IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 102 OF 2019

(Originating from Arusha Resident Magistrate Court, Criminal Case No. 112 of 2018)

ATHUMAN ADAM KAPAYA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

12/04/2021 & 31/05/2021

MZUNA, J.:

Athuman Adam Kapaya has lodged this appeal challenging the conviction and sentence of life imprisonment imposed by the Resident Magistrate Court of Arusha at Arusha (Mwankuga, Rm). Before that court, the said appellant stood charged with one count of Unnatural offence contrary to section 154 (1) (a) (2) of the Penal Code, [Cap 16 R.E 2002], the offence which is alleged to have been committed on 3rd and 4th March 2018 at Maji ya Chai Village within Arumeru District within Arusha Region whereby he is said to have carnal knowledge of one "HML" a boy of seven (7) years against the order of nature. He pleaded not guilty.

The background story from the five witnesses for the prosecution being that on the fateful day, the victim (HML) a pupil in class two was playing with other children near the appellant's house. Latter, they opted to go and watch

the movie at the appellant's house. At some time, the appellant told other children to get outside leaving the victim inside alone with him. Then the appellant gave him Tshs 700/- which was meant to buy anything he wanted. Subsequently thereafter, he undressed the victim's trouser and underwear and then undressed himself. He proceeded to insert his penis into his anus, the act which was preceded by threatening words not to shout or even tell anybody else he will kill him. Despite the pain which the victim suffered, he obeyed the threats, so he complied, never raised alarm. After such cruel act, they dressed to normal. Thereafter, other children were called inside. They continued to watch the movie. The victim's grand mother after noticing he was late, went to collect him.

The victim went back home but never disclosed to anybody including his grand mother (PW3 Namanyaki Palmet) whom they were staying together. On the following day, that is Monday, he went to school. While at school, the house Maid, one Mama Clara (Fedelina Paul Massawe PW2) overheard from other children about the sodomization of the victim. Upon the victim reporting back home, she notified his grand mother. They took him to the Hospital where he was medically examined by the Doctor. It was revealed that he had been sodomised. The PF3 showed some bruises. Upon inquiry, he confirmed to be true. The appellant was subsequently arrested and charged.

On his part, the appellant denied to have committed this offence. His line of defence led by five witnesses, being that on the material date the victim and

other children watched the TV inside his room, however he was busy outside washing his clothes. He attributed this case to have been cooked by Emmanuel (PW4), who is the victim's uncle.

The trial court believed the prosecution evidence and proceeded to convict him and pass the sentence as above noted. Dissatisfied by the decision of the trial court the appellant has lodged this appeal comprising seven grounds. During hearing the appellant was represented by Mr. John Lairumbe assisted by Ms. Anna Mzanva, learned counsels. They opted to drop ground No. 2 leaving six grounds. On the other hand, the respondent was represented by Ms. Akisa Mhando, the learned State Attorney who strongly opposed the appeal.

The appellant's grounds of appeal challenges procedural aspects as well as evaluation of the evidence. They revolve around one main issue, whether the charge was proved to the required standard of proof.

There is one point which should not detain me. In the 5th ground of appeal they challenge the conviction that it was without calling a material witness who prepared the cautioned statement of the appellant contrary to section 57 and 58 of the Criminal Procedure Act, Cap 20 RE 2002. The said cautioned statement was not tendered by the prosecution for reasons that it was not listed during the preliminary hearing. It did not form part of the evidence and therefore it is misleading to deal with it on appeal. So the allegation that the person who recorded caution statement of the appellant

ought to have been called to testify as he was the material witness, with due respect, it has no basis. The leaned State Attorney is right in my view when she said that as long as the cautioned statement was not used as evidence there was no need to summon the author to testify on it. If the defence side wanted to use it, they could have tendered it during the defence case at the trial court.

Another point of procedural aspect is the allegation that the Doctor who filled the PF3 (exhibit P1) ought to have been summoned as a material witness otherwise the said document was illegally used. Mr. Lairumbe contended that, the prosecution failed to call the Dr who examined the victim instead they called Dr. Nancy (PW5) who filled the PF3 on behalf of the Doctor who examined the victim which is contrary to section 240 (3) of the CPA. The case of **Azizi Abdalah vs Republic** [1991] TLR 71 was cited to augment that point. That due to such failure the court should draw an adverse inference.

On her part, the learned State Attorney said that the allegation that there was non-compliance with Section 240 (3) is also misplaced as the defence never asked for the said witness to be called. That the record shows, PW5 said that she testified and filled PF3 on behalf of Dr. Ayo as he was undergoing treatment. That PW5 tendered the PF3 which was admitted as Exhibit P1 without an objection. The appellant's counsel did cross examine the said witness. It was her view that that exhibit can therefore be relied upon to convict the appellants. It was her view based on the case of **Nyerere Nyague v. R,** Cr. Appeal No. 67/2010, CAT at Arusha (unreported) that any "objection to the admissibility"

must be raised before it is admitted "not during cross examination or during a defence".

This court has the following to say. Section 240 (3) of the CPA provides that;

> *"Where a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so, requested by the accused or his advocate, summon and examine or make available for cross-examination* ***the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."*** (Emphasis mine)

The record shows that Dr Ayo who examined the victim was attending treatment instead the prosecution opted to summon PW5 Dr. Nancy William Shuma. The appellant was well represented by the learned counsel but never asked to call the one who examined the victim. PW5 said the said PF3 was filled by Dr. Ayo, but she being the coordinator and an immediate supervisor to Dr. Ayo, she filled the PF3 based on the available record despite the fact that she is not the one who examined the victim. That, she was allowed to do so because the record is there.

The appellant's counsel had chance to cross examine the witness who made the report (i.e filled the PF3) as per the law above cited. So the argument that it has defects on the exact date the victim was examined with due respect

is a minor anomaly, which as well submitted by the learned State Attorney, it does not go to the root of the matter.

The law as it stands requires that "***court shall inform the accused of his right to require the person who made the report to be summoned***" which was done in our case. It was held in the case of **Sorian Justine Tarimo Versus the Republic,** Criminal Appeal No. 226 of 2007 (unreported) CAT at Arusha, his Lordship Rutakangwa, JA (as he then was) at page 9 that;

> *"This court has held in numerous occasions that once the medical report as a PF3 has been received in evidence under section 240(1) of the Act, it* ***becomes imperative on the trial court to inform the accused of his right of cross-examining the medical witness who prepared it****... the Court has, as a result, held that if such a report is received in evidence without complying with the provisions of section 240(3) of the Act, it should not be acted upon."* (Emphasis mine).

In our case the witness was called. It follows therefore that the court complied with section 240 (3) of the CPA and the appellant's argument that it was not complied with is bound to fail.

This takes me to the issue on the evaluation of the evidence. I will answer the question whether there were some contradictions on the evidence adduced by the prosecution. The learned counsels for the appellant submitted that, there were some contradictions on the prosecution evidence especially that of PW2 which contradicts with the evidence of PW1. While PW2 testified that she was informed about the incident by the children, PW1 said he never informed

anyone including her grandmother. That it is doubtful as to how did the children know about it? Another contradiction is on the exact time of the incident.

The learned State Attorney submitted that there is no contradiction between PW1 and PW2. It may be true that PW1 never told anyone about the incident. PW2 said she heard it from the children. That the children knew about it because they were together on the material date when the appellant chased them outside and remain with the victim alone and gave him Tsh. 700/=. On the other hand, PW3 said got the information from Mama Clara. Those contradictions are minor one which does not go to the root of the case and the court should evaluate it based on the case of **Chrizant John vs Republic**, Criminal appeal No. 3 of 2015, CAT at Bukoba (Unreported) page 20.

This court agree entirely that the trial court has the duty to address on the inconsistencies and where possible try to resolve them as it was so held in the case of **Mohamed Said Matula vs Republic** [1995] TLR 3. The court observed:-

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."*

I see no such contradiction. The said PW3 collected the victim from the appellant on the date of the incident after noticing that he was late. He was

crying due to headache. The victim never told anybody about that incident of sodomisation due to the threats as the appellant told him, would kill him if he told anybody. He went to school on Monday as usual. PW2 Fedelina Paul Massawe, passed at school, where she heard from the victim's friends on Tuesday when they were mocking at the victim that he was sodomised by the appellant. Subsequently thereafter she reported to his grand mother, PW3. She interrogated him. He admitted and from there they went to the Police Station then to the Hospital in the company of PW4 Emmanuel Paul Massawe. The appellant admitted that the victim went to his home and did see the video. The time of electricity cut off is immaterial because the act was done after he had chased out other children leaving the victim inside.

The reporting of the incident to the Police station and then to the Hospital was done on the same date when PW2 heard about the alleged sodomisation. The victim (PW1) gave evidence. He knew the truth and his credibility and that of other witnesses were determined by the trial court which believed to be true. The appellant had raised his concern that the case was a cooked one by Mr. Emmanuel. This argument was ruled out because he did not raise it when PW4 testified in court. It is therefore an afterthought.

I see no such inconsistencies and even if they are there, are only minor. It was held in the case of **Shadrack Meshack Madiga vs The Republic**, Criminal Appeal No. 174 of 2018 (Unreported) CAT at Dar es Salaam that; -

"...not every discrepancy in the prosecution's witnesses will cause the prosecution case to flop and that it is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled."

Contradictions are normally weighed vis a vis the prosecution witnesses not against that of the defence as the appellant's counsel argued. The raised contradictions by the appellants' counsels does not go to the root of the case hence they cannot lead the prosecution's case to flop.

Lastly on the merits of the case. The issue is whether the prosecution proved the charge to the required standard of proof. In a criminal cases the burden of proof is on the prosecution to prove the charge against the accused person beyond reasonable doubt.

Section 154 (1) (a) (2) of the Penal Code, clearly provides the ingredients for the offence of sodomisation as unnatural offence which is punishable by law. The appellant had "carnal knowledge of the victim against the order of nature." PW1 narrated how the incident took place at Mr. Athumani's house. He said that the appellant inserted his "chululu" in his anus. The appellant was well known to the victim as he was their neighbour. The evidence of the victim is the material one in rape cases as it was so held in the case of **Seleman Mkubwa vs Republic** [2006] TLR 379. His evidence was corroborated by that of PF3 (exhibit P1) which showed existence of "some bruises around the anus". The defence evidence of the appellant, his co-tenants and S.A.H (DW5) who posed as a child who was together with the appellant watching movie, did not

cast doubt on the prosecution case. The appellant was not outside washing clothes as alleged by the defence.

This court, just like the trial court, finds that the charge was proved against the appellant beyond all reasonable doubt. The offence of unnatural offence had been proved to the required standard of proof.

This appeal is devoid of merit. The same is hereby dismissed.

M. G. MZUNA,

JUDGE.

31/05/2021