IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 277 OF 2016

HASSAN KAMUNYU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

dated the 14th day of June, 2016
in
DC Criminal Appeal No. 60 of 2015

JUDGMENT OF THE COURT

27th June & 21st August, 2018

MWAMBEGELE, J.A.:

Before the District Court of Same sitting at Same, the appellant Hassan Kamunyu; a *Madrasa* teacher, was arraigned for ten counts of unnatural offence under section 154 (1) and (2) and two counts of sexual assault on a person under section 135 (2) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (hereinafter referred to as the Penal Code). It was alleged that on diverse dates of the month of December 2014, at Kihurio-Uzambala Village in Same District in

Kilimanjaro Region, he had sex against the order of nature with ten pupils, and sexually assaulted two pupils of the *madrasa*.

In the first, second, third and fourth counts he was alleged to have had carnally known against the order of nature, SA, KA, SH and MJM respectively. We wish to interject here that in this judgment, we have withheld the full names of the victims so as to protect their privacy. It was alleged in the particulars of the offence that on diverse dates in the month of December 2014, at Kihurio-Uzambala Village in the Same District of Kilimanjaro Region, he had sex against the order of nature with, respectively, SA; a boy aged 13, KA; a boy aged 11, SH; a boy aged 13 and MJM; a boy aged 11, all contrary to section 154 (1) (a) of the Penal Code. In the sixth count, he was charged with sexual assault on a person c/s 135 (2) of the Penal Code it being alleged he sexually assaulted one Kh.M; a boy aged 7 years.

He was convicted on the first, second, third, fourth and sixth counts and sentenced to thirty years in jail in respect of the first, second, third and fourth counts and five years in respect of the sixth count. The sentences were ordered to run concurrently. He was

aggrieved by the conviction and sentence in respect of the first, second, third and fourth counts and preferred this appeal. No appeal was preferred against the sixth count.

The appellant filed two Memoranda of Appeal. The first Memorandum has eight grounds of complaint and was lodged on 24.05.2017. The second one was lodged on 22.06.2018 through a document titled "Additional Grounds of Appeal" and has six grounds of complaint. In total, the appellant has fourteen grounds of complaint against the conviction on the four counts respecting unnatural offence. As the fourteen grounds of complaint have been, it seems, drafted by a lay hand and are in a discursive manner, we think, they boil down to a general complaint over the case not being proved beyond reasonable doubt on account of incredibility of witnesses, inconsistent and uncorroborated evidence of children of tender years.

The appeal was argued before us on 27.06.2018 during which the appellant appeared in person and the respondent Republic appeared through Mr. Omari Abdallah Kibwanah, learned Senior State Attorney.

We wish to point out at the outset that the appeal is in respect of the first four counts only as reflected in the Notice of Appeal. As already alluded to above, the appellant was also convicted on the sixth count and sentenced to serve five years in jail but he did not wish to appeal against that conviction and sentence. This was made clear to the appellant and he agreed that was the case.

Fending for himself, the appellant adopted both Memoranda of Appeal. He argued all the grounds generally. Elaborating, he complained that the charges against him were not proved beyond reasonable doubt hinging on the unreliability of prosecution witnesses and failure to bring material witnesses to prove the fourth count. He complained that at p. 10 of the record, PW1 referred to a "dudu", what was that? He questioned. If the witness was able to mention *mkundu*, there was no reason why he should mince words and refer to a "dudu". By that testimony, the prosecution did not prove the charge in respect of the first count.

In respect of the second count, the appellant assailed the testimony of PW2 to the effect that it was unreliable in that the

witness testified that he joined the *Madrasa* in 2015 while the offence is said to have been committed in 2014. The appellant added that the witness testified that in the month of December, 2014 he travelled to Mererani; it could not be possible that the witness was in Mererani at the same time being raped in Same.

On the third count, the appellant also assailed PW3 as not credible in that he could not remember the date when he was sodomized.

Regarding the fourth count, the appellant testified that no witness was brought to testify in respect of it. PW8 who purported to testify in respect of the fourth count is not the victim as evidenced by the charge sheet. In the charge sheet, the victim is MJM while PW8 is MGS. This count was not proved, he charged.

The appellant also assailed the testimony of PW12 Dr. Casto Mlay; the doctor who examined the victims that he testified that the victims were infected with HIV and AIDS and some with STIs but that

he refused to examine the appellant as well. That is a sign, he argued, that the witness was not credible.

The appellant concluded that the whole case is a frame-up against him and prayed that the appeal be allowed.

Mr. Kibwanah, responded to the appellant's grounds of appeal generally basing on the first general ground which states that the case against the appellant was not proved beyond reasonable doubt. The learned counsel admitted that the fourth count was not proved beyond reasonable doubt because the victim in the charge sheet is said to be MJM while PW8 who purported to be the victim is MGS. The learned counsel stated that there was a discrepancy between the charge sheet in the fourth count and the evidence adduced in its respect. He thus conceded to the appeal being allowed in respect of that count.

In respect of the remaining counts, the learned Senior State Attorney submitted that they were proved beyond reasonable doubt. He argued that the prosecution brought two witnesses to testify in respect of each count. He conceded that the unsworn evidence of

children of tender years was not corroborated but that the same was apposite at law as the trial magistrate was satisfied that they spoke nothing but the truth.

Respecting the reference to "dudu" by PW1, the learned Senior State Attorney submitted that the witness used a euphemism for the penis of the appellant. Regarding PW2 who was assailed by the appellant as not being credible and reliable for not mentioning the exact dates he was sodomized, Mr. Kibwanah submitted that there was a lapse of time between the time of commission of the offence and the time the witness was testifying. In the circumstances, he added, the witness could not be exact as to the dates the offence was committed.

On the foregoing reasons, the learned Senior State Attorney submitted that the appeal in respect of the first, second and third counts be dismissed.

In a short rejoinder, the appellant reiterated his prayers he made in the submissions in chief. He added that the offence was allegedly

committed in the month of Decembe,r 2014 while the witnesses/victims were examined in January, 2015, were the bruises still there?, he questioned. He reiterated his prayer to have his appeal allowed.

We have considered the rival arguments by the appellant on the one hand and Mr. Kibwanah's on the other. We wish to determine the appeal as summarized above and in the light of the manner argued by the appellant and respondent.

The appellant assailed the first count on the aspect that the victim did not bring evidence to prove what "dudu" was. He wondered why mince word by referring to a "dudu" while the victim had the audacity of mentioning "mkundu" in the same testimony. We agree that in the first count the victim testified as PW1. In his testimony, at p. 1 is recorded as saying:

> "***wewe S twende hivi ... baadaye ananipeleka ndani ya msikiti*** ...
> *thereafter he started to undress my trouser*

and underpants. He then started to do sexual intercourse to my anus. That the accused was doing as that: - ***Ndipo baada ya kunivua suruali na chupi anaingiza dudu lake kwenye mkundu wangu, nilikuwa nasikia maumivu makali sana".***

For this testimony the appellant brands the appellant as being unreliable. The appellant wondered what the "dudu" was. We have considered the appellant's complaint which might seem convincing at first sight. However, given the recent jurisprudence of the Court we are not convinced by the appellant's arguments. There is a paradigm shift in the recent jurisprudence of the Court from the orthodox position where in offences of this nature; sexual offences, the victims were supposed to be graphic in narrating the ingredients of the offence. Luckily, the Court has had an opportunity to deal with the point in some cases on rape. The current position is that in proving that there was penetration in a rape case, it is not always expected

the victim will graphically describe how the penis was inserted into the victim's vagina. There is a string of cases on this point. These are **Hassan Bakari @ Mamajicho v. Republic** Criminal Appeal No. 103 of 2012, **Minani Evarist v. Republic** Criminal Appeal No. 124 of 2007, **Ndikumana Philipo v. Republic** Criminal Appeal No. 276 of 2009, **Minani s/o Selestin v. Republic** Criminal Appeal No. 66 of 2013, **Matendele Nchanga @ Awilo v. Republic** Criminal Appeal No. 108 of 2010, **John Martin @ Marwa v. Republic** Criminal Appeal No. 22 of 2008, **Joseph Leko v. Republic** Criminal appeal No. 124 of 2013, **Jumanne Shaban Mrondo v. Republic** Criminal Appeal No. 282 of 2010, **Baha Dagari v. Republic** Criminal Appeal No. 39 of 2014, **Nkanga Daudi Nkanga v. Republic** Criminal Appeal No.316 of 2013, **Athuman Hassan v. Republic** Criminal Appeal No. 84 of 2013 and **Simon Erro v. Republic** Criminal Appeal no. 85 of 2012 (all unreported). The cases above and the development of the law on this subject have been discussed at some considerable length by the Court in **Baha Dagari** (supra). In that case, the Court observed:

"Several decisions of this Court have expounded the scope of section 130 (4) (a) in so far as proof of penetration in sexual offences is concerned. This scope is now settled that in proving that there was penetration it does not in all cases expect the victim of alleged rape to graphically describe how the male organ was inserted into her female organ."

The new development of the interpretation of the provisions of section 130 (4) (a) of the Penal Code has been brought into being taking into consideration, *inter alia*, cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. Thus in **Joseph Leko** (supra) the Court instructively observed:

"Recent decisions of the Court show that what the court has to look at is the circumstances of each case including

cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. *The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters. The cases of* ***Minani Evaristi v. R,*** *CRIMINAL APPEAL NO. 124 OF 2007 and* ***Hassani Bakari v. R*** *CRIMINALAPPEALNO.l03 OF2012 (both unreported) decided by this Court in February and June 2012 respectively are some of the recent development in the interpretation of section 130(4) (a) of the Penal Code."*

[Emphasis supplied].

Thus words like "[he] removed my underwear and started intercoursing me" in **Matendele Nchanga @ Awilo** (supra), "sexual intercourse" or "have sex" in **Hassan Bakari @ Mamajicho** (supra), "[he] undressed me and started to have sex with me" in **Nkanga Daudi Nkanga** (supra), "kanifanyia tabia mbaya" in **Athumani Hassan** (supra), "alinifanya matusi" in **Jumanne Shabani Mrondo** (supra) or "he put his dudu in my vagina" in **Simon Erro** (supra) or "did sex me by force", "this accused raped me without my consent", "While this accused was sexing me I alarmed" and "fortunately one B s/o T came to my home and he found this accused still sexing" in **Baha Dagari** (supra) were, though not explicitly described, taken by the court to make reference to penetration of the penis of the accused person into the vagina of the victim.

Reverting to the instant case, we think we can safely borrow a leaf from the above cases. The victims were pupils in a *Madrasa*; a religious teaching institution. Given the their cultural background, upbringing, religious feelings, the audience listening, as well as their

age, it is not surprising that some of them could not be graphic in describing the penis. In view of the authorities respecting the offence of rape from which we have found it apposite to borrow a leaf, by the victim referring to a "dudu", PW1 was simply referring to the appellant's penis. By saying "anaingiza dudu lake kwenye mkundu wangu" he simply meant the appellant inserted his penis into his (PW1's) anus. The appellant's complaint on this aspect is therefore without merit. We dismiss it.

The complaint on PW2 is that he was not credible as he testified that he started pupilage at the *Madrasa* in 2015 but the incident is alleged to have taken place in 2014. After all, he went on, the witness testified that in the month of December, 2014, he travelled to Mererani. He could not be in Mererani and at the same time being sodomized in Same. That could not be possible, he argued. This complaint has no basis as well, for, it stems from not reading the evidence properly and in context. The piece of evidence complained of by the appellant is found at p. 14 of the record during cross-examination of PW2:

"In December 2014 I travelled to Mererani area and not Karamba, to my father one Jumanne. I never disclosed to my father ..."

Our reading of the above excerpt has it that the appellant went there after the incident took place and that is the reason why he testified not to have disclosed the incident to the said father. In examination-in-chief he had already testified that he told his father (not the one referred to above) who took him to Ndungu Hospital for examination. The appellant's complaint on PW2 is therefore unfounded.

With respect to the third count, the appellant attacked the credibility of PW3 as well on account that he did not mention the time, date and year of the commission of the offence. That could not be possible, he argued. This complaint is also unfounded. PW4 was aged ten at the time he testified. Given his age, the lapse of time between the commission of the offence and the time of testifying, it is not expected that he could be accurate in every detail. This is allowable at law.

Regarding the conviction in respect of the fourth count the appellant submitted that no witness was brought to testify in support of this count. While the particulars of the offence in this count are to the effect that the appellant had carnal knowledge against a certain MJM, it was MGS who testified as PW8 in support of the fourth count. These are two different persons, he submitted. This complaint is justified. As rightly submitted by the appellant and supported by Mr. Kibwanah, this count was not proved. It was MJM who was alleged to have been carnally known against the order of nature. However, it was MGS (PW8) who came to testify in support of this count. It is obvious MJM is not MGS. We agree with the appellant that this count was not proved. This complaint has merit.

The above said, we think we still remain with one pertinent issue. This is that the evidence on which we have found and held that the respondent Republic proved against the appellant emanated from unsworn evidence of children of tender years.

We wish to start our determination of this ground with a note that the relevant provisions here are those of section 127 of the

Evidence Act, Cap. 6 of the Revised Edition, 2002, before being amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 (hereinafter referred to as the Evidence Act). Subsection (2) thereof, as it stood then, read:

> *"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*

And subsection (7) of the same section (before being renumbered by the amending Act) read:

"(7) 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."

At this juncture, we wish to interject what was held by the Full Bench of the Court in **Kimbute Otiniel v. Republic**, Criminal Appeal

No. 300 of 2011 (unreported) expounding the tenor and purport of section 127 (7) [now section 127 (6)] of the Evidence Act, the Full Bench of the Court reproduced the following excerpt from our unreported decision in **Nguza Vikings @ Babu Seya & 4 Others v. Republic**, Criminal Appeal No. 56 of 2005 to the effect that section 127 (7) [now section 127 (6)] was not intended to override the then section 127 (2) [now section 127 (2) as deleted and substituted by a consolidated subsection with subsection (3)] of the Evidence Act:

> *"From the wording of the section, before the court relies on the evidence of the independent child witness to enter a conviction, it must be satisfied that the child witness told nothing but the truth. This means that, there must first be compliance with section 127(2) before involving section 127(7) of the Evidence Act; "Voire dire" examination must be conducted to ascertain whether the child possesses sufficient*

intelligence and understands the duty to speak the truth. If the child witness understands the duty to speak the truth, it is only then its evidence can be relied on for conviction without any corroboration otherwise the position of the law remains the same, that is to say that unsworn evidence of a child witness requires corroboration".

The Full Bench of the Court went on:

"We fully re-endorse that view. The word "Notwithstanding" in section 127(7) should not be read too legalistically, but more contextually and purposely. In enacting section 127(7) Parliament could not have intended to ratify an irregularity. ... ***section 127(7) only obviates the need for corroboration, direct or circumstantial where the evidence taken under***

section 127(2) emanates from a properly conducted voire dire *thereunder;* ***however it does not dispense with or remove the requirement of corroboration where the evidence taken originates from a misapplication or non-direction of section 127(2).***

Given that section 127(7) neither details the mode of assessing the credibility of the only independent child witness nor that of establishing that the witness is telling the court nothing but the truth, in our opinion the necessity for corroboration we have just stressed becomes an even more essential and pressing requirement for evaluating the credibility of a witness and allocating it the weight it deserves. Moreover, in the absence

of confirmation from other supporting evidence, it would be too over-confidential, if not risky for the court to be fully satisfied that a child witness is telling nothing but the truth, without having positively found out earlier that he or she even knows the duty of telling the truth ..." [Emphasis supplied].

What we read in the foregoing excerpt from **Kimbute Otiniel** and **Nguza Vikings @ Babu Seya** is that section 127 (7) [now section 127 (6)] of the Evidence Act enacts that, as the law stands now, corroboration is not necessary to support unsworn evidence of a child of tender years provided that there is full compliance with section 127 (2) of the same Act.

Coming back to the case at hand, it is apparent on the record that before taking the evidence of witnesses whose age was tender, the trial court complied with section 127 (2) to the letter. The record bears it out at pp. 8-9 that the trial magistrate conducted a *voire dire* of PW1 and was satisfied that the witness did not understand the

nature of oath but understood the duty to speak the truth. Let the record speak for itself as to what the trial court stated at p. 9 after *voire dire:*

> *"Through the interview I have conducted it is apparent that this witness is a minor or a child person. He do (sic) not the nature and meaning of Oath but he possess (sic) sufficient knowledge to speak the truth. In fact this is the child whose age is under majority age of 18 years.*
>
> *I therefore warn myself that this is the evidence of the child who is testifying not under Oath. I so direct that let him adduce his evidence as per above caution."*

And the witness went on to testify without oath. Despite the fact that the evidence in the foregoing excerpt was inelegantly recorded, the message coming out of it is loud and clear that the trial

court was satisfied that the witness did not know the meaning of oath but understood the duty of speaking the truth to the court. That was the case in respect of other witnesses: PW2, PW3 and PW4. All the three witnesses; children of tender age, gave evidence without taking oath or making an affirmation because, before giving evidence, they promised, and the trial court was satisfied, to tell the truth and not to tell any lies.

From what transpired, we are satisfied that the appellant was correctly convicted on the first, second and third counts on the strength of unsworn evidence of PW1, PW2 and PW3; children of tender years. The appellant's complaint to the effect that their evidence was not corroborated and therefore illegal is without basis. It is dismissed entirely.

The above said, we think the prosecution did not prove the case beyond reasonable doubt against the appellant in respect of the fourth count. We thus allow the appeal in respect of the fourth count and proceed to quash the conviction and set aside the sentence of thirty years in jail meted out to the appellant in respect of that count.

However, we are satisfied that the prosecution brought to the fore evidence beyond reasonable doubt in respect of the first, second and third counts. The appellant's insatiable appetite for sodomy was therefore deservedly punished. The appeal in respect of the first, second and third counts is therefore without merit. It stands dismissed.

Order accordingly.

DATED at **ARUSHA** this 25th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. KULITA
DEPUTY REGISTRAR
COURT OF APPEAL