IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., MZIRAY, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 405 OF 2016

HUSSEIN HASSAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Levira, J.)

dated the 21st day of June, 2016

in

Criminal Appeal No. 19 of 2015

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JUDGMENT OF THE COURT

4th & 11th December, 2018

MZIRAY, J.A.:

The appellant was charged in the Resident Magistrate's Court of Mbeya with unnatural offence. According to the charge sheet, the appellant was charged under s. 154 (1) (a) and (2) of the Penal Code, Cap 16 R.E 2002. It was alleged that on 5th day of March, 2014 at Mapelele area in Mbalizi within the District and Region of Mbeya, the appellant had carnal knowledge of one **B.J** (name withheld), a six (6) years old child, against the order of nature.

At the end of a full trial he was convicted as charged and sentenced to the statutory minimum punishment of life imprisonment. He was also ordered to pay the victim Tshs. 20,000,000/= as compensation. Aggrieved

by the conviction and sentence, he preferred an appeal to the High Court of Tanzania at Mbeya. The High Court dismissed the appeal, hence this second appeal.

The evidence linking the appellant with the offence was that of the victim, who testified as PW1, corroborated with the evidence of PW2, PW3, PW4 and PW5 who examined PW1's anus after the incident. It is on record that PW1 who was a pupil schooling at Mbalizi used to return home at about 15.00hrs. At such time, the appellant used to take him to his house where he carnally knew him against the order of nature. It is also in evidence that the appellant repeated the same on four different occasions. His mother, PW2, on 5/3/2014 discovered uncommon conditions to the victim as he was shivering and faeces were coming out of his anus. When the victim was asked as to what had happened, he unhesitantly named the appellant as the one who used to insert his penis in his anus. When medically examined by PW4, it was revealed that the victim's anus was injured. He had bruises and laceration of about 1½ cm which was at the postural area at the edge of the anus. She termed the injury as grievous harm. He also tested HIV positive.

At the trial, the appellant categorically denied the charges against him. He told the trial court that the charge against him was actuated by hatred perpetuated by the complainant's mother, PW2, who was his

paramour but their relationship ended sour after he turned down the proposition to marry her.

In this appeal, the appellant appeared in person, unrepresented, while the respondent/Republic was represented by Mr. Ofmedy Mtenga, learned State Attorney.

Four grounds of appeal were preferred by the appellant in this appeal, which, however, may sufficiently be abridged to two as follows; **one,** that, the prosecution did not prove the case against the appellant beyond reasonable doubt; **two**, that, the trial court and the first appellate court erred in law and in fact in convicting the appellant relying on flimsy and hearsay evidence.

At the hearing, the appellant opted to allow the learned State Attorney to respond to his grounds of complaint first and if the need arose, he was to respond later in his rejoinder.

In the first place, Mr. Mtenga argued the appeal generally. He submitted that the evidence adduced proved the case beyond reasonable doubt that PW1 was sodomised and that it was the appellant who ravished the poor boy. He pointed out that the evidence of PW1 was clear that the appellant sodomised him, adding that in law it was the evidence of the victim which counted much in the cases of the nature, once believed to be

credible. PW1 told the trial court that he knew the appellant prior to the incident and in the actual fact, he narrated to the trial court how the appellant on four different occasions lured him with money and subsequently succeeded to sodomise him. The testimony was materially corroborated by the evidence of PW2, PW3, PW4 and PW5 who inspected the anus of the victim and found that the same was enlarged, had bruises and faeces coming out uncontrollably. To buttress his argument he relied on the case of **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008 CAT (unreported). Mr. Mtenga stressed that the law is settled that in cases of this nature, the best evidence comes from the victim. He insisted that since the two courts below found that PW1 was a credible witness, his evidence was sufficient to anchor conviction. He urged the Court to uphold the concurrent findings of the two courts below and sustain the conviction.

On his part, the appellant submitted that the trial court grounded his conviction relying on the fabricated and hearsay evidence. He stated that the evidence of PW1 was fabricated due to the grudges and estrange relationship he had with the victim's mother who promised to frame him. He however insisted that the evidence of PW2, PW3, PW4 and PW5 was hearsay because they did not witness the incident. On that basis he urged

the court to allow his appeal on account of the fact that the first appellate court erred in upholding his conviction and sentence.

On our part, after earnestly going through the judgment of the two courts below, we are of the settled view that there is no truth in the appellant's complaint that the evidence of PW1 was fabricated and that the evidence of PW2, PW3, PW4 and PW5 was nothing but hearsay.

The lower courts carefully weighed the evidence of PW1. Both of them were satisfied that he was a credible and believable witness. They believed that he told the truth that he was sodomised and that it was the appellant who did it. They further appreciated that under section 127 (7) of the Evidence Act, if found to be a credible witness, the complainant's evidence can alone ground a conviction as true evidence in cases of this nature has to come from the victim. On that basis therefore, the appellant's argument that the case against him was fabricated after he had been in estrange love relationship with PW2, the mother of the victim, is an afterthought hence untenable.

We are not persuaded that the evidence of PW2, PW3, PW4 and PW5 was nothing but hearsay. We say so because PW2, PW3, PW4 and PW5 inspected the victim's anus and found that he was sodomised.The evidence of PW4 was much more elaborate on this point and no one can

doubt that it came from a professional medical physician, specialist in children.

Once again, we agree with both lower courts' findings that PW1 was a credible and reliable witness and that under section 127 (7) of the Evidence Act, appellant's conviction could solely be anchored on his evidence. We reiterate what we said in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 that:-

> *"True evidence of rape has to come from the victim ..."*

From the evidence on record, we are satisfied that the appellant was properly convicted and the sentence meted out to him was the minimum provided by law. The appeal has no merit and it is dismissed in its entirety.

DATED at **MBEYA** this 10th day of December, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL