IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

(DC) CRIMINAL APPEAL NO. 3 OF 2020

(C/F Criminal Case No. 272 of 2018 of the District Court of Moshi at Moshi)

GEORGE JONAS LESILWA ---------- APPELLANT

VERSUS

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

JUDGMENT

MUTUNGI, J.

Before the District Court of Moshi at Moshi, the appellant, George Jonas Lesilwa, stood charged with the offence of unnatural offence contrary to **section 154 (1) (a) of the Penal Code,** Cap 16, R.E. 2002 (Penal Code). It was alleged that on unknown dates of April, 2018, the appellant had carnal knowledge of one "**Yahaya s/o Athumani Chambo**", (true identity hidden) a boy aged 11 years old against the order of nature.

To prove the allegation, the prosecution called for witnesses, PW1, victim's Mother, PW2, the victim himself, PW3 the doctor who examined the victim as well as prepared the PF3 report which was admitted in evidence as exhibit P1 and PW4 a police officer working with *"kitengo cha jinsia na watoto"* who drew the sketch map of the crime scene that was tendered and admitted as exhibit P2.

Briefly, the unfortunate ordeal happened when PW1, the victim's mother travelled to Morogoro and asked her neighbour and fellow tenant one, Saidi Hemed to look after her son who was by then schooling. Unfortunately, Saidi Hemed, was a busy university student and most of the time he was unavailable, thus he asked the appellant to keep an eye on the victim especially by giving him food when he returns from school.

PW2, (the victim) testified, the first time he was abused was Tuesday April, 2018 when he came back from school, the appellant invited him to eat Ugali and vegetables in his sitting room. Before he finished eating the appellant, closed windows, the door, put on the radio speaker and carried him on the shoulder to his room. He undressed him, undressed himself and inserted his penis in PW2's anus. In the course, he felt pain and cried but due to the loud music no

body heard him. PW2 told the trial court that the second time the appellant abused him was on a Saturday of the same month. They were watching movies, the appellant held his hands tight forced him to bend *"akaniinamisha tena kwenye kochi"* and inserted his penis in his anus. He also threatened to kill him if he disclosed the incidents. From thereon PW2 warned his friend one Brian not to go to appellant's home as 'he had bad habits'. Brian confronted the appellant who become angry and started threatening PW2 openly as to why he had disclosed what had happened. When PW1 returned and heard the threats is when PW2 revealed the whole ordeal. The matter was reported to the police and the appellant apprehended and charged accordingly.

In his defence, the appellant claimed that, this case was fabricated against him after PW1 got angry having known that he once punished PW2 for returning home late. At the close of the case, the trial Magistrate was satisfied that the prosecution had proved its case to the required standard and accordingly convicted and sentenced the appellant to serve life imprisonment. Aggrieved, the appellant has filed this appeal which comprises of six grounds as hereunder: -

1. That, the trial magistrate erred in law and fact in not taking part effectively in the proceedings taking into account the offence charged against the appellant is severe hence required a just and fair trial.
2. That, the trial magistrate erred in law and fact in failing to understand that there can never be a sexual intercourse between persons of the same gender.
3. That, the trial magistrate erred in law and fact in not considering rule 7(2) of GN No. 182/2016 which requires a child victim to be represented by a social welfare official.
4. That, the trial magistrate erred in law and fact in not finding that there was a lapse of time and withholding information on the alleged incident which was not reflected by the evidence of PW3, the doctor.
5. That, the trial magistrate erred in law and fact in withholding appellant's right when admitting exhibits "P1" and "P2" without reading them aloud in court hence prejudiced him.
6. That, the trial magistrate erred in overlooking the appellant's defence and never spoke a word on it hence appeared to be bias against him.

During the hearing of the appeal, the appellant appeared in person (unrepresented), whereas the respondent was represented by Mr. Omary Abdallah Kibwana, learned senior state attorney. The court did consequently order the hearing to proceed by way of written submissions.

Supporting the 1st ground of appeal, the appellant argued that the court has a duty to inform the accused of his right to legal representation as enshrined under **Article 13 (i) and 6 (a) of the Constitution of the United Republic of Tanzania**. He added that, he is an indigent person According to **section 310 of the Criminal Procedure Act** (CPA) hence was qualified and entitled to such right. To support his contention he cited the case of **Muhagama Lawrence V The Government of Zanzibar, Criminal Appeal No. 17 of 2001**, which held that the court has a duty to inform the accused of the right to legal representation before the trial court. He thus challenges the whole of trial court's proceedings and decision for denying him such right.

Supporting the 2nd ground the appellant argued that, there can never be sexual intercourse between people of the same gender hence the whole proceeding left a lot to be desired.

Regarding the 3rd ground, the appellant argued that since the victim was a child he was to be represented by a social welfare officer as per **rule 7 (2) of GN No. 182 of 2016**.

Submitting further in support of the 4th ground, the appellant argued that, there was a long time span from when the alleged crime was committed to the time the victim was examined by the doctor. He added that, the alleged abuse occurred in April of 2018 but the doctor examined him on 28th May, 2018 (a month later). The appellant contended that, the time lapse created a doubt on the doctor's report which revealed, there was friction on the victim's anus. It is doubtful to detect any friction more than a month after the alleged incidence had taken place.

The appellant further argued in respect of the 5th ground that, the doctor's opinion as reflected in the PF3 was biased. He had assumed the role of an advocate and could not help the court to form an independent judgment as was held in the case of **Kresten Cameron V Republic (2000) TLR 51**.

The appellant argued further that exhibits P1, the PF3 and P2, the sketch map were not read over to the parties after they were tendered and admitted.

On the last ground the appellant averred that, the trial magistrate analysed the prosecution case and said nothing concerning his defence. Further that, since he was acting as a guardian of the victim, he punished him when need arose including the day he went home late which is what made the victim's mother angry and fabricated this case against him. He further argued that, failure of the trial magistrate to analyse the evidence contravened **section 312 of the CPA**. He therefore prayed that this court allows the appeal, quashes and sets aside the conviction and be pleased to set him free.

Contesting the appeal, Mr. Kibwana learned senior Attorney argued that, the trial magistrate did take part in the proceedings effectively by conducting a just and fair trial to all parties. Further that, the court is not bound by law to provide *probono* legal services during the hearing.

On the 2nd ground the learned senior state attorney argued that, it is true that people of the same gender cannot have sexual intercourse, however the charge as well as the prosecution evidence established that, the appellant had carnal knowledge of the victim against the order of nature. Be as it may, the appellant understood the charge he was facing and he gave defence to that effect.

Disputing the 3rd ground of appeal, Mr. Kibwana acknowledges that, there was no social welfare officer during the trial, however, the absence of a social welfare is no fatal and he prayed that the same be pardoned by invoking **section 388 of the CPA** since no one was prejudiced by such absence and no injustice occasioned.

On the 4th ground, the learned counsel argued that, the reason for the victim to withhold information was the fact that the appellant threatened to kill him and since the incident happened when his mother was away at Morogoro, the victim reported the matter immediately after his mother's arrival.

It was Mr. Kibwana's further argument on the 5th ground that all exhibits were read out aloud in court, however it is unfortunate that the trial magistrate failed to write in the proceedings that they were read out aloud.

On the 6th ground of appeal, the learned state attorney argued that, the trial magistrate analysed evidence from both parties, assessed witnesses' evidence, their credibility and demeanour and reached to a fair decision, thus she was not biased. To support his contention, he cited the case of **Omari Ahmed V The Republic 1983 TLR 52 (CA)** that: -

(ii) The trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility.

He finally prayed that the appeal be dismissed. There was no rejoinder from the appellant. What follows is for the court to find whether the appeal has merits or otherwise.

