

TANZANIA / JUDGMENT

halfan rajabu mohamed vs republic 2023 tzca 178 6 april 2023

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.) CRIMINAL APPEAL NO. 281 OF 2020 HALFAN RAJABU MOHAMED..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Decision of the High Court of Tanzania at Dar es Salaam) (De Mello, J.1 dated the 27th day of May, 2020 in HC. Criminal Appeal No. 34 of 2020 JUDGMENT OF THE COURT 18* February, 2022 & April, 2023 MASHAKA, J.A.: This second appeal is against the decision of the High of Tanzania sitting at Dar es Salaam in HC Criminal Appeal No. 34 of 2020 which dismissed an appeal by Halfan Rajabu Mohamed, the appellant against conviction of the offence of unnatural offence contrary to section 154

- (1) (a) and (2) of the Penal Code, and subsequent sentence to statutory life imprisonment. Before the District Court of Kinondoni at Dar es Salaam, it was alleged that on 17th June, 2018 at Kimara Stop Over area within Ubungu District in Dar es Salaam Region, the appellant had carnal knowledge of i one boy (name withheld) aged five years against the order of nature. To protect his identity, we shall hereafter refer to him as the victim or PW2. The appellant denied the accusations resulting in a full triai to prove the offence against him. The prosecution relied upon the evidence of five
- (5) witnesses and tendered two (2) documentary exhibits; the PF3 (exhibit PI) and a cautioned statement (exhibit P2) in evidence to prove the allegations. In his defence, the appellant was the only witness and gave an affirmed testimony denying the accusations as having been fabricated due to the misunderstandings with the victim's mother though he had no grudges with the victim. The following narrative was presented by the prosecution case. The victim was a pupil in class one at Mount Maria Primary School, staying with his parents, Neema, the house girl and the appellant who was the security guard and also the gardener. In his unsworn evidence, he recounted that he knew the appellant and called him 'babu' that he placed his penis in his mouth and anus daily while in the corridor (kibarazani) and his room. On 15/6/2018, he recounted to his mother (PW1) what had befallen him after she saw the underwear of PW2 was dumped at a place where they kept clothes for cleaning the floor. PW1 questioned Neema why she kept the underwear there and replied that PW2 had soiled

it. PW1 checked the underwear and found it was soiled with stool. She inquired politely from PW2 why and what happened to him and PW2 fearfully told PW1 that his anus was in pain. When asked what caused the pain, he said it was caused by the appellant. When PW1 further inquired on what he did to him, PW2 explained how 'babu' Halfan, took him several times, placed his fingers into his anus, applying oil into his anus and put his penis, PW2 described further to PW1 that the appellant used to half undress him. On 16/6/2018 after being advised by her husband who was working abroad, PW1 took her son to the AAR Hospital, a private hospital. PW2 was examined by a doctor and PW1 was informed that his anus was abnormally red and prescribed some anti-pain medication. On 17/6/2018, her husband arrived and reported the matter at Kimara Police Station. The appellant was arrested on 17/6/2018. PW1 and PW2 were interviewed by the police and a PF3 was issued to take the victim for examination. PW1 and her husband took PW2 to Sinza Palestine Government Hospital for examination on 19/6/2018. Dr. Ngendo Fanuel Robby (PW3) examined PW2 at the said hospital and discovered bruises and fluid in his anus. He also found PW2's anal muscles loose. PW3 recorded his findings in a PF3 which was admitted as exhibit PI without any objection from the appellant. 3 Further evidence was adduced by the investigator of the case, F. 2375 D/CPL Arthur (PW4) who arrested the appellant on 17/6/2018 on suspicions of having carnal knowledge of a child against the order of nature. Upon his arrest, the appellant was taken to Kimara Police Station for interrogation. PW4 recorded a cautioned statement made by the appellant in which he confessed to the offence. As stated earlier, with no objection raised by the appellant, the cautioned statement was admitted in evidence and marked as exhibit P2. In his defence, the appellant evasively denied to have committed the offence and claimed an existing misunderstanding with PW1 as the source of the fabricated accusations that, she had not paid his salary for almost two years. He, however, stated that he had no grudges with the victim. Subsequently, upon full trial, the trial court was satisfied with the evidence of the prosecution. It found the appellant guilty based on the credibility of the prosecution witnesses particularly PW2; the victim which was corroborated by the evidence of PW1 and PW3. The trial court further held that, the evidence pointed to the appellant as the one who sodomized the victim and the cautioned statement (exhibit P2) 4 stated in detail what had befallen the victim. Thus, the appellant was convicted and sentenced as alluded to earlier. Aggrieved, he unsuccessfully preferred his first appeal to the High Court. The first appellate court upheld the conviction and sentence, hence this appeal. The appeal is based on seven grounds of appeal contained in two memoranda of appeal, the initial memorandum dated 25th January, 2021 and the supplementary one dated 25th January, 2022 respectively and paraphrased as follows: one, that there was a variance between prosecution evidence and the charge regarding the date the offence was allegedly committed; two, that the evidence of the victim (PW2) was admitted in contravention of section 127(2) of the Evidence Act as amended by Act No. 2 of 2016 in that he did not promise to tell lies; three, that the conviction was based on unjustified uncorroborated prosecution evidence; four, the learned first appellate judge erred in appraising objectively the credibility of prosecution witness; five, the learned first appellate judge erred in holding that the prosecution proved its case beyond reasonable

doubt as charged; six, the learned first appellate judge erred in relying on exhibit P2 (cautioned statement) while both the trial and first appellate court did not determine if it was a voluntary confession according to the law, and seven, the trial court failed to warn the appellant a layman the danger of not objecting to the incriminating evidence in exhibit P2. At the hearing of the appeal, the appellant appeared in person, with no legal representation. The respondent Republic enjoyed the services of Ms. Janeth Magoho, learned Senior State Attorney assisted by Ms. Daisy Makakala and Ms. Veronica Mtafya, learned State Attorneys. When we called upon the appellant to amplify his grounds of appeal, he opted to adopt the grounds in support of his appeal imploring the Court to consider them and set him free. At the onset, when Ms. Makakala took the floor supported the conviction the conviction and sentence. She contended that the seven grounds of appeal were not raised before the first appellate court hence they were new. Upon our probing, she admitted that among the seven, six grounds were based on points of law and the second ground in the supplementary memorandum of appeal is factual. She, thus argued the six points of complaint individually. The appellant's complaint in ground one is that there was a variance between the charge and the prosecution evidence in respect of the date when the offence was allegedly committed. Ms. Makakala submitted that there is no variance between charge and the prosecution evidence as claimed and referred us to the evidence of PW1 that it came to her knowledge about the condition of the victim on 15/6/2018 and took him to AAR hospital on the 16/6/2018 and the appellant was arrested on the 17/6/2018. She further argued that, due to the young age of the victim, he could not state the date the offence was committed on him by the appellant and that neither PW1 nor PW2 stated that the offence was committed on 17/6/2018. She urged us to consider that the appellant did understand the charge, heard and cross examined the prosecution witnesses and gave his defence distancing himself from the offence. She implored the Court to find that there was no variance and dismiss ground one. It is undisputed that the charge at page 1 of the record of appeal states that the offence was committed on 17/6/2018 while none of the prosecution witnesses stated the date when the offence was committed. There is no doubt also that the date shown in the charge refers to the date the appellant was arrested as stated by PW1. That being the position, the issue is whether such variance prejudiced the appellant or occasioned any injustice to him. As gleaned from page 15 of the record of appeal, PW2 did not state that the offence was committed on 17/6/2018. That implies that there is no indication that the appellant was prejudiced as he was aware that the date of commission of the crime was not 17/6/2018. We held in *Osward Mokiwa @ Sudi v. The Republic*, Criminal Appeal No. 190 of 2014 (unreported), that: 'We are satisfied that the error on the charge sheet was inoffensive; it neither prejudiced the appeiiant nor occasioned any injustice to him. Our view is particuiariy based on two factors; first, that the appeiiant did not raise any aiibi or similar defence whose effect depended so much on the exactness o f the date alleged on the charge as being the date when the offence was occurred. And secondly, that the appeiiant fully focused his defence on what the prosecution witnesses alleged to have occurred on 2 ? d November, 2008 at the crime scene...' In the light of the above position, we find that the variance in charge did not prejudice the appellant in any how considering the victim's

uncontroverted evidence as well as his own confession through exhibit P2 as shall become apparent later in this judgment. Additionally, he did not raise any defence of alibi in respect of the date in the charge. Therefore, the variance between the charge and the prosecution evidence did not prejudice the appellant. See - Halid Maulid and 8 Another v. Republic, Criminal Appeal No. 342 of 2020 (unreported). We find no merit in ground one and dismiss it. In ground two, the appellant is faulting the trial court on the non-compliance with section 127(2) of the Evidence Act as amended by Act No. 2 of 2016 (the Act). The complaint is in respect of noncompliance with section 127(2) of the Act that though PW2 did promise to tell only the truth but failed to promise not to tell lies. Therefore, his evidence was procured in contravention of the cited provision. Arguing against this contention, Ms. Makakala submitted that before PW2 testified, the trial magistrate posed questions to him to ascertain if he possessed sufficient knowledge to understand questions put to him and give rational answers and if he promises to tell the truth. Further, she contended that PW2 promised to tell the truth as recorded by the trial court, thus there was no contravention of the said provision. There is no dispute that PW2 was a child aged five years and in terms of section 127 (2) of the Act, of tender age who could give evidence without taking an oath or making an affirmation but before giving evidence, was required to promise to tell the truth to the court and not to tell any lies. As reflected at page 24 of the record it shows as follows: 9 "Court Inquiry; Question: What are you promising? To tell the truth or He? Answer: I promise to tell the truth," It is evident that PW2 made a promise to tell the truth though his undertaking is missing the words stipulated under section 127 (2) of the Act, as the proper wording PW2 ought to have been "I promise to tell the truth to the court and not to tell any lies" However, the anomaly does not derogate from the fact that PW2 made a promise to tell the truth, which in itself means that he will not tell lies and it was made prior to the reception of his evidence before the trial court. After conducting the inquiry, the trial court concluded that PW2 was capable of responding to the questions put to him and promised to tell the truth passing the test and adduced his evidence without being sworn. Thus, we find the complaint wanting in merit and dismiss it. We move to determine the complaint that the prosecution failed to prove the charge beyond reasonable doubt due to unjustified and uncorroborated evidence and failure to appraise the credibility of prosecution witnesses founded on grounds three, four and five. On the standard of proof, it is undisputed that the appellant was charged with unnatural offence contrary to section 154(1) (a) of the Penal Code in which penetration, however slight into the anus, with or without consent is an essential ingredient in the offence and proof of penetration makes this offence complete. (See - Joel Ngailo v. Republic, Criminal Appeal No. 344 of 2017 (unreported)). It is trite law that in sexual offences the best evidence comes from the victim. See - Seleman Makumba v. Republic [2006] T.L.R 379 and Galus Kitaya v. Republic, Criminal Appeal No. 196 of 2015 (unreported). Other prosecution witnesses may give corroborative evidence where necessary. See - Godi Kasanegara v. The Republic, Criminal Appeal No. 10 of 2008 (unreported). It is not in doubt that the trial court in its findings held that PW2; a child of tender age possessed sufficient knowledge and understood the importance of telling the truth and gave unsworn evidence. Additionally, the evidence of PW2 was corroborated by;

one, the oral account of PW3 and exhibit PI which established that there was indeed penetration indicating that PW2 was sodomized; and two, exhibit P2 in which the appellant confessed to have lured the victim to his room and sodomized him. Our reflection on PW2's evidence as gleaned from page 25 of the record of appeal was not cross examined by the appellant, hence uncontroverted evidence. At this juncture, it is crucial li to reproduce part of the appellant's cautioned statement as reflected at pages 58 and 59 of the record as follows: " mmojawapo kati ya watoto hao ni mtoto wa kium e.... aitwaye (name withheld) ambaye mimi huwa ninamlawiti kwa kumingizia mboro yangu kwenye mkundu wa mtoto huyo (name withheld), huwa ninamfanyia tendo hifo mtoto huyo Hi nijisikie raha. Matendo hayo ya kumlawiti mtoto huyo nimeyafanya kwa nyakati tofauti tofauti kama ifuatavyo, nakumbuka tarehe 06/04/2018 muda was saa 16:00 hrs jioni maeneo ya nyumbani ninapolinda nyumba kulikuwa amebakia mtoto (name withheld) ambaye niliachiwa na msichana wa kazi Neema aliyekwenda sokoni kununua bidhaa, baada ya kuachiwamimi niiimuita mtoto aje kwenye chumba changu, nilimueleza aje kucheza, aiipokuja mimi nilikuwa tayari nina nia ya kumlawiti mtoto huyof... aiipokuja nikamvua kaputuia yenye rangi nyekundu na kisha nikamvua chupi nayo ilikuwa na rangi nyekundu Nilikuwa namwambia kuwa ninataka kumfanyisha mazoezi, baada ya hapo nilimuinamisha, nikampaka mafuta ya mgando ambayo niliyaandaa kwa zoezi hilo, mafuta hayo nilimpaka kwenye mkundu wa mtoto (name withheld) baada ya hapo mimi nikavua suruali 12 niliyokuwa nimevaa kisha nikaingiza uume wangu kwenye mkundu wa mtoto (name withheld), nffifanya tendo hilo la kuingiza uume wangu wote kwenye mkundu wa mtoto huyo.... " Further at page 61 of the record, the appellant stated: "Mimi ninakiri kumingizia uume wangu 'mboro yangu' kwenye mkundu wa mtoto wa kiume (name withheld) mara tatu yaani mwezi wa tano nilimlawiti mara moja, mwezi wa nne nilimlawiti mara moja na mwezi wa sita nilimlawiti mara m oja.... " From the above excerpt, it is evident that by his own confession, the appellant clearly narrated as to how he lured the victim into his room, and in the end sodomized him several times. In the case of Mohamed Haruna Mtupeni and Another v. Republic, Criminal Appeal No. 259 of 2007 (unreported), the Court observed that: "The very best o f the witnesses in any criminal trial is an accused person who freely confesses his gui/t." It is therefore our considered view that, what is contained in the appellant's confessional statement is the best evidence which incriminated the appellant that he carnally knew PW2 against the order of nature. The first appellate court scrutinized, evaluated and reassessed 13 the evidence and in our view rightly sustained the trial court's findings based on the evidence adduced by PW2, PW1, PW3 and corroborated by exhibits PI and P2. The whole evidence was properly appraised and the offence against the appellant was proved beyond reasonable doubt as charged. We find grounds three, four and five of appeal unmerited and dismiss them all. The complaint in grounds six of appeal centre on the cautioned statement; whether it was voluntarily made. In the case of Selemani Hassan v. Republic, Criminal Appeal No. 364 of 2008 (unreported) the Court stated that: "It is also true that a statement will be presumed to have been voluntarily made until objection is made to its admissibility by the defence." As gleaned from the record of appeal, PW4 gave an account on how he was assigned to interview the appellant and recorded his cautioned statement

confessing to have committed the offence, tendered it and was admitted in evidence as exhibit P2 without any objection. We are fortified in that regard because, as gathered from page 35 of the record of appeal, the appellant through his learned counsel did not raise objection on the admissibility of the cautioned statement in 14 evidence and the trial court properly treated the cautioned statement that it was voluntarily made. In the circumstances, the appellant's complaint that his conviction was based on a cautioned statement which he was not aware of and that it was not voluntarily made, in our considered view is an afterthought. We find no merit and dismiss ground six of appeal. Ground seven is a complaint that the trial court failed to warn the appellant being a layman on the danger of not objecting to the incriminating evidence in exhibit P2. Ms. Makakala argued that the appellant enjoyed the services of an advocate who was present during the proceedings before the trial court who did not raise any objection to the tendering of the cautioned statement (exhibit P2) before it was admitted in evidence. We find that the decision of the trial court could only be faulted if the appellant could have shown that the admission of such evidence was objected to and that it did not properly exercise its judicial discretion, or at all in rejecting or admitting it. See - Nyerere Nyague v. Republic, Criminal Appeal No 67 of 2010 (unreported). The appellant was adequately represented by Mr. Egidi Mkoba, learned advocate who did not raise any objection to the tendering of the aforesaid statement as exhibit which is reflected at page 35 of the record of appeal. We accordingly dismiss ground seven for being baseless. All said, the appeal has no merit and accordingly dismiss it in its entirety. DATED at DAR ES SALAAM this 5th day of April, 2023. S. A. LILA JUSTICE OF APPEAL L. J. S. MWANDAMBO JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL The Judgment delivered this 6th day of April, 2023 in the presence of the Appellant vide video link from Ukonga Prison and Genes Tesha, Senior State Attorney for the respondent is hereby certified as a true copy of the original. R. W. CHAUNGU DEPUTY REGISTRAR COURT OF APPEAL 16

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