IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 426 OF 2020

ISAYA LOSERIAN ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Masara, J.)

dated the 27th day of March, 2020

in

Criminal Appeal No. 58 of 2019

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JUDGMENT OF THE COURT

5th & 23rd February, 2024

LILA, J.A.:

The record of appeal bears out that the District Court of Simanjiro sitting at Orkesumet in Criminal Case No. 37 of 2017, convicted Isaya Loserian, the appellant, of two counts: namely; rape, contrary to sections 130 and 131 and unnatural offence, contrary to section 154 (1) (a) of the Penal Code. It accordingly sentenced him to serve thirty (30) years imprisonment for each count. The sentences were ordered to run concurrently. As luck would have it, his appeal to the High Court of

Tanzania sitting at Arusha was partly successful as it allowed the appeal, quashed the conviction and set aside the sentence on the first count. The conviction and sentence for the second count were sustained, hence this second appeal to the Court.

The charge, as summarized in the trial court's judgment alleged that, on the 1/3/2017 at Olbil Village within Simanjiro District, at night time the appellant committed the two offences to a woman who we shall conveniently refer to as the victim or PW1.

These brief facts suffice to appreciate the essence of the appeal before the Court. On his verge to gain entry in the victim's house at about 03:00hrs on the fateful day, the appellant went to PW1's house pretending to be her son one Saitoti (PW2) and asked her to open the door for him saying *"Mama nifungulie mimi ni mtoto wako Saitoti"* and *"mama amka nipokee mtoto amezidiwa sana"*. Literally meaning that "*mother, open the door I am your son Saitoti*" and *"mother, wake up and help me hold my sick child*". Believing so, she opened the door only to find a man with long legs sitting on a log outside her house. Having realized that he was not her son, she hurriedly tried to close the door, alas, she was late and that man rushed and grabbed her, held her by the mouth and neck so as not to

allow her cry for help and laid her on the bed that was close to the door. As she did not wear an underplant, that man seized the opportunity to tear off the piece of sheet she was covering herself with and, while threatening to kill her if she was to raise her voice, inserted his male organ into her vagina and later into her anus causing her to discharge feaces continuously. Having satisfied himself, he asked the victim to tell him *"pole"*, that is "sorry" and *"asante"* that is, *"thank you"* which she did with pains and he then demanded to be served with food which she said she did not have. He pressed her to be given food which forced her to craw with pains to another room where food known as "makande" was and served it to the man in a plate with which that man left. She claimed to have identified that man when outside the house through bright moon light and also inside the house using a "koroboi" which she had lighted in her room to be Isaya Loserian, the appellant, who was a person she knew well as he used to pass by her house when going to his daily activities. As to how again she was able to see and identify the said man as being the appellant, she said that, after the incident the man stayed with her for a long time talking with her and asking her to tell him "pole" and "asante" and that even when leaving the house, he continued to threaten her not to cry

behind him. She went further to explain the attire he wore that night to be a coat having black and blue colour, pale black trouser which clothes the appellant wore on the day she testified and a *"rayoo"* Masai shoes which were different to those the appellant did wear the day she testified. Having quenched his sexual desire, that man left allowing opportunity for the victim, that very night and while dirty and crying, to go to PW2 to whom she reported the incident. PW2, on his part, informed the trial court that, on 1/3/2017 at 10.00hrs his mother (PW1) went to his residence crying and saying *"Saitoti mwanangu amkeni haraka nakufa"*, that is *"My son Saitoti quickly wake up am dying"* and named the appellant as being the person who ravished her. Assisted by two young men, PW2 managed to arrest the appellant at the place he was doing casual labour (weeding) who, however, unsuccessfully attempted to run away upon seeing them, and took him to the victim's house where he was shown the stool and he admitted raping and carnally knowing her against the order of nature. Then appellant was sent to one Lucas Luther Kingu (PW3), the Village Executive Officer, who issued them a letter to take the appellant to Mirerani Police Station. Thereafter, they sent the appellant to police station assisted by a militiaman. The victim was sent by police to the Mirerani

Health Centre where she was medically examined by Dr. Mushi who found sperms and bruise at her vagina and was discharging stool freely and he posted his findings in the PF3 (exhibit P2). PW3, whom the appellant was first sent while he was fine and without being threatened or forced and issued a letter (exhibit P1) to be taken to police station, told the trial court that the appellant admitted committing the offence of rape and carnal knowledge against the order of nature to the victim saying *"ndio nimefanya hivyo ila tulikubaliana"* that is, *"Its true I did so but we agreed to do so".* WP 8233 D/C Mariam (PW4) investigated the case and gave a summary of evidence as told by other witnesses.

The defence by the appellant was actually a total denial refuting all the allegations fronted against him. Apart from admitting that he knew the victim who he said was a drunkard woman with the background of killing her husband using a hoe, he attributed his being associated with the accusations with the grudges he had with PW2 for alleging that he was behind PW2's sale of his farm and testifying in court in a case against the victim after which the victim promised to do something bad to him. He also stated that his admission was induced by beatings by the militiamen and those who were with PW2 at PW3's office and dismissed the evidence by

PW2 that he attempted to run away claiming that he could have escaped had he truly committed the alleged offence. Finally, he claimed that his being charged was a result of PW3's failure to resolve the matter at his office. He, however, could not substantiate the accusation linking the victim with killing her husband.

To recapitulate, the appellant's liability on both counts was found impeccably established by the District Court resulting in his convictions and sentences. Such findings on the first count were not accepted by the High Court on first appeal. Relying on the Court's decision in **Marekano Ramadhani vs. Republic**, Criminal Appeal No. 202 of 2013 which cited the case of Simba **Nyangura Makapi vs. Republic, Criminal Appeal No. 144 of 2008** (both unreported), it was convinced that the first count was not established to the hilt for a reason that there was non-citation in the charge of a subsection specifying the category of offence of rape committed. No appeal lied against this finding. Save for that anomaly in the first count which the High Court treated as an incurable defect under section 388 of the CPA, conviction on the second count was sustained. It was satisfied that the conviction arose out of the testimonies by PW1 and PW5 with whom it agreed with the trial court that they were credible

witnesses. It also found as established that the appellant was properly identified at the crime scene by PW1 citing the cases of **Waziri Amani vs. Republic** [1980] T.L.R. 250, **Juma Marwa and @ Others vs Republic**, Criminal Appeal No. 91 of 2006, **Yohana Kulwa @ Mwigulu and 3 Others vs Republic**, Consolidated Criminal Appeals No. 192 of 2015 and 397 of 2016, **Horombo Elikaria vs. Republic**, Criminal Appeal No. 50 of 2013 and **Samwel Dickson & Another vs. Republic**, Criminal Appeal No. 32 of 2014 (all unreported) to support the finding. To that effect, the High Court observed at page 57 of the record of appeal that: -

> *"In his defence, the appellant admitted that he knew PW1 and her son PW2. Considering the time they spent together, also the fact that PW1 knew the appellant before and also the fact that soon after the incident had occurred PW1 went to PW2 and mentioned the appellant as the person who raped and sodomized her, I am convinced that the parameters established in* ***Waziri Amani vs. Republic*** *(supra) were met. I have no doubt that the evidence on the identification of the appellant was water tight."*

On the complaint that the trial court failed to consider the defence evidence, the High Court was of the finding that it was considered and that

exhibit P2 was properly admitted in evidence before arriving at the findings of guilt.

Eight grounds of complaints, recited hereunder, are relied on by the appellant to assail the High Court decision.

"1. *That, the first appellate Court erred in law and fact when it failed to see that the appellant's right of presumption of innocence until proven guilty under Article 13(6) (b) of the Constitution of Tanzania was violated by the trial Magistrate for declaring the appellant guilty right from the start of the judgment before his guilt was proven.*
2. *That, the appellant was convicted on a defective charge.*
3. *That, the first appellate Court erred in law and fact for failure to properly evaluate the evidence and in the result wrongly believed that the offence of unnatural offence was committed without enough proof and credible to support the allegation.*
4. *That, the Courts below erred to believe that, the appellant sodomised PW1 without seeing that the first report given to the village executive officer was only rape (kubaka) as evidenced in the caption and body of Exhibit P1 (the letter of executive officer). This casts doubt and exposes the prosecution case.*
5. *That, the two Courts below erred in law for failure to properly scrutinize Exhibit P2 (the PF3) and in the result wrongly believed that the appellant committed the charged offences as Exhibit P2*

was issued on February 2, 2017 before the alleged commission of the crime. This casts doubt and exposes the prosecution case.

6. *That, the two Courts below erred for failure to examine the credibility of PW1 and the prosecution's case in general, whereas the prosecution's case is loaded with grave inconsistencies and contradictions which cast doubt, the same should be resolved in favour of the appellant.*
7. *That, the lower Courts erred to believe that the appellant was properly and positively identified at the scene basing on identification evidence which is suspicious, incredible, unsatisfactory and below standard.*
8. *That, the two Courts below erred for failure to properly consider the appellant's defence which raises doubt on the prosecution case."*

Appearance of the appellant before us was in person as he had no advantage of being represented by an advocate, he fended for himself. As against that, the respondent Republic had a team of learned brains to represent it led by Ms. Tarsila Gervas Asenga, learned Senior State Attorney who was assisted by Ms. Tusaje Samwel Kapange and Ms. Tobiesta Chang'a, both learned State Attorneys.

Although unrepresented, the appellant, who had reduced his arguments in writing but did not lodge the same in Court as required in

terms of Rule 74 (1) of the Tanzania Court of Appeal Rules, 2009, he seized the opportunity to read them to us as a way of presenting his submissions.

Expounding ground one of appeal, the appellant attacked the learned trial magistrate by prefacing his judgment at page 30 of the record of appeal with statements which clearly showed that he was inclined to convict him quite in contravention of Article 13 (6) (b) of the Constitution of the United Republic of Tanzania which forbids one being treated as an offender. Ms. Asenga, who argued the appeal for the Republic, refuted the contention arguing that what is plain in the said page is simply narration of the evidence by the prosecution witnesses. Treating it as being aimed at convicting the appellant was a misconception, she argued. We have perused the record and satisfied ourselves that the learned trial magistrate had just recapped the evidence relied by the prosecution to secure a conviction as was presented in court. We accordingly agree with Ms. Asenga that the complaint is based on a misconception. The first ground of appeal fails accordingly.

There was no submission of the appellant in respect of ground two of appeal in which he complained of being convicted on a defective charge to

which the learned Senior State Attorney treated it as abandoned. Unfortunately, a copy of the charge was missing in the record of appeal to which fact the appellant acknowledged and expressed his readiness to treat the facts narrated by both courts below when prefacing their respective judgments as containing all the necessary information in the charge. Having examined those facts, Ms. Asenga was quick to argue that the second count to which the appellant's conviction was sustained by the High Court was in respect of unnatural offence contrary to section 154 (1) (a) of the Penal Code and the particulars as set out sufficiently informed the appellant of the offence he was facing that he had carnal knowledge of the victim against the order of nature. She urged the complaint be dismissed. Trite law is that, to render a charge defective, the contents thereof should lack necessary information stipulated under section 132 of the Criminal Procedure Act, Cap. 20 (the Act) thereby prejudicing the appellant in preparing a focused and well informed defence which culminates in occasioning an injustice to the accused as the Court stated in **Abdul Mohamed Namwanga @ Madodo vs. Republic**, Criminal Appeal No. 257 of 2020 (unreported) that: -

"It is our view that the citation of wrong penalty provision in the statement of offence in the instant case was not a violation of any express provision of the governing law, that is the CPA, but a necessity born out of laudable practice and case law. ***Even if it were so, it would still be curable under section 388 of the CPA as we are unpersuaded that the appellant in the instant case was prejudiced or embarrassed in preparing and mounting his defence. Nor is it discernible that a failure of justice was occasioned*** *because the punishment which was ultimately imposed on him was levied in terms of the law as the mandatory penalty."*

[Emphasis added]

[See also **Jaffari Salum @ Kikoti vs. Republic**, Criminal Appeal No. 370 of 2017 cited in **Onesmo Laurent @ Salikoki vs. Republic**, Criminal Appeal No. 458 of 2018 (Both unreported)].

We hasten to hold that the record of appeal supports the learned Senior State Attorney's assertion. At page 30 of the record, the learned trial magistrate prefaced his judgment with these words: -

"This is Simanjiro District Court in the Criminal Case No. 37/17 whereby the accused person one Isaya

s/o Loserian stand charged with two (2) offences Rape c/s 130 and 131 and unnatural offence c/s 154 (1) (a) both are of the Penal Code Cap. 16 R.E 2002.

It is alleged that, the above mentioned accused person on 13/3/2017 at Obill Village within Simanjiro District at night hours, did commit the above mentioned to one PW1."

In similar vein, at page 48 of the record of appeal, the High Court judgment repeated in almost similar words the above information. It is therefore plain that the information contained in the charge was informative enough of the offence the appellant was facing to enable him marshal a focused defence. The complaint stands dismissed.

On the third, fourth, sixth and seventh grounds of appeal which were argued jointly, it was the appellant's contention that had the victim been penetrated against the order of nature, exhibit P1 would have shown so to prove that the victim had complained so before PW3 who reduced the complaint in exhibit P1 which only showed that she was raped. Reacting, Ms. Asenga was of the view that exhibit P1 was just for forwarding the matter to the police station. It was her argument that the record is vivid that after his arrest, the appellant was taken to PW3 who issued a letter to

the arresting team so as to send the appellant to police. Not being a person who is mandated to frame a charge, it was not necessary for him to indicate in exhibit P1 all the accusations the appellant faced. Otherwise, that was a matter for the investigator upon the matter being reported to the police and investigated. The more so, PW2, PW3 and PW4 were clear that PW1 complained of having been ravished by the appellant against the order of nature which fact was confirmed by PW5 through medical examination, she stressed and discounted the complaint as unfounded deserving a dismissal.

In actual fact, a careful examination of grounds 3, 4, 5, 6 and 7, it would be realized that they raise one crucial issue for the Court's determination. It is whether or not it was the appellant who committed the offence. Going by the record of appeal, the only evidence linking the appellant with the commission of the offence of unnatural offence came from the victim (PW1), PW2 and PW5. According to PW1, the offence was committed at around 9.00hrs, which was at night. On the other side, the appellant flatly denied going to PW1's house on the fateful night. Therefore the question of identification comes at issue and hence the need for a clear evidence meeting the thresholds set in the often cited case of **Waziri**

Amani vs Republic (supra) on how the appellant was identified by PW1. Evidence relied on is visual identification and particularly by recognition. Trite legal stance is that such evidence is of the weakest nature and should not be relied on unless the court is satisfied that all possibilities of a proper and unmistaken identification are eliminated, that is to say the evidence must be watertight. Generally, night times are associated with darkness and the conditions are taken to be difficult and hence unfavourable for a proper and unmistaken identification. For assurance, the Court has occasionally insisted that the identification evidence must meet certain thresholds. In **Waziri Amani vs Republic** (supra) some guidelines were set out to include, but not limited to, time the culprit was under the witness's observation, distance (proximity) at which observation was made, the duration the offence was committed, and where the offence is committed at night, the source and intensity of light at the scene to facilitate a positive identification and whether the culprit was familiar to the witness. As aptly and rightly submitted by the learned Senior State Attorney, a star witness on this was PW1. Her account was that while she was asleep in her house, she heard a person calling her outside introducing himself as her son (PW2) complaining that his child was seriously sick and

she opened the door only to find a man with long legs sitting on a log which clicked to her head that the person was not her son and sought to close the door. But, was unsuccessful as that man hurriedly grabbed her, laid her on the bed and carnally knew her by inserting his penis into her vagina and later, against the order of nature causing stool to come out uncontrollably. It was her testimony that bright moon light outside and a lit kerosene lamp (koroboi) which illuminated the room aided her to identify the person as being the appellant. Another opportunity was when, upon satisfying himself, they had conversation with that man he identified as the appellant because he used to pass by her house when going to his casual work place, who then pressed her to say "pole" and "asante". Then, he asked for food and PW1 said had no food but he pressed and she moved with difficulties to where she had kept food known locally as "makande" which is a mixture of boiled maize and beans and gave it to him on a plate with which he left with. PW1 also described the attire he had worn that night as being a black and blue colored coat, pale black trouser and "rayoo" masai shoes, the ones he wore in court on 13/6/2017, save for the shoes. Although PW1 did not explain the intensity of light that came from the lamp and the moon which we take as a mere inadvertent omission, the

peculiar circumstances surrounding the commission of the offence in the instant case, dispels the chances of a mistaken identity of the appellant. The evidence by PW1 tells in details the sequence of events from gaining entry, ravishing her which act is committed by people being in contact, having conversation for some time after the incident and asking for food, it is evident that the incident took quite some time which could enable a person to see and identify a culprit even with a slight extent of light and particularly where, as is the case herein, the culprit was familiar to PW1. As to familiarity, the appellant, in his defence, admitted knowing the victim prior to the incidence. There is therefore every indication that there was enough light in the house otherwise we do not see how could the victim been able to give the appellant food in total darkness. To us, this is a clear indication that the identification evidence of PW1 was impeccable. That said, we should now hasten to point out that, PW1's testimony that she managed to identify the culprit as being the appellant in the room using kerosene lamp and while leaving the place by using moonlight, raises no doubt.

A follow up issue is whether PW1 was reliable in line with the Court's caution that victim's evidence in sexual offences should not be treated as a

gospel truth. Trite position is that every witness is entitled to credence unless proved otherwise by a cogent evidence (See **Googluck Kyando vs. R** [2006] T.L.R. 363) and that determination of credibility of a witness is the monopoly of the trial court although the same may be tested by an appellate court by assessing the coherence and considering it with evidence of other witnesses on the same incident. (see **Salum Mhando vs R** [1993] T.L.R. 170 and **Shabani Daudi vs Republic**, Criminal Appeal No. 28 of 2000 (unreported).

To begin with, neither of the courts below doubted the credibility of PW1 and her evidence was taken as being truthful. We see no good and cogent reason to interfere with such concurrent findings of fact. Hers was firsthand information and being a victim, her evidence was the best. (See **Selemani Makumba vs. R** [2006] T.L.R. 379). To add credence, PW1 reported the incident to PW2 instantly after the appellant had left and she named him as her ravisher which is a reassurance of her truthfulness [See **Jaribu Abdallah vs Republic** [2003] T.L.R. 271, **Marwa Wangiti and Another vs. Republic** [2002] T.L.R. 39 and **Swalehe Kalonga and Another vs Republic,** Criminal Appeal No. 45 of 2001 (unreported)]. PW2 immediately went to PW1's house and witnessed stool spread all over

round the room as a result of the unnatural offence committed which fact was corroborated by PW5 who examined PW1. The appellant's denial and allegation of having grudges with PW2 for being behind his farm being sold and the victim being a drunkard woman with a criminal record of killing her husband with a hoe and harbouring grudges against him because he testified against her in that case, could not shake such a strong prosecution evidence for two reasons. For **one**, the appellant's allegations were raised during defence case without them being raised when PW1 and PW2 testified so that they could be heard giving an account, hence were afterthoughts. **Two**, he was unable to substantiate them when tasked by the prosecution when he was cross-examined. In the circumstances, there was no possibility of a mistaken identity as alleged by the appellant and the cited case of **Issa Ngara vs. Republic**, Criminal Appeal No. 37 of 2005 (unreported) is inapplicable. In all, the evidence that it was the appellant who ravished PW1 against the order of nature is therefore impeccable.

There are two other issues to be discussed under the above grounds. **One**; both courts below wrongly relied on exhibit P2 because the same was issued before the commission of the offence and, **two**; that there

existed grave inconsistences and contradictions rendering the credibility of exhibits P1 and P2 doubtful.

