IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 210 OF 2018

RASHID SAID @ CHAPA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from judgment of the High Court of Tanzania, at Iringa)

(Feleshi, J.)

dated the 09th day of February, 2018
in
Criminal Appeal No. 02 of 2017

.....

JUDGMENT OF THE COURT

6th & 13th May, 2020

MZIRAY, J.A.:

Rashid Said @ Chapa, the appellant herein, was arraigned and convicted in the District Court of Mufindi at Mafinga of unnatural offence contrary to section 154(1) of the Penal [Code Cap 16 R.E. 2002] (Now R.E. 2019). It was alleged in the particulars of the offence that on 18/3/2016 at Kinyanambo "A" area within Mufindi District in Iringa region the appellant did have carnal knowledge of one **AM**, a six years old boy against the

order of nature. The name of the victim is purposely withheld to hide his identity. Upon conviction, he was sentenced to life imprisonment. His appeal to the High Court was unsuccessful, hence this second appeal.

The appellant filed a memorandum of appeal comprising four grounds of complaint which are; **one,** the High Court erred in law and fact to dismiss the appellant's appeal depending on circumstantial evidence which was not conclusive; **two,** the High Court misdirected itself when it failed to consider pains caused to PW2 on the first and second act of the crime; **three,** the High Court erred in law and fact by dismissing the appellant's appeal without considering and evaluating the evidence of the defence side; **four,** the prosecution side failed totally to prove the case against the appellant beyond all reasonable doubt.

We think that the four grounds of complaint boil down to only one issue, that the prosecution side failed to prove the case against the appellant beyond reasonable doubt, the subject of the last ground.

At the trial it was undisputed that, the appellant was a teacher at Father Silvio Pasqual School and the victim, PW2, was a standard one pupil in the said school. In a bid to accomplish his hidden agenda, the

appellant informed Salome Nganasa (PW1) who is the mother of the victim that the latter's progress in studies at school was not satisfactory hence he suggested PW1 to register PW2 (the victim) for evening studies commonly known as tuition. PW1 unhesistantly agreed to the proposal which she thought was aimed at improving the progress of her son. Arrangements were made and the victim started to attend the tuition classes in the house where the appellant was renting. There were other five pupils who were registered in the same programme to attend tuition in the house of the appellant.

The incident which led to the indictment of the appellant before the trial court happened on 18/3/2016. On that day after the tuition class was over, the appellant discharged all the other pupils to go home and remained behind with the victim. According to the victim, the appellant took him into his bed room, undressed him and abused him by inserting his penis in his anus. He warned him neither to shout nor disclose the shameful act to anyone. One that fateful day, Alex Rashid Chura (PW3), a motor cycle rider commonly known as bodaboda was dispatched by PW1 to collect the victim. Arriving at the house of the appellant he knocked the door twice but there was no response. When he knocked the door for the

third time it is when the appellant emerged and opened it. He informed PW3 that the victim was still doing his tuition exercises. After a while, the victim came out and PW3 took him straight to his home. While at home, during the night, PW1 noticed that the victim was a bit stressed and had some difficulties in walking. She became suspicious that something wrong might have happened. She examined him and found that the boy had some bruises in his anus. She informed her husband and the matter was subsequently reported to police. The victim was taken to hospital where he was examined by Dr. Patrick David Kivambe (PW4) who confirmed that the victim was sodomised.

In defence, the appellant denied to have committed the offence. He called three witnesses to bear him out. He relied mostly on the evidence of Delfina Mwangala (DW2) who was the landlady of the house he was renting. Her evidence is to the effect that the appellant did not commit the offence because she saw all the children including the victim playing outside the yard after the tuition was over. In other words, she was saying that the victim did not remain behind with the appellant after the tuition was over.

In its decision, the trial court heavily and crucially relied on the evidence of the victim to ground the conviction. In analyzing his evidnce, the trial court was satisfied that the victim was well versed with what he told the court. It commented that he was a straight forward witness and stood firm despite long cross-examination by the defence side. The trial court found him to be a credible witness and convicted the appellant on the strength of the evidence of the victim.

On appeal, the High Court was satisfied that the trial court properly directed itself on the law and evidence and for that reason it found no cause to interfere with its verdict.

The hearing of this appeal was electronically conducted by way of video conferencing. The communication between the Court and the appellant from where he was confined in prison was good and fortunately the appellant had the services of Mr. Alfred Kingwe, learned advocate who was present in Court. On the part of the respondent Republic had the services of Ms. Pienzia Nichombe, learned State Attorney who was also present in Court.

When called upon to submit, Mr. Kingwe abandoned the memorandum of appeal filed by the appellant on 15/1/2019 and proceeded with the supplementary memorandum of appeal he filed on 4/5/2020. He abandoned grounds 1, 2 and 3 as they were new grounds and proceeded with ground 4 only which as stated earlier, criticizes the prosecution to have failed to prove the case against the appellant beyond reasonable doubt.

In his submission, Mr. Kingwe casted doubt on the evidence of PW1. He argued that if at all the victim was sodomised twice, considering the pains he suffered, the incident would have been detected earliest on the first time of the act and not otherwise. He also pointed an accusing finger at PW3 that he might have been the culprit when he took the victim home in his motor cycle. He further argued that it was expected for the prosecution to call as a witness at least one among the pupils who attended tuition on 18/3/2016 to corroborate the assertion that the victim remained behind after the classes. In his view, failure to call as witnesses the other pupils who attended tuition with the victim on the fateful day tainted the prosecution case.

In respect of the evidence of PW1, he argued that it was not credible and was exaggerated in some material aspects. He referred for example at page 21 of the record of appeal where the victim testified that he slept in the appellant's house many times while in actual fact he used to attend tuition and go back home. When probed by the Court particularly to the answers PW1 gave in cross-examination, the learned counsel changed direction and conceded that the evidence of the victim was not discredited as a result of cross-examination. However, he argued that the prosecution's evidence was fabricated against the appellant after DW4 Ambrose Lubiano Kigogolo who is a relative of the appellant had on 23/3/2016 refused to give a bribe of TZS 10,000,000.00 to the victim's father for the purposes of sorting the matter out of court.

The learned counsel went on to point out some insignificant contradictions of trivial nature in the evidence of PW1 and PW3 as to who had assigned the latter to collect the victim from his tuition classes. He also challenged the evidence of PW4 to be unrealistic when he stated that the diameter of the victim's anus was 2 millimeters wide. He further argued that after the High Court had expunged the PF3, it watered down

the oral evidence of PW4 and in that respect such evidence cannot be used to corroborate the victim's testimony.

On the above shortcomings, the learned advocate prayed for the appeal to be allowed.

In reply, Ms. Nichombe was brief but focused. She submitted that the evidence which implicates the appellant is that of the victim at page 18-22 of the record of appeal where the appellant abused his position and sodomised the poor boy. His evidence alone is sufficient to sustain a conviction, she argued. To bolster her position she cited to us the cases of **Selemani Makumba v. R** [2006] TLR 379 and **Joseph Leko v. R** Criminal Appeal No. 124 of 2013 (unreported). She submitted that the evidence of the victim was corroborated by the evidence of PW1 who examined him and found bruises in his anus something suggesting that he was abused. The learned State Attorney dismissed the assertion that there were contradictions in the prosecution case. On the medical evidence adduced, it is her contention that even with the expunging of the PF3, the oral testimony of PW4 had corroborated the victim's evidence.

The learned State Attorney concluded by submitting that the prosecution proved the case against the appellant beyond reasonable doubt hence the appeal should be dismissed.

Mr. Kingwe had nothing to rejoin. He reiterated his earlier position for the appeal to be allowed.

In dealing with this appeal we think that the only contentious issue is whether the prosecution case was proved beyond reasonable doubt. The two courts below in their concurrent findings were satisfied that the case against the appellant was proved to the hilt. Admittedly, the case for the prosecution largely based on the evidence of the victim. The main question before us is whether the victim was a credible witness. On revisiting his evidence at page 18-22 of the record of appeal we find that he was consistent on the point that at the material time, after the departure of the other pupils who were attending tuition, the appellant seized the opportunity and took him to his bedroom where he undressed him and inserted his manhood into his anus. In his own words at page 19-20 of the record the victim is recorded saying that:-

