IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 39 OF 2021

(Originating from the District Court of Mtwara at Mtwara in Criminal Case No. 178 of 2020)

DADI SALUM LIKALALA@CHIPAPI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27th Oct. & 15th December, 2021

DYANSOBERA, J.:

The appellant was charged and convicted of the offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap. R.E. 2019]. The particulars alleged that on 22nd day of November,2020 at Mitambo Village within Mtwara District and Mtwara Region the appellant did have carnal knowledge of one "KA" or the victim a girl of three (3) years old against the order of nature. When the charge was arraigned against the appellant, he denied the charge. After a full trial, the trial court convicted the appellant and meted a sentence of life imprisonment.

The facts that led to the appellant's conviction are these. The victim, "KA"s is the daughter of Hidaya Ismail (PW2). On 22.12.2020 around 0800 hours PW2 went to farm with her husband one Ahmad Ally and they came back home at 1200 hours. They found their two children at their home thus PW2 started preparing some food for them. Thereafter PW1 or the victim went to play with her fellow child called Fei. The victim and his fellow were playing at the mangoes trees which are found

in the appellant's compound. When the victim and his fellow were playing, the appellant gave her some mangoes and money to buy "pipi". The victim testified that the appellant gave her mangoes inside his house and thus, he touched at her anus and inserted something at the anus. Thereafter the victim went back home at 0400 hours when PW2 was cooking buns. Thereafter, the victim's sister told PW2 that PW1 had bruised/bereaved (amejinyea). PW2 went outside and examined her and found the victim's skirt is featured with faeces. PW2 took the victim inside the house for washing her but before she started helping the victim, the victim told her to poop then she poops some blood. Seeing that PW2 asked her the place she was playing. Thus, PW1 replied "kule".PW1 took PW2 up to the appellant's homestead and told her that she was inside the appellant's house. Furthermore, the victim told PW2 that she slept in the appellant's bedroom which was unfinished where PW2 found faeces as well. On the way back home PW1 walked while crying. At last, PW2 reported the incident to victim's father who then relayed the information to village chairman. The village chairman enquired the victim who narrated him everything and thereafter he gave them the letter to report the matter to police station at Msimbati.

More so, PW3(Fatu Issa Mapua) a social welfare officer of Mtwara Mikindani Municipal, witnessed the interrogation between the policeman and the victim who admitted in konde language and said "amenichokola na mti" and pointed at her buttocks.PW3 further testified that the victim told them in Konde language that she was raped. Also, the evidence of PW4 (Kelvin Thomas Hassan) a clinical officer in-charge of Msimbati dispensary, on 23.11.2020 at about 1000 hours examined the victim and found her with bruises and some water discharging. He further tested her by using a finger and he touched her at the anus. Thereafter, the

victim felt an acute pain something which showed that a blunt object passed into her anus. The evidence of PW4 was also supported with exhibit P1.

In his defence, the appellant denied to have committed the offence. He told the trial court that he was not present at the scene of crime since he was at his farm. And thereafter the appellant went at the pitch for physical exercises. He emphasised that he came to know the case is facing at the Msimbati Police Station. As I intimated earlier that after a full trial, the appellant was convicted and sentenced to serve life imprisonment term. Aggrieved, the appellant has preferred this appeal by petition of appeal which contain six grounds which to the effect are as follows: -

1. That the trial Magistrate erred in law and facts by convicting the appellant while the offence was not proved beyond reasonable doubts if it was committed and no evidence ever proved the commission of the alleged offence.PW1 the alleged victim through her evidence never testified if she was carnally known by the appellant, no evidence of penetration was proved by PW 1 rather than PW1 claimed that the appellant touched her anus and inserted something in her anus, something which was never proved before the court since in sexual offence the best evidence is that of the victim furthermore failure to prove penetration by the alleged victim meant that PW1 was not carnally known by the appellant. Furthermore PW3 through her evidence was on the effect that (PW2) where she was, there is nowhere through the evidence of PW2 that is reflected that she (PW2) come to know or suspected that PW1 was carnally known, presence of faeces was not an ingredient of the offence, through the evidence of

PW3 it narrates contrary with the commission of the offence rather it stated that PW1 during interrogation stated that the appellant inserted a stick at her buttocks.PW3's translation was improperly applied since she (PW3) called to testify not to translate as reflected at pg. 12 of the proceedings.

2. That the trial court erred in law and facts by convicting the appellant using uncorroborated and inconsistence evidence of the prosecution side. According to the charge sheet the alleged occurred on 22/11/2020,PW2 claimed it happened on 22/12/2020,PW3 claimed PW1 was brought to her on 04/12/2020 if so the evidence does not show there PW1 was after 22/11/2020 also PW3 was not a credible or reliable witness since PW3 attended the victim before the alleged incident,PW4 in his evidence never proved what the alleged blunt object was, since if PW1 was carnally known the findings should have proved penetration of the penis failure if PW4 to name the blunt object created contradiction on the evidence.
3. That the trial court erred in law by unprocedurally admitting exhibit P1 in court and using it to convict the appellant. Through the proceedings exhibit P1 was not read in court therefore it was received as evidence in contravention with the provision of the Criminal Procedure Act section 210(3) this led the appellant not to challenge it because he never knew the contents of the document. The proceeding reflects (pg. 18) that PW4 after being granted permission to read exhibit P1 only said that these were contents of PF3.Also exhibit P1 was not tendered before being admitted as evidence in court. Furthermore exhibit P1 was not cleared first before admission.

4. That the trial court erred in law in relying on the interpretation of one Hidaya Bakari, as an interpreter who was not sworn or affirmed by the court as to comply with the Oaths and Declaration Act as well as the Criminal Procedure Act. The proceeding in page 10 is a float where the alleged interpreter was not affirmed by the court before interpreting also the records does not show which language the interpreter was conversant with and which languages she was interpreting from. Failure to comply effectively with the provisions of section 4(b) part II of the Oaths and Statutory Declarations Act [Cap 34 R.E. 2002] makes the evidence of PW1 not be acted upon since it amounts to no evidence as held in the case of Amos Seleman vs. Republic, Criminal Appeal No.267 of 2015(CAT) unreported also by the Court of Appeal of Tanzania at Mtwara in Criminal Appeal No.122 of 2018 Salum Said Kanduru vs. Republic.
5. That the trial Magistrate erred in law and facts in his judgment by failing to comply with section 127(7) of the Evidence Act [Cap 6 R.E. 2002] as amended by Act No.2 of 2016.Through the judgment there is no where shown if the Magistrate assessed the credibility of PW1, no reason is reflected in the proceedings to show that the court was satisfied that the alleged victim was telling nothing but the truth.
6. That the trial Magistrate erred in law by convicting the appellant using evidences of PW1, PW2, PW3 and PW5 evidences which were received and admitted in contravention with the provisions of part II section 3,4(a),5 and 8 (i) of the Oaths and Declaration Act [Cap. 34 R.E. 2019]. The proceedings reflects that the above prosecution witnesses were not sworn or affirmed by the court as

the law dictates rather they affirmed themselves, the court was to administer their Oaths so as to comply with the provision of the Act.

At the hearing of the appeal, the appellant appeared in person and unrepresented while the respondent/Republic enjoyed the services of Mr. Wilbraod Ngunguru, the learned Senior State Attorney. On his part, the appellant submitted that he has filed a total of six grounds of appeal and add nothing useful to add as the grounds are detailed.

As to Mr. Ndunguru, opposed the appeal and instead supported both conviction and sentence. He went further and submitted that the crucial issue is that the evidence sufficiently proved the case beyond reasonable doubt the offence of unnatural offence. The learned Senior State Attorney argued further that the victim was three years old at the time of commission of the offence. He stressed that it was amply proved that the victim was penetrated against the order of nature and the evidence of PW1 was legally defective. Besides, Mr. Ndunguru argued that the prosecution used the interpreter from Makonde to Kiswahili language. In addition, he submitted that there was clarification on the language interpreted and the witness capability. Thus, the learned Senior State Attorney argued her evidence be expunged and the same applied to the first prosecution witness. In view of that, Mr. Ndunguru submitted that the rest of evidence however, is strong enough to ground conviction.

Submitting to the identification the learned Senior State Counsel submitted that there was an apple identification since it was during the day time and the appellant and victim knew each other. He further insisted that the victim mentioned the appellant immediately after the incident and she led PW2, her mother to the locus in quo. Mr. Ndunguru

was of the view that the victim's story was credible as decided in the case **of Marwa Wangiti & Anor V. R** [2002] TLR P. 39. He stressed that the ability of a witness to name a suspect at earliest opportunity renders assurance to his credibility. Furthermore, he submitted on the identification by name which as to his view was water tight. The learned Senior State Attorney fortified his argument and referred this court to the case of **Patrick Sanga v. R**, Crim. Appeal No 213/2008 CAT at Iringa on the identification by name.

Apart from that, Mr. Ndunguru argued on the evidence of PW2 who discovered the victim emitting blood-stained stool immediately after the incident. He also, argued that Fatu Issa (PW3) and PW4 a medical doctor supported this evidence which was sufficient. As to this submission, the learned Senior State Attorney argued that the trial court was justified in convicting and sentencing the appellant to life imprisonment. He also submitted that the second and first ground are similar.

As to the third ground, Mr. Ndunguru submitted that the trial court proceeding is clear that the contents of the PF3 was read over to the appellant. However, on fourth ground the learned Senior State Attorney conceded with the appellant. He went further and submitted on the fifth ground whereby he was of the view that the trial court analysed well the evidence adduced before it. The learned Senior State Counsel argued that the sixth ground of appeal has no basis as well. However, he argued that the evidence of PW1 is the only which was legally defective but the rest evidence was alright. At last, he argued this court to dismiss this appeal.

In a short rejoinder, the appellant insisted that he was not present during the incident. He further argued that in the evening he came from the farm, went at home and thereafter had physical exercise. He submitted that he was apprehended at night around 2300 hours and taken to Msimbati then brought to Mtwara Police station where he stayed for a month and then arraigned in court on the allegation that he sodomised a child. Eventually, he submitted that this court should assist him and let him free.

Having carefully considered the grounds of appeal, the submission made by the parties and the record before me, I now turn to determine the grounds of appeal. Going by his grounds of appeal, I will determine them hazard. As to the sixth ground, I subscribe as to what the learned Senior State Attorney argued that is baseless. Indeed, this ground is baseless since PW2, PW3 and PW5 testified after taking their oath either by swearing or affirmation. This is reflected at page 12,15,17 and 19 inclusive of the typed proceedings of the trial court. As to the victim (PW1) she did not take oath as the learned trial Magistrate resorted to the dictates of section 127 (7) of the Evidence Act [Cap. 6 R.E. 2019] as a matter of compliance and he did not offend the provisions of the section 3,4 (a), 5 and 8 (i) of the Oaths and Declaration Act [Cap. 34 R.E. 2019]. Therefore, in view of that observation, I am of the settled view that this ground is baseless and is dismissed.

As to the fourth ground whereby the appellant complained that the trial court erred in law in relying on one Hidaya Bakari, an interpreter who was not sworn or affirmed by the court as to comply with the Oaths and Declaration Act as well as the Criminal Procedure Act. In the present appeal, it is clear from the record that, Hidaya Bakari an interpreter of

PW1 affirmed before she interpreted what PW1 testified. This is what transpired in respect of Hidaya Bakari at page 10 of the trial court typed proceedings:

"Hidaya Bakari Interpreter:57 years, Muslim, affirm that she shall interpret as the witness testify and not nothing."

Regarding the above extract, I will a bit concede with the appellant that interpreter was not clear as to which languages she affirmed to interpret. The affirmation ought to be clearer in the record of the trial court that she was supposed to interpret Konde language to Kiswahili language and vice vesa and here I should emphasise that this is a matter of practice and not of law. The content of the above affirmation made by Hidaya Bakari was incomplete though I am aware that the law does not state the extent of the affirmation or oath which interpreter ought to affirm or swear. Also, as to the cited laws I am of the settled view that the provisions of the laws were not offended and the cited cases are distinguishable as to the present case. Therefore, this ground is to some extent succeed and fails.

Furthermore, regarding the fifth ground whereby the appellant complain that the trial court did not comply with section 127(7) of the Evidence Act in assessing the credibility of PW1 was telling nothing but the truth. At the very outset the appellant wrongly cited the 127(7) of the Evidence Act (7) which refers to the construction of "sexual offence" means any of the offences created in Chapter XV of the Penal Code.Meanwhile, I would say that the right provision which ought to be invoked by the appellant is section 127 (2) of the Evidence Act. The intention of section 127 (2) is that a witness of a tender age will not promise to tell only the truth before the trial court assesses the witness of tender age if knows the nature of oath. Thus, if the witness knows

the nature the oath will proceeding with either swearing or affirmation. And where the trial court finds that the witness of tender age does not understand the nature of oath will proceed and require the witness to promise to tell only the truth by probing her some question which should appear in the record. See: **Godfrey Wilson v. Republic**, Criminal Appeal No.168 of 2018, CAT at Bukoba (unreported) and **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018, CAT at Mtwara (unreported). Also, it is important to refresh what transpired in the trial court as seen at page 11 of the typed proceedings: -

> "PW1: KA,3 Yrs, Moslem
>
> My name is KA, this is my mother. I promise this court that I will telling (sic) the truth and not to tell any lies.S.127(2) of the Evidence Act [Cap R.E. 2019] is complied with."

From the above extract it is crystal clear that the trial Magistrate did abide to what the Court of Appeal of Tanzania directed in the cases cited herein above. Owing to the omissions committed by the trial court, it cannot be said that the evidence of the victim was properly received. I thus, I subscribe to what Mr. Ndunguru argued that the evidence of PW1 is legally defective hence I proceed to expunge it from the record.

Apart from that, as to the third ground of complaint by the appellant that exhibit P1 as envisages at page 18 of the typed proceedings of the trial court was not cleared before admission, not read after admission and was admitted before was tendered. Also, I find this complaint unmeritorious due to the fact that exhibit P1 was cleared before it was admitted. Furthermore, it is not true that exhibit P1 was admitted before it was admitted. As to the failure to read the contents of exhibit P1 after

its admission. Upon my perusal I discovered that the appellant's complaint is short truth because the record of the trial court speaks itself that the witness cleared it before it was admitted and also it was not admitted before it was tendered. Also, as to the issue of reading it after admission indeed it was read though the appellant was confused with the language which the trial Magistrate had used. In view of that observation, I am of the settled view that this complaint is devoid of merits hence I dismiss it.

Ground one and two are merged together and form the issue as to whether the prosecution proved the case against the appellant beyond reasonable doubt. Here I will start by addressing the evidence of PW2 whether it established the offence of unnatural offence.PW 2 testified that: -

> "Before washing her she asked me to poop. I allowed her thereafter she poop out blood. Thereafter I asked here where were you? She replied "kule". I was insisted and took her where she was. She took me up to the house of his accused and told me that she was inside at that house. I asked her what did you do in this house? She replied nilila chumbani. She took me to room she said as that is unfinished one you can easily enter. Thereafter she showed me room and found feces there as well. She walking while crying."

As far as the above quotation is concerned even when corroborated with the evidence of PW4 and exhibit P1 do not prove the ingredient of the offence of unnatural offence without having the evidence of the victim. I am saying so because the evidence of PW2 does not tell anywhere in the record of the trial court that the victim was carnally

known by the appellant against the order of nature. Rather PW2's evidence only shows how she found her daughter with faeces on her skirt, popping out blood, being send and shown by the victim the place she slept. Also, the evidence of PW2 shows that was brought by the victim in the unfinished room where she entered inside with difficulties. Whereas, the evidence of PW4 suggests that the victim was penetrated with the blunt object in her anus. While exhibit P1 in the medical practitioner's remarks shows that the victim was penetrated against the order of nature and found some bruises and discharge around the anus. So when you correlate between the testimonies of the two witnesses and exhibit P1 you will realise that evidence of PW2 does not talk anything about the offence of unnatural offence.

Also, there is an inconsistence I have noticed as complained by the appellant as to the date and month of the commission of the offence facing the appellant in the charge and the testimonies of PW2, PW3 and PW4. The charge shows that the offence was committed on 22/11/2020, while PW2 testified that on 22/12/2020 at about 0800 am went to the farm with her husband and came back at 1200 hours (page 12 of the typed proceedings) when she realised that the victim was in bad condition. Whereas PW3 testified that on 4.12.2020 at about 10:20 a.m witnessed the interrogation of victim and the policeman. (Page 15 of the typed proceedings of the trial court). As to PW4 received and examined the victim on 23

.11.2020 at about 1000 hours. Therefore, from the above variation or inconsistencies as to the date and month of the commission of the offence as depicted above is fatal and incurably defective. See: **Salum Rashid Chitende v. The Republic**, Criminal Appeal No.204 of 2015,

CAT at Mtwara and **Mathias Samwel v Republic**, Criminal Appeal No. 271 of 2009 CAT (both unreported) the Court observed that:-

> "When a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that offence was committed by the accused by giving cogent evidence and proof to that effect".

In the case at hand there was no evidence adduced by the prosecution witnesses which proved what has been stated in the charge. The discrepancies stated above create doubts on prosecution case and hence it cannot be said that offence was committed and proved as alleged on the charge sheet. In view of the above observation, I am of the settled view that the prosecution failed to prove their case against the appellant beyond the required standard of proves as was echoed in the case of **Jonh Nkinze v. R** [1992] TLR 213.

In the upshot, the appeal succeeds and is allowed. Therefore, I quash the judgment and conviction and set aside the sentence that was imposed against the appellant. I order his immediate release from prison unless he is being held for some other lawful cause.

It so ordered.

W.P. Dyansobera

JUDGE

15.12.2021

This judgment is delivered under my hand and the seal of this Court this 15th day of December, 2021 in the presence of the appellant in person and unrepresented and Mr. Lugano Mwasubila, the learned State Attorney for respondent Republic.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

JUDGE