IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

CRIMINAL APPEAL NO. 55 OF 2023

(Arising from the judgment of the District Court of Shinyanga at Shinyanga before Hon. Y. Zahoro-SRM, dated on 30th March 2023, Criminal Case No. 133 of 2022)

BETWEEN

JUMA JINASA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

8th February & 12th April, 2024

MASSAM, J.:

Before the District Court of Shinyanga at Shinyanga, Juma Jinasa, was charged, tried and eventually convicted of the two offences first count attempted to commit Unnatural Offence contrary to **Section 155 of the Penal Code**, Cap 16 Revised Edition, 2022 and second count **Attempted Rape** Contrary to **Section 132 (1) and (2) of the Penal Code**, Cap 6 R.E 2022.

The prosecution side alleged that on 24th November, 2022, at Ibubu Village within Shinyanga District in Shinyanga Region, the appellant did unlawfully attempt to rape and have carnal knowledge with

one D/o of A against the nature. When the charge was read over to him, he demonstrably pleaded not guilty to the charge.

The background leading to this appeal is as follows that, PW6 (the victim) and Pw4 (the victim's friend) went to ask for some mangoes from the appellant. PW4 stated further that when PW6 was asking for some mangoes she went inside the room of the appellant and the appellant chased them away. However, PW4 went back to the appellant's house and saw him lying on the bed with PW6 while being naked and they went to report the matter to PW1 who is the mother of the victim. PW1 (mother of the victim) rushed at the scene and found the appellant naked with her child on bed, the appellant tried to cover himself with a trouser.

PW1 testified further that she saw the appellant's penis which was applied with jelly. The appellant asks her for forgiveness, but they decided to report the matter to the police station. On her side, the victim (PW6) testified that the appellant applied jelly on her buttocks and told her not to raise any voice. At the Hospital, the clinical Officer, PW2 at Nindo Hospital examined her and according to the report, he found jelly applied in the victim's anus and vagina and some bruises in her anus. Therefore, it was his conclusion that someone was attempting to sodomized and rape the victim.

Thereafter he tendered the PF3 which was admitted as Exhibit Pe1. At the police station, the appellant admitted having committed the offences as per exhibit PE2, which was tended by PW3 (G2590 D/CPL Benedictor). Then, he was arraigned before the court.

Placed on his defence, the appellant gave sworn evidence and denied having attempt to rape and sodomize the victim. The appellant also testified that he had a relationship with the victim's mother (PW1) and after he left her, she decided to fabricate this case. He prayed to be forgiven as he did not commit the alleged offences.

After full trial of the case, the accused person was found guilty of the offences as charged and he was consequently convicted and sentenced each of them to twenty years' imprisonment to each court.

Aggrieved by the trial court's conviction and sentence thereof, the appellant has filed this appeal raising eleven grounds of appeal coming down to the following complaints;

On the **first** ground the appellant is complaining that, the evidence of PW2 did not corroborate with the evidence of PW1 as he proved non existing offence of unnatural offence. On the **second** ground, the appellant complained that the trial court relied on the evidence of the victim which was insufficient, unreliable, inconsistent and incredible to

sustain conviction and sentence meted upon the appellant. And on the **third** ground, the appellant complained that the evidence of the victim (the child) was taken contrary to **Section 127 (1) and (2) of the Law of Evidence Act**.

When the matter was called on for hearing on 8/2/2024, the appellant appeared in person unrepresented whilst Mr. Goodluck Saguye, learned state Attorney appeared for the respondent. The appeal was argued orally.

Submitting in support of the grounds of appeal, the appellant prayed for his grounds of appeal to be considered as it is and be left free to join his family.

Responding to the grounds of the appeal, on the 1st ground, Mr. Saguye stated that after the victim had been taken to the hospital the duty of the doctor was to examine the victim and state what he saw and not to prove if the appellant was the one who committed the offence or not. He stated further that at page 9 of the trial court proceedings the doctor said that he found jelly in the victim's anus and bruises which proved that there was an attempt of rape, also he tendered PF3 as exhibit to prove the same. Thus, as the said evidence supported the evidence of other witness and the appellant did not object the same at the trial court, means its contents were true. He referred this court to

the case of **Sano Sadik and Another v. The Republic**, Criminal Appeal No. 623 of 2021 (CAT at Mtwara, reported at Tanzlii).

Replying on the 2nd ground of appeal, Mr. Saguye stated that the evidence of PW6 (the victim) was real and credible as she was the one whom the offence was committed against. Further to that he said that the victim (PW6) explained how the offence was committed at the house of the appellant and how his room look like. Her mother (PW1) also explain how she interact the act and found the appellant half naked and the victim was lying on the bed. More to that, as the best evidence comes from the victim, the offence was proved beyond reasonable doubt. He cited the case of **Efeso Wasita v. Republic**, Criminal Appeal No. 408 of 2020 (CAT at Mbeya, reported at Tanzlii).

On the last ground of appeal, Mr. Saguye replied that they do agree with the appellant that the trial Magistrate did not comply with **Section 127(2) of the Law of Evidence Act**, Cap 6 R.E 2019 as he did not ask the child few pertinent questions to see if she understand the nature of oath or not. However, the evidence of PW6 was not the only evidence that led to the conviction of the appellant. He added that there was of PW4 (a child) whose evidence was taken according to the law, PW1 (the victim's mother) who was the eyewitness, and PW3 (Police officer) who took caution statement of the appellant and

admitted to have committed the offence. Thus, even in the absence of the evidence of the victim, the remaining evidence are still enough to convict the appellant. So, he prayed for the appeal to be dismissed.

In brief rejoinder, the appellant stated that he confessed to have committed the offence after being bitten and maintain his prayer for the appeal to be allowed and be left free.

Having carefully considered the grounds of appeal, the submissions made by the parties and the record before this court, the main issue for my determination is ***whether the appellant's conviction was based on strong prosecution case***.

It is a trite law that, in a criminal trial the burden of proof always lies on the prosecution and the proof has to be beyond reasonable doubt. See the case of **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda Vs. Republic**, [2006] T.L.R395. In determining this appeal this court will start with ground no 2 and 3 to see if the evidence of the victim was reliable and recorded according to law as it is the principle of law that in the Case like this of sexual offence the best evidence comes from the victim. See the case of **Ally Mpalagana v. The Republic**, Criminal Appeal No. 213 of 2016. In our present case the evidence of the victim was taken contrary to **Section 127 (2) of the Law of Evidence Act**, as in terms of the said sections a child of

tender age like any other witness in a criminal trial must as general rule give his or her evidence under oath or affirmation as it is mandated under section 198(1) of CPA which reads that

> ***"every witness in a criminal matter or cause shall subject to the provisions of any other written law to the contrary be examined upon oath or affirmation in accordance with the provision of the oath and statutory Declaration Act."***

The child of tender age unlike an adult witness must however before giving evidence under oath or affirmation be tested by simplified question and the trial court satisfied that such witness can in fact give evidence under oath or affirmation as the case maybe. See the case of **Selemani Moses Sotel @ white verse The Republic** criminal appeal no 385 of 2018.

Coming to section 127 (2) of TEA is exemption in which the evidence will be taken without oath or affirmation subject to the witness promising to the court that he or she will tell only the truth and undertake not to tell lies the records must be clear as to how the court arrives into a conclusion that a certain child witness should give evidence under oath or affirmation and the evidence taken contrary to the law becomes valueless and cannot be acted upon to convict this

was held in the case of **Godfrey Wilson vs. Republic** criminal appeal No 168 of 2018, and in the case **of Issa Salum NambalukaVs. Republic** criminal appeal No 272 of 2018 which the same started that where a witness is a child of tender age a trial court should at the foremost ask few question so as to determine whether or not the child witness understand the nature of the oath if he /she replied in affirmative he or she can proceed to give evidence on oath or affirmation depends on the religion confessed by the witness. If the child does not know the nature of the oath he or she should before give evidence be required to promise to tell truth and not to tell lies.

Coming to the present case the key witnesses were two PW6 who is the victim and Pw3 who was the eye witness and all of the witnesses are in tender age the records are silent whether PW6(the victim) was tested to ascertain their ability to give evidence on oath or otherwise but there was a conclusion of the magistrate that the witness should give evidence without oath nothing indicated to the record to assist us to know how the learned trial magistrate arrive to such conclusion this court cannot rely on such conclusion ,because this court is asking itself how could a witness who does not possess knowledge of knowing the nature of telling the truth could promise to tell the truth so, that means that the said witness did not know even the need to tell the

truth or she did not know the nature of oath ,she was just subjected to give her evidence. According to the said situation, this court it asked itself in the circumstances like this what should be done?

According to the submission from the State Attorney he agreed that the evidence of victim was not recorded according to law but the one for Pw6 was well recorded so he agreed the evidence of victim to be expunged and remain with that of Pw3 which was well recorded and she was eye witness.

This court has its view that this instance depending on the facts of the case, there are situation that the evidence which was not well recorded required to be expunged but some other instances the order of retrial will serve for the purposes in order for the victim to be given the right to be heard as the victim cannot be condemned unheard for the mistakes which was done by the court. The court required to order re trial after satisfy itself that the evidence on record can convict the appellant and not to give the prosecution opportunity to fill the gaps in their case. Again, if the court satisfy itself that the evidence given was weak the order of the acquittal would be appropriate one as both

be well recorded because this is a sexual offence and the best evidence comes from the victim who is in the position to tell the court how the said offences was committed by doing so the court will be in position to know the truth in order to give the victim and the appellant the right required to be given. According to that this court found ground No 2 and 3 has merit and allow the same as the proceedings has suffered with the serious irregularities as complained by the appellant in his grounds of appeal. As the ground no 2 and 3 dispose this appeal, this court finds out that there is no need of entertaining the remaining ground of appeal.

According to that this court is hereby nullify the entire proceedings, quash the judgment of the trial court and set aside the sentence meted. This court is ordering the appellant to be tried afresh before another magistrate with competent jurisdiction. It is so ordered.

Order accordingly.

DATED at **SHINYANGA** 12th of April, 2024.

THE HIGH COURT OF TANZANIA

R.B. Massam

JUDGE

12/4/2024