

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A and FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 561 OF 2020

JONAS LESI DOO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mansoor, J.)

dated the 16th day of September, 2020

in

DC. Criminal Appeal No. 148 of 2019

JUDGMENT OF THE COURT

6th & 9th May, 2022

MUGASHA, J.A.:

In the District Court of Dodoma at Dodoma the appellant was arraigned for unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code (Cap 19 RE 2002). It was alleged by the prosecution that, on diverse dates in October, 2018 at Mlimwa "C" area within the City, Region and District of Dodoma, he had carnal knowledge of a boy aged six (6) years against the order of nature. For the purpose of concealing the identity of the boy, he shall be referred to as BULI or the victim. The appellant denied the charge subsequent to which in order to

prove its case, the prosecution paraded five witnesses and tendered three documentary exhibits.

From a total of 5 witnesses, a brief account of the prosecution was as follows: The appellant and his wife Marline Banard Mroso (PW1) had separated for about seven years and during that period, PW1 had an affair with another man and out of that relationship the victim was born. Later, the appellant and his wife reconciled and following a reunion, they all resided in the same house together with the victim and his sister named Belinda. The victim together with his sister were pupils at Mlimwa 'C' Primary School. On 18/10/2018 Martha Jonathan Kiwari (PW3) the victim's class teacher who on that day happened to be a teacher on duty, noticed change on the victim's mood and behaviour as he was not jovial like he used to be when he was in standard one. On this observation, PW3 decided to inquire from the victim's sister on what was wrong with the victim. Then, the sister brought his brother (the victim) to PW3 and he revealed to be wounded on the private parts because he was sodomised by the appellant. On hearing this, PW3 summoned the victim's mother who obliged and on the following day went to school accompanied by the victim and she was informed on what had befallen the victim. Also the victim narrated to her mother

that, it was during her absence when the appellant sodomised him. The victim further reiterated to have been sodomised by the appellant on 17/10/2018 when his mother was not at home.

According to PW3, the victim's mother was advised to report the matter to the police. However, on 21/10/2018 the victim informed the teaching staff meeting that he was not taken to the police or the hospital. As such, PW3 decided to take the victim to the police, a Police Form No. 3 (PF3) was issued and the victim was taken to Dodoma referral hospital. Upon being examined by Doctor Thobias Bundala (PW4), he found bruises on the anal area of the victim, and loose sphincter muscles and concluded these to be signs of penetration in the anus of the victim. The Doctor recorded the findings in the PF3 which was tendered in court as exhibit P2. According to WP 4437 D/Sgt Albina (PW5) who investigated the incident, upon interrogation the victim stated to have been sodomised more than twice by the appellant in the children's room, whereas the appellant denied to have committed the offence. It is against the said backdrop; the appellant was arraigned before the trial court as earlier stated.

The appellant was the only witness for the defence. Apart from admitting that PW1 was his wife and the victim being a son, he denied

the accusations by the prosecution. He told the trial court that, having learnt on 19/10/2018 from his daughter that school pupils were sodomising each other and the victim was among them, he reported the matter to the school teachers who confirmed about the victim being sodomised. However, to his surprise, he was arrested by the police at the school premises. Also the appellant told the trial court that, the case was framed up by the victim's father who happened to be the head teacher of Mlimwa "C" Primary School. He claimed to have been threatened by that teacher who continued to have extramarital affair with PW1 who bragged that the teacher in question was responsible with the pregnancy.

Believing the prosecution account to be true, the trial court convicted the appellant as charged and sentenced him to life imprisonment. Undaunted, the appellant unsuccessfully appealed to the High Court hence the present appeal to the Court. In the Memorandum of Appeal, the appellant has fronted six grounds as follows:

- 1. That, the first appellate Court failed to apprehend the nature of the evidence adduced that the charged offence was due to grudges formed by PW2 and PW1 following disciplined process by the appellant to P2.*

- 2. That, the evidence of PW2 was highly incredible and unbelievable due to fundamental contradictions and discrepancies which goes to the roots of the case on uncertainty as to who was committing the offence to the victim.*
- 3. That, the evidence of PW4 was doubtful and contradictory.*
- 4. That, the tried case/ appeal was unfair and contrary to the equality of the law where the ignorant appellant was not represented by a lawyer to assist him on such a capital offence.*
- 5. That, the first appellate Court did not draw an adverse inference to the subordinate court upon failure to adhere and comply the requirement of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016.*
- 6. That, the whole prosecution case against the appellant was cooked and not proved beyond reasonable doubt.*

At the hearing the appellant appeared in person, unrepresented. He opted to initially hear the submissions of the respondent Republic, reserving the right to rejoin, if need arises. The respondent Republic,

had the services of Ms. Bernadetha Thomas Sinyaw and Ms. Ngollo Yaya Dabuya, both learned State Attorneys.

Upon taking the floor to address the Court, Ms. Sinyaw opposed the appeal and supported the conviction and sentence. She preferred to respond to grounds 5 and 4 separately and grounds 1, 2, 3 and 6 together as they all fault the conviction of the appellant being based on the case which was not proved at the required standard.

She challenged the 5th ground of complaint in which the appellant faults the trial court for noncompliance of section 127 (2) of the Evidence Act and failure to consider his defence. On this, she pointed out that prior to giving testimonial account, the victim did promise to tell the truth as reflected at 18 of the record of appeal and as such, the law was not contravened as suggested by the appellant. She added that the appellant's defence was considered by both the trial and first appellate courts as opposed to the appellant's assertions.

Pertaining to complaint on grounds 1, 2, 3 and 6, it was Ms. Sinyaw's submission that the charge was proved against the appellant at the required standard considering that: **One**, the victim's credible account that he was sodomised by the appellant is supported by PW3 the class teacher to whom the victim initially disclosed that he was

sodomised and mentioned the appellant as the culprit which was confirmed by PW5 who interrogated the victim and reiterated what he said to PW3. **Two**, the element of penetration which is crucial in sexual offences was proved by the victim and the doctor who documented his findings in the PF3 (exhibit P3) that, there was penetration as the victim's anal area had bruises and sphincter muscles were loose. **Three**, the credible victim's account on the alleged sodomy by the appellant is the best evidence in the light of what is stated under case law. To bolster her propositions, she cited to us the case of **SELEMANI MAKUMBA VS REPUBLIC**, (2006) TLR (A)379 and **OMARI AHMED VS REPUBLIC**, (2004) TLR. She thus urged us to find grounds 1, 2, 3 and 6 not merited and proceed to dismiss them.

Finally, responding to ground 4, Ms. Sinyaw urged us to dismiss the appellant's complaint that he was denied legal representation at the trial. On this she advanced following reasons; **One**, the appellant did not request to be given opportunity to have legal representation; and **two**, he was not denied a fair trial. Ultimately the learned State Attorney urged the Court to dismiss the appeal in its entirety and sustain the conviction and sentence meted on the appellant.

In rejoinder, the appellant urged the court to consider the grounds of appeal and proceed to set him at liberty.

After a careful consideration of the submissions from either side, grounds of appeal and the record before us, basically the determination of this appeal hinges on three issues: **One**, whether the appellant was denied a fair trial; **two**, whether the trial was flawed with a procedural irregularity for noncompliance with section 127 (2) of the Evidence Act; and **three**, whether the charge against the appellant was proved beyond reasonable doubt.

Pertaining to the right to legal representation the position of the law is stipulated under the provisions of section 33 (1) of the Legal Aid Act [CAP 21 R.E. 2019] as follows:

"33 (1)- Where in any criminal proceedings, it appears to the presiding Judge or Magistrate that:-

(a) in the interests of justice an accused person should have legal aid in the preparation and conduct of his defence or appeal as the case may be; and

(b) his means are insufficient to enable him to obtain legal services,

The presiding judge or magistrate, as the case may be, shall certify that the accused ought to have such legal aid and upon such certificate being issued, assign to the accused a legal aid provider which has an advocate for the purpose of preparation and conduct of his defence or appeal, as the case may be."

In the light of the cited provision, a person in need of legal aid service has a duty to engage an advocate or apply for legal aid in terms of the cited provision in the event he/she is unable to hire an advocate. Since the appellant neither informed the trial court that he wished to engage an advocate nor apply for legal aid, he cannot be heard to have been denied legal representation at both the trial and in the first appeal. Besides and without prejudice, the appellant was present throughout the trial had opportunity to listen the prosecution evidence and cross-examine the prosecution witness. Moreover, at the close of the prosecution case and after the trial court made a finding that he had a case to answer, the appellant was addressed and given opportunity to elect the manner of giving his defence and call witnesses as per the dictates of section 231 of the CPA. Thus, the appellant was not denied a fair trial and as such, his complaint is not merited and it is hereby dismissed.

Pertaining to the complaint on noncompliance with the provisions of section 127 (2) of the Evidence Act, the said provision stipulates as follows:

"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."

In the light of the cited provision, a child of tender age may give evidence without taking an oath or an affirmation, if prior to adducing the evidence, the child promises to tell the truth. Apparently, in the case at hand this was complied with as the victim did promise to tell the truth before giving his testimony. Thus, the 5th ground is not merited and we dismiss it.

Next is whether the charge was proved beyond reasonable doubt. It is evident on the record that, the conviction of the appellant was mainly based on the credible evidence of the victim as found by the trial court and subsequently by the High Court on first appeal. We are aware that, sitting as a second appellate court we can still determine the credibility of PW1 by assessing the coherence and consistency of the witness when compared with the evidence of other witnesses including

the evidence of the appellant. This is crucial considering that every witness is entitled to credence and must be believed and his testimony accepted unless the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See - **SHABAN DAUDI VS REPUBLIC**, Criminal Appeal No. 28 of 2001 (Unreported). **GOODLUCK KYANDO VS REPUBLIC**, [2006] TLR 363, and **MATHIAS BUNDALA VS REPUBLIC**, Criminal Appeal No. 62 of 2004 (unreported).

We shall accordingly be guided by the stated position of settled law in determining the present appeal. It is settled law that, in sexual offences the best evidence must come from the victim and if he/she gives a truthful account, stands out to give direct testimony to prove the fact in question as to what actually transpired on the fateful incident. In the case at hand, at page 18 of the record of appeal, the victim clearly stated how the appellant forced him to lay down and proceeded to penetrate his anus and did so when his mother was not at the homestead. The victim also told the trial court that, the appellant threatened him not to reveal about the shameful incident and that is why he kept mum and could not tell his mother being scared that she would tell the appellant. The victim's account was not shaken when he

was cross-examined by the appellant and re-examined by the prosecutor as he maintained that it is the appellant who sodomised him when the mother was not around and subsequently, Edwin and other fellows used to penetrate his anus. The victim's consistent account is similar to the testimony of PW3 to whom the victim initially revealed about the shameful act and mentioned the appellant to be the culprit. It should be recalled that, PW3 as a teacher and guardian having observed change on the victim's behaviour made a positive intervention to inquire and gather the ordeal of the victim being sodomised by a step father. The victim's account was further corroborated by the Doctor's documented account in the PF3 showing that the victim's anal area had bruises and sphincter muscles were loose. This in addition, cements the victim's account that there was actual penetration in the anus of the victim and proves that the victim was sodomised. Therefore, like the two courts below we are satisfied that the victim gave a credible account that it is the appellant who sodomised him.

Next to be addressed is the appellant's complaint that, the case was framed up by the victim and his mother and that the victim's evidence is flawed with contradiction as it cannot be ascertained as to who sodomised the victim. We found this wanting because as it does

not stand out to be a contradiction. We say so because, the victim in his account mentioned those who sodomised him inclusive of the appellant. Thus, the fact that Edwin was among those mentioned does not exonerate the appellant from a criminal liability of sodomising the victim. Therefore, even if there were grudges, the victim's credible account that he was sodomised by the appellant, indeed points an accusing finger to the appellant and he cannot get off the hook.

We have gathered that, while the doctor in his oral account stated that he examined the victim on 23/10/2018, the PF3 show the examination to have been conducted on 24/10/2018. This is probably the gist of the appellant's complaint. We found this to be a minor lapse and it did not go to the root of the matter caused by lapse of memory due to passage of time because the doctor gave his account on 6/8/2019 which was almost ten months after the medical examination in question. Besides, the variation did not prejudice the appellant in any way.

Finally, we are satisfied the prosecution account points to the guilt of the appellant that he did sodomise the appellant as the charge was proved beyond reasonable doubt. On that breathe, we do not find any cogent reason to vary the concurrent findings of the two courts below

on the conviction of the appellant. In view of the aforesaid the appeal is not merited and it is hereby dismissed in its entirety.

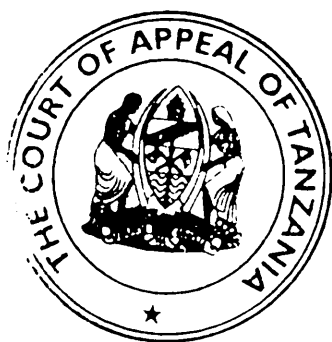
DATED at DODOMA this 9th day of May, 2022.


S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 9th day of May, 2022 in the presence of the Appellant in person and Ms. Bernadetha Thomas, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.




H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL