

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)**  
**CRIMINAL APPEAL NO. 481 OF 2021**  
**SHANI CHAMWELA SULEIMAN.....APPELANT**  
**VERSUS**  
**THE REPUBLIC.....RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(De-Mello, J.)  
dated the 28<sup>th</sup> day of July, 2021  
in  
**H.C. Criminal Appeal No. 03 of 2021**

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**JUDGMENT OF THE COURT**

*23<sup>rd</sup> & 28<sup>th</sup> September, 2022*

**LEVIRA, J.A.:**

The appellant, a lady, was charged before the Resident Magistrates Court of Morogoro at Morogoro (the trial court) with two counts; to wit, indecent assault of a boy under fourteen years and unnatural offence contrary to sections 156 (1), (2) and 154(1) (c) of the Penal Code, [Cap 16 R. E. 2002, (Now R. E. 2022) respectively. She was convicted in both counts and sentenced to life imprisonment in respect of the first count and thirty (30) years imprisonment in respect of the second count. She was aggrieved by the decision of the trial court and thus unsuccessfully appealed to the High Court, hence the present appeal.

The victim in this case was a boy aged 12 years old, whom we shall refer as H.S. or PW2 to hide his identity. Between the year 2016 and January, 2019 he endured an awful moment of his life as the appellant, on diverse dates, unlawfully and indecently assaulted him and permitted him to have carnal knowledge of her against the order of nature. When arraigned before the trial court, the appellant denied the charges fronted against her. The prosecution called five (5) witnesses and tendered one exhibit (Exhibit P1 (PF3) to prove the case against the appellant. Lilian David (PW1), the victim's mother revealed that one day in 2013, PW2 told her that "*Mama Shafii ananiambiaga nimfanye, nimtombe;*" meaning that, the appellant was regularly soliciting him to have sexual intercourse with her. Having heard that, PW1 arranged a trap with Bahati Sailen Mainde (PW3) and PW2 so that they catch the appellant.

On 13<sup>th</sup> January, 2019 PW3, was engaged by PW1 in trapping the appellant. They made arrangements and PW3 went into PW1's house with a smartphone and hide in one of the rooms. Unknowingly, the appellant appeared and as usual she asked PW2 if he wanted to have sex with her. Immediately thereafter, the appellant lifted her dress, put off her underwear and laid on the couch and the victim went on top of her and they had sexual intercourse. PW3 peeped through the door, saw

them having sexual intercourse and recorded via his mobile phone. The appellant later saw PW3 and she noticed that he was recording them. Hurriedly, the appellant took her underpants and started fighting with PW3. They raised alarm and people responded, the appellant was arrested and PW2 was taken to the police and later to the hospital. The evidence of PW1 as regards the participation of PW3 in fixing and recording the appellant while having sexual intercourse with PW1 was confirmed by PW3.

In his testimony, PW2 gave an account of how the appellant used to indecently assault him and permit him to have carnal knowledge with her. PW1 testified that in 2016 on a date which was not mentioned, the appellant told him to go inside her house and put off his clothes and she also put off hers. Thereafter, the appellant started to play with PW2's penis until it erected then she inserted it into her vagina and had sexual intercourse with him while PW2 was on top of her. Having finished doing that shameful and ungodly act, the appellant warned PW2 not to tell it to anyone. Repeatedly, the appellant kept on doing sexual intercourse with PW2.

It was PW2's further testimony that in one evening when he was in standard V, he met the appellant along the way. Thereafter, the

appellant took him to an unfinished house and put off her clothes and touched PW2's body without playing with his penis; however, it erected. The appellant inserted PW2's penis into her anus and that was the first day PW2 informed his grandmother of what had been befalling him since when he was in standard III and later, he informed PW1 as well.

Another prosecution witness was the Police Officer No. G618 Detective Alphonse, an investigator from Forensic Department who was involved in examining the video recorded by PW3 which could however not be received in evidence on technical grounds and Musa Mayara (PW5), a medical doctor who examined PW2. In her defence, the appellant (DW1) denied the charges. As earlier on stated, her appeal before the High Court was unsuccessful, hence this second appeal.

The appellant has presented before the Court two Memoranda of Appeal comprising a total of nineteen (19) grounds of appeal. For reasons to come into light shortly, we shall not reproduce them herein.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent Republic had the services of Ms. Christine Joas, the learned Senior State Attorney assisted by Ms. Monica Ndakidemi, learned State Attorney.

Before commencement of the hearing of the appeal, we engaged the appellant in a brief dialogue on the grounds of appeal which are found in the two memoranda of appeal filed on 21/03/2022 and 08/09/2022. Upon reflection, she abandoned almost all the grounds of appeal except the first ground in both memoranda of appeal where she complained that the prosecution case was not proved beyond reasonable doubt against her. She also maintained some few grounds on complaints that the age of PW2 at the time of giving evidence was not considered and section 127 (2) of the Evidence Act, Cap 6 RE 2019 (Now R.E.2022) was not complied with before recording his evidence; and that, the evidence of PW1 was nothing but a cooked story. The appellant had nothing to add to her grounds of appeal. Therefore, she reserved her right of making a rejoinder and urged us to extend mercy upon her and set her at liberty.

Responding to the appellant's ground of appeal, Ms. Joas submitted that the charge against the appellant was proved beyond reasonable doubt by the prosecution. According to her, PW2 was a credible witness and was consistent in what he was testifying and his testimony showed clearly how the appellant had sexual intercourse with him from 2016 to 2019. In that aspect, she referred us to page 95 of the record of appeal.

Ms. Joas went on to submit that in sexual offences, the best evidence comes from the victim as it was decided in **Wambura Kigingira v. Republic**, Criminal Appeal No.301 of 2018 and **Julius Josephat v. Republic**, Criminal Appeal No.03 of 2017 (both unreported). Besides, she added that the evidence of PW3, an eye witness and that of PW1 who heard directly from PW2 about what had befallen him, corroborated the evidence of PW2. Ms. Joas argued that, the appellant's defence could not save her from liability because she was talking about a conflict between her and PW3 which occurred after the incident as a resultant effect of what she did to PW2.

As regards the allegation that the age of PW2 was not proved, Ms. Joas submitted that the age was proved by PW1 and PW2 in their testimonies. She referred us to pages 18 and 23 respectively of the record of appeal where PW1 and PW2 testified that PW2 was aged 12 years old at the time when the incident took place. She added that PW1 testified on what she was told by PW2 and thus her evidence was not a cooked story as alleged by the appellant. In the circumstances, she urged us to find that the charge against the appellant was proved beyond reasonable doubt and dismiss the appeal.

In rejoinder, the appellant just reiterated the prayer she made in chief. She implored on the Court to have mercy on her.

We have thoroughly gone through the record of appeal, the parties' submissions and the sole appellant's complaint in this appeal. At the outset, we wish to state that in criminal cases, it is upon the prosecution to prove its case against an accused person beyond reasonable doubt. In answering the sole issue as to whether the charge against the appellant was proved beyond reasonable doubt, we find it apposite to start with the appellant's claim regarding the age of PW2. We wish to restate the settled position of the law as it was done by the first appellate Judge that, the age of the victim in a court of law can be proved by a parent, victim (as the case herein), relative, medical practitioner or, where available, by production of Birth Certificate – see, **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported).

In the present case, as intimated above, the appellant complained that the age of the victim was not proved by the prosecution. We have thoroughly gone through the record of appeal and found that at page 17 of the record of appeal PW1, the mother of the victim testified that her child was 12 years old and at page 18 of the record she went further to

mention his date of birth to be 08/3/2007. In his testimony, PW2 also mentioned his age to be 12 years. We also take note that, apart from PW1 and PW2, parties to the case, that is, the prosecution and the then counsel for the appellant acknowledged that the victim was a child of tender age as they deliberated on the attendance or otherwise of the social welfare officer when PW2 was about to testify from page 21 to 22 of the record of appeal. Thus, the age of the victim was not an issue before the trial court. It was first raised before the first appellate court and we agree with the findings made by the learned Judge. It is also our finding that the age of the victim was proved by the prosecution contrary to the appellant's complaint. Therefore, this claim is without merits, we dismiss it.

Regarding the appellant's complaint that section 127(2) of the Evidence Act was not observed before recording PW2's evidence, we do not think that the same needs to consume much of our time. The above cited provision provides that:

*"(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.**"*[Emphasis added].



It can be deduced from the above provision that if a child of tender age testifies before the court of law without taking an oath or making an affirmation, he or she must promise to tell the truth and not to tell lies before giving his evidence. In the current case, PW2 who was a boy aged twelve 12 years old and therefore a child of tender age promised to tell the truth as reflected at page 23 of the record of appeal and as quoted at page 173 of the record of appeal by the first appellate court. He said: "*I promise I will speak the truth before this court.*" With this clear account of what had transpired in the trial court, before PW2's evidence was recorded, just like the first appellate court, we find the appellant's complaint in this aspect unfounded with a consequential effect of it being dismissed, as we accordingly, hereby do.

