IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 292 OF 2015

ELIMRINGI SIMON MRETA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sumari, J.)

Dated the 12th day of June, 2015
In
DC Criminal Appeal No. 13 of 2014

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JUDGMENT OF THE COURT

25th & 29th July, 2016.

RUTAKANGWA, J. A.:

The appellant is a widower. He was married to one Vailet. One of the issues of the marriage was a boy going by the name of Emmanuel. Unfortunately, Vailet passed away in the year 2000, when Emmanuel was only three (3) months old.

Emmanuel grew out of infancy and went through the early formative age under the sole care and custody of his surviving parent, Elimringi Simon Mreta, who happens to be the appellant in this appeal.

According to the undisputed account, the appellant pretended to play the role of a caring single parent by sending Emmanuel to school. Emmanuel's first school was Ngonyeni Primary School in Moshi district. By the year 2010 Emmanuel, who was aged 10 years, had managed to reach standard four.

According to Emmanuel's teachers, the child who was initially bright at school, as days passed, began to deteriorate healthwise and academically, to the extent of becoming regularly incontinent. These teachers were Rose Mangia and Elisante Babuel Mbando.

Proof of Emmanuel's failing health became apparent on 6th February, 2010 when he did not attend school. When he reported the following day, he told his teacher (Rose), that he was sick as his father had been doing "bad things" to him. In elaboration, Emmanuel told his teacher that his father had been sodomising him time without number. He went on to narrate that he had always been experiencing severe pains during the course of being sodomised. Ms. Rose reported the matter to the head teacher, Mr. Elisante Mbando. Thereafter they took Emmanuel to Msae Health Centre from where he was referred to Kilema Hospital. A complaint on the reported nasty incidents was lodged at Himo Police post, and the appellant was arrested on 9th February, 2010.

The appellant was arraigned before the District Court of Moshi at Moshi on 17th February, 2010, of having carnal knowledge of Emmanuel, against the order of nature on divers dates between 2007 and 2010. The appellant denied the charge.

To prove the charge against the appellant, the prosecution paraded 4 witnesses. The appellant testified on his own behalf and called no witness. The court summoned one Dr. Kelvin E. Mbonde as a court witness. Rose Mangia, Elisante Mbando and Emmanuel Mreta, testified as PW1, PW2 and PW4 respectively. The fourth witness was one Herman Mariki (PW3) who by then was the Ward Executive Officer to whom the sodomy report had also been made by PW1 Rose and PW2 Elisante.

In his defence, the appellant, while admitting that he had all along been sharing one bed with his son, denied sodomising Emmanuel. He claimed that the accusation had been fabricated by his neighbour Monyaichi, the mother of Emmanuel's friend one Erick. Although during his cross-examination of Emmanuel he never put any question to him regarding Ms. Monyaichi, this time round he had the effrontery of telling the trial magistrate that it was Ms. Monyaichi "*who had taught my son to speak lies in court.*"

In a carefully reasoned out judgment, the learned trial Resident Magistrate found the prosecution case proved beyond reasonable doubt. She correctly directed herself thus:-

> *"I am aware that in order to prove the case of unnatural offence, the prosecution must prove that:-*
>
> *(a) The accused had carnal knowledge to (sic) Emmanuel Elimringi.*
>
> *(b) There was penetration however slight it might have been.*
>
> *(c) The said Emmanuel was a boy below 18 years."*

In finding all these essential elements of the offence proved, she proceeded to reason as follows:-

> *"Starting with the first ground that the accused had carnal knowledge to (sic) Emmanuel Elimringi, PW4 Emmanuel... told the court that the accused was that one who did (sic) carnal knowledge to him. He told the court that his*

father (accused) did carnal knowledge to him every day. He did so when the kibatari was on. Therefore he always saw his father's penis when inserting to his anus. He got pains. His father beat him at the back when he shouted. The door was closed the neighbours they cannot hear the voice.

On my own re-assessment of the evidence of PW4 there can be no doubt that PW4 was a truthful witness. His graphical description of the ugly incident could not be made by any person who was not only present but actually suffered the agony.

I am aware that this evidence need corroboration but I warned myself of the danger of acting on uncorroborated testimony of the complainant PW4. But I am very satisfied that PW4 evidence is truthful."

Upon being so satisfied, the learned trial Resident Magistrate found the appellant guilty as charged, convicted him accordingly, and sentenced him to thirty (30) years imprisonment.

In his first appeal to the High Court sitting at Moshi, it was the appellant's complaints that his conviction was based on fabricated and incredible evidence, which did not prove the charge beyond reasonable doubt. He also attempted to fault his trial because it was conducted in open court and not in camera.

The learned first appellate judge found the appeal seriously wanting in merit. It was her finding, with which we are in full agreement, that the case before her depended entirely on the credibility of the witnesses, particularly PW4 Emmanuel. She was convinced that the learned trial Resident Magistrate had "properly and thoroughly analyzed" the entire evidence before finding conclusively that PW4 Emmanuel was a truthful witness. She upheld this finding of fact and concluded that the appellant's defence was rightly rejected when compared to the overwhelming credible evidence proffered by the prosecution. She also came to a correct holding, in our respectful opinion, that the holding of the trial in open court did not prejudice the appellant "*because the*

objective to try the case in camera was to protect the victim's rights." The appeal was accordingly dismissed in its entirety.

The appellant accessed this Court with nearly the same grounds of complaint as the one he fronted in the High Court and had nothing to tell us in elaboration.

Ms. Elizabeth Swai, learned Senior State Attorney on behalf of the respondent Republic, pressed us to dismiss the appeal as the appellant has totally failed to demonstrate any error of law or any misdirections to justify our interference with the concurrent findings of fact on the identity of the perpetrator of the offence.

Admittedly, this is a second appeal based on section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 ("the Act"), which reads:-

> *"(7) Either party-*
>
> *(a) to proceedings under Part X of the Criminal Procedure Code may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact."*

After studying the evidence on record, we are of the settled minds that there was no dispute on the fact that PW4 Emmanuel was carnally known against the order of nature in the years between 2007 and 2010. The only issue was the identity of the perpetrator of this offence. The resolution of this very crucial issue depended on the credibility of the witnesses as the learned first appellate judge correctly found.

There is no dispute here on the fact that the offence of committing an unnatural offence c/s 154 (1) of the Penal Code, is a sexual offence. It is trite law that the best witness in sexual offences is always the victim of the offence herself/himself. See, **Ally Athumani v. R.,** Criminal Appeal No. 282 of 2009 (unreported). In the case under scrutiny, the victim was PW4 Emmanuel, who went through this agony for a period of four years before he opened up. This witness was very sincere that his ravisher was doing it at night behind closed doors. He did not mince words, although the trial was conducted in open court.

As observed by the learned trial Resident Magistrate, PW4 graphically explained his ordeal. Part of his evidence runs thus:-

"My father started to insert his penis to my anus since in standard one to date. My father did so

every day despite the pain I got... he was always warning me not to tell anybody about the incident otherwise he will beat me to death. Also when my father started to enter his penis in my anus I got pain and when I cried he beat me at the back..... He always ordered me to sleep naked."

The rest is told in the extract from the trial court's judgment reproduced earlier on in this judgment.

We have found this piece of damning evidence not discredited either on cross-examination which consisted of only three apparently irrelevant questions or in the appellant's own brief testimony. The learned trial Resident Magistrate, as alluded to above, found PW4 Emmanuel a very truthful witness, whose evidence needed no corroboration. This finding of fact was upheld by the learned first appellate judge. We have failed to trace any error of law committed by the two courts below in their assessment of the evidence and their reasoning process leading to this concurrent finding of fact. We are not entitled, in this second appeal to interfere with it.

To prove that PW4 Emmanuel was carnally known against the order of nature did not need an extra eyewitness, not even the court witness. So long as PW4 Emmanuel's evidence was found to be nothing but only the truth that was sufficient to prove the guilt of the appellant to the hilt. We accordingly find no merit in this appeal which we hereby dismiss.

Regarding the sentence imposed on him, having in mind the provisions of section 154 (2) as amended by the Law of the Child Act (No. 21 of 2009) which became effective on 20th November, 2009, we are of the settled view that it was illegal. When this fact was brought to the attention of Ms. Swai, she pressed us to quash it and impose the lawful sentence of life imprisonment. Despite the appellant's impassioned plea to us not to disturb the sentence in the event the appeal is dismissed, we have found ourselves constrained to impose the lawful sentence for as of February, 2010, PW4 Emmanuel was under 18 years. Acting under section 4 (2) of the Act, we nullify the illegal sentence of thirty years imprisonment, quash it and set it aside. We substitute therefor the lawful sentence of life imprisonment.

All in all, the appeal fails.

DATED at **ARUSHA** this 26th day of July, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL