**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL NO. 44 OF 2021**

(Arising from Criminal Case No. 445 of 2019 of the District Court of Moshi)

**JEREMIAH JOHSON @ MOSHA..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*17/11/2021 & 29/12/2021*

**SIMFUKWE, J**

The appellant was arraigned and convicted before the District Court of Moshi of two offences: unnatural offence, contrary to **section 154(1) of the Penal Code Cap 16 R.E 2002** and assault causing actual bodily harm **c/s 241 of the Penal Code.** He was sentenced to thirty years and three years' imprisonment respectively.

The particulars for the 1st count were to the effect that on 6th April, 2019 at Ashira Marangu area, within the District of Moshi in Kilimanjaro Region, the appellant did have carnal knowledge of one VA (victim) against the order of nature.

On the 2nd count, it was alleged that on the same date, time and place, the accused did hit one Veronica Amani @ Sandi with a wire and thereby caused her to suffer actual bodily harm.

The prosecution marshalled four (4) witnesses to prove the offence. During the hearing, the accused entered appearance up to when PW2 testified and thereafter jumped bail. The prosecution prayed and so it was ordered for the matter to proceed in his absentia. When the matter was adjourned for judgment, the accused was arrested following the order of arrest. He was to show cause as to why he was not attending to court. The court found that the reasons for non appearance of the appellant was baseless and thereafter proceeded to convict and sentence him to 30 years imprisonment for the first count and 3 years for the second count. Sentences were ordered to run concurrently. Dissatisfied with the conviction and sentence of the trial court, the Appellant has filed this appeal on seven detailed grounds.

During the hearing of this appeal, the appellant was unrepresented while the Respondent/Republic was represented by Ms. Lilian Kowero learned State Attorney. The matter proceeded by way of written submissions.

The appellant started to submit in support of the 1st, 2nd, 3rd and 6th grounds of appeal which are in respect of matters of law. In respect of the 1st ground, the appellant condemned the trial magistrate for failure to comply with **section 214 of the CPA**. He argued that from the trial court proceedings, there is no record showing that the successor Magistrate assigned any comment concerning the necessity of

resummoning the witnesses and recommence the trial contrary to **section 214 (1) of CPA,** hence prejudiced the appellant.

The appellant submitted further that even if the Respondent raised the issue of accused (appellant) not appearing, hence trial in absentia but such point is very weak to the account that the accused (appellant) had been arrested and brought to court even before delivery of judgment.

In support of his argument, the appellant cited **section 226(2) of CPA** which provides that:

> *"Where the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had probable defence on the merit."*

He argued that when he was arrested due to arrest warrant issued by the court, the court did not give him a chance to defend himself although judgment was not yet delivered. Basing on this claim, the appellant argued that there was no equality in the trial court since he was deliberately denied right to be heard before the court of law which is contrary to natural justice an essential component in administration of justice.

Submitting on the 2nd ground of appeal, the appellant faulted the trial Magistrate for failure to comply with mandatory provision of **section 312 (2) of CPA** that the judgment must specify the offence and the section of the law under which the accused person is convicted. He opined that this violates the procedure of conducting a criminal matter so one cannot say that the case was proved to the required standard. In respect of this ground, it was contended that the provision was not

superfluously added to the Act, they were enacted after the inclusion of the basic right of equality before the law. So, the trial magistrate had an inevitable statutory duty to comply fully with these provisions and its conditions stipulated in those sections are cumulatively and the duties imposed are mandatory.

In respect of the 4th,5th and 7th grounds of appeal, it was submitted to the effect that at page 5 and 6 of the typed proceedings the trial magistrate pointed out some inconsistences but she was of the view that the inconsistences did not go to the root of the case. The appellant was of the view that, it is wrong to say that the inconsistences did not go to the root of the case while those matters were the ones which make the offence to stand. It was further argued that Exhibit P1 was tendered by PW4 who is not an expert. This is unprocedural. Moreover, PW4 testified that she witnessed the doctors while examining the victim and witnessed the red swollen anus which had bruises but astonishingly the doctor's opinion in the PF3 suggested contrary to what was testified by PW4. That exhibit P1 (PF3) thus suggested that, the victim was not sodomised but only assaulted. The appellant stated that the trial magistrate relied on such PF3 to justify the offence of assault while at the same time refused to rely on the same for an unnatural offence. The appellant was of the view that this resulted to double standard.

The appellant submitted further that it is mandatory that the standard of proof in all criminal trials is beyond reasonable doubts as per **section 110 of Cap 6 R.E 2019**. The prosecution bears the burden of establishing the case in a criminal case beyond reasonable doubts and such burden remains throughout the trial it never shifts. In addition, the appellant stated that it is well known that the quality of prosecution

evidence should be watertight enough to warrant the conviction of an accused person and not the quantity of prosecution witnesses. Basing on this argument, the appellant argued that as per the whole proceedings there are lucid shortfalls which are going down to the crux of the case which the trial Magistrate overlooked, hence miscarriage of justice.

He thus prayed the Court to allow the grounds of appeal, quash the conviction and sentence and set him at liberty.

In her reply to the submissions by the Appellant, Ms. Kowero for the Respondent argued that the appellant submissions ought to be dismissed for being devoid of merits. She grouped the grounds of appeal into two groups, grounds 4,5 and 7 which are based on evidence and ground 1,2 3and 6 which are based on matters of law.

Starting with the matters of law particularly the 1st ground, Ms Kowero stated that **section 214 (1) of CPA** was complied with. She made reference to page 13 of the typed proceedings where the Magistrate In charge Hon. B.T. Maziku reassigned the case from Hon. D. P. Kinywafu RM to Hon. Edward RM following the transfer of the previous Magistrate. When all this was done, the accused had already jumped bail since 4th April 2020 and therefore forfeited himself from right to be directly addressed in terms of **section 214 (1) of the CPA.** Furthermore, the learned State Attorney was of the firm stand that the succeeding Magistrate complied with the provision of **section 214(1) of CPA**. She made reference to the case of **Flano Aphonce Masalu and 4 Others vs R. Criminal Appeal No. 366 of 2018** CAT at Dsm, in which reference was made to the case of **Juma Kuyani and Another vs R.**

**Criminal Appeal No. 525 of 2015** whereby the Court found the complainant under consideration unmerited as the Magistrate was aware of section **214(1) of CPA** as he noted down the reason of transfer as the reason for reassignment.

Responding to the 3rd ground of appeal that the trial magistrate failed to comply with **section 312 (2) of CPA** the learned Sate Attorney conceded that the trial magistrate did not stipulate the offence and section under which the appellant was convicted. However, she argued that the same does not prejudice the appellant anyhow as he was present when the charge was read to him. Also, when PW1 and PW2 (the victim) adduced their evidence in court which enabled him to understand the nature of the offence he was charged with and therefore the sentence. Ms Kowero was of the view that since the appellant was not prejudiced anyhow with such omission then the same can be cured by **section 388 of the CPA.**

Responding to the second ground of appeal it was submitted to the effect that the ground is based on misinformation since at page 24-25 of the typed proceedings on the 12th April 2021 when the appellant was arraigned before the court after being arrested, he was to show cause why he was not attending before the court, he replied that he was told not to come to court until when he was called through phone. Ms Kowero stated that the appellant did not say who told him so and therefore the trial magistrate found that reason to have no basis and cancelled his bail pending judgment. Also, the learned State Attorney referred to page 3 paragraph 2 of the judgment which stipulates that the appellant was accorded with the right to show cause for his absence

and the court was satisfied that the reasons adduced had no basis and it proceeded with judgment.

Submitting in support of the second set of grounds of appeal which are 4,5 and 7; it was stated that the trial magistrate pointed out the discrepancies and contradictions and stipulated that the same did not go to the root of the case and hence did not dismantle the prosecution case. She made reference to the case of **Maramo Slaa Hofu and Three Others vs The Republic, Criminal Appeal No. 246 of 2011** (CA) at Arusha (Unreported) where the Court referred to the case of **Said Ally Ismail vs Republic, Criminal Appeal No. 249 of 2008** in which it was held that:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

It was further submitted that; the cardinal rule is that the prosecution proves the case beyond reasonable doubt. The learned State Attorney argued that the prosecution proved their case beyond reasonable doubts against the appellant. PW2 the victim testified how the appellant grabbed her to the bush, assaulted her by a wire on her buttocks and legs and tied her on the tree, undressed her and inserted his penis in her anus. This was corroborated by the evidence of PW1 who noticed that PW2 was unhappy and unable to sit and she took a lot of time in the toilet. Moreover, it was the learned State Attorney's contention that the evidence was also supported by PW4's evidence who inspected PW2's anus and found it to be swollen, bruised and reddish in colour.

PW4 also stated that PW2 frequently visited the toilet and took a lot of time there. The witnesses' testimony was corroborated by a PF3/ Exhibit P1.

Ms. Kowero submitted further that the victim /PW2 identified very well the appellant to be the one who sodomised her. There was no any mistaken identity him and no grudges alleged by the appellant when PW1 and PW2 were testifying in court. Thus, the case against the appellant was proved beyond reasonable doubts.

Concluding his submissions, the learned State Attorney prayed for the court to dismiss this appeal and proceed to uphold the trial court's conviction and sentence since the grounds of appeal lacks merit.

After going through the grounds of appeal, submissions of both parties and trial court's records, I am of settled opinion that the grounds of appeal are centred on two issues: ***first,*** *whether there were procedural irregularities* and ***second*** *whether the case against the appellant was proved beyond reasonable doubts.* In the due course of scrutinizing these grounds I will deal with one ground after another.

Under the 1st ground, the appellant was complaining that there was failure to comply with **section 214 of the CPA.** For the sake of reference **section 214 of CPA** provides that:

> *214.-(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another*

*magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceedings recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings.*

It is on record that there was change of magistrate from the predecessor magistrate Honourable D.P. Kinywafu- RM to Honourable Edward - RM. Again, as per the records, it is undisputed that the prosecution prayed to resummon PW4. Resummoning the witness is allowed as per the above cited provision. Therefore, since the prosecution prayed for the court to resummon PW4, then I find no reason to fault the procedure considering that resummoning of the witness is allowed under the above provision.

Also, it has been established that the reasons have to be advanced once there is a change of magistrate in the course of the proceedings. This has been stated in a number of authorities. See the cases of **Inter- Consult Limited V Mrs Nora Kasanga and Mathew Ibrahim Kassanga, Civil Appeal No. 79 of 2015** and **Hatwibu Salim V. R, Criminal Appeal No. 372 of 2016, CAT at Bukoba (unreported)**.

As per the record, at page 12-13 of the typed proceedings, as rightly submitted by Ms. Kowero, the change of magistrate was due to the transfer of the former magistrate Hon. D. P Kinywafu RM as stated by Hon Maziku PRM i/c. The proceedings seem confusing since the coram

and trial Magistrate purported to have signed the proceedings are different. I faced the same confusion, so I resorted to the handwritten proceedings since the same is original proceedings and found that there was a typing error. It is on that basis that I have not considered submissions of both parties in respect of the typing error of the presiding Magistrate in the coram and the signature part.

Under the 2nd ground of appeal, the appellant is complaining that there is non-compliance of **section 312 (2) of the CPA**. The learned State Attorney conceded on such non-compliance but she opined that the appellant was not prejudiced by the same.

The law under **section 312 (2) of CPA** requires the trial magistrate when convicting to state the offence charged and the section of the Penal Code or other law under which, the accused person is convicted. In this case, the trial magistrate did not comply to the said requirement of the law. However, I asked myself if such omission occasioned any injustice. In the case of **Issa Juma Idrisa & Another vs Republic, Criminal Appeal No. 218 of 2017,** the Court of appeal discussed how to determine whether the defect is fatal and incurable. The Court observed that the fatality of any irregularity is dependent upon whether or not it occasioned a miscarriage of injustice. If it has not occasioned a miscarriage of justice the same is curable under **section 388 of CPA**. In respect of this authority, I concur with the learned State Attorney's argument that the omission does not prejudice the appellant since in the charge sheet and during the Preliminary Hearing the offence and the section was stated.

Under the 3rd ground of appeal, the appellant condemned the trial magistrate for failure to comply with **section 226(2) and (4) of the CPA** which provides that:

> *"(2) Where the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit.*
>
> *(4) The court, in its discretion, may refrain from convicting the accused in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court."*

The above provisions confer the duty to the trial magistrate to be satisfied that the accused's absence was caused by the reasons beyond his control before convicting him.

In this case, the records reveal that the Appellant jumped bail and he was arrested when the prosecution had already closed its case and the court had already set judgment date. The Appellant was brought before the trial magistrate, and the trial magistrate accorded him right to address the court on his absence and at the end the court ruled out that the reasons stated for his failure to appear in court was baseless. This is proof that the Appellant was accorded right to be heard and thus the trial was fair.

On the 4th ground, the appellant faulted the procedure used to tender exhibit P1 (PF3). Under the 5th grounds the appellant complained that PW4 tendered the said exhibit contrary to the law.

It is true as contended that the PF3 was tendered by PW4 who is not an expert nor the author of the same. I am aware with the established principle in the case of **Deus Josias Kilala @ Deo vs Republic Criminal Appeal No. 191 of 2018** that an exhibit can be tendered by a person who has the knowledge of its existence. In this case, PW4 was not an expert to tender a PF3 despite the fact that she stated that she witnessed when the victim was examined by the doctor. However, I am of considered view that there are expert's opinions which could be asked in cross examination which PW4 could not be in a position to answer. Having found as such, then this defect entitled the PF3 to be expunged from the record.

As far as the 6th ground is concerned, the appellant raised the confusion in the typed proceedings where the coram used to receive the testimonies of PW3 and PW4 indicates that the case was presided by Hon. Jenifer Edward RM, while the same indicates that it was signed by D.P. Kinywafu RM

I have gone through the records both typed and hand written, I found that there are typing errors in the typed proceedings. As per the handwritten proceedings the evidence of PW3 and PW4 was taken by Honourable Jenifer Edward RM, and the same magistrate signed at the end of their testimonies.

On the last ground of appeal, it was contended that the trial magistrate was wrong in holding that the case was proved beyond reasonable doubts. The appellant tried to note that there were discrepancies noted by trial magistrate who was of the view that the same did not touch the root of the case. Also, as per the PF3 it showed that the victim was not

sodomised while PW4 testified to the contrary. That, the trial magistrate relied on the PF3 to convict him with an offence of assault and not for unnatural offence hence double standard.

As I have stated under the 4th ground, the PF3 has been expunged from the record since the same was wrongly admitted. The remaining issue is whether unnatural offence can stand without a PF3.

It is trite law that the best evidence in sexual offences comes from the victim upon satisfying that what was testified by the victim is nothing but the truth. The Court of appeal in the case of **MOHAMED SAID VS REPUBLIC, Criminal appeal No. 145 of 2017 (unreported)** stated that:

> *"... It was never intended that the word of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness."*

In this case the appellant did not fault the truthfulness of the victim's evidence. The trial magistrate relied on the victim's evidence which was corroborated by other witnesses' evidence. The trial magistrate at page 5 of the judgment had this to say:

> *"Hence the evidence of PW2 herself suffices to prove unnatural offence, but in doing so the court must be satisfied that the victim's evidence is credible. This court having gone through the testimony of PW2 find no justifiable reasons to discredit PW2's evidence."*

Moreover, at page 7 of the judgment the trial magistrate held that:

*"On whether it is the accused who sodomised the victim; PW2 mentioned JEREMIAH as the one who sodomized her soon after getting back home and being interrogated by her father PW3, hence that assures the reliability of her testimony.*

*...Moreover, PW2 consistently mentioned JEREMIAH even when she was interrogated by PW4 after being taken there by his father.*

*...furthermore, PW2 testified that she knew JEREMIAH even before the incident as she used to go to their home and also the incident occurred in the broad daylight, hence I find that the issue of mistaken identity does not arise."*

The trial magistrate had said it all. As already stated, even in absence of PF3, unnatural offence can stand considering the fact that evidence of PW2/victim was credible as stated by the trial magistrate.

Lastly, on the issue of discrepancy noted by the trial magistrate at page 5 of the judgment, when PW2 stated that she felt pain in her stomach while PW1 stated that PW2 told her that she was feeling pain in her back. Another discrepancy is that PW2 testified that she was taken to police station and then taken to hospital on the next day while PW3 stated that the incident was reported on Monday.

As rightly submitted by Ms. Kowero these discrepancies do not extend to the root of the case. In the case of **Alex Ndendya vs R., Criminal Appeal No.207 of 2018** the Court of Appeal cited with approval the case of **Dickson Elia Nsamba Shapwata v. Republic, Criminal**

**Appeal No. 92 of 2007** which cited page 48 of **Sarkar, the Law of Evidence, 16th Edition,** which provides that:

> *"Normal discrepancies in 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 expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case material discrepancies do."*

Basing on this authority, I am of the same view that the variance does not negate the fact that the victim was sodomised by the appellant.

Another noted discrepancy is that what was testified by PW4 is contradictory with what was filled in the PF3. This will not detain much of my energy since the PF3 has already been expunged.

From the foregoing analysis, I am satisfied that the prosecution case was proved beyond reasonable doubts. I therefore find the appeal to have no merit. I dismiss it in its entirety. Conviction and sentences of the trial court is hereby upheld.

Dated and delivered at Moshi this 29th day of December, 2021.

**S. H. SIMFUKWE**
**JUDGE**
**29/12/2021**