THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOSHI)

AT MOSHI

CRIMINAL APPEAL NO. 08 OF 2023

(From Criminal Case No. 25 of 2022 before the District Court of Mwanga at Mwanga)

ANTON s/o RAMADHANI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: 31.07.2023
Date of Judgment: 28.08.2023

MONGELLA, J.

The appellant herein was arraigned before the District Court of Mwanga at Mwanga for two offences being; one, incest contrary to section 158 (1) (a) and; two, unnatural offence contrary to section 154 (1) (a) and (2), both under the Penal Code, Cap 16 R.E. 2019. The particulars of the offences are that: on diverse dates and time in 2019, at Kiriche village within Mwanga District and Kilimanjaro region, the appellant, who is the father of one WA (name intentionally withheld) a 15-year-old girl, did have carnal knowledge of her without her consent against the order of nature.

The facts of the case as drawn from the prosecution evidence are that: the appellant is the father of the victim (PW4) and the two resided in the same house at Usangi. One night in 2019, when the appellant's wife and mother of the victim (DW2) had travelled, the appellant came home drunk. PW4 opened the door for him. He checked if the younger children had slept. Then he told PW4 to sleep in his room whereby she refused. The appellant insisted and forcefully grabbed her hand and covered her mouth with a piece of "*Khanga*" that was on the veranda and tied her up. He then pulled her to his room, undressed her, applied oil on his penis and then inserted the same in both her vagina and anus. Thereafter he left her on top of the bed, bleeding while pus came out of her vagina. The victim fainted until morning whereby her siblings found her in that state and called their neighbour. Her siblings however could not explain to their neighbour as what had happened to PW4. When DW2 came back the same day, she did not report to her on what had happened as she was threatened by the appellant. The appellant continued doing such acts to PW4 on many other occasions.

The victim completed her primary school education (standard VII) and joined Usangi Day secondary School. While in Form two, she told one Fatuma Ramadhani (a Form six student) about the ordeal she had been going through in the hands of the appellant. On 23.02.2022, at 19:00hrs, one Jazira Sawaya Msangi (PW1), a member of Mtakuwa Committee which is a gender desk for women and children at Korongwe Ward was called by a fellow committee member one, Cliff Mjema, who informed her that there was an incident reported at Usangi Day Secondary School that there was a child sodomized by her father. PW1 met PW4 and interviewed her, they then decided to call the appellant to their office and asked him about the allegation. He however denied the allegation.

They thus decided to call a police officer and the appellant was arrested.

PW2, one WP 6862 D/CPL Agness, handled the investigation of the matter including following up on PW4's PF3 and interviewing witnesses. As part of the investigation, one Doctor Michael Moses (PW3), medically examined PW4 and found the sphincter muscles of her anus loose, but there was no issue as to her vagina. He thus concluded that PW4's anus had been forcefully penetrated. He filed a PF3, which was admitted as exhibit P1.

The defence case was to the effect that: the appellant was arrested and sent to the village office and interrogated for about 2 hours by PW1 as to whether he had raped PW4. He denied the allegation. That around 13:00hrs, he was taken to Usangi Police station and put in custody. On 25.02.2022, he was transferred to Mwanga Police station and locked up whereby he was told that his testament had already been recorded at Usangi police station. The appellant further defended that he had met PW1 before and they had a misunderstanding and that is why she framed him. He claimed that the investigation was conducted against a wrong person.

DW2 testified that she did not witness the victim being sodomized by the appellant. That, she was interrogated at the Ward Executive Office as to whether she had any information pertaining PW4 being raped by the appellant. That, on 20.03.2022, she accompanied PW4 to school and she refused to continue with her studies as she was ashamed of framing the appellant. That, PW4 told the head master that she was given a soda

which she believed was somewhat intoxicated or poisoned and that caused her to accuse the appellant.

After full trial, the trial court found the appellant guilty of both offences. It convicted and sentenced him to serve 30 years in jail for the 1st count and life imprisonment for the 2nd count. The appellant, aggrieved by the said conviction and sentence, filed this appeal on four grounds in which he alleges that the trial magistrate erred in law and fact by convicting him while: **one,** *the prosecution failed to prove its case beyond reasonable doubt;* **two**, *the evidence of the prosecution was contradictory;* **three**, *the defense evidence was not considered;* and; **four,** *the evidence of the prosecution witnesses on both counts was insufficient.*

The Appeal was disposed in writing. Whereas the appellant stood unrepresented, the respondent was represented by Mr. Ramadhani Kajembe, learned state attorney.

On the 1st ground, the appellant averred that there had lapsed a long time between the time the offence was committed and the date the medical examination was conducted. That, the offence is stated to have been committed in 2019 while the medical examination was conducted on 24.02.2022. In that respect, he had the stance that the situation proves that the case was fabricated against him and such doubt should be resolved in his favour.

The appellant further alleged that **section 127(2) of the Evidence Act** was not adhered to as the trial magistrate recorded the evidence of PW4 without showing that she possessed sufficient intelligence to justify

reception of her evidence and that she understood the duty to speak the truth. He saw that the omission by the Hon. Magistrate creates doubts as to her evidence which ought to be resolved in his favour.

On the 2nd ground, the appellant averred that the prosecution evidence is contradictory. Explaining the contradiction, he argued that PW4 did not provide a specific date on which she left school and that contradicts with evidence of PW1 who was called to Usangi Secondary School on 23.02.2022 to see PW4. He added that the evidence was uncorroborated showing that the case was fabricated against him.

On the 3rd ground, the appellant maintained that the defence case clearly showed that there was a misunderstanding between him and PW1 that transpired in public transport (a Noah) which caused PW1 to fabricate this case against him. Further, that the victim was promised to be assisted with her education and that of her siblings if she maliciously prosecuted him. That, DW2 testified that she did not witness PW4 being sodomized and she had stayed with her all along but did not notice any changes in PW4; and that PW4 was intoxicated or poisoned through a soda which caused her to report being sodomized by him.

On the 4th ground, the appellant averred that the evidence was insufficient to convict and sentence him. He contended that in sexual offences the procedure is to first issue a PF3 followed by treatment in the hospital, but in the case at hand, PW4 was admitted first then the PF3 was sought after treatment. He considered that a procedural error. He further averred that he was arrested on 23.02.2022, but brought to court on 01.03.2022 which was contrary to the procedure laid down under **section 33 of the Criminal Procedure Act, Cap 20 R.E. 2019.**

In his reply submission, Mr. Kajembe jointly addressed the 1st, 2nd and 4th grounds of appeal. Prior to submitting on the three grounds, he averred that the appellant had raised two new issues which are non-compliance with section 127(2) of the Evidence Act; and Section 33 of the Criminal Procedure Act. He challenged the appellant for raising the issues on the ground that the same was done without leave of the court. He contended that while parties are bound by their pleadings, the appellant departed from his pleadings. In support of his contention, he referred the decisions by the Court of Appeal in the case of ***MARIA AMANDUS KAVISHE vs. NORAH WAZIRI MZERU AND ANOTHER*** [2023] TZCA 31 TANZLII; and ***BAHARI OILFIELD SERVICES FPZ LTD. vs. PETER WILSON*** [2021] TZCA 250 TANZLII. He thus prayed for the two issues to be ignored.

On the other hand, he averred that even if **section 127(2) of the Evidence Act** was not complied with, PW4 was 16 years of age when she testified, hence above 14 years and not a child of tender age as per the definition provided under **section 127 (4) of the Evidence Act.**

Addressing the ground on whether the case was proved beyond reasonable doubt and on the alleged contradiction on the evidence of the prosecution, he stated that there were no any contradictions between the testimony of PW1 and PW4 on dates in which the offence took place as alleged by the appellant. He contended that while PW4 stated that it was in 2019 when the acts were first committed against her; PW1 stated that she questioned PW4 as to why she did not inform anyone of such acts being done against her since 2019. He added that PW4 stated that she left school in February 2022 and PW1 stated that she was informed of the incident o. 23.02.2022.

Mr. Kajembe had the stance that the elements of the two offences were proved to the hilt. That the offence of incest was proved as the appellant had prohibited sexual intercourse with a female person who was his daughter (PW4). That, their relationship was not disputed by the appellant during preliminary hearing and even DW2 acknowledged that the appellant was PW4's father. He thus found the trial court being correct in its finding that the two were related.

Regarding proof of sexual intercourse, Mr. Kajembe had the view that the assertion was given by PW4 who clearly narrated on the event that led to penetration. Considering that PW4 was the victim in the offence, he reiterated the established principle that in sexual offences the best evidence comes from the victim herself and supported his averment with the long-celebrated decision in ***SELEMANI MAKUMBA vs. REPUBLIC*** [2006] T.L.R 379.

As to the unnatural offence, he averred that PW4 testified that the appellant inserted his penis into her anus and the assertion was properly corroborated by the testimony of PW3 who medically examined PW4and found her sphincter muscles loose. He therefore had the view that the evidence adduced was sufficient for the court to convict and sentence the appellant on both counts.

With regard to the contention that the medical examination was conducted before the PF3 was issued, Mr. Kajembe challenged the assertion for not being true. He referred the testimony of PW3 saying that PW3 testified that PW4 had gone to the hospital with the PF3 which he filled after examining her.

On the 3rd ground, Mr. Kajembe contended that the trial court did consider the defense evidence. He said that the appellant stated that the case was fabricated against him by PW1, however the Hon. Trial Magistrate accorded no weight to the defence as it does not make sense. He added that the trial court judgment was in accordance with ***section 312 (1) of the Penal Code*** (sic), as it contains points of determination, decision and reasons for the said decision.

I have considered the submissions from both parties and gone through the trial court record. In the same organisation as Mr. Kajembe, I too shall deliberate on the 1st, 2nd and 4th grounds of appeal collectively and address the 3rd ground separately.

Before addressing the grounds of appeal, I shall first address the two issues raised by the appellant in his written submissions. It is indeed settled law that parties are bound by their own pleadings whereby the purpose of pleadings is to accord each party an opportunity to know the case against him or her and duly prepare his case. See: ***MARIA AMANDUS KAVISHE vs. NORAH WAZIRI MZERU AND ANOTHER*** (supra); ***BAHARI OILFIELD SERVICES FPZ LTD. vs. PETER WILSON*** (supra); ***YARA TANZANIA LIMITED vs. IKUWO GENERAL ENTERPRISES LIMITED*** [2022] TZCA 604 TANZLII and; ***SALIM SAID MTOMEKELA vs. MOHAMED ABDALLAH MOHAMED*** [2023] TZCA 15 TANZLII.

In ***SALIM SAID MTOMEKELA vs. MOHAMED ABDALLAH MOHAMED*** (supra) the Court of Appeal stated:

> *"In the bolded expression, it is glaring that since parties are bound by their pleadings, neither the parties nor the court can depart from such*

pleadings except where the court has granted leave to amend the requisite pleadings."

The Court further reasoned;

> *"We are fortified in that regard because, as earlier intimated, like it is for the parties, the trial court is as well bound by the pleadings of the parties and as such, the court should not entertain any inquiry into the case before it other than to adjudicate specific matters in dispute which the parties themselves have raised by the pleadings."*

Further, it should be recalled that the appeal was argued by written submissions. In the case of **HADIJA ALLY vs. GEORGE MASUNGA MSINGI** [2023] TZCA 17270 TANZLII it was ruled by the Court of Appeal that written submissions cannot be used as a forum for raising new complaints. On the other hand, even if I decide to look into the issue considering the serious nature of the case against the appellant, and the fact that the respondent was accorded enough time to respond to the two issues, his complaints o would still fail.

On non-compliance of **section 127(2) of the Evidence Act**, it is provided under the Act that evidence of a child of tender age may be given without oath or affirmation, but shall be procured upon first procuring a promise to tell the truth to the court and not to tell any lies by the child.

A child of tender age is defined under **section 127(4) of the Evidence Act** as a child whose apparent age is not more than fourteen (14) years." Hence as correctly argued by Mr. Kajembe, the requirement does not apply in this case as PW4 was 16 years of age when she gave her

testimony, thus not a child of tender age. This can clearly be seen on page 23 of typed proceedings whereby it is recorded:

> *"PW4: Witness Antony, Child of 16 years old, I am not schooling, I left school when I was in form two (2022) Christian, I know meaning of oath, sworn and states;"*

As evident in the above cited paragraph, the trial magistrate still questioned her as to whether she understood the nature of oath. This was however not fatal since she proceeded to give her evidence on oath. As such this issue is without merit.

As to compliance with s**ection 33 of the Criminal Procedure Act**, I shall first reproduce the same for ease reference as hereunder:

> **"33.** *An officer in charge of a police station shall report to the nearest magistrate, within twenty-four hours or as soon as practicable, the cases of all persons arrested without a warrant within the limits of his station, whether or not such persons have been admitted to bail."*

The appellant averred that the procedures for his arraignment were not followed as he was arrested on 24.02.2022 and arraigned on 01.03.2022. His averment is well reflected in his defence. However, his arguments do not align with the said provision. Clearly, the provision requires a police officer in charge to report arrests made without warrant within the limits of his station and at hand there is no any issue of arraignment of persons arrested without warrants. The complaint lacks merit as well.

I shall now collectively address the 1st 2nd and 4th grounds of appeal. It is clear that the three have one common issue, that is, whether the case against the appellant was proved beyond reasonable doubt. The appellant basically challenges the evidence by prosecution witnesses for being contradictory and insufficient.

The appellant alleges contradiction in the evidence of PW4 on the ground that PW4 did not specify the date she left school while PW1 mentioned that she was called to the school on 23.02.2022. Going through the proceedings, I have observed that indeed PW1mentioned that on 23.02.2022, she received information from one, Cliff Mjema, a member of Mtakuwa committee, about a father sodomizing his daughter and she was told to meet him at Usangi Day Secondary School. It is clear on proceedings that PW4 did not mention when she left school, but only that she left school in February.

Clearly, as argued by Mr. Kajembe, there is no contradiction between the evidence of these two witnesses. Further, there was no conflict as to the date PW1 learnt of the issue. The evidence of PW3 who examined PW4 on 24.02.2022 corroborates the evidence of PW1 that she learnt of the incident on 23.02.2022 at around 19:00hrs and thereafter involved village leaders leading to the appellant's arrest. PW4 stated that she reported the incident to one, Form six student who informed the Mtakuwa committee leading to the appellant's arrest the next day. The appellant himself admitted to have been arrested on 24.02.2022 and that was the same date PW4 was medically examined.

This plainly shows that the victim was in school by then. Even if there was contradiction on this fact, the same would be immaterial as the offence

is alleged to have been committed on diverse dates in the year 2019.The information on PW4 being in school at that time in 2022 was neither conflicted nor material in determining the issues in the case.

As to the PF3 being brought after PW4 was medically examined, I have thoroughly observed the evidence adduced by the prosecution. PW1 explained that after interrogating PW4, they called the appellant to their office and after he denied the allegation, he was arrested and PW4 was fetched from school. PW2 explained that she made follow up on the PF3 after being handed the case on 28.02.2022. PW3 explained that PW4 was brought to him on 24.02.2022 while being escorted by PW1 (Jazila). That, after examining her, he filled a form which PW4 had come with. PW4 stated that after the appellant was arrested, she went to the hospital and was medically examined and the doctor (PW3) did not tell her anything, but filled a certain paper and gave it to the Madam she had gone to the hospital with.

From the evidence of prosecution witnesses, it is clear that the PF3 (exhibit P1) was filled on the same day PW4 was examined, that is, on 24.02.2022. As to the fact that PW3 was following up on the same after receiving the file on 28.02.2022, it is obvious that she obtained the PF3 from PW1, who was handed the same by the examining doctor, as she collected statements from all involved persons as part of the investigation process. This argument therefore fails.

Now on the question as to whether the case was proved beyond reasonable doubt. Upon observing the prosecution evidence, I am of the view that the evidence adduced was sufficient to prove the case against the appellant beyond reasonable doubt. The evidence of the

PW4, the victim was very detailed as to the first day the appellant sodomized and raped her. She narrated the whole incident before the trial court as to how he forcefully pushed her onto his bed and penetrated her private parts with his manhood. PW4 further testified that the same became a continuous practice by the appellant.

It is well settled that the best evidence in sexual offences is that of the victim so long as the court finds the victim credible witness. See, **EMMANUEL MATHIAS vs. REPUBLIC** [2022] TZCA 319 TANZLII; **ESSAU SAMWEL vs. REPUBLIC** [2022] TZCA 358 TANZLII; **GODI KASENEGELA vs. REPUBLIC** Criminal Appeal No. 10 of 2008 (Unreported) and; **SELEMANI MAKUMBA vs. REPUBLIC** (supra).

In **EMMANUEL MATHIAS vs. REPUBLIC** (supra) it was held:

> *"... Settled is the principle that the best proof of rape (or any other sexual offence) must come from the complainant whose evidence, if credible, convincing and consistent with human nature as well as the ordinary course of things can be acted upon singly as the basis of conviction."*

I am satisfied that the evidence of PW4 sufficed to prove the ingredients of both incest and unnatural offence against the appellant beyond reasonable doubt. The statement of PW4 never changed at any time. She maintained throughout the same narration before PW1. She also insisted, when cross examined by the appellant, that he sodomized her. PW3, who medically examined PW4, stated that her anal sphincter muscles were loose which was a sign that she was forcefully unnaturally penetrated by a blunt object.

PW3 further stated that there was no problem with the victim's vagina, she either did not state that there was no penetration. However, considering the time the offence was committed and the time the victim was examined, one cannot expect different results than the one observed by the medical doctor (PW3). With regard to the unnatural offence, PW3 stated that the lose sphincter muscles in the victim's anus which led to feces coming out uncontrollably was a result of being penetrated. As such, I find no good reason to fault the prosecution evidence in proving the evidence against the appellant.

As to the 3rd ground in which the appellant claims that his defence evidence, I find the assertion unsubstantiated as the Hon. trial Magistrate examined and considered the defence evidence as clearly seen at page 9 of the judgment. On the other hand, however, since this is a first appellate court, I will re-analyze and re-consider the defence evidence.

The appellant, in his defence, other than giving details as to his arrest, detention and arraignment, maintained in his evidence that he was framed by PW1 following an argument they had in a public transport (Noah). Further, he alleged that in the investigation of the case it was stated that he resides in Lomue, but that was not true as he lives at Kiriche. The appellant called DW2, his wife and PW4's mother. DW2 asserted that she did not witness the appellant sodomizing PW4. That, she stayed with PW4 all along and did not notice anything odd. That, PW4 was somehow intoxicated or poisoned through a soda and that is why she framed the appellant. She added that on 20.03.2022 when she and PW4 had gone to her school PW4 refused to continue with her studies. That, PW1 wanted to pay PW4 so she would help put the appellant behind bars. Both, the appellant and DW2 contended that

PW4 was offered money and promised to be built a nice house. DW2 added that PW4 had a mental problem since May 2022.

In my view, the defence witnesses focused on discrediting the evidence of PW4 by one, alleging that she was intoxicated or poisoned, leading into framing the appellant; two, that she was promised to be financially assisted by PW1; three, that she was mentally incapacitated since May 2022; Four, that, the act was done by another person residing at Lomue.

Those allegations were not in any way proved. The appellant did not testify as to the mental status of the victim while adducing evidence. He neither did not question PW4 on her mental capacity when she gave her evidence meaning that he had no issues with the victim's mental state. The law is trite that failure to cross-examine on a fact amounts to admission of such fact as true. See **DAMIAN RUHELE vs. REPUBLIC** [2012] TZCA 160; **NYERERE NYAGUE vs. REPUBLIC** [2012] TZCA 103; and **KANAKU KIDARI vs. REPUBLIC** [2023] TZCA 223. The appellant challenging PW4's mental capacity has been raised as an afterthought.

There was no proof as to PW1 offering money to PW4 so she could frame the appellant. In fact, it was stated by DW2 that PW4 rejected such offer. As such the allegation lacks sense. In addition, the appellant did not cross examine PW4 on her relationship with PW1. I also find the appellant's defence that he had a misunderstanding with PW1 unsubstantiated as the appellant could not provide any explanation on the alleged misunderstanding. As to mistaken identity that the investigation shows that he resides at Lomue while he resides at Kiriche, thus investigation was on a wrong person, the same is found to be baseless. PW4 clearly testified that that it was the appellant, her

biological father, who raped and sodomized her, and that such acts took place at home on diverse dates in the year 2019. In addition, I have gone through the testimonies of the prosecution witnesses and found none of them mentioned about the appellant residing at Lomue.

It is settled legal position that all witnesses are entitled to credence and belief of their evidence unless the court has good and cogent reasons to hold otherwise. See: **GOODLUCK KYANDO vs. REPUBLIC** [2006] 363 and; **NYAKUBOGA BONIFACE vs. REPUBLIC** [2019] TZCA 461 TANZLII. In the latter, the Court of Appeal discussed other ways in which the court could assess the evidence given by a witness in terms of credibility and reliability. The Court cited the decision in **SALUM ALLY vs. REPUBLIC** Criminal Appeal No. 106 of 2013 in which it held:

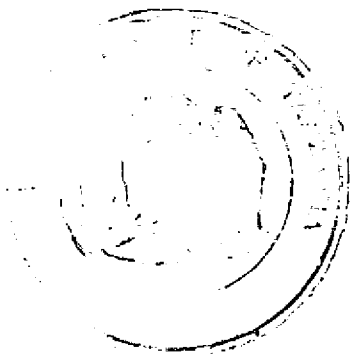
> *"... on whether or not, any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be.* ***In essence, this entails the ability to assess whether the witness's testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances particularly in a particular case.***"

The defence evidence did not cast any doubts on the prosecution case. In fact, there was no consistency in the defence witnesses regarding the assertion that PW1 framed the appellant; that, PW4 was induced to frame the appellant; that PW4 was of unsound mind; or that PW4 was intoxicated or poisoned leading into framing the appellant. Considering

that both defence witnesses were biological parents of the witness, one would expect them to have had similar versions of the assertions.

In the foregoing, I am positive that the prosecution proved the two offences against the appellant beyond reasonable doubt. This appeal is therefore without merit. In the premises, the conviction and sentence by the trial court on both counts are upheld. The appeal is dismissed in its entirety.

Dated and delivered at Moshi, in Chambers on this 28th Day of August 2023.



L. M. MONGELLA

JUDGE