IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM.

CRIMINAL APPEAL NO. 199 OF 2017

(Originating from Criminal Case No. 333 of 2016 of Kinondoni District Court)

MASUDI SHABAN MAIDA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Last Order: 30/04/2018.

Date of Ruling: 28/05/2018.

JUDGMENT

I. ARUFANI, J.

The appellant, Masudi shaban Maida was charged before the District Court of Kinondoni of unnatural offence, contrary to section 154(1)(a) of Penal Code, Cap 16, R.E. 2002. The particulars of the offence levelled against the appellant are to the effect that, on the 13th day of July, 2016 at Mburahati area within Kinondoni District in Dar es Salaam Region the appellant did have carnal knowledge of one Hassan Majala, a boy of 5 years old against the order of

nature. In the course of proving the charge the prosecution called four witnesses and the appellant gave his defence himself and called his mother.

Rehema Frank is the mother of Hassan Majala testified before the trial court as PW1 and told the trial court that, on the date of event at about 7:00 PM the appellant who were living together with them in the same house requested her to allow him to send Hassan Majala who gave evidence before the trial court as PW2 PW2 to the shop to buy a candle for him. PW1 said that, after allowing PW2 to go to the appellant's room so that he can be sent to the shop to buy candle for the appellant and seeing he had delayed to come back to their room she made a follow up and found the appellant laying on the back of PW2.

PW1 said to have told PW2 to go to eat food but PW2 refused and said he cannot go until when the appellant would rub him the dirty he had smeared on him. PW1 said that, the appellant said PW2 might have sat on water and took his black trouser and used the same to rub PW2 on his anus. PW1 said that, after PW2 going to their room she examined him on his private part and find he had been smeared with cooking oil. When she asked PW2 about that situation the victim told her the appellant did not send him to the

shop and instead of that the appellant took his "mdudu" and smeared it with the cooking oil and inserted the same in his anus. PW1 said to have felt pain but he failed to shout because the appellant covered his mouth by using his hands.

PW1 said that, after detecting that situation she rushed the victim to Magomeni Police Station to reporting the event. She said after writing her statement she was given PF3 and took the victim to Mwananyamala Hospital for examination. The victim was examined by Dr. Mary Shauritanga, PW4 who said to have found the anus of the victim was intact and rectal swab test did not reveal any spermatozoa or anything in the anus of the victim. She said to have filled the PF3 which was admitted in the case as an exhibit P1. The Policeman with number E 8664 D/CPL Alex, PW3 said to have been assigned to investigate the appellant's case and after interrogating the appellant he went to their home where he was told the appellant was living with his parents and relatives.

In his defence the appellant said on the date of event at about 07:00 PM he returned to their home from training. He said after reaching at their home he found PW1 sitting at the door of their house and when he greeted her, she didn't respond to his greeting. The appellant said to have proceeded with his activities and his

mother went to the Mosque for the evening prayer. The appellant continued to say that, after some few minutes PW1 came with policemen and arrested him and took him to Magomeni Police Station where he was told he was being suspected he had carnally known the victim against the order of nature. The appellant said to have denied to have committed the said offence and said there was misunderstanding between his mother and PW1. Thereafter he was taken to the trial court and charged with the stated offence.

The mother of the appellant, Mwamini Masudi Issa testified as DW2 and told the court that, she had listed PW1 in the list the people who were waiting to be assisted by TASAF and on the date of event PW1 followed her and asked for the TASAF money. DW2 said to have told her she had not received the money from TASAF. DW2 testified further that, later on the appellant who lives with them in their home was arrested and charged to have sodomized the victim.

After the full trial the appellant was found guilty in alternative offence of grave sexual abuse contrary to section 138 (c) (1) (b) and (2) of the Penal Code, Cape 16 R.E 2002 and after being convicted he was sentenced to serve thirty years imprisonment. Upon the appellant being aggrieved by the decision of the trial

court he filed in this court the petition of appeal which contains eight grounds of appeal to challenge both conviction and sentence imposed to him. The said grounds of appeal can be condensed as follows:-

1. The appellant was not informed of his right to give his defence and to call his witnesses as required by the law.
2. The defence evidence was not considered.
3. The conviction was based on incredible visual identification.
4. The conviction was based on contradictory evidence.
5. The trial magistrate was bias in convicting him on another offence after the prosecution failed to prove the charge of unnatural offence.

During the hearing of the appeal the appellant was unrepresented and he prayed the court to consider his grounds of appeal and allow the appeal and set him free. Miss Recho Magambo, learned State Attorney represented the Republic and told the court that, after going through the grounds of appeal, judgment and proceedings of the trial court they have discovered there is a point of law which is supposed to be determined in this matter before going to the merit of the appeal.

She said if you look at page 6 of the judgment of the trial you will find the trial Magistrate framed the issue to be determined in the matter but in the course of evaluating the evidence he based his decision on the evidence of the prosecution witnesses and he didn't consider the defence of the appellant. The learned State Attorney said that is contrary to the principle of law and is an irregularity which is not curable and it lead into miscarriage of justice. She submitted that, the rest of the grounds of appeal have no merit as there was enough evidence to sustain conviction against the appellant. At the end she prayed the court to order the file to be remitted to the trial court to enable the irregularity pointed above to be rectified.

After considering the submission made to this court by the learned State Attorney and going through the proceedings and judgment of the trial court I have find it is true that the learned trial Magistrate stated in the judgment of the trial court that, the issue to be determined in the matter is whether the appellant did have carnal knowledge of PW2 against the order of nature. The court has found that, in the course of determining the said issue there is nowhere the trial Magistrate considered the defence of the appellant and the evidence of his mother who testified before the trial court as DW2.

The court has found as rightly argued by the learned State Attorney that is a serious misdirection to fail to consider the defence of the appellant. This was observed so in the case of **Hussein Iddi & Another V. R.** [1986] TLR 166 and **Reuben Mhangwa and Kija V. R,** Criminal Appeal No. 99 of 2007 (unreported) where it was held that:-

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

The court has found the trial magistrate considered only the evidence of PW1 and said it has managed to establish the offence of grave sexual abuse contrary to section 138 (c) (1) (b) and (1) of SOSPA No. 4 of 1998. The court has found after the trial magistrate found the evidence of PW1 managed to establish the stated offence he resorted into section 300 (1) of the Criminal Procedure Act to convict the appellant on the offence of grave sexual abuse contrary to section 138 (c) (1) (b) and 2 (a) of the penal Code in alternative to the offence of unnatural offence.

The court has found section 138 (c) (1) (b) and 2 (a) of the Penal Code upon which the appellant was convicted of grave sexual

abuse is not in existence in the Penal Code. The provision which is providing for the offence of grave sexual abuse in the Penal Code is section 138C (1) (b) and (2) (a) of the Penal code. This shows that, even if the evidence of PW1 was sufficient enough to establish the offence of grave sexual abuse but he was convicted in a wrongly cited provision of the law. As observed in the case of **Mohamed Kaningu V. R** [1980] TLR 279 and **Abdallah Ally V. R** Criminal Appeal No. 253 of 2013 being found guilty and convicted in a wrong or nonexistent provision of the law cannot be said the appellant was fairly and properly convicted.

After observing the above defect the court has considered the prayer of the learned State Attorney that the file be remitted to the trial court for retrial of the case as there is sufficient evidence to sustain conviction against the appellant but failed to comprehend the available evidence is sufficient to establish which offence. Is it the offence of unnatural offence or the offence of grave sexual abuse which the court has found the conviction was based on a wrongly cited or nonexistent provision of the law.

Even if the court would have taken the offence upon which the appellant will be retried is the offence of grave sexual abuse contrary to section 138C (1) (b) and (2) (a) of the Penal Code which

is the provision of the law which establishing the offence of grave sexual abuse but after considering the evidence adduced before the trial court as featuring in the record of the trial court, the court has found there is no evidence which can prove the said offence to the standard required by the law as argued by the learned State Attorney. The court has arrived to the above view after seeing as stated in the petition of appeal the evidence of PW1 is in contradiction with the evidence of PW2.

The court has found the evidence adduced before the trial court shows that, while PW1 said when she followed PW2 in the room of the appellant she found the appellant on the back of PW2 but PW2 said when PW1 followed him she found him on a coach. When this contradiction of the evidence of PW1 and PW2 considered together with the defence of the appellant who denied to have committed the offence and said there was misunderstanding between PW1 and his mother who testified on the defence side as DW2 the prosecution evidence is not strong enough to build conviction against the appellant on the said offence of grave sexual abuse.

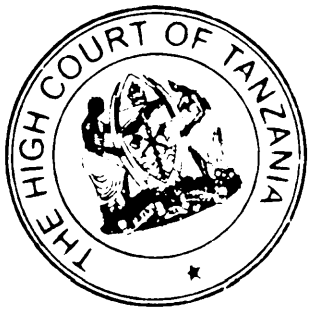
The prosecution evidence is weakened further by the evidence of PW4 who said to have examined the victim (PW2)

whom he had been alleged he was sodomized by the appellant on the date of event but failed to detect anything which would have established the appellant committed unnatural offence against the victim. Therefore the court has failed to subscribe to the view of the learned State Attorney that there is sufficient evidence to sustain conviction against the appellant in any of the offence if the court will order the case to be tried de novo.

In the light of all what has been stated hereinabove and without going further to deal with the rest of the grounds of appeal raised in the petition of appeal the court has found it is not only that the appellant was convicted on a wrongly cited or nonexistent provision of the law but the evidence adduced before the trial court did not manage to prove either the charge of unnatural offence levelled against the appellant or the offence of grave sexual abuse upon which he was convicted.

Consequently, the appeal is hereby allowed, conviction entered against the appellant is quashed and the sentence of thirty years imprisonment imposed to him is accordingly set aside. The court is ordering his immediately release from the prison if there is no any other lawful cause to incarcerate him in prison.

Dated at Dar es Salaam this 28th day of May, 2018.



I. ARUFANI

JUDGE

28/05/2018