IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 105 OF 2019

(Arising from Original Criminal Case No. 4 of 2019 of the Resident Magistrate's Court of Tabora at Tabora)

ELIAS MARCO.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

KIHWELO, J.

The appellant, Elias Marco was convicted for unnatural offence by the Resident Magistrate's Court of Tabora in Tabora Region and on 9th September 2019 was sentenced to serve a term of 30 years in prison. Being unhappy with the said conviction and sentence, he has come before this Court by way of appeal.

At the hearing before this Court, the appellant was fending for himself, unrepresented and the respondent Republic was represented by Mr. Tito Mwakalinga learned State Attorney who was quick to inform the Court that he was supporting conviction and sentence.

I desire to give a summary of the case which was believed by the prosecution and therefore led to the conviction of the appellant before embarking on deliberating the grounds raised and the rival submissions thereof.

On 23rd December, 2019 at midnight a girl (**XY**) (henceforth "the victim") aged twelve years was sleeping in her parent's house when the appellant sneaked inside that house, grabbed the victim (**XY**) who was asleep by then, put her on his shoulders and got out of the house and left with her. The victim (**XY**) found herself outside the house on the shoulders of the appellant who was trying to stop the victim (**XY**) from screaming by covering her mouth. He forcefully took the victim girl to his residence at Mazinge area and dragged her inside his room. On arrival the appellant ordered the victim (**XY**) to take off her gown and underpants but initially the victim resisted and the appellant pushed her on the ground, undressed himself and then he undressed the victim. After that the appellant inserted his penis into the victim's vagina but the victim tried to resist whereby the appellant decided to turn her back and forced his penis into the victim's anus. The victim screamed for agony but the appellant kept beating her and threatened to kill her if she kept screaming. The incidence went on until in the morning when the appellant dressed up.

During that morning the appellant threatened the victim not to get out of the house as the appellant got out and closed the door behind. When the appellant left and the victim satisfied herself that the accused left, the victim took the plastic and stood on top of it started shouting for help while peeping outside the window as the victim heard women talking

outside the appellant's window. The victim kept shouting for help and shortly thereafter the appellant came back and opened the door.

The appellant told the victim to go outside but warned her not to talk to anyone but as she was leaving the appellant's house she was stopped by the women who heard her screaming for help. The women told her to sit down and the appellant joined them. They then asked the appellant whether the victim was the woman he was referring to and the accused said the victim was the daughter of his sister but then he changed his story and said that he found the victim lost at the market and therefore he came for her rescue. However, the victim told the women that she was not her uncle but rather the appellant eloped her from her parents at Ilunde and sodomized her.

Owing to that serious allegations by the victim the women decided to summon the chairman who also summoned the militia who called the police and the police came to take the appellant and the victim to the police station. At the police station the victim met her mother and she was given a PF3 and when taken to hospital she was medically examined by PW5 and found to have been sodomized. The appellant was interrogated by PW3 DC Kalunde and confessed to have sodomized the victim. Subsequently, he was charged with the offence.

In his defence before the trial court, the appellant protested his innocence. He denied to have sodomized the victim. He alleged that the entire case against him was framed by the mother of the accused PW1

because PW1 used to brew local honey beer and at one point she asked the appellant to collect honey for her but the appellant refused as a result of which PW1 threatened to fix the appellant. The appellant went further to allege that on the fateful day he was making beehive and that he was summoned and found people gathered and consequently he was arrested for allegations of rape something which surprised him because all the four years that he has spent in that village he has never been accused of anything. He stressed that the police investigator PW4 and the victim's mother PW1 discussed something while at police station and then PW4 tortured the appellant who initially denied the allegations but later he could not resist the pain of torture and therefore confessed to have sodomized the victim as a result he was forced by PW4 to append his thumb in a piece of paper. He branded PW5 and PW3 (the Medical Doctor) as liars because PW3 did not testify what the victim said. He finally asked why the female investigator and the chairman did not testify.

After a full trial, the trial court found that the prosecution's witnesses were credible and it found him guilty, he was convicted and sentenced as it were, which is why he appealed to this Court.

The appellant's memorandum of appeal raised 5 grounds which when properly construed boil down to only 4 of them; **firstly** that exhibit P1 and exhibit P2 were not properly admitted in evidence, **secondly** that there was missing link between the commission of the crime and the arrest of the appellant, **thirdly**, that the evidence of the victim (PW2) was not taken in line with the law and **fourthly** that the appellant was denied fair trial

because he was not accorded his rights in line with section 231(1) of the Criminal Procedure Act, Cap 20 R.E 2002 (Henceforth "the CPA").

The appellant's elaboration when invited to address the court initially was briefly that apart from the grounds of appeal he argued that in Tabora rape case has been a way of fixing suspects. He went on to argue that it is not true that he raped the victim but rather the entire case was a fabrication against him just because he was in conflict with PW1.

