IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 94 OF 2012

ELISANTE KIVUO.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(Mmilla, J.)

dated the 25th day of November, 2009
in
Criminal Appeal No. 62 of 2008

JUDGMENT OF THE COURT

11th & 14th September, 2012

MBAROUK, J.A.:

In the District Court of Babati at Babati, the appellant, Elisante Kivuo, was charged with the offence of unnatural offence, contrary to section 154 (1) of the Penal Code, Cap. 16 of the Laws as amended by Sexual Offence Special Provisions Act No. 4 of 1998. He was convicted and sentenced to thirty (30) years imprisonment by the trial court. Aggrieved, he appealed to the High Court sitting at Arusha, where his appeal was dismissed. Also, his sentence of thirty (30) years imprisonment was set aside

and substituted thereof by the sentence of life imprisonment. Convinced of his innocence, the appellant has preferred this second appeal.

Briefly stated, the facts which led the appellant's conviction were that, on 28/6/2006 at around 12:00 hours, PW3 Baraka s/o Hangali (the victim) met the appellant on his way home from school. He was in the company of his sister PW4 Julieth Hangali. At the time PW3 met the appellant, he had a thorn in one of his left fingers. The appellant volunteered to assist PW3 in removing the thorn. Thereafter, PW3 directed PW4 to go ahead while he and the appellant stayed behind. Surprisingly, the appellant took PW3 into a bush where he removed PW3's short trouser, unzipped his trouser and sodomized him. PW3 raised an alarm which was answered by a passerby named as "Rasta" or Omary who arrested the appellant. "Rasta" led PW3, PW4 and the appellant to the village where he met the mother of PW3 and PW4. "Rasta" handed the appellant to the relatives of PW3 and PW4 for further action. On their part, at around 14:00 hours, the

same day, the said relatives and neighbours amongst them John Dema accompanied by the victim and the appellant found PW3's father at Muhole open market. PW2, Hangali Bura (the father of PW3) proceeded to Magugu Police Station and handed over the appellant to the police. PW3 was then given PF3 and together with PW2 proceeded to Magugu Dispensary for medical examination and treatment. The appellant was subsequently charged before the Babati District Court in Criminal Case No. 275 of 2006.

In his defence at the trial court, the appellant denied to have committed the offence and claimed to have been incriminated by PW1. He testified to the effect that PW1 had a sexual affair with his wife. He said, one day while he was on his way to the auction centre, he met the appellant who told him that he will see what he intends to do and started fighting him. It was around 11:00 hours when children were discharged from school. The appellant said, the children saw them fighting PW 1 then approached one girl and convinced her to say that she was raped

by the appellant, but she refused. PW1 then approached a boy (PW3) who agreed with the plan. Thereafter, PW1 held the appellant by the neck and took him to a ten cell leader who was not there. They then went to PW3's parents' house and found his mother only. PW3's father was found at the auction centre. Before that, the appellant said, he asked the people who were present to inspect him if he had any sperms in his private parts, but they found nothing. The people then took him to the auction centre where PW3's father was and thereafter sent him to the police station.

The appellant listed three grounds of appeal in his memorandum of appeal lodged in this Court as hereunder:-

1. That, the provisions of section 127 (2) of the Evidence Act Cap. 6 R.E. 2002 were not complied with and PW3's evidence was not corroborated.
2. That, both the trial court and the first appellate court misdirected themselves in law and in fact when they failed to assess the credibility of PW1.

3. That, the offence of unnatural offence was not proved to the standard required by law under the provisions of Section 130 (4) (a) of the Penal Code.

At the hearing, the appellant appeared in person unrepresented. The respondent/Republic was represented by Mr. Haruni Benge Matagane, learned State Attorney. The appellant urged us to adopt his memorandum of appeal and his written submission which he supplied to us.

On his part, the learned State Attorney from the outset supported the appeal for the main reason that Section 127 (2) of the Evidence Act was not complied with. On his elaboration, Mr. Haruni submitted that when PW3's evidence was taken by the trial court, the record shows that the trial magistrate only satisfied himself that PW3 understood the duty of telling the truth and proceeded receiving his evidence, unsworn. However, the learned State Attorney contended that according to the decision of this Court in the case of **Godi Kasenegala vs Republic,**

Criminal Appeal No. 10 of 2008 (unreported), a trial court ought to be satisfied on the following:-

1. That, PW3 possessed sufficient intelligence to justify the reception of his evidence.
2. That, PW3 understood the duty of speaking the truth.

Mr. Matagane further submitted that those two conditions must be satisfied conjunctively before the unsworn evidence of a child of tender age is received. He said in this case the unsworn evidence of PW3 who was a child was received outside those conditions as per the mandatory requirements of section 127 (2) of the Evidence Act, hence it, ought to be discarded. In support of his argument, he cited to us the decision in **Godi Kasenegala** *(supra)*. For that reason, he urged us to discount the evidence of PW3.

The learned State Attorney added that if the evidence of PW3 is discounted, there is no other evidence which can prove

the offence against the appellant. He said, the evidence found in PF3 was expunged by the High Court, hence there is no medical evidence in support of the prosecution's case. He also contended that PW1 and PW2 were not credible witnesses to be relied upon, because the best evidence in sexual offences comes from the victim himself/herself. As the evidence of PW3 (the victim) has already been discounted and the PF3 expunged, the remaining evidence is not enough to prove the offence against the appellant. For that reason, he urged us to allow the appeal.

In his re-joinder submission, the appellant had nothing further to submit.

We join hands with the learned State Attorney that the appeal has merit for the following reasons, **one,** it is now settled law that in receiving the evidence of a child, the conditions stipulated in section 127 (2) of the Evidence Act have to be strictly complied with. (See the decisions of this Court in **Godi**

Kasenegala *(supra),* **Hassan Hatibu vs Republic,** Criminal Appeal No. 253 of 2006, **Jackson Mlonga vs Republic,** Criminal Appeal No. 200 of 2007, **Omary Kurwa vs Republic,** Criminal Appeal No. 89 of 2007 (all unreported), to name just a few. Two main conditions have been stated earlier by the learned State Attorney, namely that the trial court ought to satisfy itself on whether a child witness possesses sufficient intelligence to justify the reception of her evidence and **Secondly,** that, the child understands the duty of speaking the truth.

A similar situation happened in the case of **Godi Kasenegala** *(supra)* where it was found that:-

> *"In the case before us, the trial judge said she had found that the witness knew the duty of speaking the truth and then proceeded to have her sworn. But she had not found that the witness*

understood the nature of an oath which is a condition precedent for taking her evidence on oath. In the circumstances there was no basis for taking Colletha's evidence. ***There was also no sufficient justification for even treating her evidence as unsworn because one of the prerequisites had not been met, that is to say there was no specific finding that she was possessed of sufficient intelligence to justify the reception of her evidence****..."*

[Emphasis is added].

It is evident that the mandatory requirements stipulated in section 127 (2) were not strictly complied with in this case. For that reason, we find that the evidence of PW3 ought to be discounted and we hereby do so. Looking at the record, even the evidence of PW4 rests on the same finding as the requirements in

section 127 (2) were not complied with too in receiving her evidence. It is similarly discarded.

Having discounted the evidence of PW3 and PW4, we are left only with the evidence of PW1 and PW2. This is because, even the medical evidence found in the PF3 has already been discounted by the first appellate court and we agree with its finding to that effect.

As claimed by the appellant and supported by learned State Attorney, both the trial court and the first appellate court misdirected themselves for their failure not to assess properly the credibility of PW1. We are of the considered opinion that the appellant's defence raised reasonable doubts which has shook the prosecution's evidence. For example, we ask ourselves, was it probable for a "reasonable person" not to resist arrest for such a serious offence by running away while he was alone with the person who arrested him. As the record shows, PW1 testified to

the effect that he arrested the appellant after he had committed the alleged crime. PW1 and the appellant were alone, yet he offered no resistance when he was taken to the mother of PW3 and later to his father. We find it difficult to understand whether that situation is probable in real life situation.

Apart from that, the prosecution failed to show clearly who was a person named by PW3 and PW4 by the name of "Rasta". Was he PW1 or another person. It was alleged that when PW3 raised an alarm, one "Rasta" or Omary appeared. We cannot say with certainty that "Rasta" or Omary was PW1, because PW1 is Abdallah Hamis and not Omary as PW3 and PW4 told the trial court.

The record also shows that, when PW1 testified at the trial court, he stated the ages of PW3 Baraka as 8 years old and PW4 Juliet as 5 years old. We have asked ourselves as to how did PW1 knew the ages of the victim and his sister's. Did he know the

children before? The record is silent on that point. We think, those doubts have to be resolved in favour of the appellant.

In addition to that, PW2 testified to the effect that the appellant and PW3 (his child) was sent to him by John Dema and his neighbours. That makes us to wonder as to who is speaking the truth, is it PW1 who said he was the one who sent the appellant and PW3 to PW2 or PW2 who said they were brought to him by John Dema and his neighbours.

We think, those contradictions found in the prosecution's evidence cumulatively have shaken the credibility of PW1 and PW2.

We are increasingly of the view that, the two courts below failed to assess properly the credibility of the evidence adduced by PW1 and PW2. We are of the opinion that, such a failure led to a miscarriage of justice.

In the view of the state affairs we have demonstrated above, we find merit in the appeal. The guilt of the appellant was not proved beyond reasonable doubt. In the event, we allow the appeal and accordingly quash the conviction and set aside the sentence. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

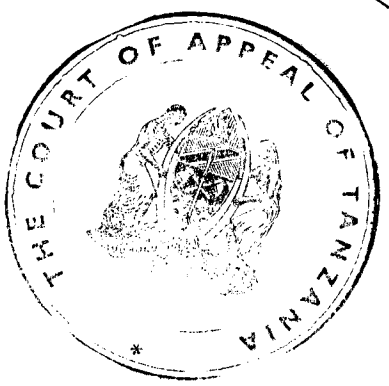
DATED at ARUSHA this 12th day of September, 2012.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL