IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 01/2020

(Originating from Criminal Case No. 09 of 2019 of Ilemela District Court at Ilemela)

ATHUMAN S/O RASHID ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

23rd March, & 11th May, 2020

TIGANGA, J

The Appellant in this appeal Athumani Rashid stood charged before the District Court of Ilemela with unnatural offence contrary to section 154 (1) (a) of the Penal Code (Cap 16 RE 2002).

The particulars of the offence he was charged with were that, on 3rd day of January 2019 at Kitangiri area within Ilemela District in the city and region of Mwanza, he did have carnal knowledge of one S s/o C (name of the victim in initials), a boy of 11 years against the order of nature.

After full trial before the district court which involved 5 prosecution witnesses and one defence witness, the appellant was found guilty, convicted and sentenced to a mandatory sentence of 30 years jail imprisonment. He was also ordered to pay Tshs. 2,000,000/= being the compensation to the victim.

Aggrieved by the conviction, sentence and the order for compensation, the appellant filed a total of nine grounded petition of appeal which for easy reference is hereunder reproduced;

1. That, the trial magistrate erred both in law and fact to convict the appellant basing on evidence which was cooked up, fabricated to appellant and that lacks corroboration and should not be considered and not be trusted.
2. That, the trial court erred in law to attach much weight to the evidence of PW2 whose evidence was doubtful, unreliable, and untruthful which cannot afford the court in convicting the appellant.
3. That, the trial court erred in law in lacking into account the memorandum or fact not in dispute as the trial court did not comply with the mandatory provision of section 192(3) of Criminal Procedure Act. (sic)
4. That, in the absence of properly or full compliance of the provision of section 127(7) of the Evidence Act there was no basis for convicting the appellant.
5. That, the word dudu does not disclose the essential element of the offence of rape i.e there was no penetration per evidence of the victim.

6. That, there was no corroborative to support the evidence of Pw1, also the evidence of Pw2, Pw3, and Pw3 which was required to support the evidence of victim was suspect and doubtful which could not be corroborative.
7. That, Pw2, Pw3, Pw4, and Pw5 were not eye witnessed Pw1 the victim being sodomised by the appellant hence their evidence was hearsay which cannot assist the court to convict the appellant.
8. That, the trial court erred in law for failure to note that section 127(7) is applicable where there has first been compliance with section 127(2) of the evidence Act.
9. That, the case against the appellant was not proved by the prosecution witnesses beyond reasonable doubt.

To appreciate what actually led to the arrest, charging and conviction of the appellant, the brief background of the case is important. Briefly, the facts are that on 3rd January 2019, at 06.50Pm, while at Mwinuko Street at Kitangiri area, the accused person called the victim requested and sent him to buy the match box at the shop. The victim honored the request and went to the shop and bought the said matchbox, he took it to the appellant who upon arrival the appellant told the victim to enter inside his house, where upon entering the appellant grabbed him, undressed and sodomised him. After finishing that act, the appellant released the victim to go home before the victim had met his mother who was searching for him. It was upon being interrogated by his mother, who suspected that there was something wrong, the victim told her mother that the appellant sodomised him. It seems that news did not only shock his mother, but also irritated her, as a result, while

in the state of anger, inflicted a severe beating to the victim before inspecting him in his anus. Soon thereafter, she informed Mama Jose a neighbour, who also inspected the victim in his anus, and assisted the matter to be reported to the street chairman who wrote them an introduction letter to police. At the police station, the victim was given a PF3 and was taken to Sekoutoure hospital where he was examined and by then the accused had already been arrested.

At the hearing of the appeal the appellant appeared in person unrepresented, while the respondent was represented by Miss Mwaseba learned Senior State Attorney. The appellant had nothing new to add, he chose to adopt his grounds of appeal, while the Miss Mwaseba strongly opposed the appeal. The grounds and arguments in opposition of the appeal as submitted by the learned Senior State Attorney are as follows.

With regard to the first ground of appeal, she submitted that the court take into account the provision of section 127(7) of the Evidence Act Cap 6 RE 2002 and the case of **Jumanne Shabani Mrondo vs Republic** Criminal Appeal No. 282 of 2010 CAT- Arusha which allows the court, if it is satisfied that the victim is telling nothing but the truth, to convict even if there is no evidence to corroborate the evidence of the victim. She submitted further that, in the case at hand, the victim promised to speak the truth and the court believed him, basing on that argument, Miss Mwaseba prayed that the ground be dismissed for want of merits.

