IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 47 OF 2021

(Original Ruangwa District Court Criminal Case No. 150 of 2020)

ALLY S/O SELEMANI CHIKUKULA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14th Febr. & 31st March, 2022

DYANSOBERA, J.:

The appellant was, before the trial District Court, charged with and convicted of unnatural offence c/s 154 (1) (a) and (2) of the Penal Code [Cap.16 R.E.2019]. He was sentenced to life imprisonment. He thought that the decision flew into his face. He has come to this court appealing. He is armed with the following grounds of appeal:-

1. That the honorable trial court erred in law and fact by convicting and sentencing the appellant while the case was not proved against him beyond reasonable doubt.
2. That the honorable trial court erred in law and fact by relying on the evidence of the PW 3 (the victim) while the same was not credible witness.
3. That the honorable trial court erred in law and fact in failure to evaluate and examine the material

evidence adduced by the appellant during trial and hence reached to an erroneous decision.

It was common ground at the trial that the victim (PW 3), a boy aged 6 years, is the son of Mohamed Issa (PW 2) and Nasra Kinyanguli (PW 1). PW 1 and PW 2 are divorces but the victim lives with his mother, PW 1, who is related to the appellant. The victim and the appellant sleeps in the same room. It is the prosecution case as evidenced in the testimony of the victim (PW 3) that on the fateful day that is on 15th day of November, 2020 at night, the victim and the appellant were sleeping together in the same room. The appellant then put his *"thing in his (victim's) buttocks"* and the latter felt pain. The appellant then took the bed sheet and rubbed the victim. The victim related this episodic event to his mother (PW 1) telling her that his uncle had carnally known him against the order of nature. PW 1 examined the victim's anus but found him with no any fluids. The victim told her that the appellant had rubbed him with the bed sheet. PW 1 went to collect the bed sheet and found it with some fluid which smelt sperms. PW 1 also noted that the bed sheet had sperms. PW 1 informed her ex-husband, PW 2, who took the victim to Mbekenyera Health Centre where the victim was medically examined by Ernest Sylvanus Mtagaye (PW 4) on that day at 1650 hrs and found the victim's anus with bruises and inflammation showing that there had been an external pressure from outside. According to PW 4, the anus area was reddish. He formed an opinion that the victim had been either carnally known or there was an attempt to do so. He then filled in the PF 3 (exhibit P 1).

The appellant was subsequently apprehended and arraigned in court. PW 5 E.7795 who claimed to have recorded the appellant's cautioned statement sought to tender the cautioned statement. The appellant objected to its admissibility and after an inquiry, the appellant's objection was sustained and the cautioned statement was rejected.

The appellant denied having committed the charged offence. He told the trial court that he was absent when the offence was being committed. He was supported in his evidence by Issa Bakari Mapinda (DW 2) and Hadija Said Malibuke @ Mama Mboka (DW 3). According to DW 3, the appellant was staying with PW 1 doing house hold and farming activities. On 13th day of November, 2020, the appellant went back home and told her that there had developed some misunderstandings between him and PW 1 on payments. On 15th day of November, 2020, DW 3 heard that the appellant had been taken to the police station. She denied to know anything respecting the offence.

The learned trial Resident Magistrate was satisfied that the evidence led against the appellant proved the case beyond peradventure.

During the hearing of the appeal, the appellant was represented by Messrs. Songea and Chiputula, learned Advocates, while the respondent was represented by Mr. Lugano Mwasubila, learned State Attorney.

Arguing in support of the appeal, Mr. Songea dropped the 2nd and 3rd grounds of appeal and argued the 1st ground of appeal which is to the effect that the case against the appellant was not proved beyond reasonable doubt. According to him, there are many doubts discernable in the prosecution case. One is the variance between the charge sheet

and the evidence. He explained that while the charge sheet talks the incident to have occurred at Naunambe village, Ruangwa District, the evidence is in respect of a place known as Mbekenyera which is different from that mentioned in the charge sheet. In his view, this is a proof that what is alleged in the charge sheet was not proved in evidence. Mr. Songea pointed out that a charge sheet is a foundation of the case.

Two, is on the name of the appellant. It is argued for the appellant that while the victim mentioned Muddy Lupaga Ally, PW 1 said that it was Selemani Ally while PW 2 referred him as Ally Selemani Chikukula. Counsel insisted that it is the law that what is alleged in the charge sheet must be proved. He made reference to the case of **Akida Mohamed Katemana v. R.**, Criminal Appeal No. 49 of 2020 whereby the Court had referred to the case of **Salumu Rashid Chitende v. R.**, Criminal Appeal No. 204 of 2015. He insisted that the specific name had to be proved. Counsel relied also on the case of **Ramadhan Ismail Kambini@ Manifongo and 2 others v. R.**, Criminal Appeal No. 3 of 2021 to buttress his argument.

