

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 264 OF 2016

**ATHUMANI RASHIDI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Tanga)**

(Msuya, J.)

**dated 26th day of June, 2014
in**

(HC) Criminal Appeal No. 31 of 2013

JUDGMENT OF THE COURT

23rd & 27th April, 2018

MBAROUK, J.A.:

In the District Court of Korogwe at Korogwe, the appellant Athumani Rashid was arraigned for an unnatural offence, contrary to section 154 (1) (a) and (2) of the Penal Code Cap. 16 R.E. 2002. Sentence of life imprisonment with six strokes of the cane was imposed on the appellant. Dissatisfied, his appeal at the High Court of Tanzania at Tanga was dismissed. Aggrieved, he has now preferred this second appeal to this Court.

At this juncture, we find it pertinent to revisit the evidence upon which the appellant's conviction was founded. At the trial court, Theresia Joseph (PW1) testified that, on 18/09/2012 at around 17:00 hrs when he was on his way to his neighbour from his village at Kilole he heard a child crying at the back of the house. He got curious and went to the back of the house but did not see anyone. There was a pit latrine around, he saw the child Fadhili naked lying down and the accused had his pants and trousers down. He slapped the accused as he was sodomizing the boy. He shouted and the neighbours responded. They started to chase the accused and arrested him. Fadhili Ramadhani, (PW2) the victim, testified that, the appellant took him to the back of the toilet where he undressed him and put his private parts to his anus and the appellant gave him two sweets which he did not eat but kept in his pocket. Whereas one Mathias Edward,(PW3) testified that on 18/9/2012 when he was on his way from "shamba", he met the appellant in custody of the villagers, and that PW2 was complaining that he was sodomized by the

appellant. They reported the matter to the police and PF3 was issued and took the victim to hospital for checkup.

On his part, John Maganga (PW4) testified that, PW2 is his grandson aged 7 years, that on 18/09/2012 while he was at his home at around 17:00 hours, he heard PW1 shouting by calling his name. He responded and saw the appellant holding his trousers. They raised an alarm and the villagers managed to arrest him. Shida Mfilinge (PW.5) testified that, on 18/09/2012 at around 17:00 hrs. she was at Turiani, some people assembled and were saying that the appellant had sodomized PW2. The appellant ran away, hence chased by villagers who then arrested him. F. 5416 DC Vume, (PW6) testified that on 20/09/2012, he was assigned to investigate a crime of unnatural offence, that the accused/appellant was one Athuman Rashid. Sara Said Mgonja (PW7), a Clinical Officer testified that, she had on 19/09/2012 examined PW2 and noted that the boy had bruises in his anus. As per her opinion, there was penetration of foreign object in PW2's anus.

In his defence the appellant denied to have committed the offence. Further, he was not that much mad to sodomize a boy of 7 years and the case was framed up by the complainants for reasons best known to them.

In this appeal the appellant appeared in person unrepresented, hence fended for himself, whereas the respondent/Republic had the services of Ms. Shose Naiman, learned State Attorney. The appellant raised five grounds of complaint which can be paraphrased as follows:-.

- One, the courts below erred in law by failing to notice the contradiction between the evidence of PW6 and PW7 on the date of issuing the PF3.
- Two, the courts below erred by relying upon the evidence of PW7 as she clarified to examine the victim a day before the offence was reported to police.
- Three, there was none-compliance with the mandatory provision of section 63(1) (2) (3) and (3).

- Four, there was none-compliance with mandatory provision of section 310 of the Criminal Procedure Act, Cap. 20, R.E. 2002.
- Five, that, the prosecution did not prove the case beyond reasonable doubt.

When the appeal came for hearing, the appellant exercised his option by letting the respondent to start to react on his grounds of appeal first and if the need arises he would give his rejoinder later.

On her part, the learned State Attorney resisted the appeal and started to argue ground number five, then ground one and two together and lastly, ground three and four together.

The learned State Attorney argued vehemently that the prosecution evidence proved their case beyond reasonable doubt. In her response to the 5th ground of complaint the learned State Attorney submitted that the evidence adduced by PW2 was a direct evidence of a victim as to how the appellant sodomized him. She added that, also there was evidence of PW1 who saw the appellant with his pants down sodomizing PW2. In addition to

that, the evidence of PW7 who was a clinical officer who examined PW2 established that a blunt object was inserted into PW2's anus.

She further, submitted that the appellant did not dispute the evidence of the victim PW2, because he failed to cross-examine him hence that is taken that the appellant admitted the facts adduced by PW.2. In support of her argument she cited the case of **George Maili Kemboge vs. Republic**, Criminal Appeal No. 327 of 2013 (unreported). She further argued that, on account of sufficiency of the victim's evidence, the evidence of PW2 was corroborated by PW1 and PW7 to prove the appellant's guilt. She therefore urged us to find that the prosecution proved its case beyond reasonable doubt.

In her reply to grounds 1st and 2nd of complaint concerning the claim that the first appellate Judge failed to scrutinize the evidence of the witnesses concerning the difference of dates when the PF3 was issued, the learned State Attorney submitted that, the contradiction is not fatal as it did not go to the root of the matters. She was of the view that, even if PF3 is done away

with, still the credible evidence of PW1, PW2, PW3, PW4 and PW7 pointed to the guilt of the appellant. In support of her argument, she cited the case of **Goodluck Kyando versus Republic**, [2006] T.L.R 363. She added that, the discrepancies such as those are immaterial, and do not deflect the substance of the prosecution's case. She therefore urged us to find the 1st and 2nd grounds of appeal devoid of merit.

As to grounds Nos. 3 and 4, she said the grounds raised are quite new. They are being raised for the first time now, she submitted that it was not proper and those complaints should be disregarded. She referred us to the case of **George Maili Kemboge** (supra) where this Court held that this Court will only look neither into matters which came up in the lower court and decided and not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal.

The conviction of the appellant as upheld by the first appellate court is based on credibility of the account of the victim's evidence that he was sodomized by the appellant and

corroborated by the evidence of PW1, PW3, PW4, PW5, PW6 and PW7.

We wish to point out that this case depends wholly on the credibility of witnesses. So, the trial court is better placed in assessing their credibility. This Court will only interfere if there is a misdirection or non-direction (See **DPP vs. Jaffer Mfaume Kawawa** [1981] TLR 149 and **Salum Mhando vs. Republic** [1993] TLR 170.

On our part, we are of the considered opinion just like the learned State Attorney that the prosecution proved their case beyond reasonable doubt. This is for the following reasons:-

- (1) The evidence of PW2 who was the victim was direct evidence, where it is now settled that the true evidence of sexual offence has to come from the victim. See, **Sulemani Makumba vs. Republic** [2006] TLR 379. In the instant case, PW2 sufficiently testified as to how the appellant sodomized him.

(2) Also PW1 as an eye witness testified as to how she witnessed the appellant inserting his penis into PW2's anus.

(3) PW7, the clinical officer who examined PW2 – the victim confirmed that a blunt object was inserted into PW2's anus.

Also, it is the evidence of PW2 that it was the appellant who sodomized him by putting his penis into his anus. As pointed out by Ms. Naiman, this evidence was not challenged at all by the appellant. When the appellant was given the opportunity to cross-examine PW2, the record shows that he had no objection. In **Damian Ruhele vs. Republic**, Criminal Appeal No. 501 of 2007 (unreported) this Court stated as follows:-

"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness."

See the cases of, **Nyandwi John Bosco versus Republic**, Criminal Appeal No 42 of 2012 and **Emmanuel**

Saguda @ Sulukuka & Another versus Republic, Criminal Appeal No 422 "B" of 2013, (both unreported).

We are of the considered opinion that from the totality of the evidence on record, the prosecution proved their case beyond reasonable doubt. For that reason, we find ground five of appeal devoid of merit.

On the point of contradictions of dates, the law on this point is now settled that not every inconsistency and or contradiction will make a prosecution's case to flop. In the case **of Bakari Hamisi Ling'ambe versus Republic**, Criminal Appeal No 161 of 2014 which cited the case of **Said Ally Ismail versus Republic**, Criminal Appeal No. 214 of 2008 (both unreported), the Court held:-

"...however, it is not every discrepancy in the prosecution's witness that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled..."

(See also: **Ally Kinanda and Others vs The Republic**, Criminal Appeal No. 206 of 2007; **Samson Matiga vs. The Republic**, Criminal Appeal No. 205 of 2007; **Omari Kasenga vs. The Republic**, Criminal Appeal No. 84 of 2011-(all unreported).

In the case of **Goodluck Kyando** (supra) this Court laid down the following principle:

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness".

We are of the view that, good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. (See **Mathias Bundala versus Republic**, Criminal Appeal No. 62 of 2004, (unreported). It is evident that the appellant's conviction was primarily based on the evidence by PW1, PW2, PW3, PW4 and

PW7 who were taken to be credible witnesses. We have seen no reasons not to believe their evidence.

Turning to grounds number three and four of the appeal. We agree with Ms. Naiman that the grounds must have been an afterthought. Indeed, as argued by the learned State Attorney, if the High Court did not deal with those grounds for reason of failure by appellant to raise them there, how will this Court determine where the High Court went wrong? In the case of **Hassan Bundala @ Swaga vs. Republic** Criminal Appeal No.386 of 2015, (unreported) this Court held that:-

"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal".

See for example, **Jafari Mohamed vs. Republic**, Criminal Appeal No. 112 of 2006 and **Nazir Mohamed @ Nidi vs. Republic**, Criminal Appeal No. 312 of 2014, (both unreported).

We entirely agree with Ms. Naiman that the raising of a new ground of appeal at a higher court without first doing so in the lower courts is not proper.

From the evidence on record, we are satisfied that the appellant was properly convicted. We therefore accordingly find that the appeal has no merit and we dismiss it in its entirety.


DATED at **TANGA** this 25th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL