**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: MKUYE, J.A., LEVIRA, J.A. And MASOUD, J.A.)**

**CRIMINAL APPEAL NO. 74 OF 2021**

**AMOS S/O ZACHARIA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Decision of High Court of Tanzania at Tabora)**

**(Bahati, J.)**

**dated the 11th day of December, 2020**

**in**

**DC. Criminal Appeal No. 135 of 2019**

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## JUDGEMENT OF THE COURT

*20th September & 4th October, 2023*

**LEVIRA, JA.:**

This is a second appeal by the appellant, Amos Zacharia against the decision of the High Court of Tanzania at Tabora (the first appellate court) in DC. Criminal Appeal No. 135 of 2019, which decision, dismissed the appellant's appeal for want of merit. Initially, the appellant was arraigned before the District Court of Urambo at Urambo (the trial court) facing two counts; to wit, unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap. 16 R.E. 2002 now R.E. 2022] (the Penal Code) and

rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code. It was alleged by the prosecution that on 3rd February, 2019, at day time, at Pozamoyo Village within Urambo District in Tabora Region, the appellant did have carnal knowledge against the order of nature and thereafter had carnal knowledge of a girl aged six years old, whom we shall refer to as the victim or PW3 to protect her dignity.

As intimated above, the appellant was prosecuted at the trial court, convicted and sentenced to serve a jail term of thirty (30) years for each count. The sentences were ordered to run concurrently. Aggrieved by the decision of the trial court, he unsuccessfully appealed to the first appellate court. Still aggrieved, he has come before the Court challenging his conviction and sentence.

It is noteworthy as a background that on the material day, according to PW3, the appellant went to her residence where she was living with her parents. Her mother took the bicycle of the appellant and went to the market, leaving the appellant and PW3 at home. The appellant undressed PW3, took off her underpants and pressed his penis into her vagina and anus. PW3 felt pains and she started bleeding. The mother of the victim came back and found the appellant at home. The appellant and PW3 were

taken to the police. Later, PW3 was taken to Kaliua Health Centre where she was examined and treated by Kassim Azizi, Clinical Officer (PW6).

PW6 confirmed to have received PW3 on 3rd February, 2019 at the hospital. Upon checking her physically, he discovered that she had difficulties in walking, her underpants had clotted blood stain and through diagnosis, she had pain as was crying when touched. He added that, her labia minora was red, virgin destroyed and anus was penetrated by a blunt object. In her testimony Jane William (PW1), the mother of the victim, stated that PW3 is her first born aged 6 years old and the appellant was once their houseservant, so, they knew each other. The appellant used to pay them visits. As usual, on 3rd February, 2019 the appellant visited them. PW1 borrowed the appellant's bicycle and went to the shop, leaving him at home with PW3. While on her way back home, PW1 heard PW3 crying. Upon arriving, she found the appellant raping PW3. The appellant had undressed his trousers up to the knees and PW3 had no underpants. The appellant was sleeping on top of PW3 and PW3 was crying. When the appellant saw PW1, he stood up, PW3 was bleeding from her vagina and anus. PW1 raised alarm and shortly, the chairman of Pozamoyo Kaliua one Masesa Mabele Shingi (PW2) arrived at the scene of crime. They asked the

appellant why did he do that, he responded: "Shetani alinipitia" meaning, it was because of devil.

They sent the appellant to Kaliua Police Station where they met WP.9123 D/C Mubage, an investigator, who issued them with a PF3 and the victim was taken to the hospital for examination. PW2 confirmed the evidence of PW1 that, indeed, he responded to the alarm and being a leader of that area, he checked PW3 in the presence of the appellant and found her bleeding from the vagina and anus. He interrogated him and the appellant pleaded them to forgive him and repeated that; "ni shetani tu," meaning, it is because of devil.

In defence, the appellant denied to have committed the alleged offence. He stated that, he went to the victim's residence to claim for his money from the victim's father and the case was fabricated against him.

The trial court weighed the evidence by both sides and found the appellant guilty of the offence with which he was charged. As a result, he was convicted, sentenced and hence, the present appeal as intimated above.

Before us, the appellant has presented three grounds of appeal as follows:

1. *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*
2. *That the two courts below did not consider defence of the appellant that the case was concocted upon the appellant as a result of the debt of shillings 300,000/= owed the mother of the victim by the appellant.*
3. *That, the available record does not show the victim's own words on the prior promise of telling the truth to the trial court as required by the law.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic was presented by Mr. Emmanuel Luvinga, learned Senior State Attorney. The appellant adopted his grounds of appeal and preferred first to hear a response from the respondent, as he reserved his right of rejoinder (if necessary).

In reply, Mr. Luvinga opposed the appeal straight away and he supported the appellant's conviction. However, he had a reservation on the sentence stating that, the appellant ought to have been sentenced to life imprisonment for both offences. Thus, he urged us to enhance the appellant's sentence.

Mr. Luvinga preferred first to respond to the third ground of appeal. He submitted that the victim (PW3) was a child. As such, she did not

understand the nature of oath but promised to tell the truth, as reflected at page 15 of the record of appeal in compliance with section 127(2) of the Evidence Act, Cap 6 R.E. 2019 (the Evidence Act). He thus urged us to find that, since PW3 promised to tell the truth, this ground of appeal is baseless.

The appellant had nothing to rejoin in respect of this ground. In order to determine whether the evidence of PW3 was properly recorded, we have examined the record of appeal; particularly, at page 15 where PW3's evidence is found. The record of appeal indicates clearly that PW3 was a child aged 6 years old. Therefore, recording of her evidence fell squarely under the procedure stipulated in terms of section 127(2) of the Evidence Act which requires the trial court to record the words of a child of tender age while promising to tell the truth – see: **Athumani Ally v. Republic**, Criminal Appeal No. 61 of 2022 (unreported).

Before recording PW3's evidence, the trial court recorded her particulars and immediately thereafter, the following words:

> *"... do not know the meaning of oath but promises to say only the truth, and states:"*

It is vivid from the above excerpt that, PW3's promise to tell only the truth was not written in her own words but the trial Magistrate indicated

what had transpired before him. Constructively, one may say that there was compliance with the requirements of section 127 (2) of the Evidence Act. Particularly, after considering whether the appellant was prejudiced in anyway by such recording in which the promise was recorded. This is somewhat different from the situation where there is no indication at all that a child witness promised to tell the truth. However, we are aware of most of our current decisions where we have pressed on recording exactly what was stated by a child witness while promising to tell the truth and not lies to the trial court. In the same vein, the line of argument favored by Mr. Luvinga in his submission before us in respect of this ground does not conform to the above current position, as the record speaks for itself.

Luckily, in the present case, apart from PW3's evidence, which is said to be the best evidence, there is direct evidence from PW1 and corroborative evidence from PW2 and PW6. Therefore, we find that the alleged procedural flaw by the trial court of not recording the exact words of PW3 while promising to tell only the truth, does not affect the entire case even if we opt, which we do, to disregard PW3's evidence. We shall demonstrate.

In the first ground of appeal the appellant claims that the prosecution did not prove the charge against him to the required standard. Mr. Luvinga

opposed that complaint as he submitted that the case was proved beyond reasonable doubt. He argued that, since the appellant was charged with unnatural offence and rape under the above indicated provisions of the law, the prosecution was required to prove that PW3 was a child and she was penetrated by the appellant. He pointed out that, PW1 testified that her child was six years old at the day of incident. Apart from her, PW6 also stated that PW3 was six years old at the time of examining her, immediately after the incident. He argued further that the appellant did not challenge in cross examination the age of PW3. Therefore, it remained to be an established fact that she was six years old.

Submitting in respect of penetration, Mr. Luvinga referred us to page 12 of the record of appeal where PW1 testified that she saw the appellant while raping PW3 and she was bleeding from her vagina and anus. Also, PW2 at page 13 of the record of appeal stated that when he arrived at the scene of crime, he found the victim bleeding from the vagina and anus. Another corroborative evidence was the oral account of PW6 who examined PW3 and found that her hymen was removed and the anus was swollen. This situation suggested that she was penetrated in both private parts of her body. It was Mr. Luvinga's argument that, although the PF3 (exhibit P1) which was filled in by PW6 was expunged from the record by

the first appellate court, his oral account sufficiently corroborated PW1's evidence on what had befallen PW3. He fortified his argument by the decision of the Court in **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016 (unreported). He concluded by stating that when the whole evidence was adduced against him, the appellant never cross examined the witnesses. This, he said, meant that he conceded that he raped PW3.

The law is settled in criminal cases that, it is upon the prosecution to prove the case against an accused person beyond reasonable doubt. Conviction of an accused cannot base on his weak defence; see: **DPP v. Ngusa Keleja @ Mtangi and Charles Mtokambali**, Criminal Appeal No. 276 of 2017 (unreported). In the present case, we had an opportunity of perusing the record of appeal thoroughly. We agree with the observation made by Mr. Luvinga that the appellant did not cross examine prosecution witnesses while adducing their evidence on vital ingredients of the offences, allegedly, he committed. It is now settled position that, failure to cross examine the adverse party's witness on a particular aspect of his evidence, the party who ought to cross examine the witness, is deemed to have accepted as true, the substance of the evidence that was not cross examined; see: **Martin Misara v. Republic**, Criminal Appeal 428 of 2016 (unreported). The elements of the offences which were to be proved by

the prosecution were mainly three. First, age of the victim which essentially, is used to gauge the punishment to be meted out on the accused, in case of conviction; second, penetration and third, that the appellant committed the offence.

In respect of the first element, we do not need to overemphasis here that, age of a victim can be proved by a parent, relative, victim herself, medical doctor and / or birth certificate; see: **Elia John v. Republic**, Criminal Appeal No. 306 of 2016 (unreported). In the current case, as correctly submitted, in our considered view, the age of PW3 was proved to be six years old by her mother (PW1) and PW6, the doctor, to whom she was sent for examination after the incident.

The second element is penetration. Again, we agree with the submission by Mr. Luvinga that oral account of PW1 and PW6 proved that PW3 was penetrated. PW1 saw both the appellant and PW3 naked and the appellant was on top of her (the victim). As a result, PW3 was bleeding from the vagina and anus. In the examination he conducted, PW6 confirmed that a blunt object penetrated PW3's anus. His evidence corroborated that of PW1.

Regarding the third element, we observe that PWI testified that she saw the appellant on top of PW3, an act which eventually, was associated

with penetration as per the evidence of PW6. We, as well, consider the fact that those two witnesses adduced evidence which was not controverted by the appellant during trial on those grounds. In the circumstances, we agree with Mr. Luvinga and it is our finding that the prosecution proved that it was the appellant who penetrated PW3, a girl aged six years old. Therefore, the charges against the appellant were proved beyond reasonable doubt. The first ground of appeal is thus without merit.

We now revert to consider the second ground of appeal relating to failure of the courts below to consider defence case. Mr. Luvinga commenced his submission by admitting that the trial court did not consider the appellant's defence. However, he differed with the appellant on the part of the first appellate court. He referred us to page 64 of the record of appeal where the said defence was considered but it did not shake the prosecution case. Mr. Luvinga went on to submit that in this ground of appeal, the appellant claimed that the mother of PW3 owed him TZS 300,000.00, but in his oral account at page 28 of the record of appeal, he mentioned the father of PW3 to be the person he owed him that amount. This defence, he argued, was an afterthought.

In rejoinder, the appellant insisted that the parent of PW3 owed him TZS 300,000.00 and when he went to claim for that amount, he was framed. He urged us to allow the appeal and set him free.

Upon perusal of the record of appeal, we agree with the appellant to the extent that the trial court did not consider his defence. To the contrary, on appeal the first appellate court considered it at page 64 of the record of appeal. We shall let the relevant part to speak for itself hereunder:

> *"I have considered the evidence of the defence and found that it is true that the trial court correctly found the appellant guilty as can be discerned from the record. This evidence cannot outweigh the evidence of the prosecution side."*

As the above excerpt reflects, we agree with Mr. Luvinga that the appellant's defence was considered by the first appellate court but did not shake the prosecution case. It is noteworthy that consideration of evidence by the court does not necessarily mean that the one whose evidence is considered, wins the case. Consideration of evidence falls under analysis stage which eventually guides the verdict. Therefore, dissatisfaction of the appellant with the verdict returned against him, does not amount to failure

to consider defence case. We, as well, find this ground of appeal without merit.

Regarding the appellant's sentence, Mr. Luvinga urged us to enhance it so that it reflects what is provided by the law. Indeed, the offences with which the appellant was convicted of attract life imprisonment sentences instead of 30 years' imprisonment meted out on the appellant.

Section 131 (3) of the Penal Code provides that:

> *"(3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

Likewise, section 154 of the Penal Code provides:

> *154.-(1) Any person who-*
> *(a) has carnal knowledge of any person against the order of nature;*
> *(b) N/A*
> *(c ) N/A*
> *(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.*

Being guided by the law above, the only option we have is to alter the appellant's sentence. Accordingly, we substitute life imprisonment

sentence on the appellant for thirty (30) years imprisonment sentence, initially imposed on him. Having done so, we dismiss the appeal for lacking in merit.

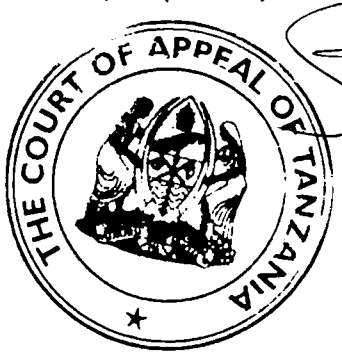
**DATED** at **TABORA** this 3rd day of October, 2023.

R. K. MKUYE
**JUSTICE OF APPEAL**

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

B. S. MASOUD
**JUSTICE OF APPEAL**

The Judgment delivered this 4th day of October, 2023 in the presence of the appellant in person, and Mr. Dickson Swai, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the Original.




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