IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

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

CRIMINAL APPEAL NO. 268 OF 2020

RAPHAEL S/O PETER.....APPELLANT

VERSUS

THE DPP.....RESPONDENT

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

(Mrango, J.)

dated the 22nd day of April, 2020

in

Criminal Appeal No. 102 of 2019

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JUDGMENT OF THE COURT

12th & 18th March, 2024

MASOUD, J.A.:

This is a second appeal in which the appellant is challenging the concurrent findings of facts of the two lower courts that found him guilty of the offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, [Cap. 16 R.E 2019 now R.E 2022]. The appellant was as a result sentenced to the mandatory life imprisonment. The appellant was charged with the offence, following the accusation that he sodomised his step son (hereinafter, the victim), when he left home with the victim in the fateful evening of 14th December, 2018, on the pretext of taking him to a

shop to buy him some sweets, whilst leaving behind his wife, one Agnes Japhet (PW1) who is the mother of the victim.

The substance of the prosecution evidence is from (PW1). The other evidence is from Stanley Amon Laibon, the clinical officer who examined the victim (PW2), and WP 10873 D/C Dicta who investigated the case from 17th December, 2018 (PW3).

It is on the record that PW1 testified that the appellant having left home with the victim, they delayed coming back home. When they later on came back, the victim remained outside behind the house, whilst bitterly crying. She curiously approached him. She took the trouble of physically examining him, only to find out that blood was oozing from his anus, which had noticeable bruises around it, suggesting that the victim had just been sodomised.

PW1 inquired from the appellant as to what had happened to the victim who was in his care when he left with him to go to a shop to buy some sweets for him. She did not get a plausible response from the appellant who only said, whilst shivering, that the victim had been playing with other children. Meanwhile, the appellant, according to PW1, attempted to escape, but he could not get anywhere as he was arrested by the villagers. Immediately thereafter, PW1 reported the incident to the police where she was given PF3 and right away took the victim to Katavi Referral Hospital for medical examination.

The evidence of PW1 is reinforced by that of Stanley Amon Laibon (PW2), the clinical officer, who medically examined the victim on the same day of 14th December, 2018 at 21:22 hrs, and found bruises around the anus, blood, large laceration and stool, suggesting that the victim had indeed been penetrated through his anus by a sharp and blunt object. PW2 tendered PF3 which he completed just after the examination and which was admitted as exhibit P1.

Apart from PW1 and PW2, there was evidence of PW3 who investigated the case from 17th December, 2018, when the appellant was already in custody. It is her testimony that she was, in the course of her investigation, told by PW1 what had happened on the fateful evening and how PW1 discovered that the victim had been carnally known after leaving and coming back home with the appellant.

In his defence, the appellant, testifying as DW1, denied the allegation, saying that the case was just framed up against him. He testified however that he did not have grudges with PW1. He admitted that in the fateful evening he also saw that the victim had anal injuries from which blood was oozing which suggested that he was sodomised. Testifying for the defence, Donard Jonas (DW2) also admitted to have witnessed the victim bleeding from his anus. He testified further that PW1 told him that it was the appellant who sodomised the victim, although he personally could not confirm whether or not it was true.

Having considered the prosecution and the defence evidence, the trial court found that the prosecution had proved the case against the appellant beyond reasonable doubt. It found that the appellant's defence did not raise any reasonable doubt in the prosecution evidence. Such findings as to the culpability of the appellant were upheld by the High Court sitting as the first appellate court. It is crystal clear from the findings of the two lower courts that the cogent evidence of PW1 that, the appellant was with the victim when the latter was sodomised pointed to only one hypothesis that the appellant is culpable, for he could not, by virtue of the testimony of PW1 and the appellant (DW1) in the trial court, give a plausible explanation to exculpate himself from being responsible for the commission of the offence. It is equally clear from the record that the evidence of PW2, who examined the victim immediately after it was known that the victim was sodomised, was found by the two lower courts to corroborate the evidence of PW1.

Aggrieved by the decision of the High Court, the appellant brought the second appeal. He raised a total of thirteen (13) grounds of appeal. Out of those grounds, three (3) were from the initial memorandum of appeal and ten (10) were from the supplementary memorandum.

After considering the thirteen (13) grounds in the light of the oral submissions made by Mr. Deusdedit Rwegira, learned Senior State Attorney for the respondent in reply to the grounds of appeal adopted by the

appellant for purposes of the hearing of the appeal, and the subsequent rejoinder by the appellant, urging the Court to favourably consider his grounds of appeal and allow the appeal; we were settled that the substance of the grounds is on the following main complaints which we paraphrased thus:

One, failure of the first appellate court to consider the evidence as a whole, instead of relying on the opinion of the State Attorney and ignoring the defence evidence. **Two**, failure of the prosecution to procure the victim as a witness. **Three**, failure to call villagers or local leaders as witnesses to prove that the appellant attempted to run away. **Four**, the age of the victim was not proved because his birth certificate was not tendered in evidence. **Five**, exhibits were illegally admitted as no trial within a trial was conducted. **Six**, the prosecution case was based on mere assumption, contradictory circumstantial evidence, and did not establish the time and place where the offence was committed. And **seven**, the charge was not proved beyond reasonable doubt.

As we pointed out above, the appellant did not have much to say other than adopting his grounds of appeal for the purpose of the hearing of the appeal and leaving Mr. Rwegira, to submit in reply whilst reserving his right to rejoin if need be. We will now consider the substance of the grounds which is, as alluded to herein above, reflected in the complaints which we paraphrased above.

On the failure of the first appellate court to consider the evidence as a whole, instead of only relying on the opinion of the State Attorney and ignoring the defence evidence as complained by the appellant, we took the liberty to scrutinise the impugned judgment. In our resolve, we find ourselves unable to agree with the appellant.

It is clear from pages 40 up to 59 of the record of appeal that the learned Judge considered in his judgment the arguments made by the parties on the grounds of appeal raised by the appellant. In his evaluation and analysis, the first appellate court Judge found that all the grounds of appeal raised by the appellant hinged on the issue whether the charge was proved beyond reasonable doubt.

The first appellate court judge at pages 51 and 52 of the record of appeal considered the arguments made by the appellant highlighting that they were characterised by attacking the credibility of PW1 whose evidence, according to the appellant, was not corroborated by any other piece of prosecution evidence. It is equally on the record that the trial court looked at the argument by the appellant that PW2 should not be regarded as a credible witness as he did not tell the trial court anything about his work experience.

It was after analysing the rival arguments by both parties in relation to the grounds of appeal and the evidence on the record that the learned Judge came up with his own findings and conclusion as is evident from

pages 54 to 59 of the record of appeal. In so doing, the learned judge also relied on a number of authorities including **Makungure Mtani v. Republic** [1983] T.L.R. 179-80 as to the inference which must be drawn from the failure of the appellant to give a plausible explanation regarding the incident. The failure, according to the learned Judge, cannot in the circumstances exonerate the appellant from being the one who sodomised the victim. We are thus in agreement with Mr. Rwegira that the complaint has no merit. Accordingly, we dismiss it.

The appellant complained on the failure of the prosecution to procure the victim as one of the prosecution witnesses and cited the case of **Selemani Makumba v. Republic** [1990] T.L.R. 379 in fortification. We understood the appellant as arguing that the failure to call the victim as a witness was fatal as in sexual offences the best evidence comes from the victim. It is indeed the position of the record of the trial proceeding that the victim was not amongst those who testified for the prosecution case.

It is however on the record that the victim was brought at the trial court in the course of the proceedings whereby it was established that the victim due to his tender age could not testify. The relevant part of the trial proceedings at page 15 of the record of appeal speaks for itself as to what transpired without being objected to by the appellant. The record reads thus:

S/A: *The victim in this case is a child aged 2 years, therefore he cannot testify. I just pray the honourable court to see him.*

Accused: *I have seen the boy, he is my son.*

Court: *A child namely Abinely s/o Reonard aged 2 years who is a victim in this case was brought by her mother Agnes d/o Joseph, and seen by the court, he cannot speak due to his age.*

Sgd

16/7/2019".

According to the learned Senior State Attorney the failure to procure a victim of sexual offence as a witness, as was in this case at the trial, is not necessarily fatal to the trial proceeding, neither does it render a relevant charge unproved, since the evidence adduced by PW1 and PW3 whose credibility was not dented was quite sufficient to ground the conviction as was found by the two lower courts. He relied on **Issa Ramadhan v. Republic**, Criminal Appeal No. 409 of 2015 (unreported) where this Court dealt with a similar complaint and in resolving it, the Court held that conviction can properly be sustained independent of the evidence of the victim. In that case, this Court was guided by the position we took in our earlier decision in **Haji Omary v. Republic**, Criminal Appeal No. 307 of 2009 (unreported) where we held that:

"The law recognises that there are instances where charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased. Senility, tender age or disease of mind may prevent a victim testifying in court (see section 127 of the Evidence Act) but this does not mean that a charge sheet cannot be proved in the absence of the victim's testimony. In this case, the victim was a four year old child. He was indeed a child of tender age. Though we agree that ideally the reason for the non-taking of the testimony of the victim should have been entered on record however such failure neither weakened the case for the prosecution nor resulted in a failure of justice".

In the light of the foregoing, we find the appellant's complaint that the case against him was not proved because the victim did not testify to be misconceived and baseless. After all, as per the guidance emerging from the above cited case of **Haji Omary** (supra), the non-taking of the testimony of the victim due to his tender age, which was not objected to by the appellant, is evident in the record of the trial proceeding as alluded herein above. Indeed, what is important is the credibility of a witness and weight of evidence. For that matter, therefore, the court can ground a conviction by relying on the evidence of a single witness if the court believes in his credibility, competence and demeanour as was clearly stated

and held in **Bakari Hamis Ling'ambe v. Republic**, Criminal Appeal No. 161 of 2014 (unreported). Accordingly, we dismiss the complaint for lack of merit.

As for the complaint about the failure to call villagers and local leaders as witnesses to prove that the appellant attempted to run away, we were rightly so in our view referred to the provision of section 143 of the Evidence Act, [Cap. 6 R.E 2022] to the effect that there is no specific number of witnesses required for the prosecution to prove any fact. It was then argued by the learned Senior State Attorney, rightly so in our view, that what matters is the credibility of the prosecution witnesses, namely, PW1, PW2 and PW3 and not that villagers or local leaders should have been called also to testify. In so far as the learned Senior State Attorney was concerned, the villagers and local leaders were not material witnesses. As such, there was nothing material that would have been adduced by them had they been called to testify over and above what came from the testimony of PW1, PW2, and PW3.

In our resolve, we considered the rival arguments whilst mindful that the complaint was with respect to failure of the prosecution to call villagers or local leaders to prove that the appellant was arrested by the villagers when he attempted to escape. The specific complaint is that those who were alleged to arrest him as he was allegedly attempting to escape should have been called to prove that allegation. While we appreciate the

submission made on the complaint by the learned Senior State Attorney, we think we need not take much time on it because of the following points which render the complaint meritless.

In the first place, the fact that the appellant was arrested by villagers was amongst the facts which were not in dispute if we go by memorandum of facts not disputed found at page 11 of the record of appeal. Since such fact was not contentious, there was no point in calling such witnesses to prove it. In the second place, it is evident at page 16 of the record of appeal that the appellant did not cross-examine PW1 on the evidence concerning him being arrested by villagers as he was attempting to escape. It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence. See, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (unreported). We thus entertain no doubt that the appellant accepted the fact that he was indeed arrested by the villagers as he was about to escape. This fortify what we stated earlier that there was no need of the prosecution to call those villagers or local leaders as there was nothing contentious to be established. We dismiss the complaint and hold that there is no adverse inference that needed to be drawn against the prosecution case for failure to call such witnesses as they were not material to the case.

On the complaint that the age of the victim was not proved because birth certificate of the victim was not tendered in evidence, Mr. Rwegira referred us to the evidence of PW1 that the victim was born on 14th April, 2016 which meant that he was just about two years old when he was allegedly sodomised and when the trial took place. At pages 15 and 16 of the record of appeal, there is indeed such evidence from PW1 which was never cross-examined upon and therefore not controverted by the appellant. Guided by the established position as to failure to cross-examine on an important matter alluded to herein above, we entertain no doubt that the appellant accepted the evidence of PW1 that the victim was then two years old. There was therefore no need for the birth certificate to be tendered in evidence to prove that the victim was a child of tender years. In fact, the testimony of PW1, the mother of the victim, on the date of birth of the victim was sufficient and the best evidence. We hence forth dismiss the complaint.

The complaint that exhibits were illegally admitted as there was no trial within a trial that was conducted is misconceived and should equally not take much of our time. We say so because the only exhibit admitted at the trial was the PF3 (exhibit P1). It was admitted without objection from the appellant as is evident at page 18 of the record of appeal and PW2 was not cross-examined on it. More importantly, PF3 does not fall within the category of documents such as cautioned statements or extra-judicial

statements which once they are objected to in a particular manner, a trial court must conduct an inquiry or trial within a trial as the case may be, to establish whether or not they were voluntarily recorded. For such reasons, the complaint fails and is herein dismissed.

The other complaint was that the prosecution case is based on mere assumption, contradictory circumstantial evidence, and did not establish time and place where the offence was committed. As to when the offence was committed, the learned Senior State Attorney relied on section 234(3) of the Criminal Procedure Act, [Cap. 20 R.E 2022] to invite us to specifically ignore the complaint on the time of the commission of the offence. It was argued in addition that the issue of time was of no relevance since the initial charge found at page 2 of the record of appeal was amended and replaced with another one found at page 4 in which the time of the commission of the offence was not specified. In any event, it was argued, the omission if at all was not fatal as it does not go to the root of the case.

We paid serious attention to the details of the record of trial proceedings in the light of the complaint and the arguments by Mr. Rwegira. It is indeed the position of the record that the charge was replaced with another one that did not specify the time. Nonetheless, our scrutiny of the record of trial proceedings found nothing contradictory as to the issue of time and place of commission of the offence. PW1 who was the material witness of the prosecution and whose evidence was never

controverted by the appellant, was categorical that the appellant left with the victim at around 18:00 hrs going to a shop. When they came back a while later, she discovered that the victim was sodomised. The evidence was corroborated by PW2 who examined the victim at 21:22 hrs on the same day. In so far as this evidence was not controverted by the appellant, we find the complaint as to time and place not only misconceived but also misplaced. We dismiss it.

As to the other aspects of the complaint on the evidence of the prosecution, we are mindful that the appellant's complaint is that the prosecution case was based on mere assumption and contradictory circumstantial evidence. While Mr. Rwegira agreed that conviction was founded on circumstantial evidence, he disputed that the evidence was contradictory and therefore not reliable and also disputed that the case was based on mere assumption.

With respect to the complaint, we considered it in the light of the rival arguments, and the evidence on the record whilst mindful of the principle governing determination of credibility of a witness applicable to a second appellate court as restated in **Shaaban Daudi v. Republic**, Criminal Appeal No. 28 of 2001 (unreported). We thus assessed the coherence of the testimony of PW1 as we also considered it in relation to the evidence of PW2, PW3, DW1 and DW2.

We did not find that the evidence of PW1 contradicted with the testimony of PW2 and PW3. We did not also find that the evidence was controverted or dented by DW1 and DW2. Rather, we found that the evidence is overwhelmingly consistent and coherent as to the fact that the victim was sodomised in the fateful evening of 14th December, 2018 at around 18:00 hrs; that shortly before the victim was sodomised, the appellant had left home with him leaving behind PW1; that when they came back home, the victim was found by PW1 to have been sodomised; that there was no plausible account from the appellant exonerating himself from the commission of the offence or explaining the circumstances pertaining to what had happened to the victim whilst under his care away from home; that the appellant was arrested by villagers as he was about to escape; and that the victim was examined by PW2 on the same day at 21:22hrs and the examination confirmed that his anus was penetrated by a sharp and blunt object which suggested that he was sodomised. With such evidence, it is no wonder that Mrango, J. (as he then was) at pages 4 and 5 of the record of appeal, held that:

> *In the light of the above testimony, it goes without a dispute that the appellant was the one who was with the victim. It is on record that the appellant picked the victim at the premise of PW1 who was also there and they went together at the shop to buy some sweet as hinted upon. They then*

disappeared for a while before they returned back to the premise of PW1. PW1, a mother of the victim, saw the victim bitterly crying. And upon her physical examination she made to the victim, she discovered that the victim was discharging blood from his anus. She also saw some bruises on it. Again, PW1 asked the appellant to explain what happened to the victim, but the appellant failed to account for such situation of the victim of crime, instead the appellant remained silent and shivering. This court is of the view that in those circumstances of facts inference is drawn to point to the guiltiness of the appellant as facts at hand excludes all other possibilities of another person to have sodomised the victim other than the appellant. In the absence of a plausible explanation from the appellant regarding the incident of the victim, the appellant cannot exonerate himself from being the person who sodomised the victim as per the case of ***Makungire v. Republic*** *[1983] T.L.R. 179-180".*

(Emphasis added).

On the basis of the prosecution evidence on the record, it is clear to us that there is no room for other hypotheses other than one pointing exclusively to the appellant as the culprit. We proceed without hesitation therefore to dismiss the relevant complaint.

Our findings herein above equally answer in the affirmative the issue as to whether the charge was proved beyond reasonable doubt, and confirm further that there is nothing of substance from the grounds raised by the appellant that would entitle the Court to interfere with or disturb the concurrent findings of facts of the two lower courts as to the inculpability of the appellant.

As the appeal is without substance for reasons stated herein above, we dismiss it in its entirety.

DATED at **SUMBAWANGA** this 16th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgement delivered this 18th day of March, 2024 in the presence of the appellant in person/unrepresented and Ms. Hongera Malifimbo, Ms. Atupele Makoga, 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