

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

CRIMINAL APPEAL NO. 3 OF 2021

(Originating from Criminal Case No. 294 of 2019 in the Resident Magistrate Court of Arusha at Arusha).

MUSTAPHA S/O SEBASTIAN MREMAAPPELLANT

VERSUS

THE D. P.PRESPONDENT

JUDGMENT OF THE COURT

26/05/2021 & 06/08/2021

GWAE, J.

In the Resident Magistrate's Court of Arusha at Arusha (trial court) the appellant, Mustapha Sebastian Mrema was charged with, tried and convicted of the offence of unnatural offence c/s 154 (1) (a) of the Penal Code, Cap 16 of Revised Edition, 2002.

It was alleged by the Prosecution side that on the date of April 2019 at Ungalimited area within the City District and Region of Arusha the appellant did have carnal knowledge of a boy aged 15 years whose name shall be referred to

as NB (victim-PW2) against the order of nature, the act which contravenes the law.

Briefly, the prosecution evidence that led to the full satisfaction of the trial court that the charge against the appellant was proved to the required standard is as follows; that on the material date, the victim was after travelling to Dar salaam. He met the appellant at bus main stand in Arusha Region. The victim was hungry by then. The appellant took the victim with a view of providing him food. Both went up to ungalimited area where there is a residence of the appellant. While the appellant and victim going, they met an old man to whom the appellant introduced the victim to be his grandson.

That, upon their arrival at the appellant's residence, they entered the room where the appellant forcibly sodomized the victim who did not raise any alarm as he scared of being injured by the victim by using bottles. That, on the fourth day the victim met the former old man whom he narrated the incidence in full and thereafter that old man called the appellant and directed him to transport the victim to Dar es salaam otherwise he could report the matter to police.

The victim was later availed with a bus ticket by the respondent. The victim then travelled to Dar es salaam where he went to his sister. Thereafter the one who was living with the victim, one Jimmy (PW1) got information that the

victim was in Dar. PW1 went to Dar to fetch the victim as he was a primary scholar. The victim narrated the incidence by naming the appellant in the name of Mustapha in the presence of Police Woman working at DSM Police. The victim was then returned to Arusha, the report was made to Muriet police station and thereafter the appellant was arrested, taken to ungalimited area where they brought him to the room alleged to be of the appellant but he did not have keys at that moment. The visit to the scene of crime was aimed at ascertaining the environment and test memory of the victim. Eventually, the appellant was charged with the offence in question.

During defence, the appellant who stood as DW1, denied the accusations by stating that he was not the owner of the room nor did he have carnal knowledge of the victim against the order of nature. He also contented that, the case against him was fabricated by PW1 due to his love affairs with a woman, Flora Manka working with shivas. The appellant went on challenging credibility of the prosecution evidence on the ground that no identification parade which was conducted and that no bruises that were seen by a medical practitioner (PW4) taking into account that examination was conducted in June 2019 while the incidence is alleged to have occurred on April 2019.

Following the trial court's verdict, the appellant felt aggrieved by both conviction and sentence. He is now before this court challenging the conviction and sentence on the following grounds;

1. That, the trial court erred in law and fact in holding that the appellant was properly identified by PW2 while the identification was questionable as he made dock identification in the absence of the identification parade
2. That, the trial court erred in law and fact by not complying with mandatory provisions of section 210 (1) (a) of the CPA
3. That, the trial court erred in law and fact by failing to draw an adverse inference against the prosecution for failing to call the local leader
4. That, the trial court did not sit in camera as required by the law
5. That, had the trial court properly directed its mind, it should have held that the prosecution evidence was not water tight
6. That, the trial court erred in law and fact by failing to analyze the evidence before it
7. That, the trial court erred in law and fact by in convicting the appellant for an offence which was not proved by concrete evidence

8. That, the trial court erred in law and fact by convicting the appellant while the charge sheet was defective

During the hearing of this appeal, the appellant appeared in person unrepresented whereas the Respondent, the Republic was duly represented by Mr. Hatibu, the learned state attorney.

Arguing in support of his appeal, the appellant reiterated his grounds of appeal save for the ground 8 which he abandoned. He however orally added that the trial Magistrate did not sign at the bottom of the PW1's evidence which according to him is a fatal irregularity capable of causing testimony of PW1 to be expunged from the record.

Opposing this appeal, Mr. Hatibu argued as follows; **firstly**, that there was no requirement of conducting the identification parade as it was the victim who led to the apprehension of the appellant at main bus stand and above all the victim and appellant stayed with the victim on three days consecutively. **Secondly**, it is trite law that evidence of each witness must be recorded in the language and shall be signed by him as required under section 210 (1) (e) of CPA). Failure to sign at the bellow, the counsel was of the opinion that, it is not fatal as its irregularity is cured under section 388 of CPA taking into account that the appellant did not challenge the contents of PW1's evidence.

Thirdly, on the complained failure to call owner / leader of the house where the offence was committed. The counsel for the respondent was of the opinion that such witness was vital witness however that alone could not exonerate the appellant from criminal liability as the victim's evidence is credible to justify the court to uphold the decision of the trial court.

Fourthly, it was difficult to find bruises at the victim's anal parts. Since the victim was found in DSM in June 2019. More so, failure to specify date of occurrence of the offence at hand is not fatal.

Sixthly, on the alleged existence of grudges, Mr. Hatibu argued that if as alleged by the appellant, the PW1 would be cross examined by the appellant and

seventhly. admitting that during PHG it was recorded that a doctor who was to appear to testify before the trial court was from Mount Meru Hospital, Mr. Hatibu argued that error is not fatal as he was subsequently transferred.

In his rejoinder, the appellant briefly stated that the PW1 told the trial court that the examination of the victim was conducted at Mount Meru Hospital and not Murieti Health Center adding that it was necessary to call the said Land Lord.

Having briefly explained what transpired before the trial court and this court on appeal, I should now determine appellant's grounds of appeal seriatim or jointly if they are related. Starting with **1st ground** on the complaint as to identification of the appellant by PW2. It is always important to conduct parade of identification in case the one allegedly identified and identifying person did not know each other prior to the incidence as opposed to those who were familiar to each other before an occurrence of a crime. Essence of conducting parade of identification being to give assurance regarding the alleged identification (See the case of **Waziri Amani vs Republic** [1980] 250.

In our case, issue of proximity is not questionable at all since the victim had testified that he happened to live with the appellant in one room (bed) for three or four days consecutively as rightly argued by the respondent's counsel. Nevertheless, in my view due to nature of the offence (unnatural offence), age of the victim, unfamiliarity between the appellant and victim before the incidence as well as lapse of time (2019 April to June 2019) when the incidence occurred and when the victim was arrested. In such situations, an identification parade was quite necessary in order to avoid victimizing an innocent person. I have also considered that possibility of any actual wrong doer introducing himself to be known by name of Mustapha in order to hide his actual name.

Moreover, I have carefully scrutinized the testimony of the victim as far as identification of the appellant is concerned and found it to be contradictory. I am of such observation due to an obvious reason that, it is not clear if the appellant is the one who posed some questions to the victim while at the bus stand and the one who took him, victim from bus stand to ungalimited area where the offence was said to have been committed. For sake of clarity, I wish to quote the testimony of the victim as herein under;

"The accused and another person were fighting for passengers, one passenger sat before (sic) me and I greeted him and asked me what is my name, and I told him, I am.....and asked me where I was staying and whether I have eaten, he told me to take me somewhere to eat and I went with him to the direction of ungalimited. We reached to a shop where we met another old man who introduced to me, that I am his grandfather, that I am the son of his first son. He showed me the room with one mattress, two buckets and He grabbed my hand; I was wearing a short ... I was scared of being attacked with those bottles. He grabbed all (sic) my two hands at the back of my back and sodomized me"

Looking at the testimony quoted above, it is not very certain as to whom the victim was referring, was it the accused now appellant or a passenger who sat beside the victim. In my view, the victim was referring the person whom he

referred to be a passenger. In this situation a parade of identification was vitally important unless the testimony of PW2 would be corroborated by material witnesses such as the owner of the house where the offence was allegedly committed or street chairperson who is said to have compelled or directed the appellant to ensure that the victim was transported to Dar as complained in the third ground of appeal.

Having determined the **1st ground** which also touches the **3rd ground**, I therefore find it apposite to proceed determining 3rd ground of appeal. Though the prosecution is not bound to call its certain witnesses however its failure to call them without explanation may justify a trial court or appellate court to draw an adverse inference against it. I am subscribing to the judicial jurisprudence in the case of **Republic v. Rugisha Kashinde and Sida Jibuge** (supra) it was stated that:

“The prosecution had the discretion to call or not to call someone as a witness. Where it did not call a **vital reliable person** without a **satisfactory explanation**, the court could presume that the person’s evidence would have been unfavourable to the prosecution (emphasis supplied”.

The same position was also maintained in the case of **Azizi Abdallah vs. Republic** (1991) TLR 71 where it held that;

"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution "

In our case, the old man, a woman who was said to have told the police (PW3) that, the appellant was living therein or street chairperson and land lord where the appellant was said to have been living. These were material witnesses taking into account of the appellant's serious standi that he was not living in the house where the offence was said to have been committed as opposed to the assertion by the prosecution. I have also taken into account that at the moment the appellant was taken to the scene of crime he had no keys of the room as depicted by the testimony of PW3 when cross examined by the appellant which is reproduced herein below;

"You refused the said room but later you agreed that you live there.

Later the woman who staying (sic) there told us that you staying (sic) at the said room
you said the keys were with another person"


Due to the nature and circumstances of the case at hand, the said persons were material witnesses in support of the prosecution case, failure to call them leaves a lot to be desired.

As to the **2nd ground** of appeal, I have looked at the provisions of section 210 of CPA and observe that evidence of a witness must be recorded down in the language of the subordinate courts (English language) save primary court by a trial magistrate or under his superintendence but, in my considered opinion, nowhere it is mandated that, the trial magistrate has to sign at the end of the testimony of a witness but in practice signing after at the end of the testimony so recorded, is mandatory for simple reason that, it is an indication that the testimony was recorded by that magistrate and that the same was refreshed to the accused or in other words signature symbolizes or guarantees ownership or authenticity of the evidence so recorded. It follows therefore, the evidence of PW1 is subject to being expunged as section 388 of CPA does not cure a such serious irregularity.


Having determined ground, 1, 2 and 3 above, I don't see any reason to be curtailed by other grounds as the findings of the court in the said grounds of appeal are capable of disposing off this appeal.


In the upshot, this appeal has merit, it is therefore allowed. The trial court's conviction and sentence against the appellant are quashed and set aside respectively. The appellant shall be immediately released from prison forthwith.

It is so ordered


M. R. GWAE,
JUDGE.
06.08. 2021

Court. Right of appeal fully explained.


M. R. GWAE,
JUDGE.
06.08. 2021



The seal of The High Court of Tanzania is a circular emblem. It features a central shield with a lion and a zebra, flanked by two figures. The text "THE HIGH COURT OF TANZANIA" is inscribed around the top inner edge of the circle, and a small "O" is at the bottom.