IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: OTHMAN, C.J., MBAROUK,J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 105 OF 2012

BETWEEN

MOHAMED SELEMANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mipawa, J.)

dated 1st March, 2010
in

Criminal Appeal No. 11 of 2008

JUDGMENT OF THE COURT

26th JUNE & 2nd JULY, 2012

OTHMAN, C.J.:

The High Court (Mipawa, J.) sitting at Mtwara upheld the appellant's conviction on the charge of an unnatural offence against Sharifu s/o Mustafa, a child aged three years, (of age) contrary to section 154(1)(a) of the Penal Code, Cap 16 R.E. 2002 as amended by the Sexual Offences Special Provisions Act, No 4 of 1998 and the mandatory sentence of life imprisonment, as well as Tz. Shs. 50,000/= as compensation, levied by the

Nachingwea District Court. Aggrieved, the appellant preferred this second appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic was represented by Mr. Peter Ndjike, learned Senior State Attorney.

The case of the prosecution as unfolded from the evidence of PW1 (Fatuma d/o Napyoto), aged 70 years old was that on 16/8/2006, the appellant whom she knew before had come to her house at Namapwiya Village looking for his grandson, Karimu Hassani. When PW1 went inside the house, she had left the appellant who pretended to be drunk playing with the child. Karimu Hassani was present. When she returned, they had all disappeared. After a while, the appellant returned with the child complaining of stomach pain. PW1 instructed her other grandson, PW5 (Ahmadi Abdu) to take the child to PW2 (Zuwena d/o Said), her mother. When PW2 undressed the child for a bath, she discovered that his anus was injured. Mustafa Ally (PW3) her husband, verified that this was so. The matter was immediately reported to the Village Executive Officer (V.E.O.) and to Lionja Police Station. On 17/08/2006, the child was examined by Dr. Beate Massawe (PW5) of Mnero Mission Hospital who confirmed that the

child's anus splyncter (i.e. ring muscles controlling the closing of the anus) was not well contracted and concluded that he had been sexually abused.

In his defence on affirmation, the appellant denied involvement. He claimed that on 16/08/2006 he had seduced CW1 (Asha d/o Kallembo @ Mama Pwagu), PW2's daughter and had spent the night at her house. That she had refused his offer of Tz. Shs. 1,500/= and instead impounded his bicycle, an incident that was reported that night to the V.E.O.

On the circumstantial evidence adduced, the trial court found out that the return of the crying child to PW1 by the appellant and the discovery at the time of his arrest of his wet underpants with semen, in the pocket of his trousers had proved the prosecution case beyond reasonable doubt.

On first appeal, the High Court found out that the appellant was seen by PW1 playing with the child and had disappeared with him. That on returning him back to PW1, the child who was well before, complained of stomach pain. It held that, in the absence of any person who was with the child at the material time apart from the appellant, the circumstances drawn from the evidence pinpointed that it was the appellant who had carnal knowledge of the child, unnaturally.

In our considered view, the High Court was correct to completely disregard the alleged discovery of the appellant's wet underpants in the pocket of his trousers as it was neither established that it contained semen as claimed nor was it proved that it was connected in any way with the commission of the offence. The appellant was correct when he complained that the alleged underpants was not even tendered in court as an exhibit.

The appellant in his memorandum of appeal essentially faults the High Court for relying on the circumstantial evidence of PW1, without corroboration; the prosecution's failure to call as material witnesses Karimu Hassani and the V.E.O. and in relying on the child's improperly filed PF3 Form (Exhibit P.1) for his conviction.

Before us, the appellant reiterated that he was not present at PW1's house. That if the incident took place as testified by PW1, PW2, PW3 and PW5, then the neighbours should have been called to confirm their story. That if he had any relationship with Karimu Hassani, then he too should also have been called by the prosecution as a witness.

On his part, Mr. Ndjike reversed the position the Republic had taken at the High Court by faulting the appellant's conviction as the evidence did not meet the requirements of the law relating to circumstantial evidence.

He did not dispute that the appellant was present at PW1's house. However, he attacked PW1's credibility for not taking any immediate action after the child who had complained of stomach pain was returned to her by the appellant. That it was not PW1 who discovered that the child was sodomised, but PW2. The only occassion the chain of circumstantial evidence was broken, he urged, was when the appellant was with Karimu Hassani and the child at PW1's house. The prosecution had not fulfilled its duty of calling Karimu Hassani as a witness to account for his movements. That the inference to be drawn from those circumstances was that it does not irresistibly point to the guilt of the appellant and to no one else as the perpetrator.