On the second ground of appeal, it is her argument that, the evidence of PW2 was the corroborating evidence, therefore she prayed the same to be believed consequent of which the second ground of appeal be dismissed.

Regarding the third ground of appeal which raises the complaint that preliminary hearing was not conducted in accordance with section 192 of the Criminal Procedure Act Cap 20 RE 2002, she submitted that the philosophy behind the procedure of preliminary hearing intended to expedite trial. In this case the accused disputed all the facts, that was the reasons the prosecution was to call witnesses to prove the case.

Ground four was argued together with ground number eight, which was that for section 127 (7) of the Evidence Act is relied on if section 127(2) has been complied with, she submitted that, there was a clear compliance with the law, she made reference to page 10 of the proceedings where PW1 promised to speak the truth, for that reasons, she asked the two grounds No. 4 and 8 to be dismissed for want of merits.

Regarding the 5th ground of appeal which was challenging the use of the word dudu, she submitted that, that the word dudu does not describe the instrument used in the commission of an offence, she made reference to the case of **Jumanne Shabani Mrondo vs Republic (**supra) at page 7 of the judgment at which the decision of **Hassan Bakari @ Mama Jicho Vs Republic** Criminal Appeal No. 103 of 2012 CAT Mtwara in which it was held that, there are so many factors which may prevent the witnesses to use plain word to describe the sexual organ. The victim said the appellant inserted his dudu in his anus. In opposing that ground, she submitted that, the PF3 as

well as the evidence of other witnesses would play as corroborating evidence.

Regarding the sixth ground that, there was no corroboratiion to support the evidence of PW1, also the evidence of PW2, PW3, and PW3 which was required to support the evidence of victim was suspect and doubtful which could not be corroborative. While opposing that ground, she submitted that, the evidence PW2 and PW3 are not doubtful, there is scientific evidence that the victim was actually carnally known therefore the evidence proved the case beyond reasonable doubt.

Regarding the 7th ground of appeal, which raise the complaint that PW2, PW3, PW4, and PW5 were not eye witness to prove that PW1 - the victim being sodomised by the appellant. That means the complaint was that their evidence was hearsay which cannot assist the court to convict the appellant.

In opposing this ground of appeal, she submitted that, in cases of this nature, the evidence of the victim alone can found the conviction without even necessarily calling other witnesses to corroborate the evidence of the victim. She therefore asked the court to find that the case was proved beyond reasonable doubt, she therefore asked the court to dismiss the appeal.

Regarding the 9th ground of appeal, which raises the complaint that, the case against the appellant was not proved by the prosecution witnesses beyond reasonable doubt. She submitted that, the offence was proved beyond reasonable doubt, that according to him, is evidenced by the fact that penetration in the anus of the victim was proved by the victim himself

and the medical doctor. Therefore the District Court properly convicted the appellant, the conviction and the sentence be upheld.

In his rejoinder submission, the appellant submitted that, the court be pleased to allow his appeal so that he can go home and take care of his family.

In this judgment, I will, for convenience purpose, deal with the ground of appeal in the manner adopted by the learned State Attorney in arguing the appeal. Regarding the first ground of appeal which raises a complaint that, the trial magistrate erred both in law and facts to convict the appellant basing on evidence which was cooked up, fabricated against the appellant and that lacks corroboration, therefore should not be considered and not be trusted. On this ground the learned state attorney submitted in opposition of the ground that, the evidence was not fabricated and asked the court take into account the provision of section 127(7) of the Evidence Act Cap 6 RE 2002. She also cited the case of **Jumanne Shabani Mrondo vs Republic** Criminal Appeal No. 282 of 2010 CAT- Arusha which allows the court, if it is satisfied that the victim is telling nothing but the truth, to convict the accused person, even if there is no evidence to corroborate the evidence of the victim.

I find these arguments in as far as the first ground of appeal is concerned, to have been directed to only one aspect of non-corroboration alone. In this ground of appeal, the appellant is also complaining that he was convicted on the cooked, and fabricated evidence.

Starting with these later aspects which the State Attorney did not address, I find however, that the appellant has not told the court how was

the evidence fabricated or cooked up, and who cooked or fabricated such evidence against him. Without any statement from him, at least showing who fabricated and for what purpose, this court is left without material to consider in dealing with these allegations as the allegation are the matter to be proved by evidence.

The other complaint in that ground was that the evidence was not corroborated. It is true that the general rule is that evidence needs to be corroborated. However in sexual related cases, as correctly submitted by the learned State Attorney for the respondent Republic, that there is exception to that general rule. Section 127(7) provides that;

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings* ***involving sexual offence*** *the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may,* ***after assessing the credibility of the evidence of the child of tender years*** *as the case may be the victim of sexual offence on its own merits,* ***notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.*** *" (Emphasis is added)*

Sub section 8 of the same section defined what those sexual related offences are, for the purposes of this section 127 means any of the offences

created in Chapter XV of the Penal Code. The offence of unnatural offence is also created under section 154 of the Penal Code is under that chapter of the penal code, therefore it falls under the category of the sexual offence. In these types of offences where the only independent evidence is that of a child of tender years or of a victim of the sexual offence, then the court may believe the evidence and proceed to convict if it has satisfied itself that the witness is credible.

That position forms the principle in the case of **Jumanne Shabani Mrondo vs Republic** Criminal Appeal No. 282 of 2010 CAT- Arusha cited by the leaned State Attorney. In the case at hand, the victim is a child of tender age, and was believed by the trial magistrate doubtless after satisfying herself that the witness was credible and was speaking nothing but the truth, there is therefore no reason to fault her. The ground is therefore devoid of merit, it stands dismissed.

With regard to the second ground, which raises the complaint that, the trial court erred in law to attach much weight to the evidence of PW2 whose evidence was doubtful, unreliable, and untruthful which cannot afford the court in convicting the appellant. Responding to this ground, the learned State Attorney for respondent submitted that, the evidence of PW2 was the corroborating evidence, therefore she prayed the same to be believed and dismiss the second ground of appeal. Looking at the evidence of the PW2 it is true that the evidence is not a direct evidence capable of stating how the offence was committed, it is rather the evidence of the witness who partly told the court what he was told by the victim, but to the large extent what she did as the mother of the victim and person who was the first to discover

the commission of the offence. Looking at the evidence, the appellant was not convicted solely basing on the evidence of Pw2 the court used her evidence as a corroborating evidence. The second ground is therefore found to have no merit, it is dismissed.

With regard to the third ground of appeal, which raises the complaint that preliminary hearing was not conducted in accordance with section 192(3) of the Criminal Procedure Act Cap 20 RE 2002. Responding to that ground, the learned State Attorney submitted that the philosophy behind the procedure of preliminary hearing intended to expedite trial. In this case the accused disputed the facts that was the reasons the prosecution was to call witnesses to prove the case. In dealing with this ground of appeal, I find it important to look into what section 192(3) of the CPA provides as here under;

> *"At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed."*

The complaint is that this provision was not complied with, now, whether the same was complied with or not, is a matter to be found in the record especially the proceedings of the day when the preliminary hearing was conducted, that is at page 7 of the proceedings. It is on the record that;

> ***Court:*** *the accused admit his names, personal particulars, to be neighbor of the victim and to have been arrested and taken to police.*

That was followed by the signature of the accused and that of the state attorney. This means that the provision of the law has been complied with, thus taking away the base of such complaint. The ground is dismissed for want of merits.

With regard to the fourth and eighth grounds of appeal which raise the complaint that, section 127 (2) of the Law of Evidence Act (supra) was not adhered to and that for section 127 (7) of the Evidence Act to be used, section 127(2) has to be complied with first. Replying on that ground the learned State Attorney submitted that, there was a clear compliance of the law, she made reference to page 10 of the proceedings where PW1 promised to speak the truth, for that reasons she asked the two grounds no. 4 and 8 be dismissed for want of merits.

On this, section 127(2) of the Evidence Act as amended by Written Laws Miscellaneous Amendment No. 4 of 2016 which came into operation on 27th June 2016 makes it mandatory that a child witness must promise to tell the truth before his or her testimony is recorded. For easy reference it is quoted as follows;

Section 127 (2)

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies"*

Section 127(4) as amended by section 26 of the Written Laws Miscellaneous (Amendment) Act No. 4 of 2016 terms the child of tender age as follows,

"For the purposes of this law, the expression "child of tender age" means a child whose apparent age is not more than fourteen years."

In this case, the charge sheet describes the victim to be 11 years old when the offence was allegedly committed, she also informed the court that she was 12 years of age when she was called to testify. This means she was a child of tender age who was subject to the provision of section 127(2) of Evidence Act quoted above.

In the recent case of **Shaibu Naringa Vrs Republic,** Crim. Appeal No. 34 of 2019 (CAT) Mtwara (unreported) in which a number of other decisions of the court of Appeal were quoted with approval, to wit **Godfrey Wilson Vs Republic**, Crim. Appeal No. 168 of 2018, **Msiba Leonard Mchelekumwaga Vs Republic** Crim. Appeal No. 550 of 2015, **Hamis Issa Vs Republic**, Crim. Appeal No. 274 of 2018 and **Issa Selemani Nambaluka Vs Republic** Crim. Appeal No. 272 of 2018 (all unreported decisions of the Court of Appeal). Of these decisions, the decision of **Issa Selemani Nambaluka Vs Republic** (supra)

"...under the current provision of the law, if a child witness does not understand the nature of an oath, he or she can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies".

Now the issue is whether the provision above quoted has been complied with? The answer to this issue is not far to find. The proceedings speak louder and actually prove that the said law was indeed complied with.

The record at page 10 show that the victim promised to speak the truth. These two grounds have no merits they are dismissed.

With regard to the fifth ground of appeal which raises the complaint that, the word "dudu" does not disclose the essential element of the offence of rape i.e there was no penetration per evidence of the victim. The learned State attorney submitted that, the word "dudu" does not describe the instrument used in the commission of an offence, she refereed the court to the case of **Jumanne Shabani Mrondo vs Republic (**supra) at page 7 of the judgment at which the decision of **Hassan Bakari @ Mamajicho Vs Republic** Criminal Appeal No. 103 of 2012 CAT- Mtwara, in which there are so many factors which may prevent the witnesses to use plain word to describe the sexual organs. It is her submission that, the victim said the appellant inserted his "dudu" in his anus. She submitted that the PF3 as well as the evidence of other witnesses would play the role of the corroborating evidence. This issue is not new, the Court of Appeal in a number of cases was confronted by this issue. In the case of **Hassan Bakari @ Mamajicho Vs Republic** Criminal Appeal No. 103 of 2012 CAT Mtwara as referred by the counsel for the respondent. It was held *inter alia* that;

> " ....*there are circumstances and they are not few that witnesses or even the court would avoid using such direct words like penis, or vagina and the like for obvious reasons including but not restricted to that person's cultural background, upbringing, religion, feelings the audience listening, the age of the person and the like. These restrictions are understandable. Given the circumstances of each case our considered view is that so long*

as the court, the adverse party and or any intended audience grasps the meaning of what is meant, then it is sufficient to mean or understand it to be penetration of the vagina by the penis....our cultural backgrounds and upbringing need to be observed and respected in matters of this kind"

In another authority of **Hassan Kamunyu Vs. Republic** Criminal Appeal No 277 of 2016, it was held that there is a shift from Orthodox way to a more modern and accommodative style.

"It is no longer a requirement for a witness in the sexual related cases to describe the act of rape in a plain language. Some of the words which are culturally accepted may be used and the court is prepared to accept them as the proper description, provided they are understood and brings home the intended concept. To insist that description of the acts should be plain, is to entice couching and teaching of the witness of tender age".

The word "dudu" as used in the court bellow to describe penis has been culturally accepted to mean private parts particularly penis. As rightly submitted by the State Attorney this ground also lacks merit, and it is dismissed.

With regard to ground six of the appeal which raises, the complaint that, there was no corroborative to support the evidence of PW1, also that the evidence of PW2, PW3, and PW4 which was required to support the evidence of the victim was suspect and doubtful which could not be corroborative. This ground has already been resolved when I was dealing with ground one

of the appeal, where it has been found that the evidence of the victim was corroborated by the evidence of PW2, PW3, and PW4 and that even if we assume for the sake of arguments that the evidence of the said witnesses are not corroborative, yet still the evidence of the victim PW1, can in law, be based upon to found the conviction in terms of section 127(7) of the Evidence Act (supra). This ground also fails.

With regard to ground seven of the Appeal, which raises a complaint that, PW2, PW3, PW4, and PW5 did not eye witness PW1, the victim, being sodomised by the appellant, hence their evidence was hearsay which cannot assist the court to convict the appellant. Replying to this ground of appeal, the learned State Attorney submitted that in cases of this nature the evidence of the victim can found the conviction, she asked the court to find that the case was proved beyond reasonable doubt and therefore dismiss the appeal. That it was not the evidence of other witnesses upon which the trial court based its conviction, but that of the victim. The evidence of PW2, PW3, PW4, and PW5 only corroborated the victim's evidence which formed the basis for conviction. Looking at this ground, its answers are just like those in the first and seventh ground, therefore as such, the ground of appeal also fail for the reasons given.

Regarding ground nine of appeal, which attacks the findings of the trial court in the sense that the case against the appellant was not proved by the prosecution witnesses beyond reasonable doubt. On this, the learned State Attorney submitted that the offence was proved beyond reasonable doubt, on the ground that, that is evidenced by the fact that, penetration in the anus of the victim was proved by the victim himself and the medical doctor

who examined him. Therefore the District Court properly convicted the appellant, the conviction and the sentence be upheld. In criminal cases, for the accused to be convicted, it must be established that the case was proved beyond reasonable doubt. The term beyond reasonable doubt, has no statutory definition, but has been defined in a number of case laws. In the case of **Magendo Paul & Another Vs Republic** [1993] T.L.R. 219 (CAT), it was held *inter alia* that;

> *"For a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the Accused person as to leave a remote possibility in his favour which can easily be dismissed."*

The same court, was loud enough to expand the principle in the case of **Chadrankat Joshubhai Patel Vs Republic, Criminal Appeal No. 13 of 1998 (CAT-DSM)** in which it held *inter alia* that:

> **"*.....remote possibility in favour of the Accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inferences.*"**

In so proving the case beyond reasonable doubt, at least two elements must be proved as held in the case of **Mariki George Ngendakumana Vs. Republic Criminal Appeal No. 353 Of 2014 (CAT) Bukoba** (unreported) that;

"It is the principal of law that in criminal cases, the duty of the prosecution is in two folds, ***one,*** *to prove that the offence was committed and* ***two****, that it is the accused who committed it"*

In the line of the holding of the Court of Appeal in these three authorities above, in this case, by the evidence of the medical doctor, there is no dispute that the blunt object was inserted in the anus of the victim. It is also the evidence of the victim before the court that, that blunt object was the penis of the accused person which was inserted by the accused person in the anus of the victim.

By the evidence of these two witnesses it has been proved that the offence of unnatural offence was committed against the victim, and the person who committed it, is none other than the accused person before the trial court who is the appellant before this court.

In the two cases of **Tatizo Juma Vs. Republic,** Criminal Appeal No. 10 of 2013 and **Abdalla Mohamed Vs. Republic,** Criminal Appeal of 2009 both of the Court of Appeal of Tanzania, (unreported) it was held *inter alia* that; the best evidence to prove the offence of sexual offence is that of the victim.

The victim's evidence in this case has categorically told the court what happened, that was not in any way controverted by the defence. That said and found, I find the prosecution to have sufficiently proved the case at hand beyond reasonable doubt. The evidence is so strong against the accused person, the same leaves no any possibilities in his favour, and if such possibility in his favour has escaped my mind and attention, then the same

must be very remote to displace the solid evidence or dislodge irresistible inference against the accused person. The Accused person **Athuman Rashid** was properly found guilty and convicted as charged before the District Court. The appeal is dismissed for want of merits, the judgment passed by the trial court is upheld.

It is so ordered.

DATED at **MWANZA** on this 11h day of May 2020

J.C. Tiganga

JUDGE

11/05/2020

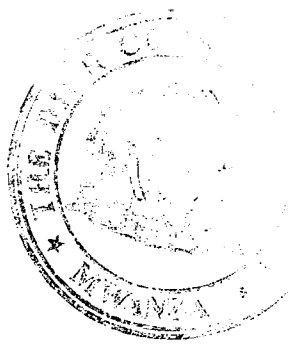
Judgment delivered in the absence of the appellant in person and Miss Mwaseba learned State Attorney for the respondent.

J.C. Tiganga

JUDGE

11/05/2020

Right of Appeal explained and guaranteed



J.C. Tiganga

JUDGE

11/05/2020