IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC CRIMINAL APPEAL NO. 75 OF 2022

(*Originating from the Judgement of Bahi District Court in Criminal Case No. 70 of 2021*)

EMMANUEL KAVULA LENDAGA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 02/11/2023

Date of Judgment: 16/11/2023

LONGOPA, J:

This is an appeal against conviction and sentence to life imprisonment for unnatural offence to Section 154(1)(a) and (2) of the Penal Code Cap 16 R.E.2019. It was alleged that on 17th day of October 2021 at 19:00hrs at Mayamaya village within Bahi District in Dodoma Region, the Appellant did have a carnal knowledge against the order of nature to two (2) different boys aged 9 years.

The prosecution arraigned a total of six witnesses and tendered two exhibits to prove their case while the Appellant side had only one witness.

Having heard the case to the finality, the trial Magistrate found the appellant guilty as charged for two counts of unnatural offences. Thus, the District Court convicted and sentenced the Appellant to a mandatory life imprisonment sentence. It is on this decision of the Court that the Appellant herein challenges the whole of that judgement on the following grounds:

1. *That, the learned trial magistrate grossly erred in law and in facts when totally misapprehending the nature and quality of the prosecution evidence against the Appellant which did not prove the charge beyond all reasonable doubts.*
2. *That, the learned trial magistrate grossly erred in law and in facts by acting on uncorroborated, unsworn evidence of prosecutrix of the two prosecutions witness that is PW 2 and PW4.*
3. *That, the learned trial magistrate grossly erred in law and in facts by acting on the evidence of PW 5(Doctor) such evidence was not properly scrutinized since he did not even remember when the made (sic) medical check-up of the said victims basing on that the question is even the PF3 tendered in Court does not bear the date, month and years filled by PW 5 when conducted medical examination.*
4. *That, the conviction based on PW 2 and PW 4 testimony was bad because they did not pass out as credible.*

5. That, the learned trial magistrate if she could think in deeply, she could discover that the case at hand was cooked and fabricated against the Appellant due to the fact that I was not in good terms with the victims' family basing on the reasons that there is a dispute of land against I Appellant and the victims' family.

6. That, the trial court grossly erred in law and in facts when he failed to notice that there were no evidence of penetration which is the highest ingredient when proving the offence of some nature like the case at hand since the evidence of doctor did not well addressed the issue of penetration.

7. That, the trial court grossly erred in law and in facts when he acted on caution statement tendered in court by PW 6 without warning herself on the danger of convicting on such uncorroborated caution statement since there was a need to send the appellant to justice of peace so as to come with evidence that real the appellant confessed to have committed the alleged offence.

8. That, the trial court grossly erred in law and in fact when did not warn herself that the alleged evidence of identification was too weak to ground conviction basing on the ground that there is a scientific principle that always the right (sic) of torch travel on a straight line unless reflect an

object due to that how can be able to make a proper identification on the right (sic) travel on straight line.

9. That, the judgement is bad in law since it does not bear sentence imposed by trial court since the said judgement only have conviction without sentence.

Summed up, these grounds fall in four main clusters namely: the identification of the accused person was not proper; irregularities in recording the caution Statement, reliance on uncorroborated evidence of the prosecution and the prosecution failure to prove their case to the required standard of proof beyond reasonable doubt.

On 2nd day of November 2023 when the appeal was scheduled for hearing the Appellant appeared in person while the Respondent was represented by Ms. Patricia Mkina, State Attorney.

In support of the appeal, the Appellant adopted all grounds of appeal as presented in the Petition of appeal and add that he objects to the admissibility of caution statement as it was improperly admitted since Appellant was beaten/tortured by police officers who interrogated him beside absence of any lawyer of his choice or relative was called to witness the interrogation.

Second, the appellant emphasized that he was not subjected to medical tests that would have proved that he did not commit alleged

offence to the children. It was his submission that being a HIV positive, if that would have been considered, the trial court could not have found him culpable of the offence. It is his submission that the district court decision could have been otherwise. He prayed that this Honourable court allow the appeal, quash a conviction, and set aside the sentence imposed against the appellant.

In rebuttal, Ms. Mkina, SA submitted that the prosecution proved the case against the appellant beyond reasonable doubts. It was submitted that testimonies of PW 2 and PW 4 who are victims narrated fully the incident and PW 5 a medical doctor corroborated the same that victims' anus were penetrated. According to Ms. Mkina, that evidence is watertight and invited this Court to the principle in case of **Selemani Makumba v. R** (2006) TLR 379 where the Court stated that evidence of the victims is the best evidence in sexual offences cases.

Further, it was her submission in respect of 2nd and 4th grounds of appeal jointly that testimonies of PW 2 and PW 4 were legally acceptable as the witnesses promised to tell the truth only the truth as per provision of section 127(2) of the Evidence Act, Cap 6 R.E. 2019. Thus, testimonies of PW 2 and PW 4 were compliant to the law and legally acceptable. This is reflected at pages 12 to 16 of typed proceedings.

On the 3rd ground of appeal, it was submitted that although PW 5 did not indicate the date of conducting medical check up of the victims, he

competently narrated his findings of the medical check up to those victims. Accordingly, PW 5 intimated before the Court to have found that both victims were penetrated through their anus. This evidence corroborated evidence that victims where carnal known against the order of nature.

Regarding 5th ground, it was submitted that the case is not fabrication as the incident happened, and it was the Appellant who committed the offence as per available evidence from prosecution' witnesses. As regards misunderstanding between the appellant and victims' family, it was submitted that it is an afterthought as the appellant did not raise it during tendering of the evidence of the prosecution. The appellant could have cross examined the witness from that family on the alleged existing conflict.

Regarding 6th ground on penetration, it was submitted that PW 2 and PW 4 testified well on the same as they described how the appellant was undressing the victims and his cloth before penetrating them. It was argued that pages 14 and 15 of the typed proceedings cater for this aspect.

On 7th ground of appeal, it was noted that though the appellant was not sent to justice of peace for taking up confession, the evidence contained in a caution statement have strengths. It cemented the prosecution's case having been legally obtained after addressing rights of the accused person prior to recording of the caution statement. This Exhibit

corroborated the evidence of PW 2 and PW 4 as the appellant did admit at the Police station to have committed the offence.

On 8th ground of appeal, it was argued that it is true that appellant was identified using torch light when he was committing the offence of having carnal knowledge against the order of nature. This was corroborated by evidence of PW 2 and PW 4.

Finally, regarding 9th ground of appeal that there is no sentence in the judgement, it is no longer the case. This court had directed the trial magistrate to provide sentence as per law.

Having heard both sides, it is the duty entrusted on this Court to weigh out on all available evidence on record to find out whether any of these grounds of appeal merits to warrant the Court to nullify decision of the trial court. I have perused both the judgment and proceedings together with arguments by the parties herein carefully. I will address these grounds as follows:

The first set is that the credibility of evidence of PW 2 and PW 4 is questionable and was not properly admitted. It should be noted that PW 2 and PW 4 are victims of the offences against which the Appellant stood charged and found guilty at the District Court. The nature of the evidence of PW 2 and PW 4 is to the effect that they know the Appellant by name of Emmanuel or Nayala.

It was their testimony that it is the appellant who had a carnal knowledge against the order of nature to both victims. They narrated how the appellant did lure them with money after having carnally known against the order of nature. The incidence happened several times and on the fateful date it was one Mr. Rajab who found both the appellant and victims naked while the appellant was carnally knowing the second victim (PW 4).

The evidence of PW 2 and PW 4 in fact narrates the ordeal that the two youngsters undergone through the acts of the appellant. It is a law in this jurisdiction that the evidence of the victim is crucial to establish the offence in sexual related offences. All other witnesses if not eyewitnesses would only corroborate that evidence of the victim.

In the case of **Godi Kasenegala vs Republic** (Criminal Appeal 10 of 2008) [2010] TZCA 5 (2 September 2010), the Court of Appeal stated that:

> 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. Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so.

Further, in the case **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) [2006] T.L.R. 379 [CA]. The Court of Appeal stated that:

> 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 the case under consideration the victim - PW1 - said the appellant inserted his male organ into her female organ. That was penetration and since she had not consented to the act, that was rape, notwithstanding that no doctor gave evidence and no PF3 was put in evidence.

See also the case of **Mbarouk Deogratias vs Republic** (Criminal Appeal 279 of 2019) [2020] TZCA 1896 (16 December 2020); and **Mathias Robert vs Republic** (Criminal Appeal 328 of 2016) [2018] TZCA 241 (25 April 2018).

These decisions emphasize on the evidence of the victim in proof of offence of rape. The decisions can be extended to other sexual related offences where it is the victim who is eyewitness of the commission of the same. In the same line, the offence of carnal knowledge against the order of nature in the instant case is similar in terms of the question of penetration of one's anus by male organ.

The evidence of the PW 2 and PW 4 who are the victims of the offence demonstrated before the trial court that they can tell the truth and each of them promised to tell the truth. Such promise was made prior to the court commencing recording of respective testimony as per page 12 and 15 respectively of the typed proceedings.

This was in accordance with the provisions of section 127(2) of the Evidence Act which states as follows:

> S. 127 (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.

I am satisfied that the evidence of PW 2 and PW 4 was properly recorded in accordance with tenets of the law. The fact that before recording such evidence without oath or affirmation, each of the victims promised to tell the truth before the Court was sufficient under the law to find that evidence reliable. Further, the law allows the child of tender age to give evidence without taking an oath or affirmation.

The Court of Appeal in **Mathayo Laurance William Mollel vs Republic** (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023), at page 12 of the judgement held that a child of tender age if promises to tell the truth, implicitly he is promising not to tell lies. There is

no need of informing the court and promising both "to tell the truth" and "not to tell lies" at the same time as it is tautology and effect of bad legislative drafting.

The trial Court relied on the evidence of PW 2 and PW 4 as the same was corroborated by evidence of PW 3 who testified to have found the appellant penetrating the second victim against the order of nature. Further, the Caution Statement of the accused person was tendered by PW 6 who interrogated the appellant at the police station. This corroboration cemented the evidence of PW 2 and PW 4 who knew the appellant as the one that penetrated them through their anuses several times.

As a result, I find the grounds 2 and 4 untenable for lack of merits as the trial court proper recorded the evidence of the victims aged 10 years old at the time of testifying upon being satisfied that they had promised to tell the truth. Also, the evidence was corroborated by evidence of PW 3 and PW 6 coupled with contents of the caution statement that is Exhibit P.2.

The second major ground is on validity of the caution statement of the appellant. This is challenged on the reason that it was not procured voluntarily. The appellant did object the tendering and admission of the caution statement on account of being tortured and forced to sign prior to admitting to have committed the offence. The nature of torture is said to be a slap. It is on record (pages 33-41 of the proceedings) trial court conducted an inquiry by affording both the prosecution and defence

opportunity to tender evidence on voluntariness of the caution statement. Trial court was satisfied that such caution statement was procured voluntarily and thus proceeded to admit the same to form part of the prosecution evidence.

The procedure preferred by the trial court is in line with a well-established legal standard in addressing voluntariness of the caution statement. In **Mereji Logori vs Republic** (Criminal Appeal 273 of 2011) [2013] TZCA 408 (6 March 2013), the Court of Appeal stated categorically as follows:

> There are several decisions of this Court which have settled the law that once an accused had taken an objection against the admissibility of a caution statement at a subordinate court, the trial court concerned has a duty to first determine the voluntariness of the confession by conducting an inquiry. we emphatically said that if the prosecution intends to admit a caution statement in evidence in a subordinate court, and the accused objects to its admissibility, the next step is to make an inquiry as to the voluntariness of the statement. Once this question is determined and the court finds that the statement was made voluntarily, it admits it, and proceeds with the trial. We said also that if this inquiry is not done, and the court receives such evidence, the statement would

have been improperly received; and the court cannot act on such evidence.

It is my finding that the trial court applied a correct and proper procedure to satisfy itself on the voluntariness of the caution statement. It is on that account that trial court gave weight to this evidence as the same was legally and procedurally correct. I, therefore, dismiss ground 7 for being devoid of any merits.

Penetration issue was argued as an important ground on this appeal and that even PW 5 who is a medical doctor did not state that there was penetration. I have reviewed the record of the trial court and found that evidence of PW 2 is to effect appellant used to have carnal knowledge against nature to both victims. PW 2 narrated how appellant undress his clothes, remained naked and undressed the victims. PW 2 and PW 4 stated to have been penetrated in their anuses several time by the appellant.

