IN THE HIGH COURT OF United Republic of TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 80 OF 2019

(Original case: Criminal Case No 87 of 2018 in the District Court of Kibaha)

YUSUPH MALEMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MASABO, J.:-

The appellant in this case is aggrieved by the decision of the District Court of Kibaha which convicted him for an unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code Cap 16 RE 2002 and sentenced him to 30 years imprisonment. His grounds of appeal are as follows:

1. The trial magistrate erred in law by contravening the mandatory provision of section 127(2) of the Evidence Act, whereby the evidence of PW2 and PW3 who were children was obtained illegally
2. That the learned trial magistrate erred in law and in fact for failure to observe that the prosecution witnesses (PW1, PW2, PW3, PW4 and PW5) were contradictory, unreliable, incredible and had material inconsistencies which rendered their story highly improbable against the appellant

3. That the learned trial court erred in law for failure to comply with mandatory provision of section 210(3) during trial which rendered the evidence received at trial inadmissible in court
4. That the learned trial magistrate erred in law and fact in convicting the appellant for the offence of unnatural offence c/s 154(1)(a) of the Penal Code while the victim failed to prove penetration against the appellant
5. That the trial magistrate erred in law and fact for failure to observe that the prosecution failed to prove the charge beyond any reasonable doubt.

When the appeal was called for hearing, the appellant appeared unrepresented hence he fended for himself whereas the Respondent Republic was represented by Ms. Christine Joas Learned State Attorney.

The appellant opened his submission by arguing that the age of the victim was not established because in page 9 and 10 of the proceedings the age of the victim appears to be 15 years while PW3 stated that the age of the victim was 13 years. He argued further that the offence against which he was charged was not proved because he was charged of unnatural offence but all the evidence adduced in court was in support of the offence of rape such that even the victim PW2 testified that she was raped. That, in general the testimony tendered in court contradicted the charge sheet as it consistently pointed to the offence of rape which casts doubts on the prosecution case.

In reply, Ms Jaos supported the appeal. She submitted that the testimony of PW1 and PW3 do not connect the appellant to the offence. That, the testimony of PW3 is also silent on who committed the offence. Moreover she submitted that in Page 11 of the proceedings the victim stated that she decided to reveal what the accused person did to her but did not explain what transpired between them. She argued further that there was no proof of penetration. In conclusion Ms. Joas submitted that in criminal cases involving sexual offences the most credible testimony is that of the victim and that considering that in the instant case the testimony of the victim is too weak, it would be fair to quash the conviction and sentence inflicted on the appellant.

Without having to labour munch on this matter I can safely say right away that I entirely agree with the learned State Attorney. Records reveal that the appellant was charged of committing an unnatural offence against one Carlotrona Maiba (PW3) a girl of 13 years. It was alleged that on unknown date in April 2018 at Kilangalala Mlandizi area within Kibaha District the appellant who as at the material date working as a houseboy for one Beatrice Shirima (PW1) had canal knowledge of the Calotrona Maiba PW3 (the daughter to PW1) against the order of nature. However, as stated by the learned state Attorney all the testimony adduced in court were in support of the offence of rape, and not unnatural offence against which the Appellant stood charged. The prosecution called a total of 5 witness and only one of these PW4 Agnes Paschal Msinzo, a medical doctor at Mlandizi hospital testified in favour of unnatural offence. Her testimony is to the effect that

upon examining the victim she found that her vagina was intact but she had bruises on the anus which suggested that she had been penetrated by a blunt object. As rightly argued by the State Attorney the testimony of the victim was too weak in that she only stated that she confided in PW2 what the accused did on her but did not explain what exactly did the accused to her.

It is well known principle in criminal trials that the burden of proof lies on the prosecution and the standard thereto is proof beyond reasonable doubt (See **Mwingulu Madata and another v R** Criminal Appeal No. 257 of 2011 (unreported); **Nathaniel Alphonce and Benjamin V. R** [2006] TLR 395; **Said Hemed V. R** [1987] TLR 116 CAT). This burden never shifts to accussed person as no duty is cast on the accused to establish his innocence (**Matula V R,** (1995)TLR 3). That in this case, it was upon the prosecution side to prove that indeed the offence of unnatural offence was committed against PW3 and that the person who committed the said offence was none other than the Appellant. It is vivid from the records that the prosecution in this case miserably failed to prove that indeed the offence was committed let alone the fact that it was the Appellant who committed it.

There is yet another major anomaly. From the account of PW1 Beatrice Shirima, mother to PW3 Carlotrona David Maiba and employer to PW2 Janeth Adric Kivembele (house maid) is that on the material date she had travelled to Tanga whereby on return she was informed by PW2 that the accused raped her. She reported the matter to police and had PW2 medically

examined. On her part PW2 Janeth Adric Kivembele testified that on the fatefull day, the accused who had previously unsuccessfully made sexual advances on her, tried to rape her in the bath room where she managed to push him and run to her bedroom but the accused followed her and managing to rape her and that she reported the matter to PW1 whereby she was taken to police and was subsequently medically examined. PW3 Calotrona David (13 years) testimony was as follows:

> "the accused raped PW2 on April 2018 it as at night. I was at the sitting room together with the accused on the material day he was there waiting to open the gate for PW1. PW2 went for shower on the material day, I was at the sitting room, accused followed PW2, I heard some noise, I ignored it, later on I saw accused coming from the toilet. PW1 came back and I went to sleep. PW2 told me later that she was raped by the accused we were just talking and that's why she told the incidence and I decided to tell me what the accused did to me"

The testimony of the three witnesses above are to the effect that the offence if any was committed against PW2 Janeth Adric Kivembele and not PW3 Calotrona David and that the PF3 was issued to PW2. However, upon perusal I have noted that the PF3 bears the name of PW3. Not only that but the facts used to implicate the accused (page 2 of the judgment) are nowhere to be found in the typed as well as in the hand written proceedings which

suggests that the proceedings and the judgment thereto were marred by multiple and grave inconsistencies which supports the reasons advanced by the learned state Attorney.

Accordingly, I allow the appeal, quash the conviction and set aside the sentence. The Appellant is to be discharged with immediate effect unless he is otherwise held for a lawful cause.

DATED at DAR ES SALAAM this 23rd day of October 2019.

J.L. MASABO

JUDGE

Judgment delivered this 23rd day of October 2019 in the presence of the Appellant and Ms. Christine Joas learned State Attorney for the Republic and the Appellant present in person

J.L. MASABO

JUDGE