IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 57 OF 2020

(Arising from the District Court of Moshi, Criminal Case No. 418 of 2019)

EDMUND THOMAS KAVISHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

In the District Court of Moshi, the appellant was charged, found guilty and convicted for the offence of Unnatural Offence **c/s 154 (1) (a)** and **(2) of the Penal Code, Cap 16 [R.E 2002]** as amended by **section 185 of the Law of the Child Act, 2009**.

Briefly, the facts of the case captured from the record are set out as follows: - PW2 a boy aged 9 years old and a standard III student at Korongoni Primary School testified to the effect that, on the 4th day of November 2019 at around 17 pm he came from school accompanied by his friend one Peter (Appellant's son). He remained in the

nearby school compound drinking some water whereas his friend headed home. A while later, his friend came back and informed him that his father (the Appellant) was calling him. He went to their house and his friend left. He remained with the Appellant who bought him some samosas. The Appellant took him to the bush at the airport. The victim undressed and the Appellant first inserted a thin stick into the victim's anus. The Appellant then had canal knowledge of the victim. He thereafter took him to the bus station to proceed for Marangu and left him there. The victim arrived late at Marangu and had to seek for shelter. It happened that he slept at a Good Samaritan's house. On the following day the victim was taken to his aunt's home at Marangu.

After interrogation by his aunt, he named the appellant and alleged he had been sodomized. The matter was reported to the police station, the victim was taken to hospital for medical examination, followed by the arrest of the Appellant. The victim's father on the other hand was very worried since it was unlike the victim to come back late let alone sleeping out overnight. The Appellant was then charged with the present offence.

The Appellant has challenged the trial court's judgment by knocking at the window of this court with a petition of appeal containing six grounds as hereunder:-

1. *That the trial court grossly erred in law and fact basing its conviction on the prosecution's unreliable, incoherent and contradictory evidence.*

2. *That the trial court grossly erred in law and fact in constructing reasonable doubts raised by the accused person and opted to rely on them in favour of the prosecution side.*

3. *That the trial court grossly erred in law and fact in failing to consider the Appellant's defence adduced at the trial, and erroneously held that the Respondent proved their case against the Appellant beyond reasonable doubt.*

4. *That the trial court grossly erred in law and fact in failing to draw adverse inference against the Respondent (Republic) upon their failure to call material witnesses.*

5. *That the trial court grossly erred in law and fact in failing to draw adverse inference against the*

victim (PW2) upon his failure to report the incidences at the possible earliest moment.

6. *That the trial court grossly erred in law and fact in failing to properly evaluate the evidence adduced at the trial instead it glossed over it to justify the conclusion reached.*

The appeal was scheduled to proceed by way of virtual conference but due to technical problems, it was proposed and agreed to be conducted by way of written submissions. The Appellant enjoyed the service of Mr Kilasara learned Counsel and the Respondent (Republic) had the service of Mr Mwinuka, learned State Attorney.

The Appellant's counsel submitted on 1st, 2nd and 6th grounds to the effect that, the trial court based its conviction on the incoherent, contradictory and unreliable evidence. To buttress his argument, the learned counsel referred the court to the evidence of PW2 (victim) at page 14 of the proceedings where he alleged, the incidence took place at the airport while coming from school and at page 16 he changed and alleged that the same was committed while coming from church.

The counsel contended further, PW2 alleged he was sodomised twice without any details of the first incidence. When cross examined, he alleged that the Appellant was at his working place at the material time. The learned counsel further expounded that, PW2 alleged that during the commission of the offence they heard school children talking while passing on the same route but when cross examined the story changed to the effect that no one was around at the scene of crime.

The counsel thus concluded in light of PW2's evidence the same is incoherent and untrustworthy to hold conviction. He invited the court to be guided by the holding in the case of **Fredwind Martine Minja vs Republic, Criminal Appeal No. 237 of 2008**.

The counsel also challenged the evidence of PW2 which he added potency that, it contradicts with that of other witnesses. He referred to the evidence of PW2 who alleged he had been sodomised twice, while PW1 stated that PW2 was sodomised trice. Other contradictory evidence came from PW3 who testified that PW2 had no bruises, wound or semen and could not tell whether the loose sphincter in PW2's anus was caused by a sharp or blunt object. The same contradicts with the victim's

evidence who alleged that before he was sodomized, the Appellant inserted a thin stick unto his anus which caused him pain. More contradiction comes from PW1 who stated, the victim (PW2) had decided to go to Marangu out of fear of getting home late, whilst PW2 narrated that he was persuaded by the appellant to go to Marangu. The counsel argued that such discrepancies in the prosecution evidence raised serious doubts. He invited the court to be guided once again by the holding in **Jeremia Shemweta vs Republic (1985) TLR 228**.

Apart from the above, the trial court failed to make any attempt to deal with such contradictions but went on to rely on the prosecution evidence. The court should have made sure the evidence was credible as in the case of **Nelson George @ Mandela and 4 others vs Republic, Criminal Appeal No. 31 of 2010** which cited with approval the decision in **Deemay Daati and 2 Others vs Republic (2005) TLR 132.** With respect he called upon this court to go through the evidence on record and make its own findings. He was firm in his view that, the trial court had misapprehended the substance, nature and quality of the evidence.

As regards the 3rd ground of Appeal, the learned counsel submitted, the trial court failed to consider the defence evidence as a whole and in particular, the evidence of DW4 and DW2 who explained the whereabouts of the Appellant at time the alleged offence was committed. To this respect, he cited the decisions of **Fanuel Kiula vs Republic (1967) HCD 369** and **Ahmed Said vs Republic, Criminal Appeal no 291 of 2015**, where it was laid down in case of failure to take into account any defence put up by the accused this will vitiate conviction.

On the 4th ground of appeal, the counsel submitted on failure by the prosecution to call material witnesses named Peter (victim's friend) who informed him that his father was calling him. Such failure entitles the court to draw an adverse inference against the prosecution case. The learned counsel referred the court to the case of **Hemedi Saidi vs Mohamedi Mbilu (1984) TLR 113** and **Azizi Abdalah v. Rpublic (1971) TLR 71** in support of his stance.

Turning to the last ground of appeal, (the 5th ground), the learned counsel blamed the trial court for failure to draw an adverse inference against PW2 for failure to report and name the Appellant at the earliest possible moment since he alleged that it was not the first time to be sodomised

by the Appellant. With respect he referred the court to the authority found in the case of **Wangiti Mansa Mwita and others vs Republic, Criminal Appeal No. 6 of 1995**. It was surprising and baffling when the offence was taking place, PW2 never raised an alarm or called for help from passer-bys despite the fact that he was never threatened or intimidated by any person or the appellant who left him behind and ran to hide in the bush. Even on his way to Marangu while in the bus and upon arrival did not mention the incidence to anyone. To make matters worse he slept in a stranger's home with two of his children but made no mention of the appellant's evil acts. Neither did he narrate to his aunty on the following day about the appellant. The victim's failure in this regard rendered his testimony highly unreliable and the trial court erred to rely on the same in convicting the appellant.

On the other hand, the learned State Attorney shortly submitted to the effect that, the contradictions as submitted by the appellant's counsel in ground 1, 2 and 6 do not affect the root of the case. He was fortified in his argument by citing the decision of **Eliah Barik vs Republic, Criminal Appeal No. 321 of 2016.** He made a strong statement that contractions by witnesses or among

witnesses cannot be escaped or avoided in any particular case.

With respect to the 3rd ground, the learned State Attorney submitted, the defence evidence was considered by the trial magistrate at page 8 of the judgment and the same was found to be weak to shake the prosecution case.

With regard to the 4th ground, the learned State Attorney submitted no number of witness is required to prove the case as envisaged by **section 143 of the Evidence Act [Cap 6 RE 2019].** The Attorney cited the case of **Seleman Makumba vs Republic [2006] TLR 380** which lay a foundation that, the best evidence in sexual offences comes from the victim and in this case the victim pointed an accusing finger to the appellant, known to him as "*Baba Pendo*".

Responding to the 5th ground of appeal on failure by the victim to name the suspect at the earliest time, the learned state attorney submitted, each case should be determined depending on its own merits and circumstances. As far as this case is concerned it revolves around a sexual offence unlike other offences like armed robbery. Be as it may, considering the victim is a minor,

naming a culprit could take some time. The learned State Attorney contended even though, the victim had actually mentioned the accused name to his father (PWI).

Mr. Mwinuka concluded by stating the grounds run short of merit and he prayed the appeal be dismissed.

In rejoinder, the Appellant's advocate reiterated his position in each ground of appeal. As for the discrepancies he stressed, these were not discussed and addressed by the trial court. He held a firm position that the discrepancies touch the root of the case.

He added the victim's story in the circumstances of this case, needed corroboration as per the cited cases of **Hemedi Said (supra)** and **Azizi Abdalla (supra)**. The name *'Baba Pendo'* was never in the charge sheet or read to the accused during the preliminary hearing. It appeared it was inserted without the leave of the court contrary to **section 234(1)** and **(2) of the Criminal Procedure Act** and for that the charge was defective.

The Appellant's counsel reiterated his position that, failure to tell anyone about the alleged offence despite the fact that he had an opportunity to tell either the police,

conductor, or aunt and was under no threat from the appellant, leaves a lot to be desired.

After keenly passing through the submissions by the parties I find all grounds point at no other than the issue ***whether the prosecution proved their case beyond reasonable doubt***. It is trite law and I need not cite any authority to bear me out that the prosecution is to prove its case beyond reasonable doubt. Under this, the Appellant is complaining of the discrepancies in evidence, failure to call the material witness, failure by the victim to report at the earliest possible time after the commission of the offence and failure to consider the appellant's defence.

Getting on the way is the issue of discrepancies as submitted by the learned advocate. The noted discrepancies are found at page 14 where the victim said he had been sodomized while coming from school whereas at page 16 he stated he was sodomised while coming from the church. Further, he stated while at the scene of crime the people were passing by including children but during re-examination, he said there were no people around. The victim when asked by Appellant where he resides, he told him that it was at Marangu while

in fact was in Moshi. The victim had stated he had been sodomised twice while PWI stated the victim was sodomised thrice. The victim, alleged he normally comes from school at 1700hrs while PWI stated the victim leaves school at 1600hrs and by 1630 he is usually at home. Moreover, as to why he was at Marangu his father stated he learnt from the victim that, he decided to go to Marangu because he feared was late and had been sodomised while the victim told the police that he had been sodomized by the Appellant and is the one who took him to the bus station to go to Marangu. These in the settled opinion of this court were glaring discrepancies.

In the case of **Alex Ndendya vs Republic Criminal Appeal, No. 207 of 2018** the Court of Appeal discussed in details the normal and material discrepancies. It was observed that normal discrepancies do not go to the root of the case while the material discrepancies do. In the matter at hand, the court on the offset finds the discrepancies do go to the root since they are material to the case.

The trial court's judgements, at page 8 did clearly state there were no inconsistences in the evidence. To the contrary as already gathered above, the victim says this at one time, but completely the opposite at some other

time. These kind of discrepancies in the various accounts of the story, in the settled view of the court give rise to some reasonable doubts about the guilt of the appellant.

Secondly, the record reveals, after arriving at the scene of crime the victim himself started to undress as shown at page 14 of the typed proceedings where the victim is quoted to have said: -

> *"He directed me to pass on the other path, he also took another path and we met at the center. After we met, he told me nothing. I started undressing my school short..."*

The trial Magistrate at page 2 of the judgement outlined the accused is the one who undressed the victim. It is the settled findings of this court, this piece of evidence was from the bench.

On the issue of failure to call material witnesses, the record is black and white that, one Peter (the appellant's son) had the knowledge that the victim had been called by the Appellant. Further, the victim had slept at the Good Samaritan's home at Marangu after the incidence and his aunt had the opportunity to talk to the victim. These were certainly material witnesses in this case.

In the case of **Boniface Kundakira Tarimo vs Republic, Criminal Appeal No. 350 of 2008 (unreported)** the court held: -

> *"it is thus now settled that where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible one"*

All those mentioned were not summoned to testify. It could be argued that Peter being the son of the appellant was not possible to call him as a witness though this is not in evidence. What about the alledged Good Samaritan, his children or bus driver. There was a need to call these witnesses to patch up or link the prosecution case. There being no sufficient reason shown why the witnesses were not called in evidence, an adverse inference is drawn against the victim that he was telling lies.

Lastly the Appellant submitted the victim failed to report

the offence to anyone at the earliest possible time. After thoroughly reading through the proceedings, there were opportunities for the victim to report the offence immediately thereafter. ***First***, he could have reported to the children who were passing near the scene while the appellant was hiding, but he did not. ***Second***, he could have reported to the Good Samaritan. If the worst came to the worst he could have reported to PW1 (his father) or his aunt while still at Marangu. Surprising enough the aunt came to know of the story after she had interrogated the victim. Failure of the victim to report is an assurance of unreliability and this puts his credibility to question. See the case of **Marwa Wangiti Mwita and Another vs Republic [2002] TLR 39**.

All these doubts shake the credibility of the prosecution case and the only conclusion is that, the prosecution failed to prove the case beyond reasonable doubt. The prosecution case is found to have been grounded on very weak evidence.

There is the allegation that the trial Magistrate did not consider the Appellant's defence, I find the same was considered at page 8 of the judgement. To this the trial Magistrate had concluded and rightly so the defence

witnesses could not account for the whereabout of the appellant at the time of the commission of the offence. For the sake of reference the same is quoted thus: -

> *"Despite the fact that the accused denied to have committed the said offence, no defence witness testified to be with him after the meeting. Each witness explained that DW1 went to the meeting which ended around 5 p.m. with such deficiency I have opted to side with the prosecution that what PW2 stated was nothing but the truth..."*

For the foregoing analysis especially failure by the prosecution to prove the case to the required standard in criminal jurisprudence, I am satisfied that the appeal has merit. I accordingly allow the same, by quashing the conviction and setting aside the sentence. The Appellant to be released from prison forthwith unless otherwise lawfully held.

B. R. MUTUNGI
Judge
29/04/2021

Judgment read this day of 29/4/2021 in presence of Appellant, Mr. Martin Kilasara for the Appellant and Mr. Kassim Nassir (S.A) for the Respondent.

B. R. MUTUNGI
Judge
29/4/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
Judge
29/4/2021