We now turn to determine the appellant's main complaint that the charge against him was not proved beyond reasonable doubt and thus the first appellate Judge erred in upholding her conviction. In essence the appellant challenges the credibility of prosecution witnesses. The law as regards the credibility of witnesses is settled that every witness is entitled credence unless there are cogent reasons not to believe a witness - see: **Goodluck Kyando v. Republic**, [2006] T.L.R 363. On appeal the credibility of a witness can be gauged through coherence and consistence of his testimony. In the case of **Elisha Edward v.**

**Republic**, Criminal Appeal No. 33 of 2018 the Court restated the position set in its previous decision in **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2001 (both unreported) when emphasising on assessment of credibility of witnesses; thus:

*"Credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of the witness can also be determined in two other ways. **One**, when assessing the coherence of the testimony of that witness and **two**, when the testimony of that witness is considered in relation to the evidence of other witnesses including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

In order to prove the case against the appellant, as indicated above, the prosecution paraded five witnesses, including the victim (PW2). The High Court while upholding the appellant's conviction just like the trial court, found that PW2 was a credible witness whose evidence could be acted upon even without corroboration, although that is not the case herein as she further found that the evidence of PW2

was corroborated by that of PW3 and PW1. At page 171 of the record of appeal, the learned first appellate Judge had this to say:

*"Thus, I find ground 2 without merit as the evidence was extracted direct from the victim himself **who was credible and, highly corroborated by an independent witness (PW3)** who witnessed what was actually taking place...."*

It is settled position that in sexual offence true evidence comes from the victim – **Selemani Makumba V. Republic [2006]** T.L.R. 379. In order to test that principle, we had an opportunity to closely examine the evidence of PW2. Without any reservation, we agree with the first appellate Judge that: *"by looking at his testimony, it narrates clearly on how he was sexually assaulted by the accused on different occasions and last incident it was witnessed by PW3"*. For instance, at page 24 of the record of appeal, PW2 testified as follows:

*"I was playing football, Shani saw me, ... she asked me to go inside so that she gives me money ... she put off her clothes and took off mine too, she put me into the bed. She started to play with my "UCHI" so that it erects ...after playing with me **she put my penis into her vagina.**"*

*After inserting my penis, she started shaking her waist,  
...."[Emphasis added].*

At page 26 of the record, he went on to state:

*"She then brought me to the 'pagale' uncompleted/unfinished house, there was a bump, I walked through that bump and then she followed, she put her wrap down, this time she just put off her pant, she touched me, **I erected, this time she didn't play with it, she then inserted into her anus, she shook.**"*  
[Emphasis added].

Looking at the evidence of PW2 at the record of appeal we observed that he was coherent and consistent in narrating what had occurred to him, which in essence proved the ingredients of the offences with which the appellant was charged. It should be borne in mind that, PW2 had sexual intercourse with the appellant more than twice and the above extract is just clear evidence of what he testified before the trial court. The evidence of PW2 regarding how he was assaulted by the appellant was corroborated by that of PW3, who on 13/01/2019 witnessed the appellant while having sexual intercourse with PW2. Another corroborative evidence came from PW1, the victim's mother

who gave a narration of what had befallen PW2 as she was told by PW2 himself which in essence reflects the above excerpts from the victim. With such evidence on record, we are satisfied that the prosecution evidence proved the offence with which the appellant was charged. We do not find any merit from the appellant's complaint that PW1 fabricated evidence against her. This complaint is unmerited as well, we dismiss it.

In the upshot, having found that the appellant's complaints are unfounded and having dismissed them, we find and hold that the case against the appellant was proved beyond reasonable doubt and the first appellate Judge was justified to dismiss the appellant's appeal. Consequently, we dismiss this appeal for being unfounded in its entirety.

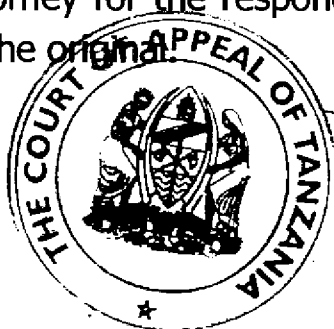
DATED at DAR ES SALAAM this 27<sup>th</sup> day of September, 2022.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

A.M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered this 28<sup>th</sup> day of September, 2022 in the presence of the appellant in person and Ms. Christine Joas Learned Senior State Attorney, assisted by Ms. Monica Ndakidemi learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



  
S. P. MWAISEJE  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**