IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 161 OF 2020

(Originating from the Court of Resident Magistrate of Mbeya, at Mbeya, in Criminal Case No. 181 of 2018)

DEKO FARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 12.07.2021

Date of Judgment: 15.10.2021

Ebrahim, J.

In the Court of Resident Magistrate of Mbeya, at Mbeya the appellant was arraigned and convicted for unnatural offence of a child boy of the age of eleven (11) years who I shall be referring to as "the victim" for the purpose of hiding his identity. The charge was predicated under **section 154(I)(a) and (2) of the Penal Code, Cap. 16 R.E 2019** (the Penal Code). He was sentenced to life imprisonment. It was also ordered to pay compensation at a tune

of Tshs. 5,000,000/= (five million shillings) to the victim. He was aggrieved, hence this appeal.

The accusation by the prosecution against the appellant as reflected in the particulars of the offence was that; on 01/11/2018 at Uyole area within the City and Region of Mbeya, the appellant had carnal knowledge of the victim, a child aged eleven years against the order of nature. The prosecution lined up a total of six (6) witnesses and two exhibits (the PF3 and cautioned statement) in their verge to prove the charge against the appellant. The material facts of the case as unveiled in the trial court record during the trial may briefly be recapitulated thus:

On the material date, the appellant found the victim and other two children (Kelvin and John) playing. He promised to give them a Hare. He told them to accompany him to his home so as to collect it. The victim accompanied him to his home leaving his fellow children waiting, but he never returned for that day. The victim and the appellant reached at the home of the appellant when it was already night. The appellant told the victim to sleep at his home, the victim heeded to the suggestion, he thus slept. The appellant used that night to accomplish his evil act. The victim

fallen asleep, when he wake up he found his short lowered to his knees and the appellant's male organ penetrated into his anus. He repeated the act about four times. When the victim tried to cry the appellant threatened him with a knife. He released the victim in the morning at 06 AM on 02/11/2018 and gave him Tshs. 200 as a bus fare.

The victim returned home in the morning. He narrated a story of what befallen him to his mother. His mother inspected him and found feaces around his anus and his short. She took him to the police station at Uyole where he was issued with a PF3. He was taken to Igawilo hospital where he was medically examined. he was found with feaces in his anus and on his short which proved that he was sodomised.

The victim managed to direct his father and police officer to the home of the appellant where he was arrested and interrogated. In his cautioned statement he confessed to sodomise the victim.

However, the appellant later on in his defence evidence forcefully denied to commit the offence. He narrated a different story that he was arrested for being suspected to be a thief but later he was charged with the unnatural offence.

His denial notwithstanding, the trial magistrate was satisfied that the prosecution had proved the charge against him to the hilt and proceeded to convict and sentence him as earlier stated. In his petition of appeal the appellant preferred six (6) grounds which were to the effect that:

1. The trial court erred in law and fact when it convicted and sentenced him while the prosecution did not prove the case beyond reasonable doubt.
2. That the trial court erred in law and fact when it relied on the evidence of the victim which was not corroborated with the evidence of the children (Kelvin and John) who was playing with him.
3. That the trial court erred in law and fact in convicting him by relying on the contradicted evidence of the doctor who examined the victim.
4. That the trial court erred in law and fact when it failed to consider that the victim did not identify him since he failed to describe him.

5. That the trial court erred in law and fact when it relied on the cautioned statement which was not corroborated with extra-judicial statement from the justice of peace.
6. That the trial court erred in law and fact when it failed to consider the defence evidence.

Basing on these grounds of appeal, the appellant prayed for this court to allow the appeal, quash the conviction, set aside the sentence and set him free.

During hearing of the appeal, the appellant appeared in person, unrepresented vide virtual court while in Ruanda prison. The respondent/Republic appeared through Ms. Xaveria Makombe, learned State Attorney who was physically present in court. The appellant prayed for the State Attorney to begin while he reserved his right to rejoin.

In response, Ms. Makombe objected the appeal, she supported the conviction and sentence passed by the trial court. Generally, the learned State Attorney contended that the prosecution proved the case at the required standard, i.e beyond reasonable doubt. She also submitted that it is not always the case that the victim should describe the culprit. For instance, in the case at

hand the victim did not describe the appellant but in his testimony he was very clear how the appellant sodomised him and he remembered the house in which the appellant resided that is why he managed to lead the police to arrest him.

On the complaint that cautioned statement was not corroborated with extra-judicial statement, Ms. Makombe argued that, it is not the requirement of the law so long as the same was admitted in court following the required procedures in the admission of cautioned statement.

As to the discrepancy of the evidence of PW3 and exhibit P1, Ms. Makombe argued that the same did not go to the root of the case. This was because, though the PW3 testified that the victim was taken to him for examination on 1/11/2018, the exhibit (PF3) showed that it was on 02/11/2018 which the date was mention by other witnesses including PW1 and PW2.The learned State Attorney thus, prayed for this court to dismiss the appeal.

In his rejoinder, the appellant reiterated the contents of his grounds of appeal.

I have considered the grounds of appeal, the submissions by the learned State Attorney for the respondent, the record and the law. 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, Page 5 of 17 Criminal Appeal No. 308 of 2013.**

However, before testing the main complaint of the appellant that the prosecution did not prove the case beyond reasonable doubt, for the purpose of convenience, I will firstly test the 6th and 5th ground of appeal since they are not much related to the main complaint.

As to the 6th ground, it was correctly argued by the learned State Attorney that the evidence of the appellant i.e the defence evidence before the trial court was considered but the trial court accorded no weight to it since it did not raise a shadow of doubt to the prosecution evidence. This can be seen at page 7 of the typed judgment. The appellant's complaint thus, has no merit.

Regarding, the 5th ground of appeal, I also concur with the submission by the learned state Attorney that it is not the requirement of the law that cautioned statement should be corroborated with extra-judicial statement. I revisited the proceedings of the trial court and found that, the appellant repudiated his cautioned statement. However, when the inquiry was conducted according to the law, the trial court was satisfied that it was indeed recorded, it was thus admitted as exhibit. The appellant is now not challenging how it was recorded or admitted in court. I see no fault on the recording procedures. This ground is thus dismissed.

Now, reverting to the main complaint which 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 evidence led to the conviction of the appellant mainly based on the testimony of the victim (PW2) and the cautioned statement (exhibit P2).

PW2 who adduced evidence on a promise to tell the truth essentially testified that, him, Kelvin and John were playing in their home street when the appellant whom he said that he did not

know before whom he was referring to as (a youth) asked them (children) to accompany him to collect a hare. PW2 and the appellant left Kelvin and John. The two after a considerable much time where PW2 referred to be far, they reached the residence of the appellant. PW2 described that the house had a main gate. They entered the room of the appellant where a mattress was laid down. Pw2 sat on the mattress later he fail asleep. When he wake up he asked the appellant to go home but the appellant told him to wait. Pw2 slept again, when he wake up on the second time he found his short (short trouser) lowered under his knees the appellant took his "dudu" penis and inserted into his anus. Pw2 wanted to raise alarm but the appellant smothered him.

PW2 further testified that the evil act was repeated about four times, and when he wanted to cry the appellant threatened to insert the knife in his anus. In the morning i.e on 02/11/2018 at 06 AM the appellant opened the door slowly took PW2 outside and gave him TShs. 200/= as bus fare for him to go back home.

When PW2 reached home, he told the story to his mother. His mother reported the incident to the police station at Uyole. He was availed with PF3 and went to Igawilo Hospital where

examination was made and found feaces around Pw2 anus which proved that he was sodomised.

Later PW2 lead his father, a friend of his father and a police officer to the home of the appellant. The appellant was found in his room, PW2 also pointed to the appellant as the one who sodomised him.

The story of Pw2 resembled that of PW1, a mother of the victim, PW4, PW5 and PW6 (all police officer). PW6 also tendered cautioned statement. The cautioned statement corroborated the story since it gave the details on how the appellant took the victim to his home and how he sodomised him.

Basing on the above evidence of the prosecution, the question is whether there is basis for this court to disbelieve PW2. In answer to this question, I will be guided by the decision in **Goodluck Kyando v. Republic,** (2002) TLR 363 that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness. In the instant case, besides denying to commit the offence, the appellant did not seriously deny the testimonies of

PW2. In the light of all this, I have no strong reasons for not believing PW2.

The version of the PW2 evidence is corroborated with the cautioned statement of the appellant. As rightly evaluated by the trial court, the cautioned statement shows that indeed the appellant committed the offence. When I read the cautioned statement, I found the statement was nothing but the confession. For example, the appellant stated that, when he inserted his penis into the victim's anus, he (victim) did not say anything but later he (appellant) became sympathy with him and he felt bad that if the same had been done to him he would have felt bad. Thus, he released him in the morning and gave a bus fare Tshs. 200/=.

Having believed PW2 the issue is whether there was need to summon Kelvin and John as suggested by the appellant. On this, I go along with Ms. Makombe that in terms of **Section 143 of the Evidence Act** no specific number of witnesses is required to prove a fact. In this case, I am satisfied that the evidence of PW2 coupled with the cautioned statement were enough to establish the appellant's guilt beyond reasonable doubt. In the premises,

no useful purpose would have been served if Kelvin and John had been called to testify on behalf of the prosecution side.

As to the complaint that the evidence of PW3 (doctor) contradicted the PF3, I hastily agree with the learned State Attorney that, the discrepancy did not go to the root of the case. This is because, PW3 testified that he received the victim on 01/11/2018 and filled on the PF3 the result of the examination. The PF3 itself shows that it was filled on 02/11/2018 which according to other evidence on record was the date when the victim was taken to hospital.

Having observed as above, it is my concerted view that, the prosecution proved the case beyond reasonable doubt. I therefore dismiss the entire appeal for lack of merits.

Ordered accordingly.

R.A. Ebrahim

Judge

Mbeya

15.10.2021