Further, evidence of PW 3 found the appellant penetrating the anus of second victim (PW 4) before putting on his clothes and running away. This testimony of PW 3 corroborates the fact that PW 2 and PW 4 were penetrated.

Moreover, Exhibit P1 revealed that the victims' sphincterotome was weak for PW 2 and lost for PW 4. PW 5 testified that the sphincterotome can get lost after an unnatural offence is committed against the child. This

was further admitted by the appellant through Exhibit P.2 which is a caution statement where he admitted having been penetrating the victims' anuses.

As I have pointed out that, it is a settled law in this jurisdiction that evidence of a victim in sexual offence is the best evidence. PW 2 and PW 4 stated without any hesitation that it is the appellant who used to penetrate them in their anuses. Thus, the question of penetration was proved by evidence of PW 2 and PW 4. The evidence of the doctor (PW5) was only corroborating what PW 2, and PW 4 had testified to have been penetrated by none other than the appellant herein. Thus, grounds 3 and 6 of the appeal collapse for lack of merits.

Regarding fabrication of the case against the appellant because of dispute between the victims' family and the appellant, we find no justification whatsoever to entertain it. It is on record that appellant did not cross examine PW 1 who is the biological father of one of the victims. If there was a dispute the appellant would raise it during testimony of PW 1. There is iota of evidence to establish existence of conflict between appellant and victims' family. I dismiss ground 5 of the appeal for untenability.

On 8th ground of appeal, the appellant emphasized much on scientific rule that right travels in straight light unless it has been prevented by an object to reiterate that it would not be possible for torch light to assist in

identifying him. This ground has no merits as well. It is the evidence of PW 2 and PW 4 who are victims that formed the basis of the prosecution's case. The appellant is not disputing that he knew the victims before the incident as PW 2 and PW 4 are neighbours and the victims always were passing in a way near to the appellant. Evidence of PW 2 and PW 4 is that they both knew the appellant before the fateful day that led to his arrest as he used to have them carnally known against order of nature. This ground should fail for lack of merits too.

On standard of proof, I am of the view that totality of evidence on record points out to the proof of the prosecution case beyond any reasonable doubts. The evidence tendered by PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6 provide without any reasonable doubts that it is the appellant who committed offence of having carnal knowledge of the victims against the order of nature. Evidence of PW 2 and PW 4 established that it is the appellant who committed offence against nature to the victims. PW 3 corroborated to have found the appellant having carnal knowledge against nature to PW 4. PW 5 testified that have found the sphincterotome of victims to be weak or lost in victims' anuses which results from penetration.

Further, evidence of PW 6 cements the evidence of PW 2 and PW 4 for admission of the appellant having committed the offence in question. I concur with Respondent's learned State Attorney that evidence of PW 2 and PW 4 is watertight to establish the offence. There is no doubt that

prosecution managed to prove the case within the required legal standard. Thus, I dismiss ground 1 of the grounds of appeal.

I am satisfied that the case was proved beyond reasonable standard as per requirement of the law in criminal cases. It is on analysis of all these available testimonies on record that made the trial magistrate correctly arrive at finding the appellant guilty of the charge of committing an offence of carnally knowing the victims against order of nature contrary to section 154(1)(a) and (2) of the Penal Code, Cap 16 R.E. 2019.

It is trite law that when an appellate court is satisfied that prosecution established the case to the required standard then the appellate court should proceed to dismiss the appeal. This was in the case of **Gaudence Sangu vs Republic** (Criminal Appeal 88 of 2020) [2022] TZCA 784 (7 December 2022), at page 19, where the Court of Appeal stated that:

> In the event, upon our own evaluation of the evidence on record, we are satisfied that the prosecution proved the case against the appellant to the required standard and thus, his conviction was legally sound. We have found no reason to interfere with it so are the sentences imposed against the appellant.

I find that trial magistrate was correct in convicting and sentencing the appellant for offence charged in accordance with the law. I find no

fault on the judgement of the District Court at Bahi. I uphold that decision thus affirm the conviction and sentence thereof.

This appeal stood dismissed for want of merits.

It is so ordered.

DATED and **DELIVERED** at **DODOMA** this 16th day of November 2023.

E.E. LONGOPA

JUDGE

16/11/2023.