IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 35 OF 2022

(C/F Criminal Case No. 47 of 2021 before District Court of Kondoa)

ALLY ISSA MKALAMBA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 16th August, 2023
Date of Judgment: 08th September 2023

MASABO, J:-

In the District Court of Kondoa (the trial court), the appellant was found guilty and convicted of unnatural offence and was subsequently sentenced to a prison term for life. The particulars of the charge against him were that on 10th June 2021 at Kelema village within Chemba District, Dodoma region he unlawfully knew the victim, PW2, a boy aged 13, years against his order of nature. The appellant denied the charge and when the case went for trial the prosecution called five witnesses who were the victim's mother (PW1); the victim (PW2); the acting village executive officer (PW3); a justice of the peace (PW4) and the investigator of the case (PW5). Also, it relied on the appellant's extra judicial statement admitted as exhibit P1.

From these witnesses, it was stated that on the fateful day the victim was sent by his mother to one Abbas Mkalamba (the appellant's uncle) to collect a bicycle. Upon arrival at the house, he met the appellant who told him to

enter the house. As he was entering the house, the appellant followed him, held a knife at him threatened to assault him within if he made any noise, an order which he obliged. The appellant then undressed him and inserted his penis into his anus and knew him against the order of nature. The victim returned home while crying and upon being asked by PW1 he disclosed what has befallen him. PW1 examined the victim and found sperms on his anus. She reported the matter to the village authorities which caused the apprehension of the appellant. After being apprehended, the appellant confessed to have committed the offence. The matter was reported to a police station where the appellant once again confessed to have committed the offence. Later on, he was taken to the justice of peace (PW4) and had his extra judicial confession statement recorded. After weighing this evidence against the appellant's total denial, the court found the prosecution to have proved the offence beyond reasonable doubt hence the conviction and sentence.

The appellant is dissatisfied by the conviction and sentence. On 9th May 2022 he filed this appeal based on six grounds of appeal which I summarize as follows: **one**, the appellant was convicted basing on a defective charge sheet; **two**, the appellant was wrongly convicted in the absence of the prosecution side; **three,** the procedure provided under section 127(2) of the Evidence Act was not complied with; **Four**, PW3 did not tender a written statement evidencing that the appellant confessed to have committed the offence, **five,** there was procedural irregularities on evidence adduced by PW4 and **six,** the trial court did not consider the defence evidence.

On 22nd February 2023, he was granted leave to file supplementary grounds whereby he filed a total of seven grounds making a total of 13 grounds of appeal. The supplementary grounds he filed were as follows: **First,** the case against him was not proved; **second,** the prosecution side neither tendered the PF3 nor called the doctor who examined the victim; **third,** the age of victim was not ascertained and proved, **fourth,** the appellant's age was not proved hence it remained uncertain whether he was 17 or 20 years; **fifth,** the appellant was not given witnesses statement before the commencement of the trial; **sixth** the court ought not to rely on prosecution evidence as it was biased and **lastly,** the appellant's defence was not considered. Based on these grounds, the appellant prayed that the court allow his appeal, quash the conviction and set aside the sentence and let him at liberty.

During a *viva voce* hearing of the appeal, the appellant had no representation. He fended for himself whereas the respondent was represented by Ms. Patricia Mkina, learned state Attorney.

The appellant adopted his grounds of appeal and prayed the court to consider them positively and allow his appeal. On the respondent side Ms. Mkina, learned State Attorney, objected the appeal. On the anomaly of the charge sheet, she quickly conceded that indeed it is true that the provision prescribing sentence was not properly set out in the charge sheet. The victim was below 18 years hence the proper provision was section 154 (2) of the Penal Code, Cap.16 RE 2019. She however reasoned that, this provision provide a sentence of life imprisonment which is equal to the sentence

prescribed in the provision set out in the charge sheet. Hence, the anomaly is curable under section 388 of the Criminal Procedure Act, Cap 20 RE 2019. In the alternative, she prayed that this court find it fit to pronounce any just order considering that no injustice was done to the appellant.

On the second ground, the learned State Attorney submitted that it has no merit as the prosecution counsels were present in court. They called witness, led their witness and from the evidence led by such witnesses the appellant was convicted. On the date of conviction, the prosecution side was present in court and was represented by Mfinanga, State Attorney. On third ground, she argued that the court did not err in recording the testimony of PW2, the victim. The provision of section 127 (2) of the Evidence Act was complied with as the victim knew the meaning of oath and he was affirmed. She argued further that, the court was satisfied that he knew the meaning of oath and was capable of testifying under oath. Hence it committed no error in recording his testimony. She contended further that, as per section 127(6) of the Evidence Act, in sexual offences, the evidence of the victim is the best evidence. If found credible, such as the one in the present case, it can support conviction even without corroboration.

On the fourth ground of appeal, the learned State Attorney conceded that indeed, the testimony of PW3 was not supported by a written confession. She however argued that, this is not a serious anomaly because, even if the evidence of this witness is discounted, the evidence of PW1 and PW2 suffices to sustain the conviction and sentence considering that as per **Seleman**

Makumba vs. R [2006] TLR 349, PW1's testimony is the best evidence and suffices to sustain the conviction even in the absence of corroboration. Submitting on the fifth ground of appeal regarding PW4's evidence, she maintained that the evidence of this witness was credible. Also, the appellant did not object the admission of his extra judicial confession statement which presupposes that he found the testimony and the confession statement correct.

Regarding the sixth ground that the appellant's evidence was not considered, she submitted that it is baseless as the defense evidence was assessed at page five of the trial court's judgment and after such assessment the trial magistrate concluded that the appellant's evidence was an afterthought and did not raise a reasonable doubt. It was observed that during preliminary hearing, he admitted that he was at the house of Abasi Mkalamba on the fateful day, 10th June 2021 but later on during trial he purported to change his statement by saying that he met the victim who was on his way being accompanied by his (the appellant's) uncle one Abbas Mkalamba but even the said Abasi was not called to testify. Hence there is point in arguing that his evidence was not considered.

Submitting on the second additional ground, she submitted that the complaint that the PF3 was not tendered and the doctor who examined the witness did not testify in court has no merit because the omission is negligible as it is not capable of changing the verdict considering that, there is on record credible evidence of the victim corroborated by the appellant's

self-confession statement which was admitted with no objection. She reasoned that his complaints is merely an afterthought.

On the victim's age complained against in the third additional ground of appeal, she submitted that it is with no merit as the age of the victim was not disputed. It was further argued that, even the appellant's age which is the subject of the fourth additional ground, has no merit because it was among the undisputed facts listed during preliminary hearing. Also, during his defence the appellant told the court at page 19 of the typed proceedings that he is 20 years old. Thus, there was no dispute as to his actual age.

Regarding the complaint that he was not given statement of complainant, it was submitted that the proceedings is silent on whether he was given the statement of the complainant or not. Nevertheless, even if he was not, the complainant was the victim and his mother who testified as PW2 and PW1, respectively and in their evidence, they stated all the facts which would have been found in the statement. The appellant cross examined them during trial and no injustice was committed against him. She cited the case of **Chande Zuberi's** (supra).

On the ground that the evidence was biased, the learned counsel submitted that the evidence was not biased. It was strong and well connected from PW1, PW2, PW3, PW4 and PW5. Also, some of the things complained were listed in the memorandum of undisputed facts hence not in issue as the memorandum of undisputed facts was signed by the appellant. She

concluded by submitting that the appellant was correctly convicted and sentenced and prayed that the appeal be dismissed.

Upon considering the grounds of appeal, the submission made by the respondent in opposition to the appeal and the trial court's record, I will now determine the appeal. The task ahead of me is essentially a re-assessment of the evidence on the record to ascertain whether, in the light of the grounds of appeal, the prosecution did not prove its case to the required standards.

Starting with the first ground of the appeal, both parties agree that the charge was defective in that the provision against which the appellant was charged was not properly cited. As per the charge sheet, the appellant was charged under section 154(1)(a) of the Penal Code, Cap 16 for committing an unnatural offence against a boy child aged 13 years. For convenience, I shall reproduce the whole of section 154. It states:

> 154.-(1) Any person who-
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> (a) has carnal knowledge of any person against the order of nature; or
> (b) has carnal knowledge of an animal; or
> (c) permits a male person to have carnal knowledge of him or her against the order of nature,
> commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(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.

Obviously, since the victim was a child under the age of 18, the charge sheet was defective as the offence fell under subsection (2). What remains to be determined is the extent of the defect and its consequences. For the appellant, it has been implicitly reasoned that the defect is fatal and incurable whereas for the respondent it has been argued that it is non-fatal hence curable under section 388 of the Criminal Procedure Act, Cap 20 RE 2022. The Court of Appeal extensively dealt with a similar issue in **Maganga s/o Udugali vs Republic** (Criminal Appeal 144 of 2017) [2021] TZCA 639 TANZLII where it instructively stated as follows:

> To begin with, let it be stated that in terms of sections 132 and 135 (a) of the CPA, every charge must contain a statement of a specific offence or offences with which the accused is charged. It is also required that the statement of offence must make reference to the specific provision of the law creating such offence. Further, the charge must contain particulars of offence. The reason or aim of the charge to contain the statement and particulars of offence is to give an accused person reasonable information as to the nature and seriousness of the offence and to enable him prepare his defence. The position where a charge sheet suffers some irregularities is settled. In the case of **Jamali Ally @ Salum v Republic**, Criminal Appeal No. 52 of 2017 (unreported) where the Court was faced with the similar scenario regarding the defective charge, it was held, among other things, that:
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> "Where particulars of the offence are clear and enabled the appellant to fully understand the nature

and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age and where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged and thus any irregularities over non-citations and citations of inapplicable provisions in the statement of offence, are curable under section 388 (1) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA)." (The emphasis is mine)

The above position was reiterated in the case of **Jafar Salum @ Kikoti v Republic**, Criminal Appeal No. 370 of 2017 (unreported) where it was held that:

"The position is that the failure in the charge sheet to cite the definition and punishment sections or to clarify the ingredients of the charge under which an accused person is charged, will be curable under section 388 (1) of the CPA if the witnesses remedy the ailment in their evidence.

Also, in a previous case of **Deus Kayola v Republic**, Criminal Appeal No. 142 of 2012 (unreported) the charge of rape was challenged for being preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1) of the same law. The Court held, among other things, that

"We have taken note of the fact that the charge against the appellant was preferred under sections

> 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131(1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of the offence having sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old." [emphasis added]

Based on these authorities and having examined the particulars of the offence set out in the charge sheet, the court found the defect curable as the particulars of the offence were drawn is such a way that they enabled the appellant to appreciate the nature and seriousness of the offence he stood charged and so did the evidence on record. Rightly guided by these authorities I have examined both the charge sheet and the evidence to see whether they sufficiently informed the appellant of the nature and seriousness of the offence and I am satisfied that they did hence, as correctly argued by the learned State Attorney, the defect is curable under section 388 of the Criminal Procedure Act. The first ground of appeal is, therefore, without merit.

The 3rd and 4th additional grounds concern age. I shall consolidate them and determine them concurrently. In these two grounds, it has been complained by the appellant that his age and the age of the victim were not established. The law is settled that, age of a person can be established through diverse means including a birth certificate, the persons own oral evidence and in respect of children, the testimony of a parent or guardian (see **Jaspini s/o Daniel @ Sikwaze vs Director of Public Prosecutions** (Criminal Appeal

519 of 2019) [2021] TZCA 58 TANZLII and **Rutoyo Richard vs Republic** (Criminal Appeal 114 of 2017) [2020] TZCA 298, TANZLII). Starting with the appellant's age, the particulars appended to the charge sheet show that he was 20 years old. Also, when he appeared in defence of his case as DW1, he personally told the court that he was 20 years old and at no material time did he dispute his age. Thus his age was undisputed. In the foregoing, the complaint that he was underage is an afterthought and with no value. Similarly unwealthy, is the complaint about the victim's age as the same was not disputed. PW1, the victim's mother testified that he was 13 years old and the victim himself while testifying as PW2 stated he was 13 years old. Hence, there was sufficient proof of his age.

There is also a complaint that the appellant was not furnished with the statement of the complainant and the same is set out in the 5th additional ground of appeal. Much as the record is silent on this issue, I will, for the following reason accord no weight to this complaint. While it is essential that the accused person be supplied with such statement to enable him to comprehend the case against him and prepare his defence, the anomaly if any ought to have been raised and resolved during trial. The record is silent which suggests that he did not raise it. Had he raised it at that stage, it could have been ascertained and cured by supplying him with the statement. Raising it at this evening hour suggests that it is an afterthought. Also, I entirely agree with the learned State Attorney that the fact that the appellant had demonstrated no injustice suffered as a result of this omission is a further testimony that his complaint is an afterthought with no merit.

The second ground of appeal will not detain me as it is incomprehensible how the trial could have proceeded to completion in the absence of the prosecution. Further, the record is in tandem with the State Attorney's submission that the prosecution was not only present in court but paraded their witnesses including the victim who testified as PW2 and on the date of the judgment, they were well represented by a State Attorney identified by one name of Mfinanga.

In the third ground of appeal the appellant's complaint is centered on the compliance or otherwise with the provision of section 127(2) of the Law of Evidence Act regulating the evidence of child witnesses. It states thus:

> 17(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.

The import of this provision as interpreted in the case of **Geofrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported) and a string of other authorities from the Court of Appeal is that, this provision serves two purposes namely, one, it recognizes a child of tender age as a competent witness capable of giving evidence on oath or affirmation and two, it requires that if a child of tender age is to give evidence without oath/affirmation, she/he must first undertake to tell the truth and not lies. In **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported), the Court of Appeal stated thus:

> "From the plain meaning of the provision of sub-section (2) of S. 127 of the Evidence Act, which has been reproduced above, a child of tender age may give evidence after taking oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.

Admittedly, the victim herein being a child of 13 years fell squarely within the scope of this provision and the recording of his evidence had to adhere to the requirement set out under the above provision meaning that he could adduce evidence on oath or upon making an undertaking to tell the truth if his evidence was to be taken without oath. The record show that, before testifying as PW2, the victim who identified himself as a Muslim was affirmed after the court drew a conclusion that he understood the meaning of oath and after being affirmed he ventured into giving his evidence and the same was recorded. That said, I am of the settled view that the recording/admission of the victim's evidence offended no law as he was affirmed before he testified. Needless to emphasize, under this provision, an oath/affirmation and an undertaking to tell the truth are alternate pre requisites means by which the evidence of the child can be received. Where, as in the present case, the child opts to give his evidence under oath, he need not make an undertaking to tell the truth and not lies. In the foregoing, the third ground of appeal fails.

Turning to the testimony of PW3 a village executive officer which is at the center of the 4th ground of appeal, it has been argued that the evidence of this witness before whom the appellant orally confessed commission of the offence should not be believed as it was not in writing. This is a lucid misconception as confession need not be in writing. The law recognizes oral confession and accords it weight. Section 3 of the Evidence Act defines confession to include oral confession. Also, Court of Appeal has on numerous authorities held that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect (see **The Director of Public Prosecutions vs Nuru Mohamed Gulamrasul** [1988] TLR 82, **Posolo Wilson @ Mwalyego vs Republic**, Criminal Appeal No. 613 of 2015 (unreported) and **aganda Saganda Kasanzu vs Republic (**Criminal Appeal 53 of 2019) [2020] TZCA 304 TANZLII. Therefore, it will be materially wrong to disregard the testimony of PW3 merely because the confession was not in writing.

Closely related to this is the 5th ground of appeal in which the testimony of PW4, a justice of the peace, has been challenged. Further to her oral testimony, this witness tendered an extra judicial confession statement made by the appellant when he was brought before her. In the statement, the appellant confessed to have committed sodomy against a boy of 13 years and he also disclosed that, upon being apprehended by a militia he was taken to the village chairman where he confessed to have committed the offence and that, later on he was taken to Chemba police station where he

also confessed commission of the offence. The appellant never repudiated or retracted the statement hence it was admitted as exhibit and thereafter, it was read over and explained to him thus he knew its content but still he did not cross examine PW4 on its voluntariness or the irregularities he now purports to raise and which he has nevertheless not explained.

All what he questioned was the time which had lapsed between his arrest and the date he was taken to PW4, a question which was answered by PW4 that it was 6 days after his arrest. Assuming that this is the irregularity he is complaining about, does it have any merit? The answer is strictly in the negative because unlike caution statement which must be made within the specified statutory time, there is no statutory time limit within which an extra-judicial statement should be recorded. It can be taken at any time but within reasonable time after the accused has expressed his willingness to make such confession. In the case of **Joseph Stephen Kimaro and Another vs Republic**, Criminal Appeal No. 340 of 2015 (unreported) cited in **Andius George Songoloka & Others vs DPP** (Criminal Appeal 373 of 2017) [2020] TZCA 369, TANZLII it was held that;

> In other words, unlike caution statements whose time to be recorded is prescribed under section 50 and 51 of the CPA, **no such limitation is imposed in extra-judicial statements**, recorded before Justices of the Peace whose concern is to make sure that an accused person before him is a free agent and is not under fear, threat or promise when recording his statement." [emphasis added].

On the strength of these authorities, the fifth ground of appeal fails as it has no merit.

In the second additional ground of appeal to which I now turn, the appellant has challenged the prosecution for not summoning as witness the doctor who examined the victim. He seems to suggest that the doctor was a material witness thus he ought to have been summoned to testify orally and to tender the PF3 and since he was not, the prosecution did not prove its case. This complaint is tandem with the record which shows that, indeed the doctor who examined PW2 was not summoned nor was the PF3 tendered as evidence in court. I will not labour much on this complaint because, as correctly argued by the learned counsel, although such evidence is material, its absence is non-fatal as in sexual offences, the best evidence comes from the victim (**Seleman Makumba v. Republic** (supra)). To the contrary medical evidence has a corroborative value as stated **in Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2008, [2010] TZCA 5, TANZLII where the Court of Appeal stated thus:

> It is now settled law that, the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give, corroborative evidence.

In the 6th ground of appeal and the 7th additional grounds of appeal, the appellant has complained that his defence was ignored, an argument which has been resisted by the respondent. The law is settled that the accused person's defence must be thoroughly assess and evaluated just as the

prosecution's case. Omission to consider the accused's defence is a fatal anomaly with severe consequences to the judgment as stated in the case of **Rajabu Abdallah @Mselemu vs. Republic**, Criminal Appeal No. 134 of 2014, [2014] TZCA TANZLII where the Court of Appeal held that:

> As this Court has stated in different cases time and again, such omission constitutes a fatal error. To reiterate what has always been insisted in this regard, both courts below ought to have observed the well-established principle of law that in writing a judgment, a court has to consider not only the evidence in support of one party's in a case and completely ignore the evidence for the other party, however worthless it may appear.

In my scrutiny of the judgment to see whether the appellant's defence was considered, I have observed that the appellants defence was thoroughly considered as reflected in page 5 of the judgment but found to have casted no reasonable doubt on the prosecution's case. The lamentation in these two grounds is, therefore, baseless.

The remaining grounds of appeal question whether the prosecution proved its case beyond reasonable doubt. It is indeed a cardinal law that in criminal cases, the prosecution is duty bound to prove the charges against the accused beyond reasonable doubt. The burden never shifts to the accused as he need not prove his innocence. All what the accused needs to do is to raise reasonable doubts on the prosecution case (see **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007, CAT (unreported) and **Mwita and Others v. Republic** [1977] TLR 54). Thus,

the appellant's conviction can only be sustained if it is established that the prosecution proved without reasonable doubt that he was guilty of an unnatural offence against PW1. It is correspondingly settled, as stated above, that in sexual offences, the best evidence comes from the victim, in this case, PW2. Looking at his testimony, appearing in page 8 and 9 of the typed proceedings, I do not hesitate to agree with the findings of the trial court that he credibly proved the case. His narration of what befell him after he arrived at Abasi's home was solid and left no stone unturned. He eloquently narrated how the appellant told him to enter the house, followed him as he was entering the house, threatened him with a knife, undressed him and inserted his penis into his anus hence knowing him against the order of nature. This evidence was unshaken hence it sufficed to convict the appellant without any corroboration. But, in addition, it was corroborated by his mother who testified as PW2. Also, it was corroborated PW3 and PW4 to whom the appellant confessed commission of the offence.

The confession by the accused, is taken by law to be the best evidence as stated in **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal 258 of 2020) [2022] TZCA 122, TANZLII where the Court of Appeal Stated that:

> It is settled that an accused person who confesses to a crime is the best witness. The said principle was pronounced in the cases of **Jacob Asegellle Kakune v. The Director of Public Prosecutions**, Criminal Appeal No, 178 of 2017 and Emmanuel Stephano v. Republic, Criminal Appeal No. 413 of 2018 (both unreported). Specifically, in **Emmanuel 13 Stephano** (supra) the Court while reiterating the above principle stated that: -

'We may as well say it right here, that we have no problem with that principle because in a deserving situation, no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess. " [Emphasis added].

Just as in the present case, the appellants in **Chande Zuber Ngayaga & Another vs Republic** (supra) had their confession statements admitted without repudiation or retraction hence their conviction but they later on challenged their conviction on appeal. Their complaints in the appeal were found to be merely an afterthought and the whole appeal was held to be baseless and dismissed in entirety.

In the foregoing and in the light of what I have demonstrated above while determining the individual grounds of appeal, I see no ground upon which to fault to finding of the trial court to which I fully subscribe. The appeal consequently fails and is dismissed in entirely.

DATED at **DODOMA** this 8th day of September, 2023

J. L. Masabo

JUDGE