Turning next to the merits of this appeal, it is a well established principle that a court of second appeal will not routinely interfere with the concurrent findings of fact by the two courts below except where they completely misapprehended the substance, nature and quality of the evidence; where there are misdirections or non-directions on the evidence or when it is clearly be shown that there is a miscarriage of justice or a violation of some principle of law or practice (See; **Director of Public Prosecutions V. Jaffari Mfaume Kawawa** (1981) T.L.R. 149 at 153; **Salum Mhando Stores v. R. (1993)** T.L.R. 170; **Amratlal D. M. t/a**

Zanzibar Silk Stores v. A. H. Jariwala t/a Zanzibar Hotel (1980) T.L.R. 31).

As correctly noticed by both courts below, the prosecution sought to prove the charge against the appellant exclusively by circumstantial evidence as no one had witnessed the occurrence in which the child had been sodomised. The child, when brought to the court was found to be of too young an age, to be held competent to testify. Admittedly, therefore, the decisions of the courts below have to be tested by the touch-stone of the law relating to circumstantial evidence and the proved facts and chain of circumstances of the case. The burden of proof remained that of the prosecution to prove the offence beyond reasonable doubt.

In dealing with circumstantial evidence, the Supreme Court of India in **Balwinder Singh v State of Punjab**, 1996 AIR 607, had this to say:

> *"In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof (See, also **SARKAR ON EVIDENCE**, 15th Ed, p.65).*

In **R. V. Kipkering Arap Koske and Kimure Arap Matatu** (1949) 16 E.A.L.R. 135, the Eastern Africa Court of Appeal held:

> *"That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused" (See, also* ***Attorney General V. Murakaru*** *(1960) E.A. 484 at 488-489;* ***Ilanda s/o Kisongo v. R*** *(1960) E.A 780)* ***Shaban Mpunzu @ Elisha Mpunzu v. R****, Criminal Appeal No 12 of 2002 (CAT, unreported).*

In **Ally Bakari and Pili Bakari v.R**. (1992) TLR 10, this Court stated:

> *"Where the evidence against the accused is wholly circumstantial, the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred".*

In addition the learned author **SARKAR ON EVIDENCE**, 15th Ed., 2004, p.66-68, pertinently observers:

> *"Where circumstances are susceptible to two equally possible inferences, the inference favouring the accused rather than the prosecution should be accepted".*

The appellant first challenged the contents of the child's PF 3 Form (Exhibit P.1) as insufficient proof that he had been sodomised. In our view, the High Court correctly found that the PF3 Form (Exhibit P.1) was sufficient proof that the child had been sexually assaulted unnaturally.

Even if that evidence were to be discounted and there is absolutely no valid reason for doing so, the evidence of PW2, PW3 and PW4 was overwhelming that his anus muscles were not intact and a male organ had penetrated therein. Accordingly, we find that there is no substance in this ground of complaint.

The appellant's other grievance was the non-production and examination by the prosecution of the V.E.O. of Namapwiya Village. **One**, this ground of appeal was not raised before the High Court. **Second**, the trial court had summoned the V.E.O. and despite several adjournments, he did not show up. It noted that it had been impracticable to secure his attendance. In its judgment, the court reasoned that if there was any doubt it had been cleared by the testimony of CW1.The trial court found out that the appellant's bicycle was impounded because he had not paid CW1, Tz. Shs. 800/= for the "pombe" he had consumed and that when she went to the V.E.O. at 8 pm, the appellant had already been arrested. It was PW3's evidence that he was informed of the incident by PW2 at 7 pm and reported it to the V.E.O. The trial court also found out that CW1 was not capable of influencing her siblings (PW1, PW2 and PW5) to point an accusing finger at the appellant. The High Court found no error with these findings of fact. We too, having examined the evidence with caution find

no reason to fault them. We also wish to add that the absence of the V.E.O was not fatal to the prosecution case as by the time the incident was reported to him by PW3, the offence had already been committed. For these reasons, we also find no merit in this complaint.

Again, the appellant raised a new complaint not raised at the High Court that it was unsafe for the courts below to have convicted him without the prosecution having called Karimu Hassani to give evidence. Mr. Ndjike too contended that his evidence was necessary so that he accounts for his movements as he had been with the appellant and the child at PW1's house.

