IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF KIGOMA)

AT KIGOMA

DC CRIMINAL APPEAL NO. 35 OF 2023

(Arising from DC Criminal Case No 327 of 2022 at Kibondo District Court)

FAIZI ABUBAKAR ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of Last Order:18.09.2023
Date of Judgement: 06.10.2023

JUDGEMENT

MAGOIGA, J.

The appellant, **FAIZI ABUBAKAR** was on 11th day of October, 2022 arraigned in the District Court of Kibondo (trial court) with one count of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, [Cap 16 R.E 2022].

The particulars of the offence as per charge sheet were that, on 10th, day of October, 2022 afternoon hours at Kumwelulo village within Kibondo District in Kigoma region, the appellant did have carnal knowledge of one JY (psedo name) aged 7 years old against the order of nature.

After full trial, the appellant was found guilty of the offence charged as such convicted and sentenced to life imprisonment.

Aggrieved by both conviction and sentence, the appellant preferred this appeal in this court armed with five grounds of appeal faulting the trial court findings, couched in the following language, namely:

1. *That the trial court erred in law and fact as the prosecution side did not consider strength of defence side on the matter of age of the accused person;*
2. *That the trial magistrate erred in law and fact by basing his judgement and conviction on weakness of the prosecution side and not on defense side for instance on the way interrogations took place at police station;*
3. *That the trial magistrate misdirected himself when he convicted the appellant because of weakness of the defence side;*
4. *That the trial magistrate erred in law and fact in accepting that the prosecution side had proved its case beyond reasonable doubt while in facts the whole prosecution evidence was suspicious;*
5. *That the trial court erred in law and facts in failing to consider the appellant's defence.*

On the strength of the above grounds, the appellant prayed this appeal be allowed, set aside conviction and sentence and set him free.

When this appeal was called on for hearing through video conference, the appellant was present and unrepresented, while the Republic was represented by Ms. Antia Julius, learned State Attorney.

When the appellant was called on to argue his appeal, he preferred to hear the State Attorney first and will reply thereafter.

Ms. Julius when rose to argue readily told the court that they strongly oppose this appeal for want of merits. The learned Attorney equally told the court that will argue together grounds Nos.3 and 4 but will argue grounds 1, 2 and 5 separately.

Arguing the 1st ground which was on the age of the appellant, the learned Attorney told the court that the age of the appellant was proved to be 18 years as shown in the charge sheet and facts which were recorded not in dispute. According to the learned Attorney, the argument that he was under age is an afterthought on his part. Not only that but also that DW5 contradicted and had an interest to serve as mother. On that note, she prayed to dismiss this ground.

On the second ground of appeal, it was the submission of the learned Attorney in opposing this appeal that, the appellant admitted to police and did not complain that he was tortured in anyway while at police when interrogated and even when admitted, no comments were made on his admission of the offence nor disputed its contents.

According to the learned Attorney, what the appellant is raising are an afterthought on his part and as such urged this court to dismiss this ground too.

On the 5th ground, it was the brief submissions of the learned Attorney that his defence was fully considered and the alibi given was given contrary to law and the trial magistrate was right for refusing to consider it.

On the 3rd and 4th grounds of appeal argued together, it was the submissions of the learned Attorney that the appellant was convicted on strong evidence of the of the Respondent. According to the learned Attorney, what is important is proof of penetration done by the appellant which was proved. The learned Attorney referred this court to the case of **Joel Ngato Vs. Republic, Criminal Appeal No.344 of 2017 CAT (Iringa) (unreported)** in which it was held that penetration is vital, however, slight, in an unnatural offence.

Guided by the above, the learned Attorney argued that the proceedings are clear PW1 told the court what the appellant did to him. But also, PW2 corroborate the evidence of PW1 because she saw the act itself and Doctor who proved that the anus was penetrated by blunt object and the offence was done day light.

On the totality of the above reason, the learned Attorney invited this court to dismiss this appeal for want of merits.

The appellant when given chance to reply told the court that he prays that his grounds of appeal be considered. According to him, he was 17 years old when the offence was committed and not 18 years. The appellant told the court that the cautioned statement was taken under torture. However, the appellant admitted that he had no quarrel with PW2. According to the appellant, the defence case was strong than the prosecution and prayed the appeal be allowed and set him free.

This marked the end of hearing of this appeal. The duty of this court now is to determine the merits or otherwise of this appeal. I will do so in the manner the grounds were argued.

On the first ground which was to the age of the appellant. Having seriously considered this point and the competing arguments, but with due respect to the appellant, the age of the accused was not in dispute because the appellant himself as correctly argued by the learned Attorney admitted that his age is 18 and it was so recorded at page 3 of the typed proceedings. Not only that even when he changed the story to be 17 years, the prosecution was able to cross examined him and at page 28 of the typed proceedings, he admitted to be 19 years old. DW5 was not even

certain of the age of his son but she just crammed 17 years without precise calculation.

On the above reasons, I am increasingly convinced to agree with the learned Attorney that, this ground in the circumstances of this appeal is wanting in merits and is thus dismissed.

This takes me to the 2nd ground which hinges on admission which was recorded in exhibit P2. The objection of the appellant was that it was not read to him and nor its contents and that it was procured by torture or inducements. But after its admission as correctly argued by learned Attorney was read out but he never pointed out any parts that were not his. I have carefully considered this ground and without much ado, find this ground too wanting in this appeal. This ground is dismissed.

Next is ground number 5 which was on the trial magistrate failure to consider his defence. Having serious considered this ground and having read the entire judgement of the trial court, I find this ground wanting in merits because the trial magistrate from pages 9- through to the end of the judgement considered defence evidence at length and found not convincing him. I equally find no merits in this appeal and proceed to dismiss this ground.

Lastly, is the 3rd and 4th grounds argued jointly which was on the argument that the prosecution did not prove the case to the required standard. I

have carefully considered this ground along with the evidence on record and what is supposed to be prove in an offence of this nature and found that, with due respect to the appellant, the Republic in this case proved penetration through PW1, PW2 and PW4 and as for PW1 and PW2 that it was the appellant who did the act.

All these pieces of evidence on record, it cannot be said that the prosecution did not prove the case. That said these grounds too have to fail and are hereby jointly dismissed.

That said and done, the appeal is found wanting in all grounds preferred and is hereby dismissed in its entirety.

It is so ordered.

Dated at Kigoma this 06th day of October, 2023.

S.M. MAGOIGA
JUDGE
06/10/2023