

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TANGA)

AT TANGA

CRIMINAL APPEAL NO. 53 OF 2020

(Appeal from the judgment of the District Court of Tanga at Tanga (Hon, R. E. Mkisi, PRM) Dated 18/05/2020 in Criminal Case No. 93 of 2018)

BETWEEN

SEBO KEA @ HAMZA.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

*Date of last order: 26/08/2021
Date of Judgment: 28/09/2021*

AGATHO, J.:

The Appellant was arraigned before the District Court of Tanga at Tanga facing a charge of unnatural offence c/s 154(1)(a) of the Penal Code [Cap 16 R.E 2002]. The prosecution alleged that on diverse dates in August 2017 and June 2018 the Appellant did have carnal knowledge of a male child (PW3) against the order of nature. The prosecution proved the case beyond reasonable doubt to the satisfaction of the trial Court. Consequently, the Appellant was found, guilty, convicted and sentenced to life imprisonment. The Appellant was aggrieved by that decision and hence he preferred this appeal. Before going into the grounds of appeal, let me

clarify few things. The charge sheet did not include a sentencing provision cited by the trial Magistrate. But failure to cite sentencing provision in a charge sheet is not fatal as that did neither affect the trial Court findings nor occasioned failure of justice. Moreover, such irregularity is curable under Section 388 (1) of the Criminal Procedure Act [Cap 20 R.E. 2019] as held in **Jamal Ally Salum V. R, Criminal Appeal No. 52 of 2017**. Another item worth clarifying is the appropriate punishment for unnatural offence. Regarding the unnatural offence committed to a child below the age of 18 the sentence is life imprisonment. This is provided for under section 154(2) of the Penal Code [Cap 16 R.E 2002] as amended by section 185 of the Law of the Child Act, 2009 which substituted the word ten (10) under subsection (2) of that section with the word eighteen (18). Thus, section 154(2) of the Penal Code [Cap 16 R.E 2002] read as follows:

"Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life."

Having clarified these two issues, we turn to the grounds of appeal. The Appellant put forward six grounds of appeal; (1) that trial Magistrate erred in law and fact by wrongly treating the evidence of PW3 (victim) as it was

based on recognition though he gave no prior description of the Appellant during reporting of the crime to the police; (2) that the trial Magistrate erred in law and fact by admitting retracted caution statement (exhibit P1) of the Appellant while he was tortured by the police officers; (3) that the trial Magistrate erred in law and fact by failing to notice that the specific or exact date in PW3 (victim) was alleged to have been sodomized by the Appellant was not specified; (4) that the learned trial Magistrate erred in law and fact by convicting the Appellant while erroneously failed to assess, evaluate and analyze the prosecution evidence; (5) that the trial Magistrate erred in law and in fact in convicting the Appellant by failing to consider the defence of the Appellant; and (6) that the prosecution did not prove the case beyond reasonable doubt. To determine the appeal the Court drew six issues and they have been responded to as shown herein below. The parties were ordered to argue the appeal by way of written submissions. They complied with the schedule set by the Court. The issues drawn were disposed;

- 1) Whether the trial Magistrate erred in law and fact by wrongly treating the evidence of PW3 (victim) as it was based on recognition though he gave no prior description of the Appellant during reporting of the crime to the Police.

From the record of proceedings, it is apparent that PW3 knew the Appellant as he sodomized him several occasions, about 8 times last being in April 2018. That is shown on page 21 of the trial Court proceedings. The detail of PW3 testimony is seen on pages 20 – 23 of trial Court proceedings. It means the Appellant was not a stranger to PW3. Whether description of PW3 and PW2 as credible. It was held in **Goodluck Kyando v R [2006] TLR 363**, that every witness is entitled to credence.

The consistency of PW3's testimony and details of places the Appellant took him is credible. The PW3 also knew where the Appellant's shop is located. This Court cannot see the demeanor of the witness but certainly from the evidence on record I find no reason to discredit the trial Court findings. Thus, the 1st ground of appeal crumbles. I should add that I was unable to see any contradiction in prosecution witnesses.

- 1) Whether the trial Magistrate erred in law and fact by admitting the retracted caution statement (Exhibit P1) of the Appellant which he claimed to have been recorded while he was tortured by the Police Officers.

While the caution statement was admitted the same was retracted as it was alleged to be a confession induced by torture. However, looking at the

trial Court judgment (pages 1 – 4) the decision was not based on the Appellant's caution statement. It was based on the retirement caution statement may be admitted if it leads to discovery.

This own of the caution statement say is expunged the prosecution evidence is strong enough to convict the Appellant.

- 1) Whether the trial Magistrate erred in law and in facts by failing to notice that the specific or exact date on which PW3 (victim) was alleged to have been sodomized by the Appellant was not specified.

While date of commission of the offence is material but there are instances where specific date may be difficult to mention, for instance where the offence occurred in diverse dates or occurred on several occasions.

In the present case the victim was sodomized on several times on diverse dates. The Appellate was accused of sodomizing the victim on several occasions. Therefore, the offence was committed on diverse dates as shown on the charge sheet.

In consolidated grounds of appeal the Appellant counsel lamented that the penetration was not complete. I am of the settled view that for unnatural offence just like rape the offence was committed when there is penetration

however slight. This was also stated in **Nasibu Ramadhani V. R Criminal Appeal No. 310 of 2017 pages 11 – 12.**

2) Whether the learned trial Magistrate erred in law and in fact by convicting the Appellant while erroneously failed to assess, evaluate and analyse the prosecution evidence. I have already stated that the trial Court properly evaluated the evidence. This is visible on pages 1 – 4 of judgment of the trial Court.

The trial Magistrate did analyse and evaluate the evidence of prosecution as shown at page 1 – 4 of the judgment. However, the defence evidence found in pages 44 – 46 of proceedings was not evaluated or considered at all. But this did not occasion failure of justice because the DW1 did not state anything significant to raise doubt on prosecution evidence. He simply claimed to have been tortured by WP Josephine. And further denied being a Bodaboda (motorcycle rider). These are seen on page 45 of the trial Court proceedings.

3) Whether learned trial Magistrate erred in law and in fact in convicting the Appellant by failing to consider the defence of the Appellant. It is the law that the trial Court must consider the defence.

Indeed, in the trial Court judgment the trial magistrate completely ignored the DW1 testimony. That is fatal. However, this being a first appellate Court I took the liberty of evaluating the defence case as captured in the trial court record of proceedings. Looking at page 44 – 46 of proceedings the Appellant defence was that he was tortured by the Police, and he does not know the prosecution witnesses and that he is not a Bodaboda rider. While it is true that the prosecution had a duty to prove the case beyond reasonable doubt as held in **Jonas Nkize v Republic [1992] TLR 213 at page 214**, also the accused cannot be convicted because of his weak defence or suspicion. In the present case, the record shows that the defence failed to raise any doubt in prosecution evidence. Moreover, the testimonies of prosecution witnesses [PW1, PW2 and PW3] were consistent, credible, and believable. Again, PW2 and PW3 were eyewitnesses and victims. It was held in **Seleman Makumba v R [2006] TLR 379** that in sexual offence cases the best evidence is that of the victim if it is credible and that what is testified is nothing but the truth.

- 4) Whether the prosecution did prove the case beyond reasonable doubt.

On pages 1 – 4 of trial Court judgment, the trial Court evaluated the prosecution evidence. Moreover, PW2 and PW3 are the victims and eyewitnesses, whose evidence is recorded on pages 12-23 of the trial Court proceedings. They have no reason to lie to Court about the offence the accused committed or what he did to them. Moreover, the DW1 did not state any fact in his defence that could have damaged the prosecution case. The defence that he was tortured led to retracting of his caution statement. That the confession was not voluntary and hence illegal. If such evidence is expunged still there is strong evidence from prosecution that warranted conviction. There is direct evidence of PW2, and PW3 who were the victims. At page 4 of the trial Court judgment the trial Magistrate was satisfied that the PW3 was a credible witness and that his testimony that he was sodomized by the Appellant was nothing but the truth. At this point reference is made to **Selemani Makumba V. R [2006] TLR 379**, the best evidence in sexual offence case is that adduced by the victim. Moreover, in the case of **Goodluck Kyando v R [2006] TLR 363**, it was held that every witness is entitled to credence unless there is reason to discredit and disbelief his testimony. In the present case PW2 and PW3 are victims, and their testimonies are not only credible but also believable. The DW1 did not discredit their testimonies during cross examination.

Considering the foregoing disposition, I find no reason to interfere with the findings of the trial Court save for failure to evaluate the defence which nevertheless did not lead to miscarriage of justice because I have examined the defence evidence on record and found it to be devoid of substance. Consequently, this appeal lacks merits and I dismiss it.

DATED at TANGA this 28th day of September, 2021.




U J. AGATHO
JUDGE
28/09/2021

Date: 28/09/2021

Coram: Hon. Dr. U. J. Agatho, J

Appellant: Present

Respondent: Muhangwa (S/A)

C/C: Zayumba


Court: Judgment is delivered in the presence of Appellant and Muhangwa State Attorney for the Respondent.




U J. AGATHO
JUDGE
28/09/2021

Right of Appeal explained.




U J. AGATHO
JUDGE
28/09/2021