On his part Mr. Mwakalinga the learned State Attorney in supporting the conviction and sentence argued that in response to the first ground the cited case of **Robinson Mwanjisi** was not relevant to the instant matter because circumstances are not the same because in **Robinson Mwanjisi** the exhibit in question was a caution statement whereas in the instant case the exhibit in question is the PF3 which is written in English and the practice is always to let the witness provide explanation and this is what PW3 did at page 16 and 17 of the typed proceedings of the trial court.

Regarding the second ground of appeal the learned State Attorney argued that records of the trial court are silent on whether the caution statement (exhibit P2) tendered in evidence by PW4 was read out in court after it was cleared for admission and actually admitted in evidence. Mr. Mwakalinga admittedly, argued that as exhibit P2 was not read out in court after admission it has to be expunged from the record.

As regards the third ground the learned State Attorney was very brief in his response. He argued that PW4 who was the investigator testified at lengthy how the appellant was arrested. To hammer his point, he referred

this Court to the typed proceedings of the trial court in particular from pages 20 to 24 and valiantly argued that this ground of complain was baseless.

In response to the fourth ground the learned State Attorney was equally very brief and submitted that as the victim (PW2) was 12 years of age at the time of testifying the trial court properly conducted itself as required by the law now, which is to promise to tell the truth as it conspicuously appears at page 13 of the typed proceedings. He however, admittedly argued that the trial magistrate asked PW2 some questions at page 12. He therefore argued that this ground of appeal was baseless too.

The learned State Attorney further agued in response to the fifth ground of appeal that the appellant was accorded his right to fair hearing as required by section 231 of the CPA as clearly indicated at page 29 of the typed proceedings where records are clear that the appellant's right to call witnesses and tender exhibits were fully explained. According to him this ground of appeal also is not meritorious.

In rejoinder, the appellant expressed that the learned State Attorney oppressed him even at the trial court and no wonder his testimony is contradictory as to the time the victim was kidnaped between 24:00 hours and 22:00 hours. He insistently denied sodomizing the victim as alleged and that the case was fabricated against him because there was conflict between him and PW1. He further alleged that given his economic situations he could not bribe the learned State Attorney. He challenged the

credibility of the evidence that he abducted the victim while she was asleep and without breaking the door of her parent's house.

I have carefully considered the rival arguments of the trained minds, the grounds of appeal and the records of the trial court and I believe that the only issue before me is whether or not the appeal before me is meritorious.

Before doing so, it is crucial to state that, this being a first appeal is in the form of re-hearing. Therefore, as the first appellate court, I have a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at my own conclusion of fact. See-**D.R. Pandya V Republic** (1957) EA 336.

I find it convenient to begin with the appellants' complaint about exhibit P1 and exhibit P2 which were not read out after admission. I think it is appropriate here to recapitulate briefly the law on this matter. Simply put, once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. See the case of **Issa Hassan Uki v Republic,** Criminal Appeal No. 129 of 2017, (Unreported) where the document under discussion was a valuation report.

In the instant case the PF3 (exhibit P1) and the caution statement (exhibit P2) were wrongly admitted as they were not read out in court after they were cleared for admission and admitted in evidence. Admittedly, this omission is fatal.

I shall now resume to discuss the consequences of exhibit P1 and exhibit P2 which were irregularly admitted in evidence during trial. Given

the position of the law which I have discussed above, I thus expunge exhibit P1 and exhibit P2 from the record.

I think also, it is instructive to interject a remark, by way of a postscript, that, looking at the typed proceedings of the trial court in particular at page 23 I noted that the trial court received and admitted in evidence exhibit P3 which just like exhibit P1 and exhibit P2 was wrongly admitted in evidence. Furthermore, exhibit P3 was not even properly introduced before it was tendered by PW4 and later admitted in evidence. Let the records of the trial court as appearing at page 23 paint the picture:

> *"The sketch map has my signature and the Street Chairman. This is the sketch map of the scene of the crime. I pray to tender the same as exhibit.*
>
> *Accused reply: No objection*
>
> *Court: The sketch map is hereby admitted as exhibit P3.*
>
> *Sgd.*
>
> *C.M.Tengwa, RM."*

The above clearly indicates that after admission of exhibit P2 (the caution statement) records of the trial court are silent as to how and why PW4 started explaining how he could identify the sketch map without explaining his connection with the sketch map itself. For that reason and coupled with the fact that exhibit P3 just like exhibit P1 and exhibit P2 was admitted in evidence but was not read out in court after admission, I find

that the cumulative irregularity relating to admissibility of exhibit P3 to be fatal and I thus expunge exhibit P3 from the records.

Having expunged exhibit P1, exhibit P2 and exhibit P3 I am, admittedly, left with a question of whether what is left from the prosecution case is a mere skeleton which cannot support conviction. I wish to remark in passing that throughout the judgment of the trial court I did not see anywhere where the trial court seems to have specifically relied on exhibit P1, exhibit P2 and exhibit P3 in convicting the appellant. I wonder whether this was done by design or sheer oversight.

Be what it may, the effect of expunging the three exhibits leaves the prosecution evidence skeletal, if anything, the rest of the prosecution's evidence becomes a mere suspicion if not hearsay and not a very strong one to warrant conviction. It is trite law that a mere suspicion alone, however strong cannot ground a conviction. I shall, at a later stage of my judgment, revert to this disquieting aspect.

Next, I will consider the issue of inconsistences and contradictions of the prosecution's witnesses which is discernible from the records of the typed proceedings of the trial court. On the whole of the evidence, the trial court was impressed by the version told by all the prosecution's witnesses but in particular PW2, PW3 and PW4. It is instructive to re-state one of the basic principles of criminal justice in our jurisdiction, that in every criminal trial, the prosecution is duty bound to prove that the accused before the court committed the charge, the standard of which is beyond reasonable doubt. That means, the evidence must be so convincing that no reasonable

person would ever question the accused's guilty. See the cases of **Joseph John Makune v Republic** [1986] TLR 44 at page 49 and **Mohamed Said Mtula v Republic** [1995] TLR 3 all cited also in **Festo Komba v Republic,** Criminal Appeal No.77 of 2015, Court of Appeal of Tanzania (unreported).

My cursory perusal of the typed proceedings of the trial court I noted material contradictions and inconsistences in the testimony of PW1 and P4 in relation to some material events that also relates to the arrest and detention of the appellant. I should let the testimony of PW1 and that of PW4 speak in their own words.

PW1 testified at page 10 and 11 as follows:

> *"I went to my mother NELEA LAMECK and told her that MARY was missing. We decided to go and report to the police station. The police told us to come back at 11:00 hrs.*
>
> *We reached home and reported again as the girl was still missing. The police detained (sic) and told me that they were going to release me not (sic) until the girl is found. Then at 14:00 hrs, I heard the police saying this man is the one who stole (sic) the girl.*
>
> *Thereafter the police took me out of the cell and asked me to identify whether the girl was the one. I identified the victim."*

On the other hand, PW4 testified at page 20 and 21 as follows:

> *"On 23/12/2018 at 19:00 hrs. I was phoned (sic) by Mbilani suburb chairman telling me to go into (sic) Uwanja wa Fisi Street there is an*

incident of disappearing of a girl. I am the ward police. I went there and found a gathering. I interrogated the parents of the victim they told me that they used to sleep with the victim and on that date (sic) they slept with her.

"That when they got out of bed they find (sic) the girl missing. That as a result of fear they notified the mysterious disappearance to the village leadership. We decided to start searching for the girl. I directed the parents to go and make their statement to the police.

Then at 09:00 hrs, while still at the scene a phone was made (sic) at the police station by the chairman of Mazinge village saying that the girl was found into the house of Elias Michael"

I am alive to the principle that where the court is faced with discrepancy in the testimony of material witnesses but that discrepancy is trivial and does not go to the root of the matter it can be overlooked. See **Dickson Elias Nsamba Shapwata v Republic,** Criminal Appeal No. 92 of 2007 (unreported). In the case of **Evarist Kachembeho & Others v R** [1978] LRT n.70 this Court observed that:

"Human recollection is not infallible. A witness is not expected to be right in minute details when telling his story."

The Court of Appeal also observed in **John Gilikola v Republic,** Criminal Appeal No. 31 of 1999 (unreported) that due to the frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies. The question before me is whether or not the

discrepancy in the instant case is trivial and does not go to the root of the case and therefore can be overlooked.

I am mindful of the principle of law which has long been settled that where a case rests squarely on circumstantial evidence, the inference of guilty can be justified when only all incriminating facts and circumstances are found to be incompatible with the innocence of the accused or guilty of any other person (see **R v Kipkering arap Koske** [1949] EACA 135 at 136.

In the instant case PW1 the mother of the victim and PW4 the police investigator are material witnesses in the case and their testimoniessurrounds around how the incidence was reported to the police and the wheels of justice started its motion there and then. The testimony of the two witnesses is not consistent and coherent as to what time did exactly PW1 go to the police to report this matter and what time was the appellant arrested. The answer to this question has very serious bearing considering the fact that the appellant is alleging that the entire case was fabricated against him and that he was arrested at his house when he came back from making a beehive. Assuming for the sake of argument that the contradictions and inconsistences are taken to be trivial and does not go to the root of the case and therefore can be overlooked something which with due respect, I decline to agree, yet the evidence of all prosecution witnesses flies in the air in the absence of corroboration now that exhibit P1, exhibit P2 and exhibit P3 have been expunged from the court records. That brings me to the point I reserved earlier on.

Considering the seriousness of the charge of unnatural offence, and in this case the mandatory sentence, thirty years, with respect, I am of the considered view that the trial court should have subjected the evidence to a more detailed analysis before arriving at the conclusion.

For the foregoing reasons, I find the appeal with merit and consequently, I allow it. The appellant's conviction is quashed, the 30 years imprisonment sentence is set aside with order of immediate release of the appellants from prison unless lawful held in on another cause.

P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Appellant: Present in person

Respondent: Absent

B/Clerk: Grace Mkemwa, RMA

Court:-

Judgement delivered this 17th day of December, 2020 in the presence of the Appellant but in absence of the Respondent.

Right of appeal explained.

B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020