IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 29 OF 2022

(Originating from Criminal Case No. 12 of 2021 of Same District Court)

RASHID HAMIS BAKARI @ KIFO.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

30/01/2023 & 07/02/2023

SIMFUKWE, J.

The appellant Rashid Hamis Bakari @ Kifo was charged before the District Court of Same (trial court) with the offence of unnatural offence contrary to **section 154(1)(a) (2) of the Penal Code, Cap 16 R.E 2019**. It was alleged before the trial court that on 18th day of January 2021 during day time, at Suji Kitivo area within Same District in Kilimanjaro Region, the appellant had carnal knowledge of one boy aged 9 years against the order of nature. He was convicted and sentenced to a statutory life imprisonment.

The appellant was dissatisfied with the conviction and sentence. He filed the instant appeal on five grounds:

1. *That, the learned trial magistrate grossly erred both in law and fact in sentencing the Appellant to "Life imprisonment "Despite the lack of proof as to the exact age of the victim of the alleged offence (PW2). Since, the charge sheet indicates that PW2's age is 9 years old, the proceedings shows that he is 5 years old and PW4's evidence indicates that, he is 9 years old.*
2. *That, the learned trial magistrate grossly misdirected herself (sic) and consequently erred both in law and fact in holding that, the alleged waterly found by PW4 (the clinical officer) in the victim's anus were sperms/semens and that the same were put there by male organ. Despite there being no proof on whether the same were sperms or semens taking into account that, from PW'4 evidence there were no proof of penetration. (sic)*
3. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, the principle in cases of this nature and the settled proposition is always that, in proof of penetration there must be an observation of doctor's examination couple (sic) with victim's evidence proof that there was penetration of male organ into a victim's genitals.*
4. *That, the learned trial magistrate grossly erred both in law and fact in convicting the appellant basing weak, tenuous, incredible and wholly unreliable prosecution evidence from prosecution's witnesses.*
5. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubts against the Appellant and the required standard by the law.*

The appeal was ordered to be argued by way of written submissions. The appellant had no representation while the respondent was represented by Ms Mary Lucas learned State Attorney.

In his submission, on the outset, the appellant averred that in cases of this nature the settled proposition is always that the standard of proof by the prosecution is beyond any shadow of doubts. That, in the case at hand, the appellant was convicted on a charged offence and subsequently sentenced to a harsh and severe sentence of life imprisonment under **section 154 (2) of the Penal Code, Cap 16 R.E 2019.** He was of the opinion that for the above subsection to apply it has to be proved beyond reasonable doubt the age of the victim of the alleged offence. That, in this case the charge sheet laid against the appellant indicated that the victim (PW2) was 9 years old. That, when the victim was testifying at page 9 of the typed court proceedings, he stated that he was five years old.

The appellant went on to insist that the age of the victim (PW2) was an essential ingredient in this case to be proved by the prosecution in support of the charge. Further, that it was an essential ingredient to be considered and determined by the trial court before invoking subsection (2) of **section 154 of the Penal Code** and impose a life sentence imprisonment against the appellant. That, unfortunately, that crucial piece of fact escaped the attention of the learned trial magistrate undetected.

The appellant raised another concern that in cases of this nature the main ingredient is penetration which can be proved through the evidence of the victim coupled with the observation of the medical practitioner. That, in this case apart from the evidence that PW2 was taken to hospital for

medical examination, there was no evidence from the medical practitioner (PW4) to show that PW2 was carnally penetrated against the order of nature. That, PW4 ended up testifying that he only saw watery like semen and that he sent/referred the said fluid to the District Hospital for more observation so as to prove whether the same were sperms or not. Surprisingly, until the prosecution closed their case, no evidence was brought to prove and show that the alleged fluid was sperms.

It was submitted further that the learned trial magistrate failed to properly consider and assign any reason as to why he rejected the appellant's strong defense. That, for undisclosed reasons the police did not do what they could have done in investigation in order to shed more light, and show the truthfulness of the alleged incidence to the court so as to minimize the possibility of a case to be concocted against the appellant. Failure of which made even the trial magistrate to be adamant that the defense of the appellant did not cast any reasonable doubt on the prosecution's case. Moreover, the appellant alleged that the learned trial magistrate shifted the burden of proof to the appellant, which was a fatal omission in law as the appellant was supposed only to raise reasonable doubt on the prosecution case and not to prove his innocence.

