IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 70 OF 2017

(Originating from Arusha Resident Magistrates' Court, Criminal No. 403/2016)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

SAROTA ALLY @ BABA KELVIN.....RESPONDENT

JUDGMENT

Date of Last Order: 08/06/2018

Date of Judgment: 13/08/2018

Before: MOSHI, J

The respondent herein was charged before the Resident Magistrates Court of Arusha with unnatural offence c/s 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E 2002. The Particulars of the offence stated that, the respondent herein on diverse dates of January to August, 2016 at Kijenge Mwanama area within the City and Region of Arusha, did have carnal knowledge to the victim KELVIN S/O AMAN a boy of nine (9) years old against the order of nature. After full hearing, the trial Magistrate found the respondent not guilty of the offence that he was charged with; hence he was acquitted.

It was the prosecution case before the trial court that, sometimes in March, the victim's parents were informed by teachers that the victim has been stubborn and he was not attending school, while he normally left home and the parents knew that he was going to school. Thereafter, the parents started to make a follow up and according to PW2 on 1/9/2016 the victim told her that he has been sodomized by the respondent. The victim (PW1) told the trial court that, one day he went to school with his friends but they were late hence the teacher chased them away; one of his friend went back home but he, with one John went to play at PPF grounds. When praying, John left out for a short call and delayed to come back; hence PW1 went out to look for him. That is when he met the respondent in the company of other two people. The other man, an Indian gave PW1 1000/= and then the respondent told PW1 to meet him at Msikitini (At the mosque). On the next day in the evening he met the respondent at Msikitini where the respondent took him at the hiding place, undressed his clothes and then sodomized him. He felt pain but he was threatened by the respondent not to tell anyone or else he will kill him. PW1 testified that the respondent had done that act several times. He started doing it since the time when he was in standard III but he never told his mother. PW2 inspected PW1 and she found some wounds outside his buttocks and his anus was enlarged. On 1/9/2016 they reported the incident to the Village Chairman and the Village Chairman gave a letter to report to Police Station where they were given a PF 3 and the child was taken to Mt. Meru Hospital. Thereafter the accused was arrested. PW3 is the doctor who examined PW1. He discovered some bruises on his back and his anus. He

found his anus *sfinta marsos* were loose that entails that he has been sodomized several times. He also filled the PF 3 which was admitted before the trial court as exhibit P1. PW4 investigated this case. He examined the victim and visited the place where the respondent used to sodomize PW1.

On defense, DW1 denied to have committed the offence. He stated that the case is planted against him based on revenge and malice from PW2 following a sexual relationship between them which stopped after the respondent discovered that PW2 was married. He also called three witnesses DW2, DW3 and DW4 to support his defense.

After full hearing, the trial Magistrate found that the defence evidence raised doubt against the prosecution; and that the doubt was not cleared; hence the court found that it could not rely on uncorroborated evidence of the victim (PW1) and acquitted the respondent. Hence, this appeal basing on the following grounds.

1. That, the trial Magistrate erred in law and fact after failed to evaluate the evidence adduced by the prosecution side.
2. That, the trial Magistrate erred in law and fact after acquitting the accused person while the case has been proved beyond reasonable doubt.

Before this court the appellant was represented by Kwetukia learned State Attorney while the respondent appeared in person and unrepresented. The court ordered the appeal to be disposed of by way of written submission and both parties filed their submissions accordingly.

Arguing the first ground of appeal, learned State Attorney submitted that the victim PW 1 one Kelvin Amani Mwarrengo testified that he was severally being sodomized by the respondent and referred this court on page 10 and 11 of the proceeding of the trial court where PW 1 testified as follows:-

> *"He was turning me back then undressing my clothes and then took his penis and ptu it between my buttocks. It was feeling pains. He was laying on top of me on my back then he put his penis into my anus. He has done this several times.... He started doing it since I was in standard (iii).....He has done the act five times when I was in standard (iv)...".*

He further submitted that, when PW 1 was cross examined he stated that the respondent threatened to kill him if he would tell any person what was going on between them. He stated that, the testimony of PW 1 is corroborated by the testimony of PW 3 a medical officer who conducted medical examination to the victim. He referred this court to page 16 up to 18 of the trial court proceedings where PW3 testified that he discovered that PW 1 had some bruises on his anus where he stated that;

