

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HC. CRIMINAL APPEAL NO. 120 OF 2019**

(Original Criminal Case No. 14 of 2018 of the District Court of Ilemela District at Mwanza)

**THE DIRECTOR OF PUBLIC PROSECUTION .....APPELLANT**

**VERSUS**

**MAKUBI S/O THOMAS @ PAULO ..... RESPONDENT**

**EXPARTE JUDGMENT**

**26 & 30/10/2020**

**RUMANYIKA, J.:**

The appeal is against judgment and decision of Nyamagana district court dated 17/07/2018 where, with respect to charges of unnatural offence Contrary to Section 154 (1) (a) and (2) of the Penal Code Cap 16 R.E. 2019 Makubi Thomas Paulo (the respondent) was acquitted and set free.

Ms. Lilian Meli learned state attorney appeared for the Appellant Republic. Having not been traced, therefore pursuant to my orders of 01/04/2020 and 07/09/2020 by way of publication having been served through Mwananchi Local News Paper of 11/07/2020), appearance of the respondent was dispensed with hence the exparte judgment (Section 381(3) of the Criminal Procedure Act Cap 20 R.E. 2019 (the CPA) refers.

The grounds of appeal revolve around three (3) points:-

- (i) That the prosecution case actually was proved beyond reasonable doubts.
- (ii) That the learned trial resident magistrate improperly analysed the evidence.
- (iii) That the prosecution evidence was actually credible.

Ms. Lilian Meli learned state attorney submitted: **(1)** that the victim (Pw3) was credible and best witness as he knew the respondent before and properly narrated the entire story the latter having offended the boy several times between 2013-2017 inclusive of the years **(2)** that actually penetration was proved as too some 4 other witnesses including the doctor and the victim's guardian supported the victim's evidence save for the respondent's threats which always prevented the victim to report the incidence before until such time a "vitumbua" monger had disclosed it and reported the case to police **(3)** that him being a tender boy (8) it would not have been expected of him to remember and exactly state the dates he had been offended by the respondent. Whether or not with respect to year 2017 in his testimony the victim testified in favour of the respondent it was immaterial much as variance between the charge sheet and the evidence was rectified by the witness (Section 234 of the CPA) **(4)** that the "vitumbua" monger, to him at the earliest possible opportune case the was reported he was such a crucial witness yes, but he did not appear in court much as the victim's evidence was enough.

The evidence on record reads thus:-



Pw1 Ruth Naluke a tailor of Kilimahewa in town stated that on 17/11/2017 at about 10.00 hours one Anna her house made told him that according to a "vitumbua" monger (informed by the victim), the respondent had been sodomising the victim. That as shortly thereafter the respondent @ **Serikali** he arrived, the victim identified and named him that he had been threatened therefore scared of the latter. The respondent was arrested and for that reason arraigned in court. That consequent to the incidents at times the victim released uncontrolled long calls that the victim and respondent had been friends.

Pw2 MV (name not real) a business woman of Dar es Salaam and the victim's mother stated that the victim was born on 12/04/2010 (copies of the clinic card and birth certificate—Exhibit "P1") collectively. That following the incident and information she came to Mwanza and found the case it was already reported to police and the victim released stool unconsciously.

Having promised the court in his testimony to tell the truth, the tender child Pw3 Mahangaiko (not real name) a pupil of Upendo Medium Primary School he stated that him and the respondent his friend they shared the street and they visited each other before only that several times and repeatedly he sodomised him in the former's bed room. That all the time he felt pains but he did not reveal it because the respondent threatened and warned him not to. Nevertheless the "vitumbua" monger had disclosed the secret act but was too late because consequently he now released stool unconsciously.

Pw4 Joyce Faustine Kitatu a clinical officer of Seko Toure Regional referral hospital stated that as he was on duty also at work on 18/11/2017

at about 16.00 hours he received the victim of chronic sodomy who reported having had been offended six (6) months previously last such that he released stool unconsciously (copy of the PF3-Exhibit "P2").

Dw1 Makubi Thomas Paulo a resident of Kilimahewa area Ilemela, Mwanza stated that orphan as he was, he finished his education in 2017 at Mbeza Secondary School (copy of identity card – exhibit "D1"). That on 25/11/2014 he came to Mwanza (copy of the bus ticket –Exhibit "D2") and left on 15/01/2015 back to school. That with regard to the incident, he was arrested by police on 26/11/2017 at about 21.00 hours but released on bail say 4 days later then he was arraigned in court. That he was only a friend of the victim's brother one Dani whom he used to visiting between the years 2014-2015 but he was not in Mwanza at the alleged times.

Dw2 Meresa Cyprian Odida the respondent's grandfather stated that he brought up the respondent from childhood. As such Dw1's evidence was a replica of the respondent essentially.

The issue is whether the prosecution case was beyond reasonable doubts proved. I would agree with Ms. Lilian Meli learned state attorney that in sexual offences the true evidence comes from the victim but in all cases the bottom line is the victim's credibility in the eyes of the court. Now, was the victim's evidence credible and trust worth? The answer is no for one main reasons; all the time he may have had been threatened by the respondent not to reveal the secret until such time when through the house made or the "vitumbua" monger as the case may be the secret was revealed. All the same Pw1's was 1<sup>st</sup> class hearsay evidence so was the rest of all much as for reasons only known to them, neither the house made



nor the alleged "vitumbua" monger appeared in court much as it is settled law that failure to appear in court of the person to whom the incident was at the earliest possible opportune reported it shakes credence of the prosecution case.

Moreover, it had not been disputed that although according to the charges the material dates ranged from 2013-2017 inclusive of the years very clearly for the entire 2017 the victim exonerated the respondent. Whereas I would agree with Ms. L. Meli learned state attorney that the material variance was curable under Section 234 of the CPA, in her testimony Pw4 made it more worse saying that the victim had told her that he had been offended in the previous 6 (six) months of 2017 last again on this one the victim could not be more unreliable. Suffice the points to dispose of the appeal.

The devoid of merits appeal is dismissed. Decision of the trial court is, for avoidance of doubts upheld.



**S. M. RUMANYIKA**  
**JUDGE**  
**28/10/2020**

The judgment is delivered under my hand and seal of the court in chambers this 30/10/2020 in the absence of the parties.



**F. H. MAHIMBALI**  
**DEPUTY REGISTRAR**  
**30/10/2020**