IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: KOROSSO, J.A., MWAMPASHI, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 296 OF 2020

DANIEL S/O MILINGA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Mrango, J.)

dated the 02nd day of April, 2020

in

Criminal Appeal No. 103 of 2019

.....

JUDGMENT OF THE COURT

11th & 15th March, 2024

MWAMPASHI, J.A.:

The appellant herein, DANIEL S/O MILINGA, was charged with and convicted of the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E. 2002; now R.E.2022] (the Penal Code) by the District Court of Sumbawanga at Sumbawanga (the trial court). Having been so convicted, he was sentenced to serve life imprisonment. His first appeal to the High Court against the conviction and sentence, *vide* Criminal Appeal No. 103 of 2019, was unsuccessful, hence the instant second appeal before us.

It was alleged before the trial court that, on 04.08.2019, at Nankanga/Mahameni Village within the District of Sumbawanga in Rukwa

Region, the appellant had carnal knowledge against the order of nature of a four (4) years old boy whom, in order to conceal his identity, we shall henceforth refer to as "SG" or "the Victim".

In its endeavour to prove the charge against the appellant, the prosecution, apart from relying on two documentary evidence, that is, the appellant's cautioned statement (Exhibit P1) and a PF3 (Exhibit P2), paraded a total of four (4) witnesses namely; G. 4770 D/C Fredy (PW1), Adolf Nombo (PW2), Paulo Ferdinand (PW3) and Bernard Gasper (PW4).

According to PW2, on 04.08.2019 at night hours, he heard a boy screaming from a certain house. His instincts led him to go to the house and push the door open and when he got in, he found the appellant and the victim. While the appellant was naked, the victim was bleeding from his anus. The appellant was then arrested. PW4 was the victim's father whose testimony was to the effect that, he was informed of what had befallen his 4 years old son, that is, the victim, who was born in 2015. He rushed to his house only to be told that the victim had been taken to the street chairperson. Upon getting at the house of the street chairperson he found the victim and observed that he had some discharge around his anus. PW4 further testified that the victim was then taken to the police post where a

PF3 was issued before he was referred to the health centre for medical examination.

On his part, PW1 testified that, on 05.08.2019, he was ordered by the OCS of Ilemba Police Station to record the appellant's cautioned statement and that the appellant confessed to have sodomised the victim. The cautioned statement which was tendered in evidence after an inquiry had been conducted, was admitted in evidence as exhibit P1. PW3 who was a clinical officer from Sololа Medical Centre told the trial court that he medically examined the victim on 06.8.2019 and observed that the victim had bruises around his anus. To that effect, a PF3, in which PW3 had posted his observations, was tendered and admitted in evidence as exhibit P2.

It should also be pointed out that there was an attempt by the prosecution to call the victim as a witness. However, the victim, undoubtedly due to his tender years, could not utter a word and was thus, discharged without testifying.

The appellant was a sole witness in his defence. In his defence on oath, he denied to have committed the offence against the victim stating that on the fateful date he was sick and was at the house of his boss when he saw the victim joining other children who were playing at a house belonging to one Samson Bernard. He claimed that sometimes later, PW2

approached him and accused him of having committed the offence against the victim which was not true.

After a full trial, based on the prosecution evidence, particularly on evidence of PW2 and the cautioned statement (exhibit P1), the trial court found the appellant guilty of the offence in question. The appellant was thus, convicted and sentenced in the manner we have allude to earlier. His first appeal having been dismissed by the High Court, the appellant has now preferred the instant second appeal on four (4) grounds of complaint which may be paraphrased as follows:

1. *That, it was an error for the conviction to be based on the cautioned statement which was doubtful and not supported by an extra judicial statement from a Justice of Peace.*
2. *That, the PF3 (exhibit P2) was improperly tendered and received in evidence.*
3. *That, the prosecution evidence was insufficient and did not support the conviction.*
4. *That the High Court did not re-evaluate the evidence on record in order to arrive at its own findings but instead it copied and pasted the evidence from the record.*

At the hearing of the appeal, whereas the appellant appeared in person unrepresented, the respondent/Republic was represented by Mr. Deusdedit Rwegira, learned Senior State Attorney.

When given the floor to argue his grounds of appeal, the appellant opted to let the learned Senior State Attorney begin by responding to the grounds of appeal first. He, however, reserved his right in rejoinder should the need to do so arise.

In his submission, Mr. Rwegira began by expressing his stance that he was not supporting the appeal. However, regarding the first ground of appeal on the cautioned statement (Exhibit P1), it was conceded by him that surely it was an error for the conviction to have been based on the cautioned statement which was recorded not within the prescribed period of four hours as required by the law. He thus, supported the first ground of appeal and urged us to expunge the cautioned statement in question from the record.

We find it more convenient to dispose of the first ground of appeal at this very stage. As rightly argued by Mr. Rwegira, according to section 50 (1) (a) of the Criminal Procedure Act, [Cap 20 R.E. 2022] (the CPA), the prescribed period within which an accused person should be interviewed by the police and his cautioned statement recorded, is four (4) hours counted from the time the accused person is placed under restraint in respect of the offence in question. It is stated under that provision that:

> *"50 - (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*

> *(a)Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offender;*

In the instant appeal, it is clear that though in his testimony PW2 did not mention the exact time when the appellant was arrested, there is undisputed evidence to the effect that he was arrested on 04.08.2019 during night hours. It is also evident from PW1 that the cautioned statement was recorded by him on 05.08.2019. Further, according to the cautioned statement (Exhibit P1), it was at 13:00 hours when it was recorded. That being the case, it is thus without doubts that, the cautioned statement in question was recorded beyond the prescribed period of four (4) hours in contravention of section 50 (1) (a) of the CPA.

It is trite law that a cautioned statement recorded not within the prescribed period of four (4) hours is liable for expunction from the record. There is a litany of authorities on this position including the decisions of the Court in **Iddi Muhidin @ Kibatamo v. Republic**, Criminal Appeal No. 101 of 2008, **Abdallah Ally @ Kalukuni v. Republic**, Criminal Appeal No. 131 of 2016 and **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017 (all unreported).

For the above reasons, the first ground of appeal is found meritorious. The cautioned statement (Exhibit P1) which, in the first place, ought not to have been admitted in evidence, is thus accordingly expunged from the record.

Regarding the second ground of complaint that the PF3 was improperly tendered in evidence it was submitted by Mr. Rwegira that, the same was properly tendered and admitted in evidence. He contended that though there was an objection from the appellant for the PF3 not to be admitted in evidence, no reasons were assigned by him and the trial court did therefore rightly overrule the objection. Mr. Rwegira did therefore urge us to dismiss the ground for being baseless.

Turning to the third ground of appeal, Mr. Rwegira argued that, as it was found by the two lower courts, PW2 was a credible witness whose evidence was strong to support the conviction. He pointed out that PW2 found the appellant naked in the room with the victim whose anus was bleeding leaving no any other conclusion but that the appellant had just sodomised the victim. Mr. Rwegira further argued that there was no reason to doubt PW2's credibility because some pieces of his evidence were supported by the appellant in his defence evidence. On this, he singled out the fact that in his defence evidence the appellant agreed to have been apprehended by PW2.

Finally, on the last ground of complaint that the High Court being the first appellate court did not re-evaluate the evidence on record to come at its own finding, it was submitted by Mr. Rwegira that the evidence on record was re-evaluated by the High Court. He contended that the High Court concentrated on the credibility of the prosecution witnesses, particularly that of PW2, and arrived at the conclusion that the witnesses were credible.

In conclusion, Mr. Rwegira prayed for the appeal to be dismissed because the charge against the appellant was proved to the hilt as required by the law.

In his brief rejoinder, the appellant just urged us to consider his grounds of appeal and allow the appeal. He insisted that he did not commit the offence against the victim and that the charge against him was not proved beyond reasonable doubt.

Having heard the submissions for and against the 2nd, 3rd and 4th grounds of appeal and also after examining the record of appeal, we are now in a position to delve into the said three grounds of appeal. On the 2nd ground of complaint that the PF3 was improperly tendered in evidence, we agree with Mr. Rwegira that the complaint is baseless. The record of appeal from page 17 to 18, clearly show that after being cleared for admission, the PF3 was tendered in evidence by the clinical officer one Mr. Paulo Ferdinand

(PW3) from Solola Medical Centre. This was the witness who medically examined the victim and who posted his observations and findings in the PF3. He was thus, the proper and competent witness to tender the relevant PF3 in evidence. Further, as also argued by Mr. Rwegira, the trial court properly admitted the PF3 in evidence and overruled the appellant's objection because the appellant assigned no reason as to why the PF3 could not be tendered and admitted in evidence. It is also clear on the record that after its admission in evidence, the contents of the PF3 were read over and explained by PW3. We thus, find no reason to fault the tendering and admission in evidence of the PF3. The ground is without merits and it is accordingly dismissed.

Before we turn to the third ground of complaint which, to our view, is central and decisive, let us first address the fourth ground of complaint which is to the effect that the High Court being the first appellate court did not perform its duty of re-evaluating the evidence on record and arriving at its own findings. In fact, this complaint should not detain us at all. Having examined the High Court judgment, we find it hard to agree with the appellant that, all what the High Court did, was to copy and paste the evidence from the record. As correctly argued by Mr. Rwegira, the High Court, while directing its mind on the question whether the charge against the appellant was proved to the hilt or not, re-evaluated the evidence on

record. After assessing the testimony of the prosecution witnesses, the cautioned statement (exhibit P1) and the defence evidence, as it can be seen at pages 61 to 64 of the record of appeal, the High Court was satisfied that, based on the totality of the prosecution evidence, the charge against the appellant had been proved beyond reasonable doubt. We thus find the fourth ground of complaint baseless and dismiss it.

