IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 06 OF 2022

(Arising from the decision of the District Court of Mpanda at Mpanda in Criminal Case No. 74 of 2021)

ENOCK S/O GOSBERT@ DUDU..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

23rd February & 21st June, 2023

MRISHA, J.

The appellant **Enock Gozbert@ Dudu** was arraigned before the District Court of Mpanda at Mpanda with one count of Unnatural Offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16 R.E. 2019]. It was alleged by the Republic that on 7th day of May, 2021 at Tulieni area within Mpanda District in Katavi Region, the appellant had carnal knowledge of one (BE) a child of 3 years old against the order of nature.

Being dissatisfied with the conviction and sentence of the trial court, the appellant has come before this court armed with three grounds of appeal. I take liberty to list his grounds of appeal thus: -

1. *That, the trial Court erred in law and fact by convicting the Appellant on the case which was not proved beyond reasonable doubt,*
2. *That, the trial Court erred in law and fact by convicting the appellant by not considering the evidence testified by PW4 Philipo s/o Felix who examined the victim without scientific instrument,*
3. *That, the trial Court erred in law and fact by not considering that the evidence testified by the prosecution witnesses was hearsay evidence.*

At the hearing of appeal before this court, the appellant was present, legally unrepresented, whereas the respondent was represented by Ms. Safi Kashindi, Learned State Attorney. The appellant took off his journey of fighting for his freedom by requesting this court to adopt his grounds of appeal as his submission in chief and set him free.

On the prosecution side, Ms. Safi Kashindi supported both the conviction and sentence passed by the trial Court. She submitted on the first ground of appeal raised by the appellant that the prosecution side proved their case by providing a total of six witnesses. That PWI is a mother of the victim who left her daughter of three years at home and later found her to the unfinished house (**Pagala**), being unable to walk and she was inserted a penis into her anus. PW1 managed to arrest the appellant inside the pombe shop *'kilabuni'* and the appellant whose trouser was found dirty on the part of knees, wanted to run away; her evidence is shown at page 8 to 11 of the typed proceedings.

The second witness being PW2 who is a victim of an offence. Her evidence is shown at page 13 of the typed proceedings. She identified the appellant as the one who inserted his penis into her anus. Ms. Kashindi further submitted that the evidence of the victim is reliable and acceptable. To bolster her argument, she referred the case of **Selemani Makumba vs Republic**, TLR 2006 page 379 in which it was stated that: -

"True evidence of rape has to come from the victim..."

Moreover, the prosecution side brought PW3 who owned a pombe shop and sell local brew shop which is near to the unfinished house. PW3 saw

appellant taking the victim to the shop to buy her some sweets. Thereafter the appellant returned to the pombe shop '*kilabuni*'; then the victim went to the shop and identified the appellant who wanted to run away. PW3 was also there when the appellant apologized for what he had done.

She submitted further that the evidence of PW3 was corroborated by the evidence of PW4 who is a Clinical officer who examined the victim and found fresh bruises in her anus; PW4 also observed that in the victim's vagina there was a reddish color and bruises were sustained about two hours, she had a hymen and her anus was loose.

The appellant confessed before PW5 whose evidence is shown at page 29 to 30 of the typed proceedings. The cautioned statement was tendered and admitted as exhibit P3; the same was read over aloud before the trial court. The learned State Attorney further argued that the cautioned statement may prove the offence against accused person. She referred the provisions of section 27(1) of the Evidence Act, [Cap 6 R.E. 2022].

> *"A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person"*

Finally, the prosecution side called PW6 who is a Justice of Peace, he recorded the Extra Judicial Statement of the appellant and tendered the document which was admitted as exhibit P4. Likewise, the document was read over to the court. Ms. Safi Kashindi argued that the extra judicial statement can be used to convict the accused person. To support her proposition, the learned counsel referred the provision of section 28 of the Evidence Act [Cap 6 R.E. 2022]. Therefore, she submitted that the aforementioned witnesses' evidence adduced before the trial court proves the case beyond any reasonable doubts.

Regarding the second ground of appeal, Ms. Kashindi argued that the ground has no merit. She argued to prove the sexual offence one has to consider whether there was penetration. The learned counsel contended that PW4 who is a clinical officer examined the victim and found she had bruises on her anus and those bruises were fresh and the anus is loose. She further argued that in examining the victim, PW4 does not need to have scientific instrument to see if the victim has bruises, her anus is loose and her private part are reddish, but through his eyes PW4 will be able know the victim's problem.

Regarding the third ground of appeal, Ms. Safi Kashindi argued that the prosecution's evidence was not hearsay evidence; their evidence was portraying about a material fact, hence it is true on the offence committed by the appellant.

She referred the evidence of PW3 who saw the appellant taking the victim and later he revealed that victim was carnally knowledge with the appellant, when the appellant attempted to run, then he apologized on what he was done, the PW3 was there. The victim identified the appellant at the "pombe shop" this proves that the victim knew the person who committed the offence. Hence, the evidence of prosecution does not fall under the category of a hearsay evidence.

Indeed, the evidence of PW2 who is a victim and who testified before the trial court is shown at page 12 to 13 of the typed court proceedings. Further, the cautioned statement of the appellant who confessed before PW5 is revealed at page 29 to 30 of the typed court proceedings. He also confessed before PW6 who is a Justice of Peace and his statement was admitted as an exhibit. This is shown at page 32 to 34 of the typed court proceedings.

The learned State Attorney argued that the above evidence cannot be treated as hearsay evidence because it comes from the appellant. Therefore, the trial court was justified to believe such evidence since the evidence is not hearsay but direct evidence. To bolster her argument, she referred the case of **Goodluck Kyando v Republic**, 2006 TLR 363.

Having said all the above, the learned State Attorney submitted that the appeal lodged by the appellant has no merits, thus she prayed this court to dismiss it and upheld both the conviction and sentence imposed on the appellant. In rejoinder, the appellant had nothing to add rather than praying this court to consider his ground of appeal and set him free.

Having carefully considered the grounds of appeal, the submissions made by the parties as well as the records before me, I now turn to determine the grounds of appeal raised by the appellant. Going by his grounds of appeal, I will determine them accordingly. The crucial issue for determination is whether the prosecution case was proved beyond reasonable doubt against the appellant.

It is elementary that the duty to prove a criminal case lies on the prosecution and the standard of proof is beyond reasonable doubt as dictated under section 144 of the Evidence Act. The phrase *"proof beyond*

reasonable doubt" was discussed in the case of **Magendo and Another v Republic**, [1993] TLR 219 where the Court stated as follows: -

> *"For a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

In this case, the learned State Attorney strongly argued that the case against the appellant was proved beyond reasonable doubt and, rightly so in my view. In the offence of unnatural offence with which the appellant stood charged, the prosecution was required to prove two ingredients which are, sexual intercourse/penetration and second that the appellant committed the offence against the order of nature.

After examining the record, particularly the evidence of PW1 who is the mother of a victim and the one arrested who the appellant inside pombe shop *"kilabuni"* it is obvious that the appellant was properly identified by the victim as the person who inserted his penis *'mdudu'* into her anus as a result she was unable to walk.

It is apparent that the victim identified the appellant in the presence of PW1 and PW3 at the pombe shop, after being identified by the victim the appellant apologized for what he had done to the appellant. It is a settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incidents such as doctors, may give corroborative evidence. (See the case of **Alfeo Valentino vs Republic**, Criminal Appeal No. 92 of 2006 and **Shimirimana Isaya and another vs Republic**, Criminal Appeal No. 459 and 494 of 2002 (all unreported).

Indeed, at the trial of the appellant, one **Dr. Filipo Felix Mwita** of Katavi Referral Hospital testified for the prosecution. His evidence was that he examined PW2 on her private parts in her anus and he guardedly said that there were bruises in her vagina with reddish color, she was complaining for pain in all parts.

The bruises were fresh of like 2 hours. She had her hymen but her anus was loose and the doctor noticed that she (the victim) was penetrated by a brunt object. Being an expert that was the best he could tell. It was not within his province to conclusively tell the Court that PW2 had been raped.

In fact, the evidence of PW3 was corroborated by the evidence of PW4 clinical officer and PF3 which was admitted as exhibit P2. The assertion that the evidence of prosecution proved the offence made by Ms. Kashindi Learned State Attorney, in my view, is supported by the authority of **Seleman Makumba** (supra) where the Court of Appeal of Tanzania had these to say: -

> *"It is, of course, for the prosecution to prove the guilty of an accused person beyond reasonable doubt and an accused person does not assume any burden to prove his innocence.*
>
> *A medical report or evidence of a doctor may help to show that there was sexual intercourse, but it does not prove that there was rape that is unconsented sex, even if bruises are observed in the female organ. True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant, that there was penetration."*

In this case under my consideration the victim, "BE" said the appellant inserted his *"mdudu"* male organ into her anus. That was penetration and since she is minor, she had not consented to the act that was unnatural

offence. The evidence of PW2 was corroborated by the evidence of Clinical officer (PW4) and documentary evidence admitted in Court i.e. PF3, appellant caution statement and extra judicial statement which was admitted as an exhibit in Court.

The term *"mdudu"* referred by "BE" was rightly understood by the trial Court to mean a male organ and its reference depends on the circumstances of each case and background of a particular witness. In this case, the victim used the term *"mdudu"* as a male organ because of her age, is understandable. This position was stated in the case of **Hassan Kamunyu v Republic**; Criminal Appeal No. 277 of 2016 (unreported) where the Court held that:

> *"There are circumstances, and they are not few, that witnesses or even the court would avoid using such direct words as penis or vagina and the like, for obvious reasons including, but not restricted to that person's cultural background upbringing, religious feelings, the audience listening, the age of the person, and the like.*
>
> *These "restrictions" are understandable, given the circumstances of each case. Our considered view is that, so*

long as the court, the adverse party or any intended audience grasp the meaning of what is meant then, it is sufficient to mean or understand it to be the penetration of the vagina by the penis."

Likewise, in the instant case though the victim did not exactly mention the male organ for whatever restrictions, I am of the considered view that she meant nothing put penetration of the penis into her anus. Moreover, the victim sufficiently explained how the appellant penetrated his penis into her anus.

However, apart from the evidence of the victim, there is her mother PW1 found victim inside unfinished house unable to walk; she inspected her and found bruises and white mucus on her anus. There is also the evidence of PW4, a clinical officer who found bruises in her vagina were reddish in color and her anus was loose. Furthermore, there is evidence of PW3 who was present when the victim identified the appellant at pombe shop.

In the light of the testimonies of the four witnesses above, plus exhibit P2, I am positively satisfied that, the prosecution proved its case beyond reasonable doubt and I see the first ground of appeal to have no merit.

As regards the second ground of appeal that there was no proof of the scientific instrument used by PW4 **Philipo Felix** to examine the victim. According to PW4 his examination was physical. As contended by Ms. Kashindi, Learned State Attorney, to prove sexual offence is whether penetration was made. She further contended that, PW4 examined the victim and found she had bruises on her anus and that bruises were fresh and her anus is loose. PW4 did not need to use scientific instrument to see if the victim had bruises, her anus is loose and her private parts are reddish. By visual he could be able to know the victim's problems. The second ground of appeal also fails.

As regards the third ground of appeal that the evidence testified by prosecution witnesses was hearsay evidence, it is important to refer the principle of evidence that hearsay evidence is inadmissible. Hearsay evidence is evidence based not on a witness's personal knowledge, but on another's statement not made under oath.

In this case the prosecution' witnesses did not give hearsay evidence. Asserting from the evidence of the victim who identified the appellant at the earliest opportunity at the pombe shop; the evidence is in no way

hearsay evidence. Not only that, but also the evidence of PW1, PW3 and PW4 are not hearsay evidence.

PW1 found the victim inside unfinished house being unable to walk and after inspecting her, she found bruises and white mucus on her anus. While PW3 saw the appellant taking the victim and later he revealed that the victim was carnal knowledge with appellant; PW3 was there when the appellant apologized on what he had done to the victim. More so, the extra judicial statement was tendered by PW6 and admitted in Court as exhibit P4; it clearly shows that the appellant he confessed before PW6 who is a Justice of Peace. The confession was made by the appellant himself; this is not hearsay evidence.

In addition, PW5 recorded the appellant's caution statement, statement was tendered in court but was objected by the appellant that he was threatened. The trial court admitted the caution statement without conducting a trial within trial which was contrary to procedure of the law. This position was stated in the case of **Makumbi Ramadhani Makumbi and 4 others vs Republic**, Criminal Appeal No. 199 of 2010, CAT (unreported) where it was stated that: -

"...the only way for every trial court to satisfy itself on the voluntariness of a disputed accused's statement is by holding a trial within trial..."

Failure to conduct trial within trial is a procedural irregularity and it is fatal; the remedy for failure to conduct trial within trial is to expunge the caution statement from the record. I expunge the caution statement from the record. The remaining evidence does not amount to hearsay evidence. In the premise, I conclude by dismissing the appeal for being devoid of any merit. The conviction entered and sentence meted out to the appellant by the trial court are upheld.

It is so ordered.

A.A. MRISHA
JUDGE
21.06.2023

Date at **Sumbawanga** this 21st Day of June, **2023.**

HIGH COURT OF TANZANIA

A.A. MRISHA
JUDGE
21.06.2023

Date - 21/06/2023

Coram - Hon. M.S. Kasonde, DR

Appellant - Present in person

Respondent - Mr. Mwakibolwa David, State Attorney

B/C - Kawawa

Mr. Mwakibolwa David, State Attorney for respondent: I am assisted by Mr. Neema Nyagawa State Attorney. This appeal is for judgment today and we are ready.

Appellant: I am prepared too for judgment.

Court: Judgment delivered this 21st day of June, 2023 in the presence of the appellant who appeared in person and in the presence of Mr. Mwakibolwa, State Attorney being assisted by Ms. Neema Nyagawa, State Attorney for the Respondent.

HIGH COURT OF TANZANIA

M.S Kasonde
Deputy Registrar
21/06/2023

Right of appeal to the Court of Appeal fully explained.

M.S Kasonde
Deputy Registrar
21/06/2023