In support of his submission, the appellant subscribed to the case of **Farida Abdul Ismail v. R, Criminal Appeal No. 83 of 2017** (unreported) at page 25 where the Court held that:

> *"Apart from the reference to defence case earlier in the course of framing issues for determination the learned trial judge did not allude to it anywhere in the judgment. The trial court's findings found at page 172 of the record, was reached without even a casual*

reference to what was said in defence and we are of the firm view that this was incorrect. This is the same thing that the court said in ***Peter Masanja Makansi versus Republic, Criminal Appeal No. 226 of 2014*** *(both unreported). In the latter case we held that it is not enough for the court to summarize the evidence for the defence, but it must specifically address it in arriving at its decision. We ask ourselves what difference would there be between a trial in the accused's absence and that which like the one under discussion the defence version does not form part of the decision? We think there is no much difference and it is a denial of the accused's right to a hearing."*

That, at page 26 of the same case, the Court of Appeal went on to state that:

"The trial judge had a duty to address the defence case even if, in the end, she would have rejected it provided she gave her reasons. Thus, if the learned judge had observed the requirement to give reasons to her decisions, she would have considered the defence case and assigned reasons for rejecting it...."

Guided by the cited case law, the appellant prayed for re-evaluation of evidence on record by this court and arrive at its own decision thereon. He prayed further that, this court should see all the above elaborated shortfalls in the prosecution's case and resolve the same in favour of the appellant.

In the final analysis, the appellant prayed this appeal to be allowed, conviction be quashed and sentence be set aside.

Responding to the first ground of appeal for the respondent Republic, Ms Mary Lucas learned State Attorney submitted that from the record of proceedings nowhere it was indicated or testified that the victim was 5 years old. That, the victim was 9 years old as sufficiently established by PW4 Dr. Renatus Makunga at page 18 of the proceedings. On the issue as to who may prove the age of the victim, Ms Mary referred the case of **Isaya Renatus vs Republic, Criminal Appeal No. 542 of 2015** (unreported) in which it was held that evidence as to proof of age of a victim can be given by the victim, relative, parent, medical practitioner, or birth certificate. She concluded that the first ground of appeal lacks merit and prayed that it should be dismissed.

On the second and third ground of appeal, the learned State Attorney submitted that through the testimony of PW2 after he sufficiently promised the court to tell the truth, proof of penetration was conclusively established. She made reference to page 12 of the proceedings where PW2 told the court that ***"he inserted the whole of his penis and it entered in anus until he ejaculated, I felt pain and I hate him."***

Ms Mary stated that the testimony of PW2 was corroborated by PW4 Dr. Renatus who examined the victim and filled the PF3 which shows that PW2 was penetrated and remains of sperms were found. She was of the view that pursuant to **section 130 (4) (a) of the Penal Code,** penetration as special element of sexual offences has been well established. The argument was cemented with the case of **Selemani Makumba vs The Republic [2006] TLR 380** in which it was settled that best proof in sexual offences comes from a victim. Ms Mary also cited the case of **Abraham Iddi Alute @ Ngudu vs The Republic, Criminal Appeal No. 347 of 2017** (unreported) in which it was held that proof of

penetration can also be established by a medical practitioner. In conclusion, it was submitted that the second and third grounds of appeal lacks merit and prayed the court to dismiss them.

On the fourth and five grounds of appeal, it was replied that PW1, PW2 and PW4 gave an account of direct evidence as per best evidence rule declared under **section 61 and 62 of the Evidence Act, Cap 6 R.E 2022.** That, the rule was underscored in the case of **Athumani Rashid vs Republic, Criminal appeal No. 264 of 2016.**

Referring to the present case, it was contended that the trial court found the victim PW2 as a witness of truth, as he was found crying and mentioned the appellant at the earliest opportunity to PW1. His evidence was corroborated by the evidence of PW1 and PW4.

Ms Mary was of the opinion that the demeanor of all prosecution witnesses was weighed by the trial magistrate who chose to trust them. She referred to pages 8,9 and 10 of the judgment where the trial magistrate weighed prosecution evidence vis a vis defence evidence. The learned State Attorney cited the case of **Magendo Paul and Another vs Republic [1993] TLR 218** in which it was held that:

> *"...The law would fail to protect the community if it admitted fanciful possibilities to deflect the court of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence* ***"of course it is possible but not in the least probable"****, the case is proved beyond reasonable doubt."*

Ms Mary asserted that in this appeal, there is no cogent reason to fault the decision of the lower court as the case was proved beyond reasonable

doubt. She added that from the whole proceedings of this case, there is no any good and cogent reason for disbelieving the testimony given by all prosecution witnesses. She cemented her submission with the case of **Goodluck Kyando vs the Republic [2006] TLR 363** which propounded the legal position that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.

It was concluded that this appeal is devoid of merit and that it should be dismissed in its entirety.

Basing on the above arguments, the learned State Attorney commented that the trial Magistrate correctly convicted the appellant basing on PW2's evidence since the best evidence came from him.

From the submissions of both parties, what is contested is the age of the victim and the issue of penetration. The appellant is of the view that the two issues were not proved by the prosecution beyond reasonable doubts. On the other hand, the respondent Republic is of the opinion that the two issues were proved beyond reasonable doubts.

Starting with the issue of penetration, as rightly submitted by the learned State Attorney, it is settled law that penetration can be proved through the evidence of the victim under the best evidence rule as propounded in the case of **Selemani Makumba v. Republic** (supra). I have carefully considered the complaint of the appellant that evidence of the victim was not supported by evidence of the medical practitioner (PW4) who testified. With due respect to the appellant, in sexual offences, conviction may be grounded by solely

relying on the testimony of the victim alone where the court is satisfied that the victim is speaking nothing but the truth. **Section 127 (6) of the Evidence Act** (supra) is relevant. The section reads that:

> *"127 (6) Notwithstanding the preceding provisions of this section,* ***where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence,*** *the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits,* ***notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*** Emphasis added

In the case of **Mohamed Said Rais v Republic, Criminal Appeal No. 167 of 2020** (unreported) it was held that evidence from the victim of a sexual offence can ground conviction if it is beyond reproach by itself which boils down to credibility.

In his decision the learned trial Magistrate convicted the appellant basing on the best evidence rule. He relied on what the victim narrated before the court how the appellant took him to the farm near the baobab tree where he carnally knew him against the order of nature. However, concerning evidence of PW4 whose credibility is questioned by the appellant, at page 8 of the judgment the trial magistrate had this to say:

"Notwithstanding the evidence of the victim in this case, there is the evidence of PW4 who is the clinical officer examined (sic) the victim and he found watery and semen or sperms in the anus of the victim. ***This suffice to prove that the same were inserted inside by male organ hence penetration."*** Emphasis supplied

In other words, what the trial magistrate was trying to say is that evidence of PW4 corroborated evidence of PW2 on the issue of penetration.

In his submission, the appellant also pointed out that the learned trial magistrate failed to properly consider and assign any reason as to why he rejected the appellant's strong defence evidence. I examined the judgment of the trial court on what was said about the defence of the accused person. At page 8 last paragraph of the judgment of the trial court, it was stated inter alia that:

"The accused person flatly denied to have been committed (sic) the offence of unnatural offence against the victim; ***although he admitted to go with the said victim to the farms*** *where he wanted to take mangoes in his farm."* Emphasis mine

At page 9 of the judgment, the learned trial Magistrate stated that when given chance to cross examine the victim, the appellant told the court that he had no question. Basing on that fact, the trial court drew an adverse inference against the appellant that he had admitted all the facts which the victim narrated before the court.

In the circumstances, I am of the opinion that the complaints of the appellant in relation to the issue of penetration and failure to consider his defence, are unfounded. The trial court considered the defence of the

appellant and gave reasons for its decision which I do not see any reason to disturb.

On the issue of the age of the victim that it was not proved, the appellant submitted that, in his testimony the victim alleged that he was five years while the charge sheet indicated that the victim was nine years old. On that account the appellant concluded that the age of the victim was not proved beyond reasonable doubts. In the case of **George Claude Kasanda v. DPP, Criminal Appeal No. 376 of 2017** it was held that:

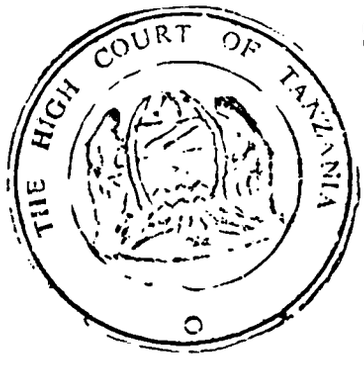
> *"Before we proceed, we find it opportune to remind the courts below and the prosecution that preliminary answers and particulars given prior to giving evidence are not part of the evidence as the same are not given on oath. (See **Simba Nyangura vs Republic, Criminal Appeal No. 144 of 2008** (unreported). Instead, they serve as general information (See **Nalogwa John vs Republic, Criminal Appeal No. 588 of 2015** (unreported)."*

According to the proceedings of the trial court, apart from the charge sheet, the age of the victim was confirmed by PW4 who stated in his testimony and the PF3 which he filled that the victim was 9 years old. In the PF3 it has been indicated that the victim was taken to hospital by his brother one Ally Hamidu which means that possibly he is the one who mentioned the age of the victim to the doctor. Guided by the above authority, the age of the victim is presumed to be that indicated in the charge sheet and testified by PW4 a medical practitioner; and not the one indicated in the particulars of PW2 when he testified.

Therefore, the complaint of the appellant in respect of the age of the victim has no merit.

On the basis of the findings herein above, I find this appeal devoid of merit and it's hereby dismissed in its entirety. Conviction and sentence meted against the appellant confirmed.

Dated at Moshi this 07th day of February, 2023.



S. H. Simfukwe

Judge

07/02/2023