> *"...after all the students disappeared, the teacher Rashid undressed my trouser and pants thereafter erect his penis to my anus I was the last to be to the teacher. The teacher told me to go to sleep to his bedroom, and the accused bedroom there is a bed, ... He started to did bad behavior to me, he took his penis and he put to my anus, it was the second time an accused did it to me. The first time also did it at his bedroom, accused warned me not shout."*

It is apparently clear from the above evidence that the victim was sodomized by the appellant. Mr. Kingwe has controverted that evidence by arguing that the victim was not a credible witness. In support of his argument, the learned advocate referred us to page 21 of the record of appeal where in cross-examination, the victim stated that:-

> *"We went to tuition five students and at last we remain two and sometimes I remain myself.* ***I slept to teacher many times."*** (emphasis supplied).

According to the learned advocate, this piece of evidence contradicts with his evidence in examination in chief where he said that it was the second time to be sodomised by the appellant.

It is trite law that the assessment of credibility of a witness in so far as the demeanour is concerned is the domain of the trial court. (See **Isaya John v. R**, Criminal Appeal No. 167 of 2018 (unreported). In the instant case, the trial court carefully analyzed the evidence of PW1 and found that he was a credible witness. The findings of the trial court, which we highly appreciate, are indicated in its reasoned judgment at page 68 of the record of appeal where the learned trial Resident Magistrate observed:-

> *"I hasten to say that I found PWII quite satisfactory as he appeared to be well versed with what he told the court. He was a straight forward witness who stood firm despite long cross-examination by the prosecution side. In my part without doubt I think the witness PWII is a witness of truth as they was testifies steadily and with a clean mind."*

No doubt the above findings of the trial court which were affirmed by the High Court defeats Mr. Kingwe's argument that the victim was not a

credible witness. On our part, we have no reasons at all to interfere with the concurrent findings of the two courts below as far as the credibility of the victim is concerned and we hasten to add that his evidence was sufficient to ground conviction even without corroboration as correctly submitted by the learned State Attorney.

However, if we are to look for corroboration, we find that the victim's evidence has been materially corroborated by the evidence of PW1 who examined him and found that he had bruises in his anus. It is further corroborated by the evidence of PW3 who at page 25 of the record of appeal confirmed that he went to the appellant's house and knocked twice without any response, but on the third time the appellant opened the door and cheated that the victim was still doing his exercises. He released him after a while. This piece of evidence has materially corroborated the victim's testimony. Further corroboration is found in the evidence of PW4, the doctor who examined the victim. The issue that the anus of the victim was 2 millimeters wide is insignificant and cannot vitiate the prosecution case.

There are other matters which Mr. Kingwe raised in his submissions ranging from contradictions in the prosecution case, failure to call the pupils who were attending tuition as witnesses, fabrication in prosecution case to put the appellant in peril and lastly, failure to give the defence the consideration it deserved. On a proper examination of the record, with respect, we did not find any contradiction in the prosecution evidence to taint the case for the prosecution. Likewise, the assertion that the victim's family demanded a bribe of TZS 10,000,000/= as settlement is not supported by any iota of evidence. On a further close examination of the defence evidence we are satisfied that it was well considered but unfortunately did not raise any reasonable doubt against the prosecution case as incorrectly submitted by Mr. Kingwe. Lastly, there was no point to call the pupils who attended tuition as witnesses because the evidence of the victim had sufficiently proved the charge to the standard required. The trial court relied on this evidence and not circumstantial evidence as alleged in the first ground of appeal.

In total, having closely deliberated on this appeal, we would agree and support the findings of the High Court that the appellant was properly

convicted. In the final analysis and for all above reasons, we hereby dismiss this appeal.

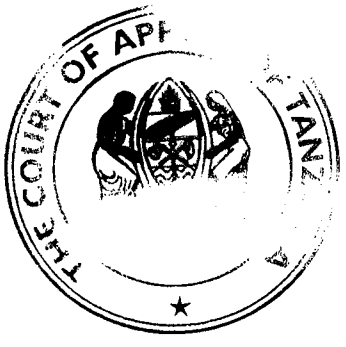
DATED at **IRINGA** this 12th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 13th day of May, 2020 in the presence of the Appellant in person through video conference and Ms. Penzia Nichombe, learned State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL