THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 80 OF 2022

(Originating from the District Court of Lindi, at Lindi, in Criminal Case No. 33 of 2022)

STEVEN MCHANGO MALIKANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 24.04.2023
Date of Judgment: 23.06.2023

Ebrahim, J.

In the District Court of Lindi, at Lindi the Appellant was arraigned and convicted for unnatural offence by having carnal knowledge a child boy of the age of eight (8) years who I shall be referring to as "the victim" for the purpose of hiding his identity. The charge was predicated under **Section 154 (1) (a) of the Penal Code,**

Cap. 16 R.E 2022 (the Penal Code). He was sentenced to life imprisonment. He was also ordered to pay compensation to a tune of TZS. 2,000,000/= (Two Million shillings) to the victim. He was aggrieved, hence this appeal.

The allegation by prosecution against the Appellant as reflected in the particulars of the offence was that; on 26.07.2022 at Mnolela village within District and Region of Lindi, the Appellant had carnal knowledge of the victim, a boy of eighty (8) years old against the order of nature. In then verge to prove the charge against the appellant the prosecution lined up a total of five (5) witnesses and one exhibit (the PF3). The material facts of the case as unveiled in the trial court records during the trial may briefly be recapitulated thus:

On the material date, the Appellant found the victim playing and he took him to his house. He removed his clothes and inserted his penis into the anus of the victim. After he has accomplished his evil act he released the victim. The victim went out and met with his brother who asked him what was he doing inside there. He narrated a story of what had befallen him. He told his brother that he was raped by

the Appellant, his brother Dadi and Shaibu arrested the Appellant and took him to the office of the village executive officer. They were asked to go to Mnolela office, where the victim told them that when he was raped, he felt pain and could not walk properly. After they had been given a letter by the Ward Executive Officer, they were told to go to Mingoyo police station where they were issued with the PF3 **(Exhibit P1).** The victim he was referred to Sokoine hospital and he was medically examined. The were also found with stool he was found with stool, bruises in his anus and on his short which proved that he was sodomised.

The Appellant on in his defence evidence forcefully denied to commit the offence. He told the trial court that when he came from his farm, he found the victim playing at his door. However, before could enter to his house he was grabbed and beaten. He asked for the lenience of the court; His denial notwithstanding, the trial Magistrate was satisfied that the prosecution had proved the charge against him to the hilt and proceeded to convict and sentence him as earlier stated.

In his petition of appeal, the Appellant preferred ten grounds of appeal and four additional grounds of appeal which however can be smoothly condensed into three grounds as follows:

1. That the trial court erred in law and fact by convicting the appellant while the respondent failed to prove the case beyond reasonable doubt.
2. The trial court erred in law and in fact by convicting the appellant basing on the evidence of a child of a tender age which was uncorroborated and improperly taken.
3. That the trial court erred in law and in fact because the charge sheet was defective.

Basing on these grounds of appeal, the Appellant prayed for this court to quash the conviction and set aside the sentence thereof and order an immediate release of the Appellant from jail and set him at liberty.

During the hearing of the appeal, the Appellant appeared in person, unrepresented whereas Mr. Mwapili, learned State Attorney represented the Respondent/Republic.

Submitting in support of the appeal the Appellant prayed to adopt his grounds of appeal and additional grounds of appeal and prayed for the appeal to be allowed.

In response to the grounds of appeal, Mr. Mwapili learned State grouped into two the grounds of appeal and additional grounds of appeal, to wit: the defective charge sheet and that whether prosecution proved the case beyond reasonable doubt. He argued on the charge sheet, the Appellant was charged with unnatural offence contrary to Section 154 (1) (a) of the Penal Code [Cap. 16 R. E 2022], there is no any legal defect to cause miscarriage of justice. He explained that the charge contains statement and particulars of the offence describing all the ingredients of the offence.

He argued that the case was proved beyond reasonable doubt. He substantiated his argument by referring to the case of **Amran Hussein v The Republic Criminal Appeal No. 13 of 2019**, which held that the Republic has to prove the ingredients of the offence under **Section 154 (1) (a) of the Penal Code.** He argued also that PWI (the victim) proved the case as per the principle set in the case **Selemani Makumba v The Republic [2006] TLR, 379**, where it was stated that:

'Evidence of sexual offences must come from the victim'.

He added that, the evidence of PW1 was corroborated by **PW5 – Medical doctor** who proved penetration, bruises, stool and observed that the and anus was loose. On additional grounds of appeal, the learned State Attorney speaking about **Section 127 (2) of the Evidence Act [Cap. 6 R. E 2022]** referred to the proceedings of the trial court at page 6, where PW1 promised to tell the truth. He urged the count to dismiss the appeal because the case was proved beyond reasonable doubt.

In his rejoinder, the Appellant reiterated his prayers.

I have keenly gone through the grounds of appeal and additional grounds of appeal, the submissions by the learned State Attorney for the Respondent, the records and the law. In this appeal mindful of the fact that this is the first appellate court. I am therefore have a duty to subject the entire evidence into objective scrutiny while considering in mind of the fact that the trial court had an opportunity to observe the demeanour of the witnesses; see **Charles**

Before adressing the main complaint by the Appellant that the prosecution did not prove the case beyond reasonable doubt. for the reason to be apparent soon, I will first address the 2nd ground of appeal.

It was argued by the learned State Attorney that the evidence of the victim at page 6 of the proceedings of the trial court, PW1 promised to tell the truth.

The issue for consideration is thus, **whether the evidence of the victim, a child of tender age was properly received in the trial court**.

According to the evidence of PW2, brother of the victim and PW4, the father at the time of adducing evidence i.e 2022 the victim was aged 8 years. Hence, a child of tender age. In terms of **Section 127 (4) of the Evidence Act [Cap. 6 R.E 2022]** and the case of **Issa Salum Nambaluka v. Republic, Appeal No. 272 of 2018, Court of Appeal of Tanzania at Mtwara (unreported)**; the phrase "child of tender age" is defined to mean a child whose apparent age is not more than fourteen years.

Section 127 (2) of the Evidence Act [Cap. 6 R.E 2022] regulates the procedure for receiving the evidence of the child of tender age. It 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."*

The CAT in a number of decisions insisted that the promise by a child witness shall be recorded. The decisions include; **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba (unreported) and the case of Issa Salum Nambaluka (supra).** The procedures in receiving the evidence of the child witness of the tender age, narrated by the CAT in the above cases cited above are as follows:

a) That, the child of tender age can give evidence with or without oath or affirmation.

b) The trial judge or magistrate has to ask the child witness such simplified and pertinent questions which need not be exhaustive depending on the circumstances of the case. The questions may relate to his/her age, the religion he professes, whether he/she

understands the nature of oath or affirmation, and whether or not he/she promises to tell the truth and not lies to the court. If he/she replies in the affirmative, then he/she can proceed to give evidence on oath or affirmation depending on the religion he/she professes. However, if he/she does not understand the nature of oath or affirmation, he/she should, before giving evidence, be required to make a promise to tell the truth and not lies to the court.

c) Before giving evidence without oath, such child is mandatorily required to promise to tell the truth, and not lies to the court, as a condition precedent.

d) Upon the child making the promise, the same must be recorded before the evidence is taken.

In the instant case the trial court, before receiving the evidence of the victim, recorded as follows:

> **"PW1,.....8yrs, Simana, residence, Primary school pupil, Mwera, Muslim; ....., ninasoma madrasa na kusema uongo ni dhambi na nimekuja**

kusema ukweli na ninaahidi kusema ukweli."[Emphasize is added]

The records also show that the probing questions were asked by the trial court to the victim in view of determining whether or not he understood the nature of oath or affirmation and the victim was asked if she knew the importance of telling the truth. I therefore, have no sencilla of doubt that the procedure was followed and the child promised to tell the truth in terms of section 127(2) and (3) of the Evidence Act, Cap 6, RE 2022.

Furthermore, the evidence of PW1 was corroborated by the evidence of PW2, and the doctor who also tendered Exhibit P 1 to support his evidence.

as reflect at page 6 paragraph 2 of the printed trial court proceedings.

As for the 3rd ground of appeal, I agree with the submission by the learned State Attorney that the Appellant was charged with unnatural offence contrary to **Section 154 (1) (a) of the Penal Code [Cap. 16 R. E 2022]**, there is no any legal defect to the charge to cause miscarriage of justice. The appellant has not pointed any the

charge has statement and particulars of offence describing all the ingredients of the offence.

The complaint that PW1 testified that the incident took place on 28.07.2022 as per the printed proceedings while the charge stated that the incident took place on 26.07.2022. is a typing error because the hand written proceedings reflect that the incident occurred on 26.07.2022. Further more PW2, PW3, PW4 and PW5 testified that the incident took place on 26.07.2022.

This ground of appeal is thus dismissed.

Now, reverting to the main complaint which is predicated on the ground that the case was not proved beyond reasonable doubt. The Appellant has raised a number of issues on showing that the prosecution case was not proved to the hilt.

The evidence led to the conviction of the Appellant mainly based on the testimony of the victim (PW1) and the PF3 (exhibit P1). PW1 essentially testified that, him and Philipo were playing when the Appellant took him to his house and sodomissed him. When he took him was not there.

PW1 further testified that the Appellant removed his clothes and inserted his penis into his anus. After the Appellant finished his evil act, he released him and he went out.

The story of PW1 resembled that of PW2, uncle of the victim, PW4, and PW5 (Medical Doctor). PW5 also tendered PF3. The PF3 corroborated the story since it entailed the observations which conclude that was sodomised.

Basing on the above prosecution evidence PW1 the question is whether there is basis for this court to disbelieve PW1. In answer to this question, I will be guided by the principle illustrated in **Goodluck Kyando v. Republic, (2002) TLR 363** that *"every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness."*

In the instant case, apart from the commission of the denying to the offence, the Appellant did not seriously deny the testimonies of PW1. In light of the above, I have no strong reasons for disbelieving believing PW1 in considering the fact that his testimony was convenient even with that of other witnesses.

The version of the PW1 evidence is corroborated with the PF3. As rightly evaluated by the trial court, the PF3 shows that indeed the Appellant committed the offence.

Having believed PW1 the issue is whether there was need to summon Philipo as suggested by the Appellant **Section 143 of the Evidence Act [Cap. 6 R.E 2022]** provides that no specific number of witnesses is required to prove a fact. In this case, I am satisfied that the evidence of PW1 coupled with the PF3 were enough to establish the Appellant's guilt beyond reasonable doubt. In the premises, no useful purpose would have been served if Philipo had been called to testify on behalf of the prosecution side.

Deriving from as above, I find that prosecution managed to prove the case beyond reasonable doubt. I therefore dismiss the entire appeal for lack of merits.

Ordered accordingly.

R.A Ebrahim

JUDGE

Mtwara

23.06.2023