IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

CRIMINAL APPEAL NO.84 OF 2017

(Originating from District Court of Kiteto at Kibaya in Criminal Case No.05/2016)

NATUPUNYA ILEMETUNYI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

DR. OPIYO, J.

The appellant NATUPUNYA ILEMETUNYI was convicted as charged, with the offence of unnatural offence contrary to Section 154 (1) (a) of the Penal code, Cap 16 R: E 2002. He was sentenced to life imprisonment. Aggrieved he has preferred appeal to this court. His memorandum of Appeal has 5 grounds of appeal which reads as follows:

1. That, the trial Magistrate erred in law and in fact by failing to put into consideration the evidence of PW5 (Clinical Officer).

2. That, the trial Magistrate erred in law and in fact by not complying with the provision of section 127 (1) of the Evidence Act.

3. That, the trial Magistrate erred in law and in fact by acting upon defective charge sheet.

4. That, the trial magistrate erred in law and in fact by not complying with the Mandatory Provision of section 312 (2) of the CPA Cap 20 R.E 2002.

5. That, the trial Magistrate erred in law by convicting the appellant on the weak prosecution evidence and shifting the burden of proof to the appellant.

The brief background of the case can be summarized as follows, on 05/06/2016 at around 23:45 PW1 was at home sleeping with her three children as her husband was on safari to Dar Es salaam, suddenly the door of the house was broke and someone entered who is the appellant herein. She ran away and went to call one Sindilo. When she went back to the house she found the appellant holding her daughter aged 2 years while raping her. That, she was bleeding at her anus and it had a big hole. The appellant was locked inside the house and in the morning they sent the victim to the hospital. The

appellant was arrested charged, convicted and sentenced to life imprisonment.

When the appeal was called for hearing the appellant appeared in person, unrepresented he had nothing vital to tell this court, apart from saying that the trial court convicted and sentenced him on insufficient evidence by the prosecution witnesses. He consequently prayed for this court to allow his appeal and he be set free.

Ms. Kiango, learned State Attorney who represented the respondent vehemently resisted the appeal, she submitted that, the prosecution witnesses proved the case against the appellant as PW1 and PW2 were the eye witnesses who saw the appellant committing the offence.

Responding to the ground that, section 127 (1) of the Evidence Act was not complied with, Ms. Kiango argued that, it has to be noted that, the victim was 3 years old so given the age she could not testify before the court. She said, PW5 testified that, the child was unable to express herself even when she was taken for examination so she could not also testify on what was done to her. She argued that although the law requires reasons for failure to bring witnesses, but even if the victim was not brought to testify, still the evidence of PW1

and PW2 was enough to ground conviction as they found the accused in *pari delicto* sodomising the victim, and they saw her bleeding from her anus.

On the third ground, it was her argument that the charge sheet was not defective as it indicated the offence he was charged with and the statement of the offence was clear. So, although it did not show the subsection (2) of section 154 but that did not invalidate the charge sheet.

The Learned State Attorney was of the view that, the evidence of PW1 and PW2 was sufficient to prove the offence. She added that, they explained how the accused went to PW1 home with intention of raping her and when she ran away to call PW2 and came back, they found the accused on top of the victim sodomising her and she was bleeding from her anus. PW2's testimony corroborated PW1's testimony and they both knew the appellant well as their neighbor. MS. Kiango said the evidence of PW5 corroborates that of PW1 and PW2 that he found the appellant in the room and he apologized to him.

The main issue for determination in this appeal is whether the charge of unnatural offence was proved to the required standard of proof

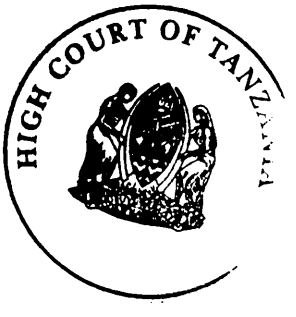
against the accused. The appellant was charged with unnatural offence. According to the prosecution the evidence which proved that the victim was sodomised by the appellant was that of PW1, PW2, PW3, PW4 and PW5 as well as the medical report, exhibit P1. The evidence of PW1 and PW2 was to the effect that on the eventful night when the appellant invaded the house of PW1, she ran out crying for help and went to the house of PW2, so when the two reached at the house of PW1 they found the appellant read handed sodomising the victim. The evidence of PW3 was held by the trial court to have corroborated that of PW1 and PW2 that it was the appellant who sodomized the victim.

I have carefully considered the evidence of the prosecution witnesses and gone through the contents of the PF3 Exhibit P1. According to the content of the PF3, it is clearly indicated that, there was no any bruises or wounds found on the anus of the victim and there was no any bleeding seen from the anal canal. From that observation, it is obvious that content of exhibit P1 did not corroborate the evidence of the two first witnesses who said that the victim was bleeding in her anal canal. I was expecting the PF3 to have corroborated the evidence of PW1 and PW2 who said they found the victim was sodomised by the appellant and that she had a very big hole in her anus and was bleeding. Given her tender age, if anything of the sort was done to

her it could have been so vivid to be proved by the medical examination report.

Needless to say, the burden of proof lies on the prosecution to prove that the offence of unnatural offence was indeed committed and it was the appellant who did the same. for that, I would like to reiterate the provision of **section 112 of the Law of Evidence Act, 1967 [Cap. 6 of the R.E. 2002]** which requires that the burden of proof as to any particular fact to lie on that person who wishes the court to believe in its existence, in this case the prosecution. In the instant case, there is no evidence from the prosecution to establish the offence that the appellant was charged with beyond reasonable doubt, the prosecution evidence leaves a lot of doubts which in my opinion should be resolved in favor of the appellant.

In the circumstances, I accordingly allow the appeal, quash the conviction and set aside the sentences. The appellant is to be released forthwith from custody unless otherwise lawfully held. It is so ordered.



DR. M. OPIYO

JUDGE

27/07/2018