW2 told her that the victim is having a hard stool which is stained with blood. That, soon thereafter PW2 stated that the victim is complaining of being carnally known by the appellant against the order of nature. That, she accompanied PW2 and the victim to a nearby nurse whom she knew and

the nurse advised them that it is a serious matter they should go to the hospital. That, while on the way to the nurse, the victim looked fine and he walked for about 15 minutes without any difficulty. Linda A. Assey (DW3) corroborated the evidence by the appellant and DW2. Gilbert Apolinary (DW4) 19 years, explains that he is the one who slept with the victim on the fateful day on his bed. That he was sleeping with his young brother John and then DW2 brought the victim to sleep on the same bed and at 18:00hours the victim asked for drinking water, DW2 gave him water and they went outside.

Based on this evidence the appellant was convicted and sentenced as mentioned earlier and he is appealing to this court armed with 2 grounds:

1. *That, the Trial Court erred in law and in facts for convicting and pass sentence to the appellant while the case was not proved beyond reasonable doubt.*
2. *That, the Trial Court erred in law and in facts for convicting and pass sentence to the appellant without properly considering, evaluating and analysing appellant evidence.*

At the hearing, the appellant was present and he was represented by Messr. Steven Kitali and Baltazar Mahai, both learned counsels, while Ms. Rehema Mbuya appeared for the respondent.

Mr. Kitale submitted that; in order to prove the offence against the appellant, 2 things needed to be established (i) penetration (ii) against the order of nature. He argued that, there was no proof of penetration as the victim talked about sand being put in his anus. He relied on the case of **Dadi Salum Likalala @ Chipapa v R** Criminal Appeal no. 39 of 2021 were the court held that the words *'amenichokonoa na mti akionyesha matakoni'* meaning *'he inserted a piece of wood while pointing his buttocks'* were not enough to prove the offence of unnatural offence. He also raised contradictions of time of the alleged offence between PW2 and PW5 the medical Doctor and submitted that Section 210 (3) and 135 (f) of Criminal Procedure Code were not complied with. He also submitted on the issue of contradiction on the dates of incidence between prosecutions witnesses and the charge sheet. That, the charge sheet did not show the date and place of the incidence. That, the PF3 shows that PW1 was examined as a victim of rape and not unnatural offence, and the said examination was done 24 hours after the incidence. That, there is a big difference of the victim's name throughout the prosecution case the accused could not have understood and defend himself properly.

The 2nd Attorney Mr. Baltazar argued the second ground of appeal. He submitted that the court did not consider the appellant's evidence. That, there is a contradiction on what time PW1 reached home and that

the chain of transaction is clear that on the incidence day, the victim did not come across the appellant between the time when he reached the scene and the time when he was handled to PW2. That, if the appellant was cleaning the windows he could not have reached down and called DW3. That, the whereabout of the victim before going to the hospital were unknown and that the appellant went to police by himself thus, he did not commit any offence.

In rebuttal Ms. Mbuya strongly opposed the appeal. In respect of the 1st ground she explained that the evidence reflects at page 12 of proceedings that the *voire dire* test was done to PW1. That, PW1 did a dock identification that he knew uncle John, and he stated that uncle John hurt him on his buttock using sand.

She argued that, at page 12 of proceedings, there are remarks from the trial magistrate that the child is too young to understand the questions and even in the judgment the same issue of age is mentioned.

As regards to alleged contradictions by the appellants' counsel she stated that based on the age of PW1, the child can be fearful but the main evidence was established. She objected to the submission that there were contradictions on the date of the incidence, she submitted that PW2 testified that the offence took place on 14th September and that the victim was examined on 15th of September 2020.

As regards the issue of penetration, the learned state attorney stated that the PF3 (Exhibit P.1) is very clear and even testimony of PW4 that the spinster muscles are elastic but from inside and the child would have been hurt from outside by a blunt object forcing from outside. That, this evidence there was penetration. She argued that the victim mentioned to PW2 that it was uncle John who put sand to him, then, 2 hours later, the victim is in pain, and the Medical Dr. proved penetration. Therefore, the issue would be who is responsible. She submitted further that it was explained by defence that DW1, DW3 and others could have seen the appellant clearing windows from inside however there was no sketch map showing if the spot where the rest of the family members were sitting, they could monitor the movements of appellant. As regard the cited case of **Dadi Salum Likalala** referred by the respondent, she contradicted it and cited the case of **Hassan Bakari @ Marwa Juho versus Republic Criminal Appeal No. 103/2012** (Court of Appeal of Tanzania) Mtwara. Where it was held that in sexual offences cases involving children there are so many reasons or factors which may prevent the witness from stating what happened. That in that case the victims could not explain further than *'dudu' 'cheche' and 'mti'* to refer to sexual intercourse. In respect of the contradiction of the date, she stated that the main witness PW2 mentions 14/9/2020 and the rest of the testimony

supports that. The different of the date by the investigator only is not fatal and it could be cured by **section 388 of the Criminal Procedure Act**. As to the PF3 she agreed that the date of the offence has changed but the 24 hours have not yet lapsed. That, the child takes time to heal even after 2 or 3 days still penetration can be proved. Therefore, she stated that a difference of few hours is immaterial. She finalised the 1st ground by stating that the landlady had no grudges with the victim's mother, therefore, there was no reason to for anyone to frame the case against the appellant.

In respect of the second ground, she explained that the evidence was properly analysed by the trial court. She referred this court to pages 14, 18 and 19 of the judgment where the magistrate analysed the evidence by defence regarding constipation, who picked the victim from school and regarding the number of male adults in the appellant's family. She finalised by stating that the victim was living with his mother therefore there was no need to call the victim's father as a witness as he was not even present at the scene.

Having dispassionately considered the evidence, record of appeal and both parties' rivalry arguments, the issue is whether the prosecution has established the offence of unnatural offence against the appellant.

Section **154 (1)(a)(2) of the Penal Code** establishes the offence of unnatural offence. It provides thus:

154.-(1) Any person who

(a) has carnal knowledge of any person against the order of nature;

(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.

Therefore, as rightly argued by the appellant's counsel the main 2 factors to be established were (i) The appellant had canal knowledge of the victim and (ii) Against the order of nature.

To begin with, I find it prudent to start with the doubts highlighted by the learned counsel. At the trial, the prosecution evidence established the following; **One;** there is no dispute that the victim arrived at the scene at around 15:00hrs and was received by Linda [DW3) in healthy condition. **Two;** the offence is alleged to have been committed between 15:00 hrs and 19:00 hrs. **Three;** the victim though through unsworn evidence mentioned the appellant as the responsible person with hurting him by adding sand in his anus. **Four;** there is a medical expect evidence indicating that the victim anus had bruises from outside. **Five;** there is no dispute that the victim was known to the appellant as they were living next doors to each other, using his last name and interchanging it with

the middle name won't confuse the appellant**. Sixth;** the appellant was ably represented by a learned counsel during trial who is expected to understand the proceedings and assist the appellant to understand. Therefore, as rightly argued by the learned senior state attorney, the contradictions are minor and do not go to the root of the case.

As to whether the unnatural offence was established against the appellant, I have painstakingly assessed the evidence of the victim who is a child of a tender years and a star witness. When it comes to receiving evidence of child Section 127 (6) of the **Evidence Act** is to the effect that:

> *6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may,* ***after assessing the credibility of the evidence of the child of tender years of*** *as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings,* ***the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth. (****emphasis supplied****).***

It means therefore, evidence of a child of tender years can be relied to convict if the trial magistrate is satisfied that the said child witness is

telling nothing but the truth. At page 11 of proceedings, the trial magistrate has noted that *a witness has been asked if he understand the meaning of telling the truth and that he promises to tell nothing but the truth*. I find that, the trial Magistrate has an opportunity to examine the child and saw his demeanour having doing that, his opinion at page 14 of the judgment was that;

> `*About 8 moths has passed from when the incidence occurred to the date of adducing evidence in court, the boy could not exactly state what hurt him but what really matters is that he managed to tell the court that he was hurt and who hurt him'*

This evidence of the victim is corroborated by the medical practitioner (PW4) that the victim had bruises in his anus which were from outside, and the other corroboration is from that of his mother PW2 on the fact that the victim could not pass stool easily and he had blood in his anus, therefore, the bruises were not caused by constipation.

I have also considered the trial Magistrate's approval of state attorney's submissions during trial that a 3-year-old would not lie and there is a reason why he pointed out the appellant out of more than five (5) people in the appellant's family. The victim was certain about the appellant hurting him and mentioned him on the same day, few hours after the incidence. I have also noted that although the appellant is supported by defence witnesses that on the fateful the evening, he was

cleaning windows from 16:00 hrs, it is also in evidence that in the same evening at 18:30 hrs, the appellant helped Elias with his homework and he went back to clean the windows up to 19:00hrs. It appears that, the cleaning of the windows was not a continuous activity. Because the evidence shows that the incidence is alleged to have happened between 16:00hrs when the victim came back from school and 19:00hrs when the victim's mother (PW2) came back home, the cleaning of windows explanation is not a reasonable doubt as it does not go to the root of the case.

Therefore, I am satisfied that the appellant was involved in hurting or causing the bruises as seen in the victims anus. However, what is still a troubling issue is whether the victim's statement at page 12 of typed proceedings *"Uncle John aliniumiza matakoni, aliniumiza na mchanga"* amount to carnal knowledge in terms of section 154 (1)(a) of the Penal Code.

In dealing with sexual offences the court has come across similar situations where a victim explains in the sexual intercourse but not in words which are direct inferring that there was penetration. In the renowned case **of Hassan Kamunyu v R**, Criminal Appeal no. 277 of 2016 CAT Arusha (unreported). It was held that:

> *"Thus words like "[he] removed my underwear and started intercoursing me" in Matendele Nchanga @ Awilo (supra),*

"sexual intercourse" or "have sex" in ***Hassan Bakari @ Mamajicho*** *(supra), "[he] undressed me and started to have sex with me" in* ***Nkanga Daudi Nkanga*** *(supra), "kanifanyia tabia mbaya" in* ***Athumani Hassan*** *(supra), "alinifanya matusi" in* ***Jumanne Shabani Mrondo*** *(supra) or "he put his dudu in mv vagina" in* ***Simon Erro*** *(supra) or "did sex me by force " "this accused raped me without my consent" "while this accused was sexing me I alarmed" and "fortunately one B s/o T came to my home and he found this accused still sexing" in* ***Baha Dagari*** *(supra) were, though not explicitly described, taken by the Court to make reference to penetration of the penis of the accused person into the vagina of the victim."*

I am bearing in mind the fact that the victim was just 3 years and relatively young. The victim might not even have understood what was happening to him because at his age, he is expected to have neither sexual knowledge nor experience; hence "*kuingiziwa mchanga matakoni*" that is sand being put in his anus is the best imagination he could have of the harmful act. It is my view therefore, based on PW1's wording in his testimony, carnal knowledge was proved.

It goes therefore, being guided by the mentioned decisions, by the victim's stating " "*Uncle John aliniumiza matakoni aliniumiza na mchanga*" these words are sufficient to establish carnal knowledge.

Having said that, I join hands with the trial Magistrate in sustaining both conviction and sentence against the appellant. The appeal has no merit and it is hereby dismissed.

It is so ordered.

Dated at **MWANZA** this 6th day of March 2023.

L. J. ITEMBA

JUDGE

Right of appeal explained.

L. J. ITEMBA
JUDGE
6.3.2023

Judgment delivered in the presence of the appellant in person and Ms. Gladys Mnjari RMA in the absence of the respondent.

L. J. ITEMBA
JUDGE
6.3.2023