> *".....I discovered that have some bruises on his back and his anus. Some of those bruises where showing that he got those bruises few days back like 4 days and others bruises were for long time which had already been affected. In his anus sfinta marsos were loose and that entails that he has been sodomized several times..."*

He further contended that, from the evidence at hand the trial magistrate erred in law and fact after he failed to evaluate the evidence that was adduced by the prosecution side by holding that, the testimony of PW 1 was not corroborated by any other independent witness. He said that, even if the evidence of PW 1 was required to be corroborated the law is so clear when it comes to the offences involving sexual offences and he cited section 127 (7) of the Evidence Act [Cap. 6 R.E 2002] which provides that;

> *"Notwithstanding the preceding provision of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of the sexual offence...notwithstanding that such evidence is not corroborated, proceeding to convict..."*

He further stated that, the above provision of the law was interpreted by the Court of Appeal in the case of **Omary Kijuu vs The Republic,** Criminal Case No. 39 of 2005 (unreported) where it was stated that;

> *"...Amended section 127 of the Evidence Act, 1967 by adding sub section (7). That amendment allowed conviction of rape even of uncorroborated evidence if telling nothing but the truth as in this case..."*

He stated that, PW 1 in this matter is a child of tender years and the court found him to be reliable witness following the *voire dire* conducted upon him. As to whether PW 1 identified the respondent; he submitted that, that fact had been proved beyond all reasonable doubt as the offence was

conducted during the day time, therefore there in no mistaken identity. He contended that PW 1 identified the respondent by calling him his name and referred this court to page 10 of the proceedings where PW 1 identified the respondent as Baba Kelvin. Thereafter he described the whole process from when the respondent used to take him to the hidden place, undressing him and sodomized him severally. He further invited this court to the decision of Court of Appeal in the case of **Omary Kijuu vs The Republic** (supra) where the court had the following to say:-

> *"Next is the question of identification, that is whether the appellant was properly identified at the scene of crime. PW 1 described the whole process from when the appellant forced..."*

He said, in the case at hand PW 1 indeed described the whole process from when the respondent used to take him to the hidden place, undressing him and sodomized him severally and how the respondent used to threaten him if he would have divulged what was going on between them. He further submitted that, the respondent's defense that this is the cooked-up case does not hold water because when PW 2 was testifying nothing arose during cross examination to the effect that PW 2 and DW 1 had sexual relationship and the same had been broken and that PW 2 promised to revenge against the respondent. He said that, the Court of Appeal of Tanzania had once come across a situation like this in Criminal Appeal No. 103 of 2006 between **Nyeka Kou vs The Republic** (unreported) where the court had the following to say:-

".... the Appellant has told us that he was not in good terms with the couple and that they implicated him falsely with the crime of rape. We think this belated defence which was not given as evidence at the trial is an afterthought....."

He thus contended that, the defence by the respondent in this matter is an afterthought as there was no question put forth to PW 2 in regards to the existence of conflict as between PW 2 and DW 1.

Submitting on the second ground of appeal, he submitted that this case had been proved in the standard required by the law i.e. *"proved beyond reasonable doubt".* He stated that there is the testimony of the victim and the doctor who attended the victim. The offence had been committed during the day light so the issue of identification has no room. There is also PF – 3 which was admitted as exhibit P1 which proves that PW 1 had been sodomized. He contended that, in totality of the whole testimony and evidence tendered there is no doubt that the respondent had committed the offence charged. Therefore, he prayed this court to allow appeal by quashing the decision of the trial court and set aside the acquittal order and find that the respondent guilty of the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E. 2002] and sentence him accordingly.

Opposing the appeal, the respondent in reply to the first ground of appeal submitted that in her evidence in court PW2 who is the mother of the victim stated at page 13 of the typed proceedings that;

"we started to make follow ups and on 1/9/2016 we discovered that our son has been raped by Baba Kelvin"

Further on page 17 of the typed proceedings PW3 who is a Doctor said;

"On 8/9/2016 among the patients I treated was Kelvin Amani who has brought (sic) to the hospital as a client (sic) who came as the suspect (sic) case of sodomy (sic).

That means the victim was taken to the hospital eight (8) days after his mother had discovered that he was sodomized. He said, there is no any reason as to why the boy was not taken to hospital immediately after the discovery of sodomy incidence on 1/9/2016. PW3 emphasized at page 18 of the typed proceedings that;

"I was the one who signed on 08.09.2016 day (sic) received the child even the stamp show (sic) I signed on 08.09.2016 about the rubbing (sic) may be I did write a number mistakenly but that change (sic) was made by me"

He stated that, that means 8 days later is when the victim was taken to hospital.

Further PW3 at page 17 of the typed proceedings stated that;

"Some of those bruises were showing that he got those bruises few days back like 4 days and other bruises were for a long time which had already been affected"

He contended that, the evidence created a lot of doubts as to who committed that act (if any) since the victim remained with his mother for eight (8) days without being examined by doctor. He further stated that if the mother of the victim discovered the sodomy incidence on 1/9/2016 and took the victim to hospital on 8/9/2016 and PW3 who is a medical Doctor proves some of the bruises to be 4 days old it follows that, the victim was sodomized after his mother had reported the matter to the police station. In her statement the mother of the victim said after she had discovered the rape incidence she reported to the local leader who issued a letter and instructed them to report to the police station. Without any clear explanation or reasons, the case was reported on 5th September 2016 at the police station which is five days after PW2 had discovered that the victim was sodomized. PW4 who is a police officer gave evidence at page 20 of the typed proceedings that;

> *"I received a file around 11:00 hours. The case was reported on 05.09.2016 around mid-way time (sic) I do not remember the time (sic)*
> *I was the one who wrote the statement of the parent (sic) on 05.09.2016 on 06.09.2016 I received a file as an investigator."*

He insisted that, there is no clear reason as to why the matter was not reported to the police on 1/9/2016 when it was discovered. Also critical analysis need be made since PW2 and PW4 are in contradiction as to when the matter was reported to police; i.e. on 1/9/2016 or 5/9/2016? He therefore contended that, it was not proved that the act of unnatural

offence was not committed by the respondent/accused. He said that, the case of **Omary Kijuu vs the Republic** cited by the appellant does not hold any water in this case because the victim stayed with his mother for about eight (8) days hence it may be there was another Baba Kelvin who was raping the boy as on the circumstance the act of rape was done while the matter has been reported to Police. Also the case of **Nyeku Kou Vs Republic**, cited by the appellant is distinguishable to this case because in the said case the act of rape was reported a day after the rape, but in this case the situation is different. He further submitted that, the findings of PW3 that the bruises were 4 days old establish a serious doubt as to who was the actually person who sodomized the boy as the victim was on the hands of his mother since 1/9/2016, the report to police was made on 5/9/2016. The prosecution did not examine in chief to clear this doubt. He referred this court to the case of **Agnes Liundi vs R** (1980) TLR 46 CAT where the Court of Appeal held as follows:-

> *"The court is not bound to accept medical testimony if there is good reason for not doing so. At the end of the day, it remains the duty of the trial court to make a finding and in so doing, it is incumbent upon it to look at, and assess, the totality of the evidence before it including that of medical experts"*

He further submitted that, PW4 one DC Anna who is the investigator did not investigate the case accordingly as to help prosecution to call all necessary eye and or material witnesses to the case. He referred this court to the evidence of PW1 who testified that;

One day I was going to school with my friends and we were late at school, the teacher chased us away and one of my friends went back home but me and John went to play a game at PPF. Later on John went out to susu but he was not coming back when I went out to look for him I meet with Baba Keslvin who was with other people and that was Mhindi by race and another person who is an African.

He stated that, none of those people neither the teacher of that school that was mentioned by the Victim was summoned to give evidence in court. PW4 opted to give her hearsay evidence instead of summoning the eye or material witness. He referred this court to the case of **Aziza Abdalla v R** (1991) TLR 71 (CAT) where it was held that;

"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reasons being shown by the prosecution side"

He added that, the evidence by PW2 Scholastica Amani Msangamila and PW4 Anna were all hearsay evidences and cited the case of **Blasland** (1985) 2 ALL ER 1095 Lord Bridge where the court held that;-

"The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanor would throw on his testimony is lost"

He further stated that, the evidence by the victim PW1 was not also credible evidence and had a lot of doubt. He testified to tell truth always but he had never told his mother the act of sodomy immediately on the first day it happened. Therefore, the prosecution case was not proved beyond reasonable doubt and referred this court to the case of **Jonas Nkize v. Republic** (1992) TLR 213 and prayed this appeal be dismissed and uphold the decision of the trial court.

I have considered the submission of both parties. In the first ground of appeal, the appellant complains that the trial Magistrate erred by failing to evaluate the evidence adduced by the prosecution side. The respondent herein, was charged before the trial court with unnatural offence. It is an established principle in criminal case, that the burden of proof always lies on the prosecution and the proof has to be beyond reasonable doubt as stated in the case of **Nathaniel Alphonce Mapunda & Benjamin Alfonce Mapunda vs. Republic** [2006] TLR 395. The prosecution case relied on the evidence of PW1, PW2, PW3 and PW4 and also tendered exhibit P1 (PF 3) in order to prove the case against the respondent. Going through the evidence of prosecution witnesses as adduced before the trial court, there is no eye witness who saw the respondent sodomizing PW1 apart from the evidence of PW1 himself who pointed the respondent as the one who sodomized him. As rightly submitted by learned State Attorney, when it comes to sexual offences, the court may convict the accused based on independent evidence of the child of tender years or a victim as stated under section 127 (7) of The Evidence Act (supra). In the case of **Juma**

Peter vs. The Republic, Criminal Appeal No. 237 of 2013 (unreported), the Court of Appeal stated that;

> *".....just as is the case with rape, true evidence of an unnatural offence has to come from the victim, more particularly, if he gives positive evidence that there was penetration against the order of nature."*

Considering the evidence of PW1, being collaborated with the evidence of PW2 and PW3 I concur with the finding of the trial Magistrate at page 4 of the typed judgment that the said evidence proves that PW1 was penetrated against the order of nature. The fundamental question before this court is whether there was sufficient evidence from the prosecution to prove that it is the respondent who sodomized PW1. As already pointed above, there is no eye witness who saw the respondent sodomizing PW1. The only evidence that connects the respondent with the offence charged is that of PW1 who mentioned the respondent as the one who did that act to him. Although the law allows the court to convict the accused of sexual offences based on uncollaborated evidence of the victim as shown above, but in order for the court to do so, it must be satisfied that the child is telling nothing but the truth as indicated under section 127 (7) of the Evidence Act (supra) which states that;

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence and may, after assessing the credibility of the evidence of the child of tender years of as the*

MSIKITINI. He did not mention *"bodaboda".* But PW4 testified that PW1 told her that the respondent used to take him by foot and other times by *"bodaboda".* The facts pointed above creates doubt on trustworthy of PW1's evidence. Besides that, PW1 in his evidence stated that the respondent started sodomizing him since when he was in standard (III) but he managed to hide the truth for the whole year until when he was in standard (IV) when he managed to tell her mother after been interrogated. Although PW1 stated that the respondent used to threaten to cut him by razor if he would tell anybody about the act, but I find that is not a sound reason because in my view, a child who is trustworthy could have not kept quite without telling her mother or either parent about what happened for that long period (for a year) even at a time when he was not under immediate threat (meaning after parting with the respondent). It was stated by the Court of Appeal in the case of **Yust Lala vs. The Republic,** Criminal Appeal No. 337 of 2015 (unreported) that;

> *"In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1. It was her evidence that she did not mention the appellant for all that period because of his threat that he would slaughter her if she discloses to anybody that he raped her.* ***Since she was not staying with the appellant we find it doubtful that with such a serious offence, she could for all that period fail to tell her mother about it."*** *(emphasis is mine)*

All those facts, creates doubts on trustworthy or credibility of PW1' s evidence. It was stated in the case of **Augustino Kaganya, Ethanan Nyamoga and William Mwanyenge vs. Republic** [1994] TLR 16 that *"trial court is the best place to determine credibility".* Since the trial court was at best place to determine credibility of PW1 and considering the doubts raised on trustworthy of the evidence of PW1 as pointed above, I therefore concur with the finding of the trial Magistrate that it was not safe to convict the respondent based on uncollaborated evidence of PW1.

Besides the above, the duty of the defence side is only to create doubt against the prosecution evidence. It is my view that the defence through the evidence of DW1, DW2, DW3 and DW3 managed to raise doubt against the prosecution evidence when thay stated that this case is planted against the respondent based on terminated sexual relationship between PW2 and the respondent; the doubt which was not cleared by the prosecution by rebutting that evidence. Therefore, basing on the reasons stated above, I find that the prosecution side failed to prove its case beyond reasonable doubt. Hence the respondent was properly acquitted for being not guilty. The Appeal is dismissed accordingly.

Order accordingly.

S. C. MOSHI

JUDGE

13/08/2018