After going through the trial court's record as well as parties' submission the following is the analysis by the court. Starting with the first ground of appeal, the appellant alleges that he was not given a right of legal representation. **Section 21 and 33 (1) of the Legal Aid Act,** Cap 21 R.E. 2019 provides that;

"21.-(1) An indigent person who intends to receive legal aid may approach any legal aid provider and apply for legal aid services"

"33.-(1) Where in any criminal proceedings, it appears to the presiding judge or magistrate that-

(a) in the interests of justice an accused person should have legal aid in the

preparation and conduct of his defence or appeal as the case may be; and

(b) his means are insufficient to enable him to obtain legal services,

the presiding judge or magistrate, as the case may be, shall certify that the accused ought to have such legal aid and upon such certificate being issued, the Registrar shall assign to the accused a legal aid provider which has an advocate for the purpose of preparation and conduct of his defence or appeal, as the case may be."

From the provisions above, it is evident that legal representation is a right to any person, however such right is not automatic. The one in need has to make a formal application though the respective officers in charge if she/he is still under custody. Such application can also be made orally during trial and the court may grant it by issuing a certificate for legal aid, assigning the accused the legal aid provider. However, in the present matter two things can be seen;

First, a careful scrutiny of the record does not indicate any request made by the appellant to be assigned an

advocate during the trial. This complaint was raised in his petition of appeal to this Court. **Second**, the appellant was released on bail and was not in custody until 28th December, 2018 when he was convicted in another case. At that time PW2 had already testified, it is my considered opinion that he was in a position to freely choose any representative he wanted from the law firms. Since he has failed to substantiate his claims that he was denied the right to representation, this ground crumbles.

Regarding the second ground of appeal, as rightly admitted by the respondent that there cannot be sexual intercourse between persons of the same sex. Regardless, it is my considered opinion that the mere use of the word 'sexual intercourse' by the trial magistrate in the proceeding instead of 'carnal knowledge against the order of nature' did not occasion miscarriage of justice.

What is gathered from the proceeding is the fact that, the respondent prosecuted the case by establishing that, the appellant had carnal knowledge with PW2 against the order of nature. The appellant knew the offence he was charged with and he defended himself against the same. I thus do not think that the mere use of the words 'sexual intercourse' prejudiced any party as the same did not go to

the root of the matter. This ground is meritless and is dismissed.

As far as the 3rd ground is concerned the appellant challenges the trial court's proceedings and decision for not adhering to rule 7 (2) of GN No. 182 of 2016. **Rule 7 (2) of the Law of the Child (Juvenile Court Procedure) Rules, 2016** which reads as follows: -

> *"(2) When a child is being tried for a criminal offence, the court shall be arranged in the following manner - ..."*

The coaching of the above rule is on how the juvenile court conducts its proceedings when the accused is a child, unlike in the present matter where the appellant an adult was the accused being tried at the trial court. This rule therefore does not apply in the current matter. In the circumstances, this ground is meritless and I dismiss it.

Coming to the 4th ground of appeal, the appellant challenged the lapse of time from when PW2 was sexually abused to when he reported the incident. The Court of Appeal has in a number of its decisions emphasized that rape is normally conducted in secrecy so the best evidence in rape cases comes from the victim herself as clearly

established in the case of **Selemani Makumba V R (2006) T.L.R 92**. From the history of the incident, PW2 being a boy of eleven (11) years when the crime was committed, naturally, he must have known what happened to him was wrong hence was shameful and discreet to let other people know what befell him. Nevertheless, he told his friend Brian to beware of the appellant and reported the incident to his mother immediately after she returned. Apart from that, he was threatened he would be killed in the bushes had he disclosed the ordeal. The threats can be seen though PW1 who testified at page 12 of the typed proceedings that: -

> *"...Next day morning hours I asked the victim to tell me why the accused was coming home to take him. I heard him saying "Badilisha nguo tukawatafute hao watoto uliowaeleza maneno na kama ni ya ukweli mi nitaenda kukunyongea polisi"... I become afraid and asked the victim to tell me the reason in detail. I prepared water and went to clean his body. The victim told me that when I was still on journey, the accused used to have carnal knowledge with him against nature..."*

From such revelation, PW1 reported the matter and PW2 was examined and observed that he had been sodomized. I will therefore consider the case to have been reported within reasonable time. Notwithstanding the circumstances leading to reporting the incident, what matters is whether there was compelling evidence that the appellant carnally knew the victim. The answer of which is yes from the doctor's testimony. This ground is baseless and accordingly disallowed.

The 5th ground is to the effect that exhibit P1 and P2 were admitted without being read out aloud. Although the learned state attorney submitted that the same were read out, however such contention is not reflected in the proceedings. In the case of **Lack Kilingani V R, Criminal Appeal No. 402 of 2015 (unreported)** as cited with authority in the case of **Erneo Kidilo & Matatizo Mkenza V The Republic, Criminal Appeal No. 206 of 2017 CAT at Iringa (Unreported)** the Court stated: -

> *"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone along way, to fully appraise the appellant of*

facts he was being called upon to accept as true or reject as untruthful.

Since it is not seen in the trial court's proceedings that exhibit P1 and P2 were read out, the same are expunged from the record. This ground is meritorious and I therefore allow it. As the PF3 is expunged from the record now the question is whether or not the prosecution case can stand without it. In **Salu Sosoma V R, Criminal Appeal No.4 of 2006 (CAT-MWZ) (Unreported) at page 7 the Court of Appeal**, had this to say;

"...likewise, it has been held by this court that lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence point to the fact that it was committed."

In the present matter, the trial court did not solely rely on exhibits "P1 and "P2" in reaching its decision. However, PW2's evidence was sufficient to prove the charges of unnatural offence against the appellant. His testimony is well corroborated by PW1, and PW4 who testified at page 28 that;

"To my examination it was like there had been friction on his anal. It has (sic) like he had been

having sexual intercourse against order of nature. I therefore concluded that there had been something blunt being entered inside his anal (anus)"

At page 29 he went on testifying

"I checked him if had been infected with HIV, he was not, but we gave him Medication (medicine) "kwa ufupi sehemu ya njia ya haja kubwa ya mhanga ilikuwa wazi kabisa haifungi"

"Misuli ya Mlango (sic) wa haja kubwa pia ilikuwa imelegea na haikazi njia ilikuwa nyekundu na kama kuna uvimbe"

The evidence on record in collaboration with the evidence of PW1, PW2 and PW3 is clear that the prosecution managed to prove that, the evidence point the alleged offence was committed and it was no other than the appellant who committed the offence.

Lastly, the appellant argued that the trial magistrate did not consider his defence, however, on page 7 and 8 the trial magistrate made analysis of both parties' testimonies and reached her verdict. The evidence adduces outweighed the allegation that the case was fabricated against him.

Nevertheless, PW2 being the victim, his testimony is believed to be true. In the case of **Mohamed Said V Republic, Criminal Appeal No. 145 of 2017, CAT at Iringa** held *inter alia* at page 14 that;

> *"We are aware that in our jurisdiction it is settled that the best evidence of sexual offences comes from the victim [**Magai Manyama v. Republic** (supra)]. We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim.*
>
> *However we wish to emphasize the need to subject the evidence of such victims to security in order for the courts to be satisfied that what they state contain nothing but the truth."*

I fully subscribe to the position laid above especially on the truthfulness of the PW2's testimony as I have failed to gather as to why he would lie against the appellant. I consider his evidence based on truth as there is no doubt to prove otherwise and this goes to support the trial court's findings. In his defence at the trial court and in his submission in this court, the appellant has never casted doubt on PW2's

evidence exclusively but rather he claimed that the case has been cooked and framed against him by the victim's mother. I have given due weight to his submission however, PW2's testimony being the victim, as already observed is trust worthy and sufficient to prove the case beyond reasonable doubt. This ground is also dismissed.

In light of the above analysis, it is my finding that, the prosecution proved the case against the appellant on the standard required in criminal jurisprudence. The appeal is sanctioned to a dismissal, consequently the trial court's decision is upheld.

It is so ordered.

B. R. MUTUNGI
JUDGE
30/7/2020

Judgment read this day of 30/7/2020 in presence of the Appellant and Mr. Kibwana (S.S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
30/7/2020

RIGHT OF APPEAL EXPLAINED.