The other discrepancy pointed out by the learned Counsel for the appellant was on non-compliance with the provisions of Section 127 (2) of the Evidence Act on how to take evidence of children of tender age. He said that PW 2 who was the victim was 6 years old in which case the trial magistrate was duty bound to comply with the legal requirements that is to require the witness to promise to speak the truth and the magistrate had to record how she had arrived at that assessment. Mr. Songea cited the case of **Godfrey Wilson v. R.**, Criminal Appeal No. 18 of 2018 to reinforce his argument. It was his contention that this court has been insistence on the compliance with the said procedure as was pointed out

in the case of **Moses Rafael Lyego v. R.**, Criminal Appeal No. 58 of 2020. It was further argued for the appellant that non-compliance with the procedure vitiates the proceedings. A prayer was made that the said evidence of PW 2 be expunged from the record. If this evidence is expunged from the record the remaining evidence becomes a hearsay incapable of sustaining conviction, learned Counsel asservated.

A further argument was advanced on part of the appellant that when PW 5 was testifying, there was no cross examination by the appellant which means that the appellant was denied of the basic right to cross examine him and this means that there was no fair hearing. The case of **Ex. D. 8656 Cpl Senga Iddi Nyembo and 7 others v. R**, Criminal Appeal No. 16 of 2018 was referred to this court in support of this argument.

The decision of the trial court was attacked on another front. It was submitted on part of the appellant that the PF 3 was not read out in court which was contrary to the legal requirement as stipulated in the case of **Hassan Issa Uki v R.**, Criminal Appeal No. 129 of 2017. Further that PW 4 stated that he was not sure if the act was committed on the victim. Learned counsel for the appellant concluded that the case against the appellant was not proved to the required standard.

In his response, Mr. Lugano Mwasubila opposed the appeal and supported the decision of the trial court. He said that the evidence against the appellant was cogent and sufficient to prove the case against the appellant. He clarified that the evidence of PW 3, the victim, detailed how the appellant Ally penetrated him in the room in which they were sleeping

together and the carnal knowledge was against the order of nature. The victim then informed his mother, PW 1. Mr. Mwasubila pointed out that the evidence of the victim was in itself sufficient to prove the case. He cited the case of **Selemani Makumba v. R** [2006] TLR 379 to support his argument. In his further submission, the learned State Attorney said that it is the law under Section 127(6) of the Evidence Act [Cap 6 R.E.2019] that the evidence of a child of tender age alone is sufficient to prove a case. He told this court that the evidence of PW 3 was not rebutted during cross-examination and was, therefore, credible as the witness was truthful as was stated in the case of **Googluck Kyando v. R** [2006] TLR 363. Mr. Mwasubila further submitted that the evidence was also supported by that of PW 1, his mother, to whom the report was made immediately after the incident. The case of **Marwa Wanditi and another v. R** [2002] was cited in support of this argument. Mr. Mwasubila further argued that the case of PW 3 was supported by the evidence of the Doctor (PW 4) who medically examined the victim and testified to have seen all the signs of penetration.

In his further elaboration, learned State Attorney submitted that the evidence of PW 1 and PW 2 established that the appellant admitted before them to have committed the offence and asked for forgiveness and this is an oral confession which can lead to a conviction. Reliance was made on the cases of **Jacob Mayani v. R.**, Criminal Appeal No. 558 of 2016 at page 17 and **DPP v. Nuru Mohamed Gulamlasul** [1988] TLR 82. Learned State Attorney dismissed the complaint that the evidence of PW 3 was not properly recorded referring this court to page 9 of the trial court's proceedings where the trial magistrate took into account section

127 (2) of the Evidence Act and asked the witness if he promised to tell the truth. Mr. Mwasubila sought to distinguish the case cited by Mr. Songea and argued that the evidence of PW 3 was recorded after all procedures were followed.

On the inconsistencies between the charge sheet and the evidence as pointed out by Mr. Songea, learned State Attorney argued that they were baseless and that the village of Mbekenyera is within the village of Nandenje. With regard to the name of the appellant, Mr. Mwasubila argued that the learned Counsel did not go through the record in depth as all the witnesses mentioned the appellant to be Ally and the victim did even point a finger to him. He was of the view that the contradictions did not go to the root of the matter as they did not relate to the ingredients of the offence and are curable under section 388 of the Criminal Procedure Act.

Learned State Attorney admitted that PW 5 was not cross examined but argued that it was just a human error, his evidence was not considered and the omission is immaterial as the appellant was no prejudiced. It was also admitted on part of the respondent that there was omission to read out the PF 3 but still there was the evidence of PW 4 which was strong, Mr. Mwasubila insisted.

He concluded that the since all witnesses were credible, the finding by the lower court on credibility binds the higher court. He relied on the case of **Omary Ahmed v. R.**, [1983] TLR p. 52 to support his argument.

With regard to sentence, Mr. Mwasubila said that it was deserved and needs no court's interference.

In his short rejoinder, Mr. Songea commented that since the learned State Attorney admits that PW 5 was not cross examined, the omission went to the root of the matter as the accused right remains there irrespective of whether or not the evidence was considered. With regard to respondent's admission that exhibit P 1 was not read in court, the effect is to expunge it from the record.

Mr. Songea went on submitting that the ingredients of the place where the offence was committed was not proved and the same applies to the names. On the admission of the evidence of PW 3, learned Counsel argued that the methodology used by the trial magistrate were not stated. He cited the case of **Maganga Ikelenge v. R.**, Criminal Appeal No. 1 of 2021.

Having summarised the evidence and the arguments of the learned State Attorney for the respondent and learned Counsel for the appellant and after considering the record, I am now in a position to determine the present appeal.

As far as the appellant's complaint that there was variance on the place the offence is alleged to have been committed that is whether it was at Mbekenyera or Naunambe, I agree with the learned State Attorney that the complaint has no basis. The record is clear that Mbekenyera is within Naunambe village. This is clear from the trial court's record at p.2 of the typed proceedings and the proceedings dated 19.11.2020 in the handwritten copy of proceedings.

On the name of the appellant, the evidence of PW 1 and PW 2 was clear that these witnesses were referring to Ally Selemani being the person

who carnally knew the victim. The victim did not say that the person who carnally knew him was Muddy Lupagaa but he told the court that Muddy Lupagaa was his father and named the appellant as Ally. To be clear, the record of the trial, court according to the proceedings found at p.9 of the typed proceedings speak itself:

During the examination in chief, the victim is recorded to have told the trial court the following:

> *"My father is Mudy Lipugaa. Ally was residing at our house. He is the accused here in court (the witness pointed his finger to accused person). He was sleeping in my room. He had put his thing in my buttocks and I felt pain..."*

The same version is reflected in the handwritten proceedings dated 15.12.2020. The argument by learned Counsel for the appellant that the specific name of the appellant was not proved is but a misconception and misleading. The specific name of the appellant was proved to the required standard that he was Ally Selemani. It is also the same name the appellant used during his defence. All this is reflected on the charge sheet. So, the cases cited by Mr. Songea are inapplicable to the present case and, therefore, distinguishable.

Another complaint raised by Mr. Songea in his submission was that there was non-compliance with Section 127 (2) of the Evidence Act [Cap. 6 R.E.2019] in that the learned Magistrate did not require the victim who was of the tender age to promise to speak the truth and that there was no record on how the said Magistrate arrived to that assessment. Mr. Mwasubila opposed that argument and told this court that the trial

Magistrate duly complied with the law and the record is clear on this. With respect, I agree that the learned Resident Magistrate complied with the law. Before receiving the evidence of the victim she complied with section 127 (2) of the Evidence Act and she so recorded. There after she recorded that the victim promised to speak the truth. I find the complaint by Mr. Songea on non-compliance with Section 127 (2) of the Evidence Act baseless and I dismiss it.

With regard to the failure by the trial Magistrate to permit the appellant to cross-examine PW 5 when testifying, the fact the learned State Attorney admitted, there is no dispute that the evidence of PW 5 was not considered by the trial Magistrate in her judgment. I agree that the failure to allow the cross examination was insubstantial particularly where the whole evidence of PW 5 was rejected and was not considered in the judgment which led to the appellant's conviction. The appellant was not prejudiced either. That complaint is dismissed.

Regarding failure to read the contents of the PF 3 and the evidence of PW 4 showing that he was not sure if the offence was committed, I think Mr. Songea is right. According to the record of the trial court, the PF 3 which was admitted in court as exhibit P 1 was not read out in court to the appellant after it was cleared and admitted. Likewise, the evidence of PW 4 was clear that he was not sure if the act of carnal knowledge was committed or there was a mere attempt. Mr. Songea was of the view that the consequences of failure to read the contents of exhibit P 1 are to have it expunged from the record and if that occurs, then there is no other reliable evidence to convict the appellant.

With respect, I agree. The record of the trial court speaks itself. In convicting the appellant, the learned Resident Magistrate observed at page 5 of the typed proceedings thus:-

> *"Now, turning back to the issues as raised on whether the accused persons had known the victim against the order of nature, there is no dispute that the victim was carnal known (sic) against the order of nature. This issue is proved by the evidence of PW 4 who is medical practitioner attended him after the incidence and exhibit P 1 which is the PF 3 of the victim. PW 4 told this court that he examined the victim and in his anus there is a signs (sic) of penetration as the anus was reddish in colour. There were bruises and the area was inflamed meaning there was object forced from outside meaning the victim carnally known against the order of nature. Again, it is the evidence of the victim that the accused person was the one who had done that to him in his evidence he told this court that the accused person was the one who had done that to him. In his evidence he told this court that the accused person put his thing in his buttocks. The victim is a child of 6 years and I could not expect him to mention the exact name of the private parts as also said in the case of* ***Haruna Mtasiwa v. R.****, Criminal Appea No. 206/2018 CAT (unreported) "...given the age of the victim, it was not expected she would*

graphically tell the trial court that the appellant had inserted his penis in her vagina.

As the above excerpt of the judgment of the trial court depicts, there is no dispute that the learned Resident Magistrate, in convicting the appellant, relied heavily on the PF 3 and the evidence of PW4, the witness who medically examined the victim. As rightly pointed out by Mr. Songea, the evidence was too insufficient to ground conviction against the appellant.

In the first place, the exhibit P1 which is a PF 3 had its contents not read to the appellant. The appellant was, by then, unrepresented. The appellant was in that sense denied of his right to know the contents of exhibit P 1. The consequences as pointed out in the case of **Hassan Issa Uki v. R** (supra) are to expunge it. The same is expunged from the record. There now remains the evidence of the victim, PW 4, PW 2 and PW 3. The issue is whether the evidence of these witnesses was sufficient to prove the case against the appellant beyond reasonable doubt.

As far as the evidence of PW 1 and PW 2 is concerned, what they stated in court was according to the version they received from the victim. Their evidence was, to a large extent, hearsay. Besides, PW 1 was clear in her evidence that when she examined the anus of the victim she did not find any fluid therein. The victim had told her that the appellant had rubbed him with a bedsheet. PW 1 told the trial court that when she examined the bed sheet she found it with fluid which smelt sperms. This evidence was not supported anywhere as that bed sheet was not only not taken to the medical expert but also was not tendered in court. PW 2 did

not examine PW 3's anus but said that when he took him to Mbekenyera Health Centre, he, PW 2, was told that PW 3 had been carnally known against the order of nature. This leads me to examine the evidence of PW 4, the medical officer who medically examined PW 3.

PW 4, at p. 11 of the trial court's proceedings dated 15.12.2020 is recorded to have stated as follows:-

> *"I examined that child of 6 years old as it was suspected that he was carnally known against the order of nature and he mentioned Ally as the one who had done it. and I examined that child he had bruises in his unus (sic) was inflated showing that there was external pressure from outside that area was reddish in colour and I filled the PF 3 for that purpose, he had a scar of a nail means he was forcing it.* ***According to that it means that either he was carnally known or there was an attempt*** *(emphasis supplied).*

As rightly pointed out by Mr. Songea, even PW 4 was not sure if the act of carnal knowledge was committed on the victim or it was a mere attempt.

Now, on the evidence of the victim. In his testimony as reflected at p. 9 of the typed proceedings of the trial court, PW 3 who is the victim in this case is recorded to have testified, though by way of repetition, thus:

> *"My father is Muddy Lipugaa. Ally was residing at our house. He is the accused herein court (the witness points his finger to the*

accused person). He was sleeping in my room. He had "put his thing in my buttocks" and I felt pain. He took a bed sheet and rubbed me"

Putting *"his thing in my buttocks"* cannot, by any stretch imagination, be regarded as the same as carnally knowing against the order of nature and hence a proof of penetration. It could also convey the ordinary meaning of the phrase. This explains why PW 1 who examined the victim immediately after the alleged incident did not find any fluid in the victim's anus.

It is trite that in cases like the present one, penetration is one of the elements which must be proved beyond reasonable doubt so that a conviction can lie. In this case, I am far from being persuaded let alone convinced that the element of penetration was proved. I find the case against the appellant not proved beyond reasonable doubt. The conviction was therefore against the weight of the evidence and, for that reason, the sentence was uncalled for.

In the final analysis and for the above reasons, I find the appellant's appeal meritorious and I allow it. I quash the conviction and set aside the sentence.

I make an order that unless lawfully held for other causes, the appellant should be set at liberty forthwith.

W. P. Dyansobera

Judge

31.3.2022

Court: Judgment to be delivered by the Deputy Registrar, High Court, Mtwara.

W. P. Dyansobera,

Judge

31.3.2022