Turning to the third ground of complaint that the prosecution evidence did not support the conviction, we would, at the first place, restate the settled practice of the Court that in a second appeal, the Court cannot interfere with concurrent findings of facts by the two lower courts, unless the findings are unreasonable or unless it is evident that some material points or circumstances were not considered by the two lower courts. See- **Mohamed Juma @ Mpakama** (supra) and **Masumbuko Charles v. Republic,** Criminal Appeal No. 39 of 2000 (unreported).

Mindful of the above, and in the absence of the appellant's cautioned statements (Exhibit P1) which we have already expunged from the record, and considering the fact that based on the evidence of PW3, PW4 and the PF3 (Exhibit P2) it cannot be doubted that the victim was sodomised, the only issue for our determination is whether the remaining prosecution evidence on record, prove beyond reasonable doubt that it was the appellant

who sodomised the victim. Since the victim did not testify, the only evidence calling for our careful scrutiny is that of PW2.

The two lower courts concurrently found that PW2 was a credible witness and that his evidence which is to the effect that he found the appellant naked in the room with the victim who was bleeding from his anus, proved beyond reasonable doubt that it was the appellant who committed the offence against the victim. While we have no reason to fault the finding that PW2 was a credible witness, we are, however, not in agreement with the two lower courts that, taking into consideration his testimony and the circumstances of the case, the allegation that it was the appellant who sodomised the victim was proved beyond reasonable doubt. For ease of reference, we find it apt to reproduce in full, PW2's testimony as found at page 16 of the record of appeal, as here under:

> *"I am living at Nankanga village dealing with fishing activities. On 04.08.2019 I was at Nankanga village. It was during the night hours, I heard alarm of a child who was about (sic) to cry. I responded the said house but the said house was closed, I pushed door of house, I saw the accused person was naked, I saw the victim was with blood on his anus, actually when I saw the accused in the said room was on the case (sic) to commit the said offence was few paces, two paces. The accused person was arrested. That I*

know the accused person prior the incident he is working with Malela. That is all".

When cross-examined by the appellant, PW2 stated that:

"I heard alarm of the child, a child was crying door was close I pushed door using my legs (mateke) I saw you on the case (sic) to commit the alleged offence you were naked indeed. I was about few paces, two paces you were in the room with the victim. That is all".

To our considered view, the above reproduced testimony of PW2 leaves a lot to be desired on the issue whether it was the appellant who sodomised the victim. One, as the incident happened at night, PW2 did not tell if there was light in the room to enable him see and observe that the appellant was naked and that the victim was bleeding from his anus. Two, while the two lower courts had it that the appellant was arrested and taken to the street chairperson by PW2, in his testimony, PW2 did not explicitly state that he is the one who arrested and took the appellant to the street chairperson. PW2 is on record just stating that "*The accused person was arrested.*" He did not tell who arrested the appellant. It is therefore not known who arrested and took the appellant to the street chairperson. Worst still, the street chairperson who could have told the court as to who took the appellant before him was not called to testify. Three, it is not known

and no explanation was given as to why and how PW2 single handedly handled the case at the scene of crime without the involvement of neighbours or any other people. Though in saying so we do not mean that PW2 could not have handled the case alone, we are of a considered view that from the nature of the incident in question and the circumstances of the case, the possibility of the incident not attracting neighbours was minimal. In short, PW2's testimony does not give a clear sequence of what really happened hence leaving a lot to be desired in as far as the coherence of his testimony is concerned.

It is for the above explained reasons and circumstances that we find that, under the circumstances of this case and in the absence of the victim's evidence, PW2's evidence was porous and insufficient in proving that it was the appellant who sodomised the victim. The charge against the appellant was thus, not proved beyond reasonable doubt. Finding so does not, however, mean that we are not mindful of the settled position that conviction can be founded in the absence of victim's evidence. Our decision is based on peculiar circumstances of the case as we have endeavoured to explain above and also on the principle that each case has to be decided largely on its own facts and also that the core function of courts is to ensure that justice is done in every case not only to the victims of crimes but also

to the accused persons. See- **Wambura Kiginga v. Republic**, Criminal Appeal No. 301 of 2018 (unreported).

All said and done, we find the third ground of appeal meritorious. The charge against the appellant was not proved to the hilt as there was no sufficient evidence to prove that it was the appellant who sodomised the victim. We accordingly allow the appeal, quash the conviction and set aside the sentence imposed on him. We further order the appellant be released from the prison forthwith unless he is otherwise lawfully held.

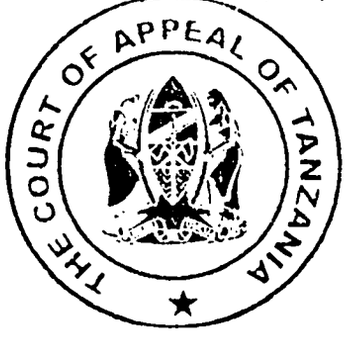
DATED at **SUMBAWANGA** this 14th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The judgment delivered this 15th day of March, 2024 in the presence of the appellant in person unrepresented and in the presence of Mr. Kizito John Kitandala, and Ms. Hongera Malifimbo, both learned State Attorneys for the respondent/Republic is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL