IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 252 OF 2017

(Originating from Bagamoyo District Court, Criminal Case No. 297/2017)

ABASI HASSAN @ SHEHA ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

LUVANDA, J.

In the District Court of Bagamoyo the appellant above named was arraigned for unnatural offence contrary to *section 154 (1) (a) and (2) of Cap. 16 R.E 2002*. Four witnesses testified for prosecution case. In recap, their evidence was to the effect that on 31/08/2016 the appellant pulled the victim into Mareto Guest House, undressed her clothes, forced the victim to bed by threat, closed her mouth then committed unnatural offence (sodomy)

where the victim craped. On 01/09/2016 the victim reported the incidence to her father, where the accused was arrested at about 20 hrs at Mareto Guest House and asked for amicable settlement of the matter. The victim was issued with PF3 for medical examination. The trial court believed the prosecution witnesses, convicted and sentenced the appellant to 30 years in jail.

The appellant was aggrieved, lodged the appeal with seven complaints as follows; he was denied the right to be heard and to resummon witness after being arrested; he was not addressed the right of defence after his arrest; the trial Magistrate did not make a ruling of case to answer; the prosecution case failed to prove its case beyond reasonable doubt as the evidence of PW1 and 4 was doubtful; no DNA test for specimen, semen and viscid fluid was conducted; the matter was procedurally transferred from Hon. Makube, SRM to Hon. Masua, RM. He prayed for court to allow the appeal, quash the conviction and set aside the sentence.

At the hearing of appeal, the appellant had nothing to submit in support of his ground of appeal. Mr. Kissima learned State Attorney responding to the grounds of appeal submitted that the appellant was charged for sodomy under *section 154(1)(a) and*

(2) Cap. 16 which is a correct provision, but on a judgment the trial Magistrate convicted the appellant under *section 154(1) and (2) Cap. 16* where she omitted paragraph (a), which is fatal. That on a date when the prosecution had closed it is case, the accused was present but the matter was scheduled for judgment without complying to section 230 and 231 CPA. That the Magistrate did not make a ruling of a case to answer, neither afforded the appellant his rights including a right to defence. That resummoning witnesses is the discretion of the court. That on the date when PW1 and 2 testified neither the accused nor his sureties appeared. He submitted that PW1 explained how the offence was committed and she identified the appellant who confessed and asked for mercy. That this evidence was corroborated by PW2 and PW3, as such the prosecution case was proved beyond reasonable doubt. That it is not mandatory for specimen of both the victim and accused to be taken, as the best evidence is that of a victim.

With regard to the first ground of appeal, as submitted by the learned State Attorney the appellant was denied a right to be heard. The trial records shows that on 15/11/2016 when the matter was called for hearing two prosecution witnesses were on

attendance but the appellant was absent. The court adjourned the matter to 17/11/2016 and issued an arrest warrant to the accused and summons to show cause to his sureties. On 17/11/2016 the appellant did not appear, hence the trial court ordered the matter to proceed in his absentia under *section 226 CPA*, where two witnesses (PW1 and 2) testified for prosecution. The matter was adjourned to 14/12/2016 and then to 19/12/2016 on which warrant of arrest and summons to show cause for accused and his sureties, respectively were still in force. On 19/12/2016 the accused was recorded present, where two prosecution witnesses (PW3 and 4) testified, but the appellant was not given an audience or opportunity to cross examine prosecution witnesses and neither was asked as to why he did not attend previous session. Actually the appellant remained as a shadow at his trial, as he did not participate a trial and even the fate of his bail was not resolved, as the trial Magistrate had ordered for previous order to be enforced, to wit an arrest warrant and summons to show cause. But it seems the appellant who was in court was let to go at home. This was an anomaly and the way the trial was conducted was unknown to the procedure. It was expected after the accused had attended on 19/12/2016, the trial court could give the appellant an audience

to address the court as what had prevented him to attend the previous sessions and thereafter the trial Magistrate ought to afford the appellant opportunity to resume and participate a trial from a stage it reached, including making a finding of whether to resummon PW1 and 2 or not. Also the trial Magistrate was expectedly to rule out on a fate and aftermath of the appellant bail, given that he had surrendered himself.

Probably the trail Magistrate was faced with difficult on how to go about, as the provision of section 226 CP is silent, in the circumstances like the instant case, where the accused revamp, resurface and surrender himself to the court after an order to proceed under section 226 CPA is made, but the accused appears in between prior or final verdict is made. To my findings the procedure and course to be taken is like what I have explained above, which is a good court practice.

There is still other anomaly to the proceedings dated 19/12/2016, as after the prosecutor had closed prosecution case, the trial Magistrate rushed to schedule the matter for judgment without making findings as to case to answer and affording the accused's right under *section 231(1)(a) and (6) Cap. 20 R.E 2002*. It would appear the trial Magistrate was still under a wrong assumption

that the appellant had no right of audience after the matter is ordered to proceed under *section 226 Cap. 20* even if he resurfaces thereafter in between. The procedure adopted by the trial Magistrate was awkward, as the appellant was condemned unheard. The right to be heard is a fundamental principal in any criminal trial, noncompliance or compromising with it for whatever unjustified reason or scapegoat, renders a trial nullity.

There were also other anomaly, for instance the trial court had engaged into conducting cross examination to prosecution witness, this was an error. Cross examination is normally conducted to a witness by the adverse party to the proceedings *(See section 146(2) Cap. 6 R.E 2002)*. But the court is not an adverse party rather a neutral empire, as such is expected to ask any questions and not to cross examine, and those question can be asked by court at any time when a witness is testifying, but ordinarily they are been reserved and asked at the end after re-examination as a case may be, for a neatly and consistence of court proceedings. *(See section 176(1) Cap. 6 (supra)*.

Also a trial judgment is titled *"exparte judgment"*. This is novel to criminal procedure and practice, as there is no term "*exparte*" judgment in criminal trial. In view of aforegoing anomaly, the

learned State Attorney invited the court to remit the matter to the subordinate court. But I asked whether I should order retrial? My answer is an emphatic NO! I explain. The evidence reveals that PW1 was sodomized by the appellant at Mareto Guest House in broad day light. PW1 did not say to had ever attempted to scream out, but her (PW1) father (PW2) said PW1 was closed her mouth! PW4 who was quest attendant thereat, stated that she saw ordure on a bed sheet and followed PW1 asked what was wrong, but PW1 did not disclose to PW4 that she was sodomised. More important a PF3 (Exhibit P1) authored by PW3, his remarks are as follows, I quote;

> *"It is a castome (sic-custom) as she declares herself to involve in sexual business on the vaginal and anus at different parties. But the men did not pay. Confirmed to be sodomised".*

In premises, retrial is undesirable and is not a proper course to be taken in the circumstances of the matter, where the victim prophesy being a petty courtesan and it seems a charge was preferred because the appellant did not furnish consideration.

Having said, the trial court proceedings, findings, conviction are abrogated for being a nullity and sentence is set aside. The appellant is to be released forthwith, unless otherwise is held for a different lawful cause.

Appeal allowed.

E. B. Luvanda

JUDGE

19/06/2018