IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 107 OF 2018

HANDO DAWIDO .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

Dated 29th day of January, 2018
in
Criminal Appeal No. 63 of 2017

JUDGMENT OF THE COURT

24th November & 2nd December, 2021

LEVIRA, J.A.:

The appellant, Hando Dawido was tried before and convicted by the Resident Magistrate's Court of Manyara at Babati (the trial court) of the offence of Grave Sexual Abuse contrary to section 138C (1) (a) and (2) (b) of the Penal Code [Cap. 16 R.E. 2002] as amended by section 180 of the Law of the Child Act, No. 21 of 2009. He was sentenced to serve 20 years imprisonment. According to the particulars of the offence, on 27th June, 2016 at Seloto Village within Babati District in Manyara Region, for sexual gratification, the appellant inserted his fingers into the vagina of MG (name

withheld) a child aged six (6) years whom we shall refer to as the victim or PW4.

The prosecution case was based on the evidence adduced by five witnesses including the victim. It was PW4's testimony that on the fateful day she was left home together with her siblings by her aunt, Rosemary Maasai (PW1) who had gone to a farm. While PW4 and Patrice Gabriel (PW5) were at home cleaning the compound, the appellant appeared and asked PW4 to get inside the house. PW4 refused and thus the appellant took a stick and started to beat her forcing her to get inside the house. The appellant carried her to the bedroom of PW1, put her on the bed and started pinching her on thighs and later on inserted his fingers into PW4's vagina. According to PW4, she felt pain and thus cried out for help but the appellant ordered her to calm down. PW5 heard PW4 crying and went where he could see what the appellant was doing to PW4 as the door to the room was open. PW5 corroborated PW4's evidence as he stated: "*I saw Hando Dawido the accused person inserting his fingers into her vagina and beating her to calm down".* PW5 rushed to the farm to call PW1 so as to witness what the appellant was doing to PW4. However, when they arrived at the scene of the crime, the appellant ran away after seeing them. In her evidence PW1 confirmed PW5's testimony and

added that she met the appellant at the door of her house. Upon interrogation, PW4 narrated to her what had befallen her. PW1 reported the incident to the hamlet chairperson one Dionisi Mala (PW2) who arranged with a militia man, one Askari Herman (PW3) for the arrest of the appellant. According to PW3, the appellant was arrested at Semak "B" hamlet Gogoi town upon which he admitted to have committed the alleged offence and requested him to help so that he (appellant) could escape. Later on, the appellant was taken to the police station where the charge was prepared and subsequently, he was arraigned before the trial court facing the charge of grave sexual abuse offence as earlier on intimated. The appellant's lone defence could not shake prosecution case as he only denied in two lines that, he did not commit the offence with which he was charged. The following was his defence:-

> *"It is not true. I never committed the alleged offence.*
>
> *That is all."*

Upon satisfaction that the prosecution proved its case to the required standard, the trial court convicted and sentenced the appellant accordingly as stated above. Aggrieved, the appellant unsuccessfully appealed to the High

Court, hence the present second appeal. In the memorandum of appeal, the appellant has raised the following grounds:-

1) That, the first appellate Judge erred in law and in fact by failing to address an irregularity in the proceedings of the trial Court. The recording of evidence particularly of PW2, PW4 and PW5 was in total contravention of section 210 (1) (a) of the Criminal Procedure Act, Cap 20 R.E. 2002, (the CPA).
2) That, the first appellate Judge erred in law and in fact when she upheld conviction and sentenced while the trial magistrate did not conduct *voiredire* test in accordance with the law.
3) That, the first appellate Judge erred in law and fact when she upheld the judgment, conviction and sentence while the prosecution failed to prove the case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent Republic was represented by Ms. Lilian Aloyce Mmassy, learned Senior State Attorney assisted by Ms. Amina Kiango, learned State Attorney.

The appellant adopted his grounds of appeal and preferred to hear a reply from the learned State Attorney as he reserved his right to make a rejoinder, should the need arise.

In reply, Ms. Kiango supported the appellant's conviction and sentence right away. She went on submitting that the first ground of appeal is unmerited because the trial court complied with the requirements of section 210 (1) (a) of the CPA while recording the evidence of PW2, PW4 and PW5. She referred us to pages 11 to 12 and 15 to 20 where the evidence of those witnesses was recorded and argued that, the record indicates that section 210 (1) was complied with as the evidence was recorded in narrative form except that the trial magistrate signed at the end not after the evidence of each of those witnesses. She argued further that, failure to sign after the evidence of each of those witnesses is not fatal as the omission is curable under section 388 (1) of the CPA. After all, she added, the appellant did not show how he was affected by such omission and thus in her view, he was not prejudiced. The appellant had nothing to rejoin in respect of this ground of appeal.

We have carefully considered the grounds of appeal, the submission by the learned State Attorney and the record of appeal. We wish to note that the first ground of appeal was not raised before the High Court. Ordinarily the

Court is clothed with powers to deal with appeals from the High Courts' decisions or decisions of subordinate courts with extended jurisdiction. However, since the first ground raised a legal issue, we shall determine it.

In the first ground of appeal, the issue for our determination is whether the trial magistrate complied with the requirements of section 210 (1) (a) of the CPA in taking the evidence of PW2, PW4 and PW5. We think, it is desirable to quote the above provision before determining the issue we have raised. It provides:-

> *"210 (1) (a) – the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record".*

In the light of the above provision, we observe the manner in which recording of evidence of witnesses is supposed to be; that it shall be taken down in writing in the language of the court by the magistrate or in his presence and shall be signed by him and shall form part of the record. It is not in dispute that the trial of the appellant before the trial court was

conducted by the learned Senior Resident Magistrate, B. T. Maziku. This means the first requirement was met. Another requirement is that the evidence of witnesses must be reduced in writing in the language of the court; certainly, this is what the trial magistrate did. On 22nd September, 2016 he recorded the evidence of PW1, PW2 and PW3. Also, on 4th October, 2016 he recorded the evidence of PW4 and PW5 and finally on 19th October, 2016 the defence evidence was also recorded in writing. The only omission which was also conceded by Ms. Kiango which falls under the third requirement is that he did not sign immediately after recording the evidence of PW2, PW4 and PW5 but she indicated that section 210 of CPA was complied with.

The question that follows under the circumstances is whether it is proper to hold that the trial magistrate did not comply with the requirements of the above law? Our answer to this issue is twofold. First, having gone through the record thoroughly we discovered that on 22nd September, 2016 the trial magistrate recorded the evidence of PW1, PW2 and PW3 without a break in between. She signed immediately after the evidence of PW1, skipped to sign after that of PW2 and then signed after recording PW3. We however noted that immediately after recording the evidence of each of those witnesses, she indicated that section 210 of the CPA was complied with. On

4th October, 2016 she recorded the evidence of PW4 and PW5 without breaking in between and finally she signed before fixing the date of hearing of defence case. In our considered opinion, since the trial magistrate affixed her signature after recording the evidence of witnesses on the same date they testified and after closure of court business on the particular date, it cannot be said that the evidence of those three witnesses lacked authenticity.

Second, although the appellant claimed in his first ground of appeal that section 210 (1) (a) of the CPA was not complied with, he did not elaborate to indicate how, if at all, was affected by such omission. We are alive of the established position that failure to sign proceedings affects their authenticity as we stated in a number of our decisions including **Yohana Mussa Makubi & Another v. Republic,** Criminal Appeal No. 556 of 2015; **Sabasaba Enos v. Republic,** Criminal Appeal No. 406 of 2017 and **Magita Enoshi @ Matiko v. Republic,** Criminal Appeal No. 407 of 2017 (all unreported). In **Magita Enoshi @ Matiko** (supra) the trial judge did not sign after taking evidence of all the witnesses and therefore the Court held that the authenticity of the proceedings was questionable. However, we are firm that circumstances of the current case are distinguishable because the trial magistrate signed on a particular date after recording the evidence of those

witnesses as demonstrated above. The issue as to whether the signature was affixed should not take much of our time. The most important thing is that the trial magistrate signed to authenticate the evidence she recorded from the witnesses and the entire proceedings in compliance with the requirement of the law. We are satisfied that the appended signatures sufficed the purpose. Therefore, we do not find merit in this ground of appeal, which we accordingly dismiss.

In respect of the second ground of appeal, Ms. Kiango submitted that when the trial court was conducting the proceedings, particularly while recording the evidence of PW4 and PW5 on 4th October, 2016 *voire dire* test was no longer a requirement of the law following the amendment of section 127 (2) and (3) of the Tanzania Evidence Act, Cap 6 R.E. 2019 (the EA) by section 26 of the Miscellaneous Amendment, Act (No. 2) Act No 4 of 2016 (Act No. 4 of 2016). She went on to state that the amendment required a child witness to promise to state the truth. In support of her argument, she cited the case of **Al – Jabir Juma Mwakyoma v. Republic,** Criminal Appeal No. 463 of 2018 (unreported).Ms. Kiango referred us to pages 15 and 17 of the record of appeal where PW4 and PW5 respectively promised to tell the truth before giving their evidence. She concluded that this ground of appeal is

baseless. There was no rejoinder from the appellant in respect of this ground of appeal.

We are invited in this ground of appeal to determine whether the High Court was justified to uphold the decision of the trial court which was based on the evidence recorded without conducting *voire dire* test. We wish to state straight away that the appellant's complaint in this ground is misconceived. We have thoroughly perused the record of appeal and we agree with Ms. Kiango that when the trial court was recording the evidence of PW4 and PW5, children of tender age on 4th October, 2016, section 127 (2) and (3) of the EA had already been amended by section 26 of Act No. 4 of 2016 which came into force on 8th July, 2016. Following this amendment, a child of tender years is allowed to give evidence without oath or affirmation but before doing so, he or she is required to promise to tell the truth and not to tell lies. For clarity section 127 (2) of the EA provides:-

> *"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".***
>
> [Emphasis added]

The above position of the law was restated by the court in**Issa Salum Nambakula v. Republic,** Criminal Appeal No. 272 of 2018 (unreported) as follows: -

> *"... under the current position of the law, if the child witness does not understand the nature of oath, he or she can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies."*

In the current case, the above requirement of the law was complied with by the trial court as reflected at pages 15 and 17 of the record of appeal, where both PW4 and PW5 promised to tell the truth and not to tell lies. We as well agree with the first appellate Judge's finding in this ground of appeal that it lacks merit and we therefore dismiss it.

Responding on the third ground of appeal Ms. Kiango submitted that the charge against the appellant was proved beyond reasonable doubt through the evidence of PW4 and PW5 which was direct evidence. She argued that the evidence of PW4 was so categorical on how the incident occurred which in essence proved the ingredients of the offence with which the appellant was charged. In elaboration she said, PW4 testified that the appellant insertedhis fingers in her vagina an act which was also witnessed by PW5. The appellant

was well identified by those witnesses as the act took place in day time and both witnesses knew him even before the incident. She stated further that the evidence of PW4 and PW5 was corroborated by that of PW1 and PW3. According to the evidence on record, she insisted, that the appellant admitted to PW3 that he committed the charged offence and asked PW3 to help him escape.

She went on submitting that the offence was committed by the appellant without the consent of PW4 as the said witness stated in her evidence that, she resisted but the appellant forced her to the extent of pinching her and finally committed the offence. She thus urged us to find that this ground of appeal has no merit as well.

Generally, the learned State Attorney submitted that the appeal is without merit and thus urged us to dismiss it. When accorded the right to make a rejoinder, the appellant said that he had nothing to say.

The question in the third ground for our determination is whether the charge against the appellant was proved beyond reasonable doubt. In determining this issue, we need to consider the elements of the offence grave sexual abuse with which the appellant was charged. As intimated earlier, the

appellant was charged under section 138 C (1) (a) and (2) (b) of the penal code which provides:-

> *"138 C – (1) Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any other instrument or any orifice or part of the human body of another person, being anact which does not amount to rape under section 130, commits the offence of grave sexual abuse if he does so in circumstances falling under any of the following descriptions, that is to say –*
>
> *(a) without the consent of the other person;*
>
> *(b) .....*
>
> *(c) .....*
>
> *(2) Any person who -*
>
> *(a) ....*
>
> *(b) commits grave sexual abuse on any person under eighteen years of age,*
>
> *is liable on conviction to imprisonment for a term of not less than twenty years and not exceeding thirty*

years, and shall also be ordered to pay compensation of an amount determined by the court to any person in respect of whom the offence was committed for injuries caused to that person."

According to the above provision the prosecution was required to prove the ingredients of the offence of grave sexual abuse which are; **one** the use of any part of the human body for sexual gratification and **two**, lack of consent of the other person to whom the act is done. It is apparent on the record of appeal that the prosecution witnesses; particularly, PW4 who was a child of tender age, was able to prove that the appellant committed the offence with which he was charged. Her evidence was corroborated by that of PW5 also a child of tender age who witnessed the appellant committing the offence. The excerpts below show how those witnesses managed to prove both ingredients of the offence. At page 15 of the record of appeal PW4 testified as follows:-

"Hando Dawido came home. He told me to enter inside our house. I refused as I did not know the reason. ***He took a stick, beat me at my thighs and forced me to enter inside the house.*** *Hando Dawido the accused carried me from outside and brought me*

inside our auntie's room and put me on my auntie's bed. On bed ***he started pinching me on my thighs and later on inserted his fingers here inside the vagina ...*** *he dragged (pulled) aside my underpants to get a space to insert his fingers into my vagina and succeeded to insert his fingers into my vagina."*

[Emphasis added]

At page 18 of the record of appeal PW5 was recorded testifying that:-

"Hando Dawido the accused told "PW4" to enter inside the house. They entered. ... when they were inside, I heard PW4 crying a lot. I went inside to look what happened. ***I saw Hando Dawido the accused person continues inserting his fingers*** *into her (PW4) vagina and* ***beating her to calm down".***

[Emphasis added]

As it can be seen from the above excerpts, PW4 did not give consent for the appellant to insert his fingers in her vagina. In the first place, when the appellant asked her to enter inside the house, she refused but the appellant forcefully took her inside while beating her, pushed her into the bed, pulled

her underpants aside and ultimately succeeded to insert his fingers into her vagina. The incident took place during day time around 11:15 am while PW4's aunt was at the farm, both PW4 and PW5 knew the appellant very well even before the incident to the extent of mentioning his name in full and the incident took some minutes. We are settled in our mind that under the circumstances, the question of mistaken identity does not arise.

The evidence of PW4 was also corroborated by that of PW1 who upon being informed by PW5 about what was happening to PW4, she quickly rushed home and met the appellant whom she knew before at the door running away after seeing her. At page 10 of the record of appeal PW1 stated that when she entered inside the house, she found PW4 crying, upon asking her what had befallen her, PW4 told her that Hando Dawido inserted his fingers in her vagina by force and she felt pain. Apart from PW1, it was also the evidence of PW2 at page 11 of the record that he arrived at the scene immediately after the incident and PW4 told him that, Hando Dawido (the appellant) had inserted his fingers in her vagina.

Having considered the whole evidence on record we are satisfied that the appellant's general denial to the charge did not shake the strong prosecution evidence. We thus agree with Ms. Kiango that the charge against

the appellant was proved to the required standard and we do not see the need to interfere with the concurrent findings of the courts below.

In the upshot, this appeal lacks merit and it is hereby dismissed in its entirety.

DATED at **ARUSHA** this 1st day of December, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2021 in the presence of the Appellant in person, and Ms. Eunice Makala, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL