THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

CRIMINAL APPEAL NO 2978 OF 2023

(Originating from the District Court of Chunya Criminal Case No. 92 of 2023)

JALEDO S/O CHARLES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 15 April 2024 & 7 May 2024

SINDA, J.:

The appellant was charged with the offence of unnatural offence c/s 154 (1) (a), (2) of the Penal Code [CAP 16 R.E 2022] (the **Penal Code**). The District Court of Chunya (the **Trial Court**) convicted and sentenced him to serve 30 years imprisonment.

The particulars of the offence are that on 29 June 2023 at Sinjili 'B' village within Chunya District, Mbeya Region the accused person did have carnal knowledge of one WB a child of 9 years old against the order of nature.

Against that decision, the appellant appeals on a number of grounds which can be consolidate into the following:

1. *That the Trial Court erred in law and fact to convict and sentence the accused person while there was contradictory evidence.*
2. *That the Trial Court erred in law and fact to convict and sentence the accused person while the prosecution failed to discharge its duty to prove the offence charged to accused person beyond reasonable doubt.*
3. *That the judgment delivered by the trial magistrate is erroneous since it does not reflect what transpired during hearing and the evidence adduced by both parties.*
4. *That the Trial Court erred in both law and fact when convicting an accused person while there was no corroboration of evidence of PW1 and that of PW2.*
5. *That the reasoning of the trial magistrate erred both in law and fact when he neglected to consider at all the defense put forward by accused person without assigning any cogent reason on its judgment.*

At the hearing of the appeal, the appellant appeared in person, and was represented by Mr. Ezekiel Mwampaka and Ms. Tumaini Amenye, learned counsels. The respondent was represented by Mr. Rajabu Msemo, learned State Attorney.

Submitting on the second ground of appeal, Ms. Amenye argued that the prosecution failed to prove the offence beyond reasonable doubt because the victim (**PW1**) stated that he named the appellant after he was threatened by her mother (**PW2**), as shown on page 5 and 6 of the Trial Court proceedings (the **Proceedings**). She added that even the doctor's testimony was contradictory, hence the offence was not proved.

She submitted further that PW2 saw the victim coming from the appellant's house wounded, and upon threatening him that's when the victim mentioned the appellant. She cited the case of ***Malimi Peter vs Republic***, Criminal Appeal No. 480 of 2020 (CAT at Mwanza) to support her argument.

In relation to the first and fourth grounds, Ms. Amenye submitted that the Trial Court convicted the accused person while there was no corroboration of evidence of PW1 and PW2. Also, the investigation officer (**PW4**) at page 17 of the Proceedings stated that he did an investigation on rape and not

unnatural offence as per the charge. He said he collected the exhibits on the offence but on page 18 of the Proceedings states that he did not visit the scene of the crime, thus his evidence based on hearsay.

Ms. Amenye further argued that, soon after the victim came from the appellant's room he went to the toilet, so there is a chance he was wet from the toilet and not from the act with the appellant as allegedly by PW2. Therefore, there was contradictions on evidence before the court.

Ms. Amenye submitted further that it is a settled principle in law, that when there is contradiction going to the root of the case and there is failure of the victim to mention the accused earlier, the court must warn itself when taking such evidence. She cited the cases of ***Abel Orua aka Matiku and Two Others***, Criminal Appeal No. 441 of 2020 (CAT at Mwanza) and ***Mohamed Said Matura vs*** 1995 TLR 3 to support her argument.

Mr. Mwampaka submitted on the third and fifth grounds of appeal. He cited the case of ***Makorobela Kulwa Makorobela and Eric Juma aka Tanganyika vs Republic*** 2002 TLR that explained on the burden of proof in criminal cases and that the standard should be beyond reasonable doubt. He added that the trial magistrate also added new issues which were never

mentioned in the Proceedings. This shows that the magistrate already formed his opinion before hearing the case and did not consider the defence evidence. He cited the case of ***Hussein Iddi & Another vs Republic*** 1986 TLR 166.

In his reply submission, Mr. Rajabu Msemo argued on the second ground of appeal that the prosecution had to first prove on the following whether the victim was entered against the order of nature, whether the appellant was the one who had canal knowledge of the victim and lastly whether the victim was below 18 years.

Mr. Msemo added that the issues herein above were proved since the victim said the appellant had carnal knowledge of him and the same was corroborated by PW3 who said the victim's anus was lose meaning was penetrated.

Mr. Msemo added further that in the case of rape and unnatural offence, the evidence of the victim is what matters. He cited the case of ***Selemani Makumba vs Republic***, 2006 TLR 379.

He maintained that the victim delayed to name the appellant because he was threatened by the appellant. The submission by the appellant's

advocate, that the victim mentioned the appellant after being threatened is irrelevant. He mentioned that on page 10 of the Proceedings, it shows that PW2 said that PW1 was scared to inform her because the appellant threatened to kill him. He emphasized his argument by citing the case of ***Goodluck Kyando vs Republic,*** 2006 TLR 363.

He argued that the third ingredient is whether the victim was below 18 years. He stated that age can be proved by birth certificate. PW2 said the victim was 10 years at page 10 of the Proceedings.

Mr. Msemo further argued that the defense counsel relied on ***Malimi Peter vs Republic*** (**supra**) which is distinguishable, because in the case of Malimi, the Court asked itself whether the evidence by the victim was reasonable to warrant conviction and the court noted the evidence was contradictory.

On the first and fourth grounds, Mr. Msemo argued that it's immaterial that PW4 did not go to the scene of crime. Mr. Msemo argued that the issue of collaboration is baseless because the victim explained how the incident took place. The victim evidence was collaborated by PW2 and PW3.

On the third and fifth grounds Mr. Msemo submitted that PW2 fabricated the case because of the loan of TZS 20,000. He stated PW2 was not cross

examined on the matter. He stated the failure to cross examine means they agreed to what was said.

He summed up by the submitting that since the offence is committed against a child of tender age he prayed for the sentence to be elevated from 30 years to life imprisonment as per Section 154 (2) of the Penal Code.

In his rejoinder, Mr. Mwampaka submitted on the second ground and agree on the ingredients to prove the offence but the issue is on whether the appellant is the one who committed the offence.

He further argued that the learned State Attorney said the issue of looseness of the anus was irrelevant. The Doctor was supposed to state this. He cited the case of ***Suleiman Makungu Versus Republic (Supra),*** that the best evidence is from the child. The court was to look as to when the story changed from fixing the bed to penetration.

On the issue of naming the accused at the earliest convenience, the learned counsel rejoined that the victim was coming from the house of the accused, then went into the toilet and came out wet. When asked he said he was helping the appellant to fix the bed.

He rejoined further that the victim being threatened is not irrelevant. If the child was open to his mother, he would have said the truth. And that on re-examination of PW1, he said his mother threatened him on page 6 of the Proceedings.

Emphasizing on the second ground, the counsel argued on the use of Malimi case.

Rejoining on the fifth ground, that the magistrate failed to consider the defense of the accused and Mr. Msemo prayer that the sentence to be upheld to imprisonment for life, the counsel submitted that the prayer should be disregarded.

I have considered the instant appeal, the grounds in support thereof, the submissions of both sides, the record of this appeal and the law. The issue is whether the appeal has merit.

In my discussion, I will consolidate the first, second, third and fourth grounds of appeal together. To start, I will reproduce a portion of the victim's testimony at paragraph from page 5 of the proceedings, to wit;

> *"I went to my house mother saw me and I was wet she asked me and interrogated me but I was not okay and my leg was not*

okay. The next day my mother keep asked me why I was not walking properly. My mother tried to threatened me. I thereafter, told the truth that I was carnally known by the accused against the order of nature….."

Reading between the lines and after careful deliberation, it came to my knowledge that PW2 did not threaten the victim into mentioning the appellant. Rather she threatened him into telling her why he was not walking properly. These are too different circumstances. And after being threatened, the victim said he told the truth that the appellant carnally knew him against the order of nature. I therefore find the issue of threats at this juncture to be irrelevant, since it was a natural reaction from a mother into inquiring what was wrong with her son.

Concerning the contradicting evidence by PW3, counsel for appellant argued that the witness failed to explain on his evaluation. Having gone through the records of the Trial Court and the PF3 filled by PW3, I am of a view that PW3 elaboration on the matter was highly informative. He first explained from page 14 to 15 of the Proceedings that the victim was penetrated because his anus was loose and also there were no bruises implying this was not the first time that the victim was being penetrated.

Whatever the case, however important expert opinion is, it does not amount as a factor for determination in sexual offences. In the case of ***Hatari Masharubu @ Babu Ayubu versu Republic*** Criminal Appeal No. 590 of 2017, the CAT said:

> *"Moreover, without prejudice to the above, we must emphasize that, it is not always the case that where there is no medical evidence, it is an assurance that rape was not committed. To this end, in Lazaro Kalonga v. The Republic, Criminal Appeal No.348 of 2008 (unreported), the Court stated that: "We are mindful of the fact that lack of medical evidence does not necessarily, in every case, mean that rape is not established. Where all other evidence point to the fact that it was committed (see for example Prosper Mjoera Kisa v. The Republic, Criminal Appeal No. 73 of 2003 and Salu Sosoma v. The Republic, Criminal Appeal No.31 of 2006 (both unreported)."*

Hence the current case being closely related to that of rape, the same position applies.

On his part, Mr. Msemo contended that for an offence of unnatural offence three ingredients must be proved, that is; whether the victim was entered against the order of nature, whether the appellant was the one who had canal knowledge of the victim and whether the victim was below 18 years.

This is provided in the case of ***Aman Ally @ Joka versus Republic Criminal Appeal No. 353 of 2019***, that:

> *As for the unnatural offence contrary to section 154 (1) (a) of the Penal Code, the prescribed penalty is life imprisonment where the victim is a child below the age of eighteen years. For ease of reference, we excerpt the said provisions as follows: "154. -(1) Any person who (**a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years. (2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.** "[Emphasis added].*

On the first ingredient, it has well been established since after medical examination PW3 clearly confirmed that the victim was penetrated. On the second ingredient the victim clearly stated that he said the truth that the appellant did have carnal knowledge of him against the order of nature. On the third ingredient, the age of the victim has been proved by both the victim and PW2 on pages 3 and 10 respectively of the Proceedings.

There is a minor contradiction concerning the age of the victim. The victim claiming he is 9 years old and the mother saying he is 10 years old. The mere fact that the victim is under the age of the majority becomes an added factor to the case, especially on matters surrounding the sentence.

Additionally, counsel for the appellant argued that PW4 did not visit the scene of the crime and also investigated on rape and not unnatural offence. In the circumstances of the case, visiting the scene of crime would not make any difference mainly because the act had already been executed. The only way forward would be to interrogate the victim, witnesses and the accused something that PW4 managed to do. Further, as the entire setting including parties involved and their testimonies, evidenced on the offence of unnatural offence, this court believes that the investigation made was in relation to the offence at hand was on unnatural offence and not otherwise.

On that note, in sexual offences the victim's evidence is the best evidence as provided in the case of ***Selemani Makumba versus Republic*** (supra). And with all said and done, it is my belief in this case the Trial Court reached its decision based on evidence brought before it. That being said I find the first, second, third and fourth grounds of this appeal with no merit.

On the fifth ground, the appellant counsels are of the view that the Trial Magistrate deliberately neglected all the defense put forward by the appellant during trial. It is enough to say that a person is not guilty of a criminal offence because his or her defense is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him or her which establishes his or her guilt beyond a reasonable doubt. (See the following cases; **Nathaniel Alphonce Mapunda & Benjamini Alphonce Mapunda versus Republic** (2006) TLR 395 (CA), **Oketh Okale versus Republic** (1955) EA 555 and **Said Hemed versus Republic** (1987) TLR 117.

It is thus the duty of the prosecution to prove the case at the required standard so as to convict the accused. With that, the accused defense however convincing, becomes useless once the prosecution has fulfilled that duty. In my opinion this ground too has no merit.

In the foregoing, while also considering the second ingredient constituting this particular offence – I have no doubt that there is truthfulness on the allegations against the appellant and I hereby agree with the findings of the Trial Court.

Consequently, after receiving the prayer from the respondent's counsel during his reply submissions and having gone through the judgment, it came to my attention that the punishment imposed to the appellant is contrary to the law.

Under Section 154 (2) of the Penal Code, it plainly states:

> *"Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."*

The victim in this case being under the age of 18, the Trial Court misdirected itself by sentencing the appellant to 30 years imprisonment instead of a life imprisonment as provided by the law. Accordingly, I proceed to set aside the sentence and substitute for it with sentence of life imprisonment with effect from the date of the conviction by the Trial Court.

In conclusion, I find that the entire appeal has no merit and is hereby dismissed. Nonetheless, the appellant shall serve the enhanced sentence stated above.

The right of appeal was explained.

Dated at Mbeya on this 7 day of May 2024.

A. A. SINDA
JUDGE

The Judgment is delivered on this 7 day of May 2024 in the presence of Ms. Tumaini Amenye, learned advocate for the appellant and Mr. Augustino Masesa, learned State Attorney for the respondent.

A. A. SINDA
JUDGE