IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 168 OF 2023

(Arising from the Decision of the District Court of Kigamboni in Criminal Case No. 22 of 2023)

ABILAI HASSAN MOHAMED----------APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

Date of last order: 25/03/2024

Date of Judgment: 03/05/2024

A. A. MBAGWA, J.

This is an appeal against both conviction entered and sentence imposed by Kigamboni District Court in Criminal Case No. 22 of 2023. The appellant, Abilai Hassan Mohamed was charged with, tried and convicted of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16. R.E 2022].

It was alleged in the charge that, on unknown dates between January, 2023 and February in 2023 at Dege area within Kigamboni District in Dar es Salaam Region, the appellant, Abilai Hassan Mohamed, did have carnal knowledge of one (AJ), a boy of seven (7) years against the order of nature.

Upon arraignment, the appellant pleaded not guilty to the charge, and therefore the matter went to a full trial. In a bid to prove the allegations, the prosecution paraded four witnesses. However, this being a sexual offence case, I will not disclose the names of witnesses except the doctor who conducted a medical examination of the victim. I have taken this stance because mentioning the name of the victim's mother would lead to the disclosure of the victim's identity thereby detracting the purpose of concealing the victim's identity. Suffice it to say that the victim testified as (PW1) whereas his mother was PW2, and PW3 was the victim's younger brother aged three (3) years by then. Ezra Maswi Yohana, the clinical officer at Kigamboni District Hospital testified as PW4. In addition, the Republic tendered one documentary exhibit namely, PF3 (exhibit P1). The appellant, on his part, stood as a solo witness and did not have any exhibit.

In a nutshell, the prosecution's account was that at the material time, the appellant, Abilai Hassan Mohamed was working as a house boy in the victim's house. He used to take the victim and his younger brother (PW3) to and from school, among other duties. He also used to stay with the duo at home when the victim's parents were away.

It was the evidence of the victim's mother PW2 that on the 2nd day of February 2023 in the evening peeped into the victim's room.

Outrageously, she saw the victim's young brother PW3 holding his penis in a bid to insert it into the victim's anus. PW2 was shocked. She however managed to calm down and gained the courage. She friendly interviewed his two sons namely, PW1 and PW3 as to where they learned that unbecoming habit. PW3 told her that he saw their uncle, Alibai (the appellant), doing it unto the victim (PW1). At that moment, the appellant was in his bedroom. PW2 called his husband who arrived at home shortly. The victim's father, upon being briefed on what was obtaining, went to report the matter to Kigamboni Police Station. On the same night at around 00:00hrs, the police officers came and arrested the appellant.

PW1 (AJ) in his unsworn evidence testified that the appellant undressed the victim (PW1) and forcefully inserted his penis into his anus in the appellant's room. It was the testimony of PW1 that, he lives at Dege Area within Kigamboni Municipality where he stays with his father, mother (PW2), his young brother (PW3), and the appellant whom he identified as Uncle Abilai in the dock. PW1 clarified that the incident took place on the day when they did not go to school and their parents were away. Thus, they were only three at home namely, the victim (PW1), his younger brother(PW3), and the appellant.

Before inserting his penis, the appellant told PW3 to lick his penis. After the incident, PW1 did not tell anyone about it because the appellant cautioned him not to let anyone know it.

PW1's testimony was supported by the testimony of PW3. In his unsworn evidence, after he had promised to tell the truth, PW3 testified that he saw Uncle Abilai (the appellant) inserting his penis into PW1's anus. He further testified that the appellant had asked him (PW3) to lick the appellant's penis.

PW2, the victim's mother told the court that upon reporting the incident, they were issued a PF3 which they submitted to Kigamboni District Hospital for medical examination of the victim. At Kigamboni Hospital they were attended by a clinical officer one Ezra Maswi Yohana (PW4). PW4 testified that on 03/02/2023, he received PW1 and PW3 in the company of their parents (PW2 and her husband). He thus examined both PW1 and PW3. He observed that PW1's anus muscle was loose and open. As such, she concluded that PW1 was penetrated. As to the victim's younger brother (PW3), the clinical officer stated that he found his anus intact. Finally, PW4 recorded his findings in the PF3 that he tendered as exhibit P1.

On the other hand, the appellant strongly denied the allegations. He testified that he was framed as he owes PW2's husband his outstanding salary payments to the tune of Tshs. 400,000/=.

On account of the evidence presented, the trial Magistrate was satisfied that the allegations were proved beyond reasonable doubt hence she found the appellant guilty and convicted him of the offence. Consequently, she sentenced the appellant to life imprisonment and ordered him to pay the victim (PW1) compensation of Tshs. 500,000/=.

Aggrieved by the verdict and sentence, the appellant brought the instant appeal. In the petition of appeal, he fronted six grounds namely;

1. **That, the learned trial magistrate erred both in law and facts for failure to properly evaluate, analyze, and consider the evidence of PW2 on record, a failure of which led the trial court to arrive at an improper and erroneous finding that the appellant's defence was an afterthought.**

2. **That, the learned trial magistrate erred both in law and facts to convict the appellant based on evidence of PW1 and PW3 without the same being assessed in line with the defence evidence.**

3. **That, the learned trial magistrate erred in law to convict the appellant based on evidence of PW1 and PW3 whose evidence was not assessed to determine whether they were telling nothing but the truth as required by section 127 (6) of the Evidence Act, (Cap. 6 RE 2022).**

4. **That, the learned trial magistrate erred both in' law to disregard the appellant's defence in the absence of good and cogent reasons for not believing his defence evidence.**

5. **That, the learned trial magistrate erred both in law to convict the appellant in a prosecution case which was not proved beyond reasonable doubt."**

Upon a cursory glance at the above grounds of appeal, I was inclined that the appellant's complaints may be reduced into three (3) grounds of appeal namely;

1. That, the prosecution evidence was too weak to ground the appellant's conviction.
2. That, the trial court unreasonably disregarded the appellant's defence.

3. That, the evidence of PW1 and PW3 (child of tender age) were taken contrary to the dictates of section 127 (6) of the Evidence Act, [Cap 6 R.E 2022].

It is noteworthy that the appellant fended his appeal whilst the respondent/Republic was represented by Mr. Clement Masua, learned State Attorney. The appeal was disposed of by way of written submissions and both parties timely complied with the filing schedule.

In his submission in support of the appeal, the appellant argued grounds 1 and 5 conjointly, consolidated grounds 2 and 4 as one ground, whereas ground No. 3 was argued severally.

Submitting on the 1st and 5th grounds of appeal, the appellant said that, had the trial court properly evaluated and analyzed the evidence of the prosecution, it would have found that the case against the appellant was not proved beyond reasonable doubt as to justify the conviction of the appellant. He submitted further that, the prosecution evidence depicts that PW1 and PW3 implicated the appellant to avoid punishment from their parents. In the appellant's opinion, PW1 and PW3 had interest to serve hence their evidence ought not to be relied on. To buttress his arguments, he cited the case of **The Director of Public Prosecution vs. Justice Lumina Katiti and 3 others**, Criminal Appeal No. 15 of

2018. CAT at Da es Salaam (unreported) on pages 13 to 14, where the Court of Appeal of Tanzania held that;

> **"The concept of a witness with interest to serve is meant to discredit a witness by establishing that he told a lie in order to serve his skin."**

In reply to grounds 1 and 5, Mr. Masua, learned State Attorney submitted that the court properly analyzed the evidence and the prosecution discharged its duty of proving the case beyond reasonable doubt. He submitted further that, PW1, the victim of offence was capable of explaining the act done to him by the appellant. Mr. Masua went on that PW3 corroborated the testimony of PW1 that, he was present at the time the appellant was sodomising PW1.

Further, the learned State Attorney submitted that PW4 corroborated the evidence of PW1 as she confirmed that upon, examining PW1, she found his anus open and the muscles were loose. Mr. Masua candidly submitted that the victim was penetrated as exhibited in the PF3 (exhibit P1).

The learned state attorney submitted further that the prosecution evidence was coherent throughout hence a sign that they were witnesses of truth. To stress the point, he cited the case of **EX.G.2434 PC George**

vs. the Republic, Criminal Appeal No. 8 of 2018, CAT at Moshi (unreported) where the Court had this to say;

> **"The credibility of a witness can also be determined in two ways: one when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation to the evidence of other witnesses, including that of accused person. In the two other occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."**

Based on the submission above, Mr. Masua implored the court to dismiss the 1st and 5th grounds for want of merits.

With regard to the 2nd and 4th grounds, the appellant submitted that the evidence of PW1 and PW3 was not assessed in line with the defence evidence. He expounded that the defence evidence was disregarded without good and cogent reasons. He argued that a careful scrutiny of the evidence reveals that PW1 and PW3 were coached to implicate the appellant. The appellant lamented that the conviction was solely based

on the evidence of family members hence it was likely to be cooked. On this, he relied on the decision of the Supreme Court of India in **Rameshwar V. State of Rajasthan**, 952 AIR 54, 1952 SCR 377.

Replying, the learned State Attorney submitted that the trial court considered the defence evidence but rejected it after it found the prosecution evidence cogent. He referred the court to the case of **John Stephano & Others vs. Republic**, Criminal Appeal No. 251 of 2021, CAT at Bukoba (unreported) in which the court held that rejection of defence evidence does not mean the defence was not considered. He thus prayed for these grounds to be dismissed for lack of merits.

On the 3rd ground of appeal, it was the appellant's submission that, the law, that is section 127(6) of the Evidence Act, (Cap. 6 RE 2022) is clear that the Court should be satisfied that the child of tender age is telling nothing but the truth. He challenged that the trial court did not record the reasons for accepting the evidence of PW1 and PW3 hence an impression that the trial court did not assess the credibility. He stressed that the omission was fatal and offended the mandatory requirements of section 127 (6) of Evidence Act, [Cap. 6 RE 2022]. He thus prayed for the court to hold that, the prosecution evidence against the appellant was not credible and reliable to prove the case against him to the hilt.

In constrast, the learned State Attorney for the respondent submitted that the legal requirement was complied with by the trial magistrate. He elaborated that PW1 (victim) on pages 18-19 and PW3 on pages 33-34 of the proceedings prior to giving their testimony, promised to tell the truth and not lies in terms of sub-section (2) of section 127 of the Evidence Act [CAP 6 R.E 2022]. He stressed that the trial Magistrate went further and conducted an assessment by asking PW1 (Victim) and PW3 some questions before they testified. He submitted that as per the case **Mathayo Laurence William Mollel vs. The Republic,** Criminal Appeal No. 53 Of 2020, CAT at Arusha, it is not a legal requirement for a child to indicate whether he understands the meaning of the oath. In **Mathayo Laurence William Mollel** (supra), the Court of Appeal had this to say;

"...the trial court ought to have conducted a test to verify whether the child witnesses knew and understood the meaning of oath or affirmation. In our considered view, that requirement would only be necessary if the child witnesses testified on oath or affirmation. We respectfully think that if a child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with".

In view of the above, the learned State Attorney prayed the court to dismiss the appeal in its entirety for lack of merits.

Having canvassed the rival submissions, I should, at the outset, register my appreciation to both the appellant and the learned State Attorney for their industrious and researched submissions. Suffice it to say that I have dispassionately considered both submissions in my deliberations.

At this juncture, the relevant issue for determination is therefore whether this appeal is meritorious.

As hinted above, the 1st and 5th grounds were consolidated and argued conjointly. After a thorough scrutiny of the appellant's complaints in the above grounds, it is my view that the grounds require this Court to decide whether the charge against the appellant was proved beyond reasonable doubt. It is common cause that the evidence of PW1 and PW3 proved that, indeed the appellant carnally knew PW1 against the order of nature. Their evidence was corroborated by PW4 who found the victim's anus open. In addition, the prosecution evidence was coherent and consistent hence there was no reason for the trial court to discredit their testimony.

It is a settled position of the law that in sexual-related offences, the best evidence comes from the victim. See the case of **Selemani Makumba v. Republic [2006] T.L.R. 379**. I have strenuously assessed the victim's evidence and found him a reliable witness. On pages 20 -24 of

the typed proceedings, the victim (PW1) testified that it was the appellant who inserted his manhood into his anus. The victim did not disclose the incident as the appellant had warned him not to disclose the same. The whole saga was unearthed when (PW3) was caught by their mother (PW2) trying to insert his penis into PW1's anus. The appellant has invited this court to disregard the evidence of PW1 and PW3 as persons who had interests to serve citing **The Director of Public Prosecution V. Justice Lumina Katiti and 3 others (supra).** It is a trite law that every witness is entitled to credence unless there are good reasons not to believe him. See: **Goodluck Kyando vs the Republic,** [2006] TLR 363. In assessing the credibility of a witness, the court has to consider various aspects including the coherence of the witness evidence vis a viz other witnesses. I have keenly navigated through the evidence as a whole and noted that all the prosecution witnesses were so consistent. The evidence of PW1 and PW3 was augmented by the medical findings through PW4. On top of that, it would be irrational to demand a different witness whereas it was clearly testified that at home no other person was staying there apart from the appellant, PW1, PW2, PW3, and the victim's father. In that regard, the argument by the appellant that the prosecution witnesses had an interest to serve is, in the circumstances of this case,

without merits. I therefore find no good reasons to disbelieve the prosecution witnesses.

With the foregoing analysis and observation, the 1st and 5th grounds are devoid of merits and therefore dismissed.

I now turn to consider the 2nd and 4th grounds which have been condensed into one complaint namely, the trial court unreasonably disregarded the appellant's defence. On this, the appellant laments that the testimonies of PW1 and PW3 were not assessed in line with his defence. He added that PW1 and PW3 were couched to implicate him. He argued that his claim that he owed PW2 Tanzania Shillings Four Hundred Thousand (Tshs. 400,000/=) as salary arrears was not considered. Furthermore, the appellant complained that neither the arresting officer nor the investigator of the case were brought in by the respondent to testify. He implored the court to draw adverse inference against the respondent's case.

To be fair to the trial magistrate, the defence evidence was adequately considered particularly on page 17 of the judgment. The learned trial magistrate categorically stated that the allegations with respect to claims of Tshs. 400,000/- as salary arrears was an afterthought as the same was not cross-examined by the appellant after PW2 had given her testimony. Further, on page 21 of the impugned judgment, the trial

magistrate expressly stated that she considered the appellant's defence and arrived at the findings that the same did not raise any reasonable doubts.

It is my findings that the appellant's defence was duly considered by the trial court but rejected on the ground that it did not raise any reasonable doubt. As such, the trial magistrate cannot be faulted on that.

Again, with respect to the complaint that, the prosecution failed to parade material witnesses namely the arresting officer and the investigation officer, I find this complaint bereft of merits. His evidence speaks against this complaint. In his own testimony during the defence, the appellant testified that he was arrested and later on interrogated by the police officers (page 48-57) of the typed proceedings. To add up, there is no specific number that the prosecution has to parade in order to prove the case. Rather, the case is determined based on the quality of evidence. In the case of **Goodluck Kyando vs Republic (supra),** the court held that there is no particular number of witnesses that is required to prove the case. This is inline with the dictates of section 143 of the Evidence Act.

It is for the above reasons, I am constrained to hold that the appellant's complaints on that aspect has no basis. I accordingly dismiss it.

In the 3rd ground, the appellant challenges the admission and reliability of the evidence of PW1 and PW3 (children of tender age). His complaint was predicated on section 127 (6) of the Evidence Act. He assaulted the trial magistrate saying that he received the evidence in contravention of section 127 (6) of the Evidence Act, [Cap 6 R.E 2022]. He said that the magistrate did not record the reasons for believing that PW1 and PW3 were telling nothing but the truth. To canvass this grievance, it behoves me to reproduce the relevant section. Section 127(2) of the Evidence Act provide;

> ***(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 shall start with the question whether or not the evidence of PW1 was received according to law. On this, I find it pertinent to reproduce part of the proceedings dated on 17th April, 2023 when PW1 was called on to testify. On pages 17 -20 of the typed proceedings, it reads as follows;

"Court: -1. Prosecution case opens.

2. Case proceed in camera as per S. 186 93) of CPA Cap 20 R.E 2022.

PW1

Court-Victim is of tender age

SIGNED

S. W. MWAKALOBO-SRM.

17/04/2023

ASSESMENT OF THE VICTIM BY THE COURT

Court-What is your name?

Victim-My name is (omitted)
Court-How old are you/
Victim-I am seven (7) years old.
Omitted:
Court -Do you know the different of speaking the truth and lies/
Victim-Yes, the child who speaks the truth is a good child and the one who is telling lies is a bad child.
Court-Do you promise to tell the truth and not lies/
Victim-Yes, I promise to tell the truth and not lies.

SIGNED
S. W. MWAKALOBO, SRM.
17/04/2023
Court: Victim (PW1) promised to tell the truth and not lies.
SIGNED

S. W. MWAKALOBO-SRM
17/04/ 2023
Court-S. 127 (2) of TEA CAP 6 R.E 2022 Complied with."

Looking at the above extracted proceedings, there is no gainsaying that the requirements of section 127(2) was duly complied with as PW1 promised to tell the truth and knew the meaning of telling truth.

Regarding the credibility, it is a settled position that the evidence of a child of tender age should not be discarded on flimsy reasons without proof on a balance of probabilities that there was something lacking that really affected the quality and credibility of such evidence. In the case of **George Jonas Lesilwa vs Republic**, Criminal Appeal No. 374 of 2020. CAT at Moshi (unreported), the Court of Appeal at page 18-19 of the typed

Judgment while commenting on Section 127 (2) of the Evidence Act (supra) had this to say;-

> "For the sake of completeness, we are constrained, before leaving this subject, to observe that, going by the above interpretation of the law, it must be clear that, **the evidence of a child of tender age should not be discarded on flimsy reasons without proof on a balance of probabilities that there was something lacking that really affected the quality and credibility of such evidence.** In other words, **an appellate court should look at the substance of the complaint raised by the appellant and see whether the alleged non-compliance with section 127 (2) of the Evidence Act was of such a nature as to be said, in rational terms, to have produced a substantial defect upon such evidence.** The above observation, no doubt is the reason behind the recent introduction of section 127 (7) of the Evidence Act as amended by the Legal Sector Laws (Miscellaneous Amendment) Act No. 11 of 2023, which we find it imperative to reproduce, thus: **"Notwithstanding any other law to the contrary, failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child in-admissible".**

Guided by the above holding, it is my considered findings that section 127 of the Evidence Act was complied with and the trial magistrate rightly and correctly received and relied on the evidence of PW1 and PW3. In addition, the evidence of a child of tender age, in terms of section 127(6) of the Evidence Act, is considered pivotal in sexual related offence especially where the child witness is the victim of crime. The court is enjoined to receive and rely on it even without corroboration. The section provides;

> **"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 age 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 age or the victim of the sexual offence is telling nothing but the truth."**

In sum, I am satisfied that the evidence of PW1 and PW3 was taken in conformity with the dictates of the law and for that reason, I dismiss the 3rd ground of appeal.

That said and done, I find no reasons to fault the trial court. I therefore dismiss the appeal in its entirety. The conviction and sentence of life imprisonment imposed by the trial court are hereby upheld.
It is so ordered.

The right of appeal is explained.

Dated at Dar es Salaam this 3rd day of May 2024.

A. A. Mbagwa

JUDGE

03/05/2024