The appellant's contention on the first issue was that, while exhibit P2 was filled and issued by police on 2/2/2017, the evidence on record was that the offence was committed on 1/3/2017. Ms. Asenga conceded to the infraction but was quick to argue that it was a mere slip of the pen by the one who issued it as PW2, PW3 and PW4 maintained in court that PW1 was taken to police on 2/3/2017 and was issued with PF3 (exhibit P2) so as to be taken to hospital. Even PW5, who examined PW1, filled it on 2/3/2017. Having comprehensively considered the prosecution evidence, there is no suggestion that the offence could have been committed in February, 2017. Hence, we agree with the learned Senior State Attorney that it was a mere slip of the pen. This ground fails.

We need not delve much on the complained inconsistences as they related to exhibits P1 and P2 on grounds already discussed above which we have made a finding that they are without merit. We leave it there and the complaint is dismissed.

Lastly, we shall consider ground eight (8) of appeal. It is about failure by both courts below to consider the appellant's defence evidence.

Initially, Ms. Asenga resisted this complaint, but on being prompted by the Court on the defence evidence at pages 32 and 60 of the trial court and High Court judgments, respectively, she could not afford maintaining her position and impressed upon the Court to step into the shoes of the High Court as it did in the case of **Athumani Mussa vs. Republic**, Criminal Appeal No. 4 of 2020 (unreported) and evaluate the defence evidence and was confident that it did not merit casting doubt to the prosecution evidence. Nothing was argued by the appellant on this complaint. All the same, we have examined the defence evidence, which as earlier demonstrated, constituted of a flat denial in the commission of the offence, a defence of alibi and grudges between him and bot PW2 and PW1. Save for the defence of *alibi*, following our findings above, the two remaining defences are without merit.

In his defence of ***alibi***, the appellant testifieded that he had ever not gone to PW1's home and that on 3/3/2017 he was at one Wasiwasi's house hanging tents ready for a marriage ceremony. When he was cross-examined, he admitted ignorance on how to raise such a defence. It is a glaringly truth that the defence of *alibi* was raised after the prosecution had closed its case and without giving notice. In terms of section 194 (4)

of the CPA and our decisions in **Marwa Wangiti vs Republic** (supra) and **Charles Samson vs. Republic** [1990] T.L.R. 39, a trial court, under section 194(6) of the CPA, may at its discretion either disregard it after taking note of it or accord less weight on it. In the instant case, there was complete omission to consider it without assigning reasons for disregarding it. We think, that was an error. But, exercising our mandate as first appellate court as we were invited by the learned Senior State Attorney to evaluate his defence, even if the defence of *alibi* would have been considered, as we have demonstrated above, the prosecution evidence through PW1 placed the appellant at the scene of crime which fact dispels its significance [See **Edgar Kayumba vs. Director of Public Prosecutions**, Criminal Appeal No. 498 of 2017 (unreported)]. The defence is therefore highly improbable. Further, it was established by the prosecution that the offence was committed on 1/3/2017 at night time not on 3/3/2017 the appellant claimed not to have visited PW1's house. The defence of *alibi* was therefore misapplied by the appellant on account that it is relevant or available to an accused person only when it suggests that he was not at the scene of crime at the time of the commission of the

charged offence. There is therefore no merit in this complaint and we dismiss it.

To round up, we are satisfied that the appellant committed the offence of unnatural offence against PW1 as charged and was rightly convicted and sentenced. The appeal is therefore without merit. It is dismissed in its entirety.

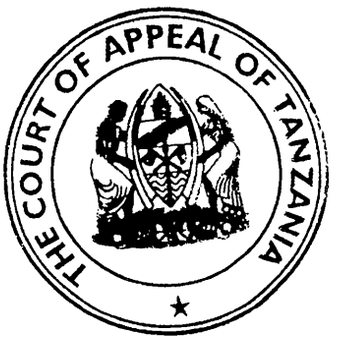
DATED at **ARUSHA** this 23rd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of the appellant appeared in person and Ms. Neema Mbwana, learned counsel for the Republic/Respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL