IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 78 OF 2021

(Arising from the decision of the District Court of Sengerema at Sengerema in Criminal Case No. 170 of 2020)

OKINYI S/O APINDE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

8th & 12th July, 2021

RUMANYIKA, J:

Having had been charged with, and on 6/5/2021 he was convicted for unnatural offence C/s 154 (1) (a) of the Penal Code Cap 16 RE. 2019, according to particulars of offence that on 15/10/2020 at about 13:00 hours at Nyampulukano village district of Sengerema, Mwanza region Okinyi Apinde (the accused) had carnal knowledge of **AP** (name not real) a girl 8 years old pupil of class II Sengerema primary school.

He is aggrieved hence 10 (ten) grounds of appeal, which revolve around points as under: -

(1) That instead of corporal punishment the first offender was given a custodial sentence.

(2) That the prosecution case wasn't actually beyond reasonable doubts proved.

(3) That the uncorroborated appellant's cautioned statement was improperly admitted in evidence.

(4) That Pw3 wasn't credible because he did not name the appellant at the earliest opportunity.

(5) That being children of tender ages the evidence of Pw3 and that of the victim was contrary to provisions of Section 127 of the Evidence Act Cap 6 RE.2019 received.

(6) That Pw7 was not credible because he could not practically with naked eyes able to see and observe what was in the victim's anal cavity.

(7) That with regard to Pw4, Pw5 and pw6 the learned trial magistrate improperly analyzed the evidence.

(8) That the appellant was contrary to law arrested therefore possibly the charges fabricated.

(9) That the appellant was not fairly tried because he could not have appreciated nature of the charges and the evidence adduced.

(10) That the trial magistrate erred in law and fact not holding that the prosecution evidence was too contradictory and inconsistent to warrant conviction.

The appellant appeared in person and Ms. L. Meli learned state attorney appeared for the respondent Republic.

Through audio teleconference hearing, through mobile numbers 0737877746 and 0717418929 respectively on 8/7/2021 the parties submitted as follows: -

Actually the appellant submitted nothing essentially.

In support of the conviction and sentence, Ms. Lilian Meli learned state attorney submitted; **(a)** that the appellant may have had been the 1st offender yes, but given the offence he was charged with and convicted for, the sentence was either life imprisonment or, like it happened to a term of 30 years in jail **(b)** that in fact the appellant wasn't convicted for his weak defence but credible evidence of the victim and doctor (Pw2 and Pw7) respectively **(c)** that actually the appellant's cautioned statement it

was properly recorded and admitted in evidence because following the objection inquiry was properly carried out disposed of **(d)** that the victim may have had, at the earliest possible opportune not named the appellant yes, but on that one Pw3 was reliable **(e)** before the court the two children of tender age Pw2 and Pw3 may have had promised to speak the truth and that one they did. With respect to provisions of Section 127 of the Evidence Act therefore, the issue of noncompliance it should not have been raised **(f)** that the trial court actually evaluated the evidence properly. If anything, it being the 1st appeal this court may now wish to re-evaluate the evidence on record much as through attire the appellant was further identified **(g)** that the appellant may have had been arrested only by the civilian Pw2, Pw3 and Pw4 yes, but earlier on one having had been finger pointed out by the most credible and reliable victim Pw2 (case of **Selemani Makumba v.R** (2000) TLR 379.

A brief account of the evidence on record reads thus: -

Pw1 Mama Majuto (the name not real) stated that she was maternal aunt of the class II victim of Sengerema primary school. That as she was home on 15/5/2020 at about 12:15 hours, only a class I Jonathan pupil arrived from school and, when asked about the missing victim, the latter

took them to Mtakuja and Igogo hills all in a vain but shortly at a certain bushy area they saw the victim sort of being escorted by the appellant but the former walked with difficulties and implicated the appellant. That the appellant attempted to escape but he was shortly apprehended and pw1 and fellows learnt that the victim had been sodomized and raped.

Pw2 having promised the court to speak the truth, Siwema Maliya Tabu (the name not real), at the time only 8 years old she stated that she was class II at Sengerema primary school and stayed under care of grandmother and Pw1. That as together with Jonathan they were. on their way back from the school they met the appellant around who gave her shs. 200/= and led her away into bushes but they left leaving the said Jonathan behind. That the appellant threated and he sodomized her. She felt pains, bled and emitted stool until when the appellant was done then now led by Jonathan, Pw1 and others they met her walk from the bushes whereby the appellant attempted to escape but he was almost red handed apprehended.

Pw3 also the child having promised to speak the truth, Jonathan Benson stated that as, together with Pw2 (the victim) were, and on their way back home from school they met the appellant at about noon, the

latter just gave her shs. 200/= and he took her away. That as the two never came back, he went home and reported the case to the victim's aunt and led them back at the victim's and appellant's last point of departure, where they saw the two but shortly the appellant, at the time in a while T-shirt and black trousers, he was arrested by police.

Pw4 Joyce Mabula stated that she was neighbor of the victim. That as she was at home on 15/10/2020 afternoon from school her son pw2 arrived worry looking and he reported the missing victim where. in terms of attire he described the appellant. He led them to the last point of departure of the appellant and victim in bushes where shortly they saw the two. The appellant attempted to run away but he was apprehended. That now examined, the victim had some blood clots in vaginal cavity in a blood stained under pant.

Pw5 Wp 7410 DC Mponela the respective gender desk focal person stated that following the incident, and was duly assigned, she took up the matter on 15/10/2020 shortly thereafter having had examined the victim and found blood ooze in her private and anal cavities in which case, finally the doctor established sodomy and, on that one she (Pw5) recorded the victim's statement.

Pw6 F. 5939 DC Mathew of Sengerema police department of criminal investigations stated that following the incident, but duly assigned by the OCCID, on 15/10/2020 he investigated the matter whereby also, the victim identified the appellant's attire and the respective certificate of seizure (Exhibits "P1" and "P2") respectively. That the appellant confessed (copy of the cautioned statement Exhibit "P3").

Pw7 Blandina S. Kalulu, a medical doctor and Incharge of Sengerema Health center stated that as he was on 15/10/2020 on duty at work, but following the incident the same reported to him by aunt, he examined the victim and found the latter's vaginal cavity and hymen intact but spoiled by stool also she noticed unusual loose anal muscles, bruises and some stool discharges but she tested HIV negative (copy of the PF3 – Exhibit "P4"). That is all.

The accused (Dw) Okinyi Apinde he stated that with regard to the charges he was, say on 17/10/2020, but for no reasons arrested by some civilian women. That from the start he denied the charges but say four days later the policemen arraigned him in court. That if anything, but only misled by pw3, he was, only on suspicion basis suspected, arrested and

charged save for his age which was overstated and he signed the cautioned statement but forced by police. That is all.

As far as the cardinal principle is concerned the central issue is whether the prosecution case was beyond reasonable doubts proved much as, according to evidence of the victim and the doctor (Pw2 and Pw7) the former may have been that sexually abused and assaulted but who was the responsible and actual assailant.

At least not only Pw1, Pw4, Pw3 and Pw2 for that matter were complainants but also now with exception of Pw3 and Pw2 having had the incident been reported to them, and they tracked the offender, the four had common interest such that, and this one should not be taken as quantity evidence superseding quality evidence, it was safe to have the latters' evidence corroborated by such other independent witnesses more so who, if at all responded to the alleged alarms raised by the first four prosecution witnesses who following the alarms they chased away and apprehended the appellant. It is very unfortunate that without reasons stated, despite their relevance and importance, no one of them appeared in court leave alone their names being known. It is trite law that unexplained party's failure to produced essential evidence it entitled the

court in favor of the appellant to draw adverse inference (case of **Edward Nzabuga v. R**, Criminal Appeal No. 136 of 2008 (CA) unreported. Ground 3 of the appeal fails.

Moreover, the blood stained victim's clothes may have been collected yes, but again for reasons only known to the prosecution none of the clothes were produced in court with the view to establishing that it was, but human blood and it belonged to the victim that one therefore it would have corroborated evidence of the victim and that of Pw7.

Last but not least, with the above stated shaky prosecution evidence, the appellant's cautioned statement (Exhibit "P3") it needed corroboration. It could therefore not stand alone because at times in all fours the exhibit it told no truth because as supported by Pw1, also in her evidence the victim stated that she was defiled and sodomized but if at all credible and reliable, Pw7 told the court that the victim was only sodomized and perhaps these were the areas of contradictions that appellant complained about. Ground 10 of appeal succeeds.

The appellant may have been suspicious and, on that basis only arrested and charged under the circumstances yes, but the law was long settled that however strong it might be suspicion alone formed no basis of

conviction but beyond reasonable doubts proof by the prosecution (case of **Mwingulu Madata and Another v.R,** Criminal Appeal No. 257 of 2011 (CA) unreported.

Had the learned trial resident magistrate properly analyzed and observed all this he would have arrived at a different conclusion. Ground nos. 2, 4, 7 and 8 of the appeal are not allowed suffice the points to dispose of the entire appeal. The appeal is allowed. The conviction and sentence are quashed and set aside respectively. Unless he was held for some other lawful cause, the appellant be released forthwith from the prison. It is so ordered.

Right of appeal explained.

S. M. RUMANYIKA

JUDGE

11/07/2021

The judgment delivered under my hand and seal of the court in chambers this 12/07/2021 in the absence of the parties.

THE HIGH COURT OF TANZANIA
MWANZA

S. M. RUMANYIKA

JUDGE

12/07/2021