THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 149 OF 2022

(Originating from the District Court of Chunya District at Chunya, in Criminal Case No. 64 of 2022)

CHANGE MOHAMED MAWANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: 21/02/2023
Date of Judgement: 30/06/2023

Ndunguru, J.

Before the District Court of Chunya District at Chunya in Criminal Case No. 64 of 2022 Change Mohamed Mawanga (the appellant) was charged with two counts of sexual offences. First count was rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019, and the second count was unnatural offence contrary to section 154 (1) (a) of the same law.

It was alleged by the prosecution in the particulars of the offence that on diverse date April, 2022 at Mlimanjiwa village within Chunya

District and Mbeya Region the appellant did have carnal knowledge to **SM** (name withheld for protecting her dignity, henceforth to be referred as the victim or PW2 interchangeably) a child girl aged 4 years old. Also, that the appellant penetrated the victim against the order of nature. The appellant pleaded not guilty to both counts.

The case went to a full trial, the prosecution lined up three witnesses and tendered one documentary exhibit i.e a PF3 (exhibit PE 1). In turn the appellant fended himself and called no witness. At the end of the trial, he was convicted of both counts and sentenced to serve life imprisonment in each count. The sentences were ordered to run concurrently. Aggrieved by both the conviction and sentence, the appellant preferred the present appeal.

The facts of the case are not complicated, can be briefly narrated as that, when the victim's mother (PW1) was in the process of bathing the victim, she (the victim) told her that she was feeling serious pain in her anus and vagina. PW1 told that fact to her mother (PW1's mother) who advised the victim to be taken to hospital for examination.

At the hospital the Doctor (PW3) made a preliminary examination when he found the victim with some warts in her anus was further found to be infected with sexual transmitted diseases (STD) of Syphilis.

Then a social welfare was invited to talk to the victim and for further medical examination. Medical examination found that the victim's hymen was perforated and swelling at her labia minora and labia majora. It was also found some warts inside and outside the victim's anus. It was the Doctors view that the victim was penetrated by a blunt object in both her vagina and anus.

When the victim was asked about who raped her, she said it was uncle CHANGE, (the name of the appellant). Thereafter the appellant was arrested then arraigned to the trial court for the above offences.

At the beginning, Mr. Emmanuel Clarence, learned counsel for the appellant filed a petition of appeal comprising of four grands of appeal. At the later stage, upon the leave of this Court he filed a supplementary petition of appeal containing two grounds of appeal. Then, counsel for the appellant abandoned some grounds in the first petition of appeal thus, remained with three grounds to wit; **one,** that the trial court erred in law for failure to test PW2 on whether she understood the nature and meaning of an oath and how the court before taking her evidence, **two,** that the trial court erred in law for failure to indicate what transpired before PW2 promise to tell nothing but the truth and **three,** that the

trial court erred in law in convicting and sentencing the appellant while the case was not proved beyond reasonable doubt.

At the hearing of the appeal the appellant was represented by advocate Emmanuel Clarence while the respondent/Republic was represented by Ms. Agnes Ndanzi learned State Attorney.

To set the ball rolling, advocate Clarence started arguing that the court acted against the requirement of section 127 (2) of Evidence Act, Cap. 6 R.E 2019 in receiving the evidence of PW2 a child of tender age. He contended that though the law allows a child of tender age to give evidence without oath upon promising to tell the truth, the trial court was duty bound to show on the record how it was satisfied that the child did not know the meaning and the nature of oath. He also argued that the trial court did not record the questions which it asked the witness so as to reach to the conclusion that she did not know the meaning of oath for her to promise to tell the truth.

Mr. Clarence was of the view that the trial court committed fatal irregularities which rendered the evidence of PW2 not properly received the consequence of which is to be discarded and disregarded. He supported his stance with the case of **Ramson Peter Ondile v. R.** Criminal Appeal No. 84 of 2021 Court of Appeal of Tanzania (CAT) at Dar

es Salaam (unreported). On that bases he argued that the remaining evidence cannot prove the charge.

Regarding the complaint that the charge was not proved against the appellant, Mr. Clarence submitted that the evidence of PW2 and PW3 contradicted since PW2 only said that she was raped but PW3 said she was raped and sodomized as the result, the appellant was convicted for rape and unnatural offence. He also argued that there was no evidence to prove the offence of unnatural and the offence of rape since the evidence of PW2 was received contrary to law. Mr. Clarence prayed for this court to allow the appeal by quashing the conviction and set aside the sentence or the case be ordered for retrial.

On her part, Ms. Ndanzi resisted the appeal. She submitted that the trial court adhered to section 127 (2) of Cap. 6 which allows taking evidence of a child of tender age to be done upon oath or promise to tell the truth. She also argued that the law does not provide for the manner the court should reach to the conclusion that the child does not know the nature of oath. To support her argument, she cited the case of **Seleman Mose Sote vs R.** Criminal Appeal No. 385 of 2018 CAT (unreported). It was Ms. Ndanzi's view that the evidence by PW2 was properly received as she promised to tell the truth.

As to whether the charge was proved or not, Ms. Ndanzi submitted that the evidence of PW2 and PW3 proved the charge to the required standard. That PW2 told the trial court how she was penetrated and PW3 with exhibit PE1 proved all ingredients of rape and unnatural offence. Ms. Ndanzi therefore urged this court to dismiss the appeal and sustain the conviction and sentence.

When Mr. Clarence was invited for rejoinder, he had nothing to add.

I have considered the submissions by the parties, the record and the law. In determining the merits or demerits of this appeal, this court will resolve two issues; **firstly,** whether or not the evidence of PW2/victim was properly received and **secondly,** whether the charge against the appellant was proved to the required standard.

Starting with the first issue, whether or not the evidence of PW2 (the victim) a child of 4 years was properly admitted. The appellant's counsel is unanimously arguing that the evidence was not properly admitted on the reason that the proceedings do not show the question asked to the victim for the court to conclude that she did not know the nature of oath hence give evidence upon promise to tell the truth. The learned State Attorney has maintained that the evidence was properly

given and admitted as long as the victim firstly promised to tell the truth. It was her argument also that the law i.e section 127 (2) does not provide for the manner to arrive to the findings that a witness of tender age does not know the meaning and nature of oath.

It should be noted at the outset that the requirement of asking a witness of tender age as to whether he/she knows the nature of oath or not emanates from the legal requirement of every witness in a criminal case, subject to the provisions of any other written law, to give evidence upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act – section 198 (1) of the Criminal Procedure Act, Cap. 20 R.E 2022.

However, one of the exceptions to that requirement relates to witnesses of tender age who do understand the meaning and nature of oath as per section 127 (2) of the Evidence Act where a witness is required to promise to tell the truth to the court and not to tell lies. The contentious between the counsel for the parties in this case locks horns on how should the court arrive to the findings that a witness of tender age does not understand the nature of oath so as to promise to tell the truth.

In the cases of **Ramson Peter Ondile v. R**. (supra), **Issa Salum Nambaluka v. Republic,** Criminal Appeal No. 272 of 2018, CAT at Mtwara (unreported) and **John Mkorongo James v. R.** Criminal Appeal No. 498 of 2020 (unreported) the Court of Appeal when discussing the provision of section 127 (2) stated that:

> *"The provision enjoins trial courts when dealing with children of tender age as witnesses, to still* ***conduct test on such children to test their competence****. It is unthinkable that s. 127 (2) of the Evidence Act can be blindly applied without first testing a child witness if he does not understand the nature of an oath and if he is capable of comprehending questions put to him and also if he gives rational answers to the questions put to him."*
>
> (Emphasis added)

As above indicated the Court of Appeal stated that to ascertain if a witness of tender age knows the nature of oath a trial court has to conduct test on such child to test competence and if he/she gives rational answers to the questions put to him. Most important to be noted as it was also said in **Ramson Peter Ondile v. R.** (supra) and **Wambura Kiginga v. R.** Criminal Appeal No. 301 of 2018 is the

principle that each case must be decided on its own facts and the core function of the court is to ensure that justice is done by whatever means.

Following the principles above, I consider it pertinent to reproduce how the trial court recorded before it received the evidence of PW2. It is as follows:

> *"**PW2:** (.....) 4 years old, A kindergarten pupil, Resident of Mlimanjiwa village.*
>
> ***Court:** Since a victim PW2 is a child under 14 years old, I addressed her in terms of section 127 (1) and (2) of the TEA, CAP 6 RE 2019.*
>
> ***PW2:** I promise to tell nothing but the truth.*
>
> ***Court:** The child promised to tell the truth and she possessed interigent(sic) enough to testify and because of her age she is not preferred to testify under oath section 127 (1) (2) of TEA [CAP 6 RE 2019] is complied with."*

What I gather from the above; the trial Magistrate indicated to have addressed the witness (a child of tender age) in terms of section

127 (1) and (2) of the Evidence Act. He (the Magistrate) then indicated that the witness possessed intelligent enough to testify. Most important it is recorded; PW2 herself promised to tell nothing but the truth. In my considered view the trial Magistrate would not reach to the finding that the witness possessed intelligent to testify without conducting test to her. My respective view is supported by the statement of the trial Magistrate that he addressed the witness in terms of section 127 (1) (2) which means that he asked the witness if she knew the nature of oath that is why the witness thereafter promised to tell the truth.

The contention by the counsel for the appellant that the record should indicate questions asked by the court and the answers responded by the witness, in my view, that trend would be regarded as good practice for ensuring transparency of court proceedings. However, the indication that the law has been observed would be sufficient as much there is no law offended and in the absence of injustice occasioned to the parties or to any one of the parties.

In the premises, for the above reasons I find that the evidence of PW2 was properly received in accordance with section 127 (2) of the Evidence Act. The related ground of appeal therefore is dismissed.

With regard to the second issue of whether the prosecution ably proved the charge beyond reasonable doubt. It was the counsel for the appellant's complaint that the offence of unnatural was not proved. I have gone through the evidence of prosecution witnesses, particularly that of the victim, PW2, which is considered to be the best evidence in rape cases. See**: Selemani Makumba v. Republic** [2006] TLR 379; **Hamis Mkumbo v. Republic,** Criminal Appeal No. 124 of 2007 (unreported) and **Rashidi Abdallah Mfungwa v. Republic**, Criminal Appeal No. 91 of 2011 (unreported).

In my ascertained view, I concur with the appellant's counsel. The count of unnatural offence was not proved. This is because, the victim did not say anything about being penetrated in her anus. It was indicated by the trial court at page 12 of the typed proceedings that PW2 said; *"That Change hold my hand and penetrated his dudu here (she pointed her vagina area."* In the upshot it unsafe to rely on the evidence of PW3, a Doctor that the victim was penetrated in her anus since the essence of medical examination is to prove penetration not a perpetrator.

Now, after the findings that unnatural offence was not proved, it is time to see if the remaining count, i.e rape was proved. It was the

learned State Attorney's view that the offence was proved since the victim managed to tell the trial court how the appellant penetrated her. She was also mindful of the principle in rape cases that penetration however slight suffices to prove the offence of rape.

I concur with the learned State Attorney on the principle of penetration per section 130 (4) (a) of the Penal Code and the case of **Mathayo Ngalya @ Shabani v. Republic,** Criminal Appeal No. 170 of 2006 CAT (unreported) where it was stated that:

> *"The essence of the offence of rape is penetration. For the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence."*

Also, it is true as contended by the learned State Attorney, the victim mentioned the appellant as the perpetrator, nonetheless, the evidence to be believed and base a conviction must pass to the credibility test. Credibility of witness can be determined not only by demeanour but also on coherence of testimony and relation of the evidence with other witnesses including that of the accused person; see **Shaban Daud vs Republic,** Criminal Appeal No. 28 of 2000 CAT at Dar

es Salaam (unreported) and **Goodluck Kyando vs Republic** [2006] TLR 363.

In this case of the victim did not state in her evidence about the pain she experienced as the result of being penetrated by the appellant. On that fact it is where the learned State Attorney forms the opinion that penetration presupposes slight. However, in my concerted view I do not think if the victim's evidence was credible. I will demonstrate why. The evidence by PW1 was that the victim told her that she was feeling serious pain in her anus and vagina. PW3 and exhibit P1 stated that the victim's hymen was perforated and swelling in labia minora and majora. This piece of evidence suggests penetration which is more than slight penetration. Should I now find evidence of these witnesses corelating with that of PW2? Probably, not.

Moreover, there is no specific date of when the offence was committed. But according to PW1's reply to the question asked by the appellant during cross examination the estimation was that the offence was committed about a week before PW2 relayed the information of feeling pain. Questions may arise how the victim a child of four years after the ordeal managed to walk unnoticed of feeling pain. Why a person like her grandfather whom she lived with was not told about

incidence. Is it imaginable that the victim did not bath for a week, if she did a person who helped her to bath did not notice anything or was not told about the pain.

In the parity of thinking, considering that the penetration was deep, it therefore does not occur to me that a child of 4 years who has been raped by a man to the extent of sustaining injuries for a period of more than a month could just proceed with her life normally and go unnoticed for the whole period by her grandfather. It also does not occur to me that a child of 4 years who has been raped by a man to the extent of sustaining injuries for a period of a week could be able to walk stably and go to school as it was said that she was in kindergarten. In my view, the Hon. Magistrate ought to have considered these facts while assessing the credibility of the evidence adduced by prosecution witnesses so as to arrive at a just decision.

There is also evidence that the victim was found infected of STD. The appellant in his defence told the trial Court that the police took his blood sample for test but never gave results back. He was interested to know if the STD found with the victim was also with him. In view it would have added weight to the prosecution evidence if the appellant

status of STD would have adduced considering that the prosecution did not cross-examine him about that fact of his blood to be taken for test.

In the light of the above analysis, I am confident to hold that the prosecution's evidence left a lot to be desired as the result, I hereby allow the appeal quash the conviction and set aside the sentence imposed on the appellant. I order the appellant be released from prison unless he is held therein for another lawful cause.

It is so ordered.

D.B. NDUNGURU

JUDGE

30/06/2023