It is equally on record that Karimu Hassani was summoned by the trial court on 9/8/2007 as a witness under section 195 of the Criminal Procedure Act, Cap 20 R.E. 2002. He too did not show up despite several adjournments. Having closely scrutinized the record, we are of the considered view that his absence is neither detrimental to the chain of circumstantial evidence established by the prosecution case as we shall demonstrate nor weakens the irresistible inferences sought to be drawn from the evidence of PW1, PW2, PW3 and PW5.

The remaining pivotal question that must now be determined is whether or not the courts below were, on the proved entire chain of circumstantial evidence justified to hold that it unerringly pinpointed to the appellant who had committed the offence and to no one else and was incompatible with his innocence. That the prosecution had established its case beyond reasonable doubt. The record bears out that the prosecution had relied on the evidence of PW1, PW2, PW3 and PW5 which the trial court believed. In our respectful view, it was in the best position to do so having had the advantage of seeing, hearing and assessing their evidence. (See, **Peters V. Sunday Post** (1958) E. A. 424 at 429).

It is trite law that in a case of circumstantial evidence, where a series of circumstances are dependent on one another as is the instance case, they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated –**SARKAR ON EVIDENCE,** 5th Ed., p.66-68, 2004.

That said and bearing in mind the totality of the evidence, the first circumstance arising is that it was conclusively proved that the appellant was present at PW1's house. PW5 too, saw him there. On the evidence of PW1, no reasonable doubt has been raised that the appellant had not

spent the night at her house. He was at PW1's house at the material times as testified by PW1 and corroborated by PW5.

The second circumstance arising out of the chain of evidence is that when PW1 went inside the house, she left the appellant who pretended to be drunk, playing with the child. Karimu Hassani was also there. When she came out, she did not see them. The evidence admits no other reasonable interpretation that it was appellant, with or without Karimu Hassani who had disappeared with the child and worst still, without informing PW1. PW1 was given temporary custody and guardianship of the child by PW2. We see no reason why the child at that age was taken away from PW1's house without her being duly informed or her knowledge. With respect, we do not think that this circumstance creates a snap in the chain of circumstantial evidence as suggested by Mr. Ndjike. Even if it were to be taken that the child was whisked away by Karimu Hassani, given the proved fact that he was returned after a while to PW1 by the appellant and no one else and in the condition he was in, the irresistible inference to be drawn remains that the appellant was directly connected, jointly or severally with his disappearance at PW1's house and return thereto. Wherever the child was taken and who ever did so, at its age, it could not have returned to PW1 without someone. The appellant's subsequent act of returning back the

child who was complaining of stomach pain which turned out to be sodomy provides a connecting element.

The third relevant piece of circumstantial evidence forming part of the network of facts, that was fully established was that it was the appellant and not Karimu Hassan who returned the missing child to PW1's house. He complained of a malaise he did not complain of sometime earlier, stomach pain.

The fourth inter-woven circumstance is that when the appellant returned the child back to PW1's house, he had just been victimised. To be precise, the appellant brought back a sodomised child. Furthermore, PW1 said, she had waited for a while for their return. On cross-examination, she responded that it had taken one hour between the time they had disappeared and their return. In our respectful view, there was sufficient opportunity between the disappearance of the appellant, and his reappearance together with the child at PW1's house after a while, for the offence to have been committed. This provides another fully proved circumstance.

Mr. Ndjike attempted to impugn PW1's credibility for not having discovered or not doing anything when the child was returned back to her

by the appellant. With respect, in our considered view she reasonably explained the reasons. PW1 said she did not suspect anything as the appellant claimed to be Karimu Hussaini's friend and the child was after all, a male. PW1 wasted no time in instructing PW5 to return back the complaining child to PW2. He cried of stomach pain all the way. On that score, there is no valid reason to impeach her credibly and the veracity of her evidence. The courts below believed her evidence and we see nothing perverse that would justify our intervention at this stage.

On the whole evidence, we are of the considered view that the cumulative effect of all the above fully proved circumstances are consistent only with the hypothesis of the guilt of the appellant and no one else, and are totally inconsistent with his innocence. There were no other coexisting circumstances which could have easily weakened the inference of guilt. The prosecution has proved its case beyond reasonable doubt. In the result, we see no reason to disturb the concurrent finding of facts and the decisions of the courts below. We find the appeal devoid of merit and dismiss it in its entirely.

DATED at **MTWARA** this 30th day of June, 2012

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

MBUYA R. M.
DEPUTY REGISTRAR