IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

(DC) CRIMINAL APPEAL NO. 46 OF 2019

(From the decision of the District Court of Rombo (R.R. Futakamba, RM) in Criminal Case No. 264 of 2017)

SAFINATI SIMON NDEKOYA@MDOKO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 13th July, 2020

Date of Ruling: 10th August, 2020

Mwenempazi, J.

The appellant, Safinati Simon Ndekoya, was charged at the District Court of Rombo at Rombo, of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cape 16 R.E. 2002. He is alleged to have committed the offence on 20th day of November, 2017 at Mengeni Chini Village within Rombo District in Kilimanjaro Region to one "John" (true identity hidden) a boy of 5 years.

At the conclusion of the trial he was convicted as charged and sentenced to life imprisonment. Aggrieved, he filed this appeal based on five grounds which will be discussed in the course of his submission as he expounded them.

At the hearing of the appeal, the appellant appeared in person and had no legal representation. The respondent/Republic was represented by Ms. Akisa Mhando, learned State Attorney. By consent of the parties it was ordered for the hearing to be disposed of by way of written submission. The appellant filed his written submission on time while the respondent did not. The Respondent prayed for the extension of time and the appellant did not dispute, however still the Respondent failed to file reply submission despite been given extension of time to file as prayed. Therefore, this appeal will be determined based on submission of the appellant only.

On the first ground of appeal the appellant stated that the trial magistrate erred in both law and fact by holding that the victim identified the appellant by name and face while according to records it appears as if the victim did not know the name of the appellant properly. He submitted that the victim at first, he named the appellant as Mdoko and later on when cross-examined by the appellant he named him Kidoko. For that reason, the appellant was of the view that it was doubtful whether the victim was telling the truth.

With respect to the second ground of appeal the appellant faulted the prosecution evidence regarding time around which the incidence occurred.

The appellant argued that there was confusion on the evidence of the victim (PW1) as it varied with that of (PW2) the Doctor in respect of time. He pointed out that the victim alleged to have gone back home at night where he slept and then he was also taken to hospital at night, while on the other side the doctor also said to have received the victim at 18hrs. He was of the view that the night referred to by the victim may not be the same night the incident is said to have occurred. He argued further that since the evidence of PW1 was of paramount importance according to section 127(7) of the Evidence Act, the trial court should have commented on the credibility of that witness and made sure that the anomalies are resolved instead of just believing the witness because he was a child.

Arguing the third ground of appeal the appellant faulted the procedure which the PF3 was admitted in court. He submitted that the PF3 was admitted without being read out loud.

Lastly the appellant submitted that the trial court failed to take into account the defence evidence and that to him occasioned miscarriage of justice.

In determining this appeal, I will discuss each ground of appeal as an issue for determination. Beginning with the first ground of appeal which was based on the issue of identification, the appellant argued that the victim did not give a description of the appellant appearance. According to the record of proceedings it shows that the victim identified the appellant by name and he even remembered where the appellant stays that is where he

took PW4 and showed him the house. The identifiaction of the appellant is not doubted as the circumstance were favourable because the victim met the appellant in the evening around 16:00 hours and given the time they spent together when he convinced him to go with him to his house and gave him food to eat he can not say he could not identify him properly or mistook him with somebody else. After all being a child of five years I think that was enough in so far as identification of the appellant is concerned. The fact that the victim did not give description of the appellant in court was not necessary given the circumstance of the case which involved a child of tender years he is not expected to have that capacity of describing the appellant as long as he remembered his name and he could identify him in court. Consequently, this ground is meritless.

Moving on to the second ground of appeal, the appellant challenged the credibility of prosecution witnesses in relation to time. According to the record of the trial court proceedings indeed there is discrepancy in so far as time of the occurrence of events is concerned. Discrepancies in witnesses' testimonies is inevitable given the fact of time when they are giving testimony and the time when the event occurred also the fact of age and memory capacity of a witness. The question is whether such discrepancy goes to the root of the case as to occasion failure of justice. In this case the difference in time did not in my view affect the root of the matter because the matter in question is whether the evidence adduced proved the charge of unnatural offence against the appellant beyond reasonable doubt. The provision of law under which the appellant was

charged that is Section 154 (1) (a) of the Penal Code [Cap 16 R.E 2002], talks of carnal knowledge against the order of nature. PW2 who examined the victim said that he found bruises in PW1 (the victim)'s anus and that the sphincter muscle were loose also the anus was open which suggests that something round shaped entered the anus which extended the sphincter muscle. The victim PW1 said the appellant inserted "kidudu cha kukojolea" in his anus which clearly meant the appellant inserted his penis into the victim's anus. In my view these testimonies proves the offence without doubt and the variance in time does not in any way affect the root of the case. Therefore, this ground also lacks merit.

In the third ground the issue is with respect to the procedure of admission of exhibit P1 (PF3). I did note from the proceedings of the trial court that the PF3 after being admitted was not read out loud. It is the established practice of the Court that demands for the document to be read out loud after admission. The rationale behind this procedure is to allow the appellant to fully assess the facts he is being called upon to accept as true or reject as untruthful. However, failure to do so depending on circumstance of the case does not necessarily at all times affect the admission of such exhibit. In this case, for instance, PW2 the doctor who tendered the exhibit did testify about its contents by explaining how he conducted his examination upon the victim's body specifically on his anus and what he discovered after examination therefore despite the fact that it was not read the appellant was made aware of its contents through the doctor's testimony. This is why he was able to appraise the same and

respond when he was asked as to whether he had any objections before it was admitted as an exhibit as seen on Page 17 of the typed trial court proceedings the appellant/accused person responded that he had no objection. In view of that even if the PF3 is expunged from record which is hereby expunged, still PW2's testimony stands valid as it corroborates the victim's evidence. Therefore, my observation in this case in so far as reading out loud the contents of PF3 is concerned necessary its omission did not in any way prejudice the appellant in this case. Even without PF3 in record conviction would still stand.

On the fourth ground the appellant faulted the trial magistrate for not considering the defense evidence in which he argued that the trial magistrate did not comment anything while to him the defense had material substance worth consideration. I did not see merit on this ground because I have read both the defense evidence and the trial court judgment and found that indeed the trial magistrate did consider the defense testimony, only that she was not persuaded by the same. On page 6 of the typed trial court judgment second paragraph the honorable magistrate did discuss the defense adduced by the appellant and made her findings that the defense did not create doubts. The doubt the appellant pointed out was that PW3 said she didn't know him while the husband PW4 said she did. As I have already explained earlier contradictions in witnesses' testimonies are bound to be present however the same are not to be given weight unless they go to the root of the case and proved to occasion failure of justice. At this point the discrepancy referred to by the

appellant did not go to the root of the case in fact the appellant's conviction was not at all based on the evidence of PW3 and PW4 but on the victim's evidence and PW2's evidence. This ground is therefore meritless.

Finally, on the fifth ground of appeal the issue the appellant complained about was that the trial was not conducted in camera. This ground should not detain me much as it is clearly stipulated under section 186 (3) of the Criminal Procedure Act [Cap 20 R.E 2019] that proceedings of this nature should be held in camera. However, in as much as that statement is true it is also provided as a rule of practice. That it does not, however mean that all proceedings held in open court are a nullity merely for having been so conducted unless it could be shown that a miscarriage of justice occurred. This was so held by the court of appeal of Tanzania in the case of **Herman Henjewele vs Republic, Criminal Appeal No. 164** of 2005 (unreported) cited with authority from the case of **Mario Athanas Sipeng'a vs. Republic, Criminal Appeal No. 116** of 2013 (Unreported). In the present case also, there is no evidence of miscarriage of justice occasioned on either party therefore this ground also lacks merit.

In light of what has been discussed above, I find no merit in the entire appeal. I therefore dismiss the appeal forthwith. It is so ordered.

DATED and DELIVERED at Moshi this 10th day of August, 2020

T. MWENEMPAZI
JUDGE
10/8/2020