IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 164 OF 2020

WILFRED ANDISAI MMARI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 2nd day of March, 2020

in

Criminal Appeal No. 37 of 2019

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JUDGMENT OF THE COURT

20th & 27th September, 2023

MWANDAMBO, J.A.:

Wilfred Andisai Mmari, the appellant, appeals from the judgment of the High Court sitting at Moshi which dismissed his appeal against conviction and sentence in a charge of unnatural offence made by the District Court of Siha. The appellant's appeal is predicated upon five grounds of appeal in a memorandum of appeal and one additional ground in a supplementary memorandum of appeal lodged subsequently.

Before the trial court, the appellant stood charged with unnatural offence contrary to section 154 (1) (a) of the Penal Code. The particulars of

the offence alleged that on 12 September 2018 at a place called Koboko, Sanya Juu, Siha District, Kilimanjaro Region, the appellant had carnal knowledge of a 14 years boy (name withheld) against the order of nature. The appellant pleaded not guilty to the charge. In a trial that followed, the prosecution led evidence to prove the charge through four witnesses, including the victim (PW 4) and Dr. Joseph Temba (PW3); a Doctor at Siha District Hospital. PW3 had examined PW1 after disclosing the ordeal to his brother; (PW4) and mother (PW2) three days after the incident that is, 15 September 2018, to be exact.

Briefly, according to PW1, on 12 September 2018 in the afternoon, at a place called Isanja, he met the appellant who offered to assist him in connecting him to a land lord as he had heard that he was looking for a room to rent. The victim obliged. Despite a long wait, the prospective landlord did not surface. It turned out that, the place at which PW1 and the appellant waited for the prospective land lord was a playground at which people had gathered. After the rest of the people had left, the victim lost hope and wanted to go back home. The appellant is said to have lured the victim for a sexual intercourse which he declined. However, the appellant prevailed over the victim, pushed him down, undressed his trousers before undressing himself and thereafter inserted his penis into

the victim's anus whilst covering his mouth to prevent him from screaming for help. According to PW1, he felt a lot of pains after the act despite which, he refrained from disclosing it to anyone including his parents because the appellant threatened to terminate him should he dare doing so. Besides, PW1 told the trial court that he felt very shy disclosing the ordeal. It was not until on 15 September 2018 when the victim's brother (PW4) found him sleeping in agony and upon interrogation, he narrated the awful story to him who relayed the information to PW2; their mother. Afterwards, PW1 was taken to the police to report the incident and obtain a PF3 before proceeding to Siha Hospital where PW3 examined the victim. PW3's finding upon examination revealed relaxed sphincter muscles, bruises on the anus with an open canal and smelling discharge which was indicative of forced entry into the anus by a blunt object. PW3 posted his findings in a PF3 which was admitted as exhibit P1.

In his defence, the appellant distanced himself from the accusation contending that his arrest was attributed to a fight he had with the undisclosed relatives of the victim. At the end of the trial, the learned trial Resident Magistrate found the prosecution case proved the essential ingredient constituting unnatural offence; penetration through the evidence of PW1 corroborated by PW3. The trial court found too as proved beyond

reasonable doubt that, it was the appellant and no other person who committed the awful act. It thus convicted him as charged followed by a sentence of 30 years' imprisonment.

The appellant's appeal before the first appellate court was predicated on three complaints faulting his conviction as wrongful due to; **one**, non-compliance with section 127(2) of the Tanzania Evidence Act (the Act); **two**, insufficient evidence of identification and, **three**, weak prosecution evidence. The High Court (Mkapa, J.) concurred with the trial court on findings of fact resulting into the appellant's conviction. It thus dismissed the appeal which has resulted into the appeal now before us. As alluded to earlier, the appellant faults his conviction and sentence on six grounds of appeal which shall become apparent in the course of our deliberation. At the hearing of the appeal, the appellant urged us to consider his grounds and allow the appeal before letting the respondent Republic to reply.

We shall begin our discussion with the sole ground in the supplementary memorandum of appeal which faults the first appellate court for sustaining conviction grounded upon PW1's evidence received contrary to the dictate of section 127(2) of the Act. Ms. Revina Tibilengwa, learned Principal State Attorney who teamed up with Ms. Eliainenyi Njiro,

learned Senior State Attorney to resist the appeal on behalf of the respondent Republic urged the Court to dismiss the ground for being misconceived. According to the learned Principal State Attorney, even though there is no indication that PW1 who was a tender age witness made a promise to tell the truth and not lies in terms of section 127(2) of the Act, his evidence was taken upon affirmation as required by section 198(1) of the Criminal Procedure Act (the CPA) after the trial Magistrate had been satisfied herself that, PW1 knew the meaning of an oath. At any rate, Ms. Tibilengwa argued, if there was any non-compliance with section 127 (2) of the Act, the appellant was not prejudiced thereby.

Having heard Ms. Tibilengwa's submission, we do not think she is necessarily correct contending as she does that PW1's evidence was properly received in accordance with section 198 (1) of the CPA. Section 198 (1) of the CPA requires every witness in a criminal trial to give evidence on oath but that section is subject to any other written law to the contrary. Ms. Tibilengwa agrees that one such written law is section 127 (1) and (2) of the Act which provides: -

> *"**127.** -(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of*

giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence."

It was common ground that PW1 was a witness of tender age whose evidence was receivable with oath if, upon some initial interview by the trial court, such a witness is shown to understand the meaning of an oath in terms of section 127 (1) of the Act. It is significant that, the initial interview and trial court's finding must be reflected in the record before the tender age witness gives his evidence. See: **Salum Nambaluka v Republic,** Criminal Appeal No. 272 of 2018 (unreported). Otherwise, the tender age witness who is incapable of testifying upon oath is permitted to do so without oath or affirmation subject to making a promise to tell the truth and not lies as required by section 127 (2) of the Act.

There is no dispute in this appeal that PW1 gave evidence upon affirmation. However, there is no indication in the record on what informed the trial court to receive PW1's evidence upon affirmation. The record does not show that the learned trial magistrate observed the dictates of section

127 (1) of the Act by putting some initial questions to PW1 to ascertain his ability to give evidence upon oath. With respect, the reception of such evidence was irregular. Nevertheless, the next question is whether such evidence was wholly worthless.

We have anxiously considered the issue and are of the view that, such evidence survived the trial court's omission. In our considered view, the omission by the trial Magistrate was a curable irregularity under section 388 of the CPA as urged by Ms. Tibilengwa. We say so because, in the context of this appeal, much as the reception of PW1's evidence upon affirmation was irregular, such evidence must be treated as without oath. Mindful of the Court's previous decision in **Ally Ngozi v. Republic** (Criminal Appeal No. 216 of 2018) [2020] TZCA 1786 (24 September 2020) TanzLii, we hold that, PW1's declaration that he will tell the truth and nothing but the whole truth constituted a promise to tell the truth within the ambit of section 127(2) of the Act. It follows thus that, PW1's evidence was as good as evidence received without oath as required by section 127 (2) of the Act. Consequently, the complaint in the supplementary memorandum is dismissed which takes us to a discussion on the complaints in the memorandum of appeal.

We shall begin with a remark that, grounds one, two and three in the memorandum of appeal did not feature before the first appellate court. Ordinarily, such grounds could not be considered by the Court. However, as we are satisfied that they involve issues of law, we shall consider them anyway.

The complaint in the first ground is against the trial court's alleged failure to address the appellant on his rights after a ruling that he had a case to answer in terms of section 231 (1) of the CPA. Ms. Tibilengwa submitted, and rightly so in our view, that, the complaint is baseless because the record speaks otherwise. An examination of the record (at page 16-19) shows that, after the ruling, the appellant is recorded to have stated that he would testify upon oath with no other witness than himself. That was indicative of the trial court addressing the appellant on his rights in pursuance of section 231 (1) of the CPA. Indeed, the appellant defended himself upon oath after which he closed his case. The Court has dealt with similar complaints in various decisions including in **Robert Shayo v. Republic**, Criminal Appeal No. 409 of 2016 (unreported). Like in the instant appeal, the record did not indicate that the trial Magistrate addressed the accused of his rights under section 231 (1) of the CPA but the accused informed the trial court to give evidence under oath with no

other witness than himself. The Court rejected that complaint holding that had it been otherwise, the accused could not have done what he did. We held alike in **Charles Yona v. Republic** (Criminal Appeal No. 79 of 2019) [2021] TZCA 339 (2 August 2021) TanzLii. We accordingly reject this complaint as baseless.

Grounds two, three and four boil down to the general complaint captured in ground five that the case against the appellant was not proved beyond reasonable doubt. Ms. Tibilengwa argued the grounds conjointly and invited us to hold that the appellant's complaints are all baseless. She advanced several reasons in support of her argument; **one**, existence of penetration as an essential ingredients in the offence under section 154 (1) (a) of the Penal Code was proved through the evidence of PW1 corroborated by PW3 and PW4; **two**, PW1 proved also that it was the appellant who committed the act considering that there was no possibility of mistaken identity since, not only was the appellant familiar to him but also the long duration PW1 spent with the culprit; **three**, the appellant's complaint regarding delayed report of the ordeal by the victim was sufficiently explained that is; threat of being terminated as well as shyness, and thus the attack against PW1's credibility was misplaced; **four**, the case was properly investigated which resulted in the prosecution calling

witnesses including PW3 to prove the charge. In addition, it was Ms. Tibilengwa's submission that, the complaint against the lower court's failure to consider his defence that the case against him was fabricated was baseless since, apart from his general assertion that he was arrested in connection with grudges he had with the relatives of the victim, the appellant offered no plausible defence to displace the prosecution evidence. The learned Principal State Attorney implored us to dismiss the complaints and eventually the appeal. Given the opportunity for a final word, the appellant had nothing more than reiterating his urging to the Court for a positive determination of his grounds of appeal.

After hearing the arguments in opposition to the appeal on the complaints in grounds two, three, four and five in the light of the evidence, we cannot, but agree with the learned Principal State Attorney that the appeal lacks merit. We shall explain shortly.

To start with, the offence the appellant was charged with; unnatural offence entailed the prosecution proving penetration of a male sexual organ into the victim's anus. The first appellate court concurred with the trial court that the appellant sodomised the victim who felt a lot of pains afterwards. The victim's evidence on penetration was corroborated by PW3

who examined him after three days. The examination revealed relaxed sphincter muscles, bruises on the anus with an open canal and smelly discharge which was indicative of forced penetration. It is noted that, the contents of the PF3 (exhibit P1) were not read out by PW3 who tendered it, and thus liable to be expunged as urged by Ms. Tibilengwa. Nevertheless, PW3's oral evidence sufficed to corroborate PW1's testimony which could stand on its own without such corroboration considering the principle laid down by case law through **Selemani Makumba v. Republic** [2006] T.L.R. 379; true evidence in sexual offences must come from the victim. PW1 who was the victim of the offence did as much. He proved too as found by the trial court that, there was no possibility of mistaken identity of the culprit considering that, apart from their familiarity, PW1 spent considerable time with the appellant from the afternoon till evening.

Despite the appellant's attempt to dent PW1's credibility due to delay in reporting the ordeal, such an attempt is misplaced. As both courts below concurred based on PW1's evidence, the appellant threatened the victim with termination should he dare telling anyone about the ordeal. Besides, the victim felt shy and unsurprisingly so, disclosing such an awful act to anyone until he was discovered by his brother (PW4) three days later. It

was through inquiry that that PW1 he broke the news whereupon PW4 conveyed the sad news to PW2 who took the victim to the police for reporting the incident before proceeding to the hospital for medical examination. Luckily, this is not the first time the Court is confronted with such a complaint. In **Selemani Hassani v. Republic**, Criminal Appeal No. 203 of 2021 (unreported) for instance, a similar complaint featured premised on the Court's decision in **Wangiti Marwa Mwita & Another v. Republic** [2003] T.L.R. 271 for the proposition that a delay in reporting an incident by a witness dents his credibility. The Court distinguished the application of that rule in cases involving sexual offences where the victims of such offences are of tender age associated with threats. The Court subscribed with the observations made by the supreme Court of Philippines in the **People of the Philippines v. SPO1 Arnufo A. Aure** and **SPO1 Marlion H. Fero, G.R.** No 180451, October 17, 2008 thus:

> *"Delay in reporting an incident of rape due to death threats and shame does not affect the credibility of the complainant nor undermine her charge of rape. The silence o f a rape victim or her failure to disclose her misfortune to the authorities without toss of material time does not prove that her charge is baseless and fabricated. It is a fact that* ***the victim would rather***

privately bear the ignominy and pain of such an experience than reveal her shame to the world or risk the rapist's making good on his threat to hurt or kill her." [At page 18]

We hold alike in this appeal that contrary to the appellant, the delay and more so of just three days sufficiently explained by PW1 had nothing to do with his credibility. It is glaring that the trial court was satisfied that PW1's credibility was impeccable [at page 25 of the record of appeal]. Equally baseless is the complaint that the two courts below erred in not finding that the appellant's defence on being framed up in the case created doubt in the prosecution case. As rightly submitted by Ms. Tibilengwa, the appellant's defence was too fanciful to create any doubt in the prosecution case. Undeniably, the trial court considered that defence [at page 26 of the record of appeal] and rejected it as an afterthought. We share the trial court's view and reject the appellant's complaint in this regard. In view of the above, we do not find any basis in the complaint that the case was not properly investigated, whatever that was complaint was meant to achieve. On the whole, we dismiss the appellant's complaint in grounds two, three, four and five being satisfied that the appellant was properly convicted as found by both courts below.

As the Court was about to retire, we probed both the appellant and the respondent's counsel on the propriety of the sentence of 30 years' imprisonment mindful of the victim's age in the light of section 154(2) of the Penal Code. The trial court imposed a sentence of 30 years' imprisonment which was sustained by the High Court on appeal. It is significant that section 154 (2) of the Penal Code imposes a life sentence to a person convicted of unnatural Offence involving a person below 18 years, as it were. Ms. Tibilengwa implored us to exercise our revisional power under section 4 (2) of the Appellate Jurisdiction Act (the AJA) by quashing the sentence of 30 years' imprisonment sustained by the first appellate court and substitute it with the mandatory life sentence. For his part, the appellant reiterated his innocence and appealed to the Court's mercy.

We have alluded to shortly that the appropriate sentence was life imprisonment as mandated by section 154 (2) of the Penal Code. Neither the trial court nor the High Court had regard to the dictates of the law on the sentence imposed where the victim is below 18 years. It has been held that superior courts have a duty to ensure the proper application of the law – See for instance; **Marwa Mahende v. Republic** [1998] T.L.R. 249. Since the two courts below applied the law erroneously regarding sentence, we are bound to correct it. Accordingly, in the exercise of the

Court's power of revision vested in it by section 4(2) of the AJA, we enhance the jail term sentence to life imprisonment as the appropriate sentence.

That said, the appeal stands dismissed for want of merit.

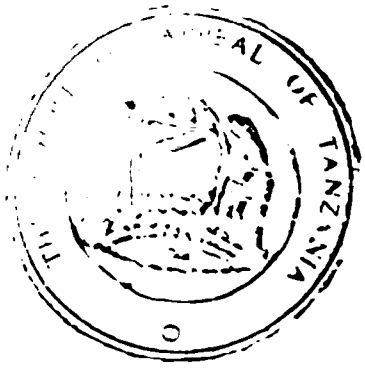
DATED at **MOSHI** this 26th day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 27th day of September, 2023 in the presence of the Appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney and Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL