IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 128 OF 2020

(Originated from the Resident Magistrate Court of Mbeya in Criminal Case No. 92 of 2018)

MOSES S/O MWANDENGA ---------- APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

JUDGEMENT

Date of Last Order: 12.07.2021

Date of Judgement: 13.09.2021

EBRAHIM, J:

The Appellant herein has lodged the instant appeal raising five grounds of appeal complaining that the case was not proved beyond reasonable doubt and that there was no witness who saw the commission of the offence. The Appellant's other complaints are that there was contradiction between the evidence of PW1 and PW2 on the dates of the incident and that PW3 did not prove that

the Appellant confessed to the commission of the offence without recording the cautioned statement. He lastly challenged the fact that exhibit P1 – PF3 was not read out in court and that the defence case was not considered.

In proving the case against the Appellant, Prosecution called four witnesses. The background of the case can be deduced from the testimony of the victim who for the purpose of preserving his identity I shall refer him as PW1 only. He testified that the Appellant had canal knowledge of him on 18.05.2018 at around 1900hrs as he was heading to where his grandmother was doing her business where he met with the Appellant and he told him to bring back his goods that he had stolen. It was when the Appellant took PW1 to his house and started assaulting him with a belt. Thereafter he held a knife at him and sodomised him. After finishing, the Appellant poured a bucket of water to PW1 and they left. PW1 went to report to his grandmother who called his uncle and together they went to the police. At the police, they were availed with PF3 to go to the hospital where PW1 was examined. The Appellant was arrested following the incident. The Appellant denied the charge.

After considering the evidence from both sides, the trial court found the Appellant guilty of the charged offence, convicted and sentenced him to 30 years imprisonment, hence the instant appeal.

The case was conducted through virtual court where the Appellant appeared in person unrepresented at Songwe Prison. The Respondent was presented by Ms. Xaveria Makombe, learned State Attorney.

The Appellant prayed for the State Attorney to begin while reserving his right to re-join.

Ms. Xavier recapitulated the evidence of PW1 that he explained how the Appellant sodomised him and mentioned the name of the Appellant at the earliest to his grandmother, PW2. She said PW3 also said that PW1 mentioned the Appellant and that according to exhibit P1- PF3 which was tendered by PW4, it showed that PW1 had bruises. To cement her argument that PW1 mentioned the Appellant at the earliest opportunity, she referred to the case of **Nebson Tete Vs The Republic**, Criminal Appeal No. 419 of 2013. Submitting on the second ground of appeal, counsel for the

Respondent in relying on the Court of Appeal Case of **Goodluck Kyando V R** [2006] TLR 363 at 367 on the credibility of the witness said that there was no other person who witnessed the act apart from the evidence of PW1; but it does not mean that the Appellant did not have carnal knowledge of PW1.

She commented on the discrepancies on the date as pointed out on the 3rd ground of appeal that the charge sheet shows that the incident occurred on 17.05.2018 but the victim said the incident occurred on 18.05.2018 and PW2 said the incident occurred on 17.06.2018. she termed it as a normal discrepancy which occurs after the passage of time and she referred the court to the Court of Appeal Case of **Dickson Elia Nsamba Shapwata and Another V R**, Criminal Appeal No. 92 of 2007.

The learned State Attorney admitted on the 4th ground of Appeal that PW3 interviewed the Appellant but did not reduce it into writing but termed ie as oral confessions as held in the case of **Geofrey Sichizya V DPP**, Criminal Appeal No. 176 of 2017. She added also that there is no law that compel the police to send the accused

to justice of peace. She concluded therefore that, the oral confession was not illegal. On the issue that exhibit P1 was not read out in court, Ms. Xavier explained that the Appellant was given the chance to interrogate the witness. She referred to the case of **Chrizant John Vs The Republic**, Criminal Appeal No. 313 of 2015 where the witness explained what he did. She thus said that none reading of exhibit P1 in court was not fatal. Lastly, he concluded that the defence evidence was considered by the trial court and prayed for the appeal to be dismissed.

In brief rejoinder, the Appellant prayed for the court to consider his grounds of appeal. He also adopted his grounds of appeal.

conducted When the case was called for hearing, the Appellant appeared in person unrepresented.

I have followed the rival arguments in this appeal mindful of the fact that as the first appellate court, I am obliged without fail to subject the entire evidence into objective scrutiny while considering that the trial court had an opportunity to observe the demeanour of the witnesses- **Charles Mato Isangala and 2 Others V The Republic,**

Criminal Appeal No. 308 of 2013. The first ground of appeal is predicated on the ground that the case was not proved beyond reasonable doubt. The Appellant has thus raised a number of issues on showing that the prosecution case was not proved to the hilt.

The Appellant claimed on the first ground of appeal that there was no other person who witnessed the incident. It is true that in this case there were no other eye witnesses apart from PW1 who testified that, the Appellant sodomised him when they were only two of them in the house of the Appellant. Therefore the important aspect here is the credence of the testimony of PW1.

Of-course, I am not oblivious of the issue of credence of the witnesses. More – so, I am also aware that credibility of a witness is a monopoly of a trial court in so far as demeanour is concerned. However, the appellate court can determine the credibility of a witness by considering the testimony of the witness in relation with evidence of other witnesses including that of the accused person; and when examining the coherence of the testimony of the said witness with other witnesses. This principle was well illustrated in the

case of **Siza Patrice V R**, Criminal Appeal No. 19 of 2010. In this case, PW1 clearly testified before the court on how the Appellant upon finding him on his way to his grandmother's business area, near Maendeleo area around 1900hrs alleged that PW1 had stolen eggs and Tshs 2,000/-. PW1 said the Appellant wanted to go with him to their place (PW1's place) but when PW1 told him that the key is with his grandmother, the Appellant suggested that they should go to his house. At the Appellant's house, PW1 explained how the Appellant beat him by using a belt, sodomised him and poured water over him. After that they went together to find PW1's grandmother but the Appellant hid himself. Furthermore, it is the position of the law that in sexual assault cases, the best evidence comes from the victim as illustrated in the cited case of **Selemani Makumba V R [supra]**. Moreover, in terms of **section 127(7) of the Evidence Act, Cap 6, RE 2019,** the court may proceed to enter conviction on the uncorroborated evidence of the victim if it believes that the victim is telling the truth. **Section 127(7)** of the **Law of Evidence Act, Cap 6 RE 2019** read as follows:

"S.127 (7) 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 or 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 supplied).*

In this case, it is on record that PW1 was 12 years old when the incident occurred. There is no dispute regarding his age as her grandmother also confirmed in her testimony that PW1 was 12 years old. The age of PW1 is also reflected in **exhibit P1.** Furthermore, the Appellant at no time cross examined on the age of the victim. Despite his age, when PW1 was adducing his testimony he was narrative and consistent. He told the court that he knew the Appellant and he mentioned him by name. Nowhere had the Appellant registered any bad blood with PW1 or his family. PW1 also explained how the Appellant closed the door and went to look for belt from the milling machine which he used to beat him up and

threatened him with a knife. He also said that PW1 was a mason. PW1 did not dispute that he was not a mason. The sequence of events was narrated by PW2 that when PW1 went to her place of business, he told her that he has been beaten and sodomised by a young man whom PW2 said she had forgotten the name she was told by PW1. She also said that PW1 was wet when he went to her, in pain and could not sit. The same narration was given by PW3 who said that she interviewed PW1at the police station.

Thus, the coherence of his testimony makes this court to believe his credence and reliability of his testimony as illustrated by the Court of Appeal the cited case of **Goodluck Kyando VR (supra)**, as there was not cogent reason for not believing him. Furthermore, I find corroboration on the testimony of PW1 on the testimony of PW4 who examined PW1 on 17.05.2018 and found out that PW1 had bruises in his anus. He also confirmed to have filled in **exhibit P1** which showed that PW1 had multiple abrasions and bruising in the interior surface of the anus. I therefore find the 2nd ground of appeal to have no basis considering that the act happened when the Appellant was alone

with PW1 and I find no reason to disbelieve the testimony of PW1 in naming the Appellant as the one who sexually assaulted him.

The Appellant claimed on the 3rd ground of appeal that there was contradiction on the dates when the incident occurred. He said PW1 said the incident occurred on 18.05.2018 but PW2 said the incident occurred on 17.06.2018. In going through the evidence on record, I noted that PW1 said that the incident occurred on 18.05.2018 whilst PW2 said the incident occurred on 17.06.2018. However, PW3, the detective said that she was told by PW1 that the incident occurred on 17.05.2018 when she interviewed him on 21.05.2021. The charge sheet reads that the offence was committed on 17.05.2018 and so does exhibit P1 where it is recorded that PW1 was examined on 17.05.2018 at 2208hrs.

It is the position of the law that not every discrepancy is fatal but only where it goes into the substance of evidence. See the case of **Omary Kasega V. R,** Criminal Appeal No.84 of 2011. In addressing the issue of discrepancies in evidence, the Court of Appeal in the

case of **Maramo s/o Slaa Hofu and 3 Others v. Republic**, Criminal Appeal No. 246 of 2011 (unreported) held as follows:

"... normal discrepancies are bound to occur in the testimonies of witnesses: due to normal errors of observations such as errors in memory due to lapse of time or ***due to mental disposition such as shock and horror at the time of occurrence.*** *Minor contradictions or inconsistencies, embellishments or improvements on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety"* **[emphasis is mine].**

The same view was taken by the Court of Appeal in the cited case of **Nebson Tete Vs The Republic** (supra) which quoted with approval a passage by the learned authors of Sarkar, **The Law of Evidence, 16th Edition, 2007** at page 48 where it was said that:

"Normal discrepancies in the evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, ***due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be.*** *Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancy do not corrode the credibility of a parties case, material discrepancies do".* [emphasis added].

I fully subscribe to the above demonstrations of the Court of Appeal. As intimated above, the victim in this case was 12 years old when he was assaulted. Thus, in considering his age, the trauma experienced and the fact that he had to re-live it again in court, it is very possible and normal for him to mix the dates between 17.05.2018 and 18.05.2018. The same goes with his grandmother, PW2 who mixed up the month i.e. 17.06.2018 instead of 17.05.2018. Nevertheless, there is ample evidence that the incident occurred on 17.05.2018 as I have shown above i.e. exhibit P1 and the testimony of PW3 who interviewed PW1 and said he told her that the incident occurred on 17.05.2018. It is my stance therefore that the mix up of dates by PW1 who by then was a very young boy who has had bad experience and PW2 an aged woman whose grandson had been violated is not within the category of material discrepancy as explained by the Court of Appeal above. More –so the root of the case is whether PW1 was sexually assaulted by the Appellant. I therefore find this ground of appeal is also unmeritorious.

Coming to the fourth ground of appeal, the Appellant complained on the reliance of the testimony of PW3 when she said

that the Appellant confessed to have committed the offence when she interviewed him at the police station without tendering the cautioned statement. Counsel for the Respondent relied on the case of **Godfrey Sichizya Vs DPP (supra)** and argued that oral confession can be used to form a conviction. Nevertheless, the circumstances of the cited case are distinguishable with the instant case on the basis that in the cited case, the Appellant was said to have had confessed before a civilian, PW1. However, as for the testimony that the accused admitted the offence before PW3, the law requires that since she is a police officer, unless she had tendered the cautioned statement of the accused, the contents of the Appellant's admission would not be orally admitted here in court. Once the accused admits the offence before the police, the provisions of **section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019** requires the said police officer to immediately reduce such admission into writing. **Section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019** reads as follows:

"57.-(1) A police officer who interviews a person for the purpose of ascertaining whether the person has committed an offence shall,

unless it is in all circumstances impracticable to do so, cause the interview to be recorded.

(2) Where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes, during the interview, either orally or in writing, a confession relating to an offence, the police officer shall make, or cause to be made, while the interview is being held or as soon as practicable after the interview is completed, a record in writing,..."

This position has been extensively illustrated by the Court of Appeal in the case of **The DPP V Sharifu Mohamed@ Athumani and 6 Others**, Criminal Appeal No. 74 of 2017 when discussing the similar situation and cited with approval the case of **Mashaka Pastory Paulo Mahengi@ Uhuru and 5 Others V Republic**, Criminal Appeal No. 49 of 2015 (unreported). The Court of Appeal held that:

*"It seems to us clear that the learned trial judge was articulating the position settled by this Court in **Mashaka Pastory Paulo Mahengi (supra)** when she said that the prudence of Section 57(1) of the CPA requires that if the accused person admits to an offence, the same should be reduced in writing and the narration of the contents only to be made after the same has been cleared for admission".*

From the above position of the law, PW3 cannot give evidence as to the admission of the offence by the Appellant unless she had

tendered the cautioned statement of the accused and the same was admitted into evidence. In the circumstances therefore, I expunge from the record the testimony of PW3 on saying that the Appellant told her that ***"he had sodomized the victim but they had a consensus (sic). That is the victim agreed";*** and any other evidence regarding the admission of the Appellant on the commission of the offence before her. I however, agree with the counsel for the Respondent that there is no requirement that the accused must be sent to justice of peace after admission. The accused shall be sent to justice of peace if he/she is willing to do so.

Coming to the ground of appeal on the failure to read exhibit P1 by PW4 before the court. I am of the stance that it is not fatal in this case as PW4 clearly explained that he examined PW1 and found him with bruises and treated him. The Appellant even cross examined PW4. Hence he was not prejudiced.

As for the defence case was not considered, that argument is not true. The trial court considered the evidence of the Appellant and found out that the same did not raise reasonable doubt and did

not even dispute the victim story on how they met. Further, upon going through the testimony of DW1, he only picked the discrepancy that PW3 said PW1 was beaten by a rubber string and that while PW2 said PW1 could not sit, while PW4 said he welcomed them to sit. He also explained how he was arrested. Like trial court, I find no difficulty in finding that his defence did not cast a shadow of doubt into prosecution's case.

From the above background, I find that prosecution case was proved beyond reasonable doubt. Save for the 4th ground of appeal that I expunged part of the content of PW3's testimony, this appeal is unmeritorious and I accordingly dismiss it.

Furthermore, looking at the facts of the case, the victim in this case was 12 years old when the Appellant sodomised him. **Section 154 (2) of the Penal Code, Cap 16 RE 2019** provides for the sentence of life imprisonment where the person is convicted for the offence of having carnal knowledge of any person against order of nature where the offence is committed to a child under eighteen years of age. The law reads:

"154.-(1) Any person who-

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment. *(emphasis is mine).*

That being the position of the law therefore and in terms of **section 366(1)(a)(ii) of the Criminal Procedure Act, Cap 20 RE 2019**, I accordingly substitute the sentence of 30 years imposed by the trial court to life imprisonment.

Ordered accordingly.

R.A. Ebrahim
Judge

Mbeya.

13.09.2021

Court: Right of appeal explained.

R.A. Ebrahim
Judge
13.09.2021

Date: 13.09.2021.

Coram: R.A. Ebrahim, Judge.

Appellant: Present in person

For the Republic: Ms. Zena James, State Attorney.

B/C: Gaudensia.

Ms. Zena James, State Attorney: The case is coming for delivery of judgment and we are ready.

R.A. Ebrahim

Judge

13/09/2021

Appellant: I am ready.

R.A. Ebrahim

Judge

13/09/2021

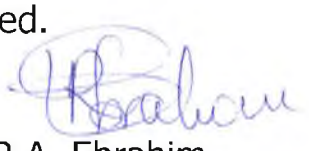
Court: Judgement is delivered today in the presence of the Appellant and learned State Attorney, Zena James.

R.A. Ebrahim

Judge

13/09/2021

Court: Right of Appeal Explained.



R.A. Ebrahim

Judge

13/09/2021