IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 64 OF 2021

(Originating from Criminal Case No. 66 of 2020 of Moshi District Court at Moshi)

JABIRI RICHARD MSANGI@ ANKO JABIR ..... APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

23/05/2022 & 5/7/2022

SIMFUKWE, J.

The appellant herein was charged before the District Court of Moshi on three counts; namely rape contrary to **Section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 R. E 2002,** the second and third counts were for **unnatural offence contray to section 154 (1) (a) of the Penal Code** (supra)

On the first count it was alleged that on unknown date of January,2020 at Chekereni-Mabogini Kahe area within the District of Moshi in Kilimanjaro region, the appellant Jabir Richard Msangi @ Anko Jabir did have carnal knowledge of one Bertha Reginald Lyimo a girl aged 4 years old.

Under the second and third count it was alleged that on unknown date of January,2020 at the same place, the appellant Jabir Richard Msangi @ Anko Jabir did have carnal knowledge of one Bertha Reginald Lyimo a girl aged 4 years old and Felix Reginald a boy of 5 years repectively against the order of nature.

Before going to the merit of this appeal, I find it prudent to narrate the genesis of this appeal. The case was initited by PW3. It was the prosecution story that, PW3 while washing the victim (PW2) dicovered bad smell from her vagina. Upon inquiry the victim reveals that it is the accused who often did *'tabia mbaya'* to her. That, the accused sometimes inserted his penis to her vagina and to PW1's anus (another victim). Upon hearing this story, their aunt decided to report the matter to the police station as a result the accused was subsequently arrested and charged as above. The victims were also taken to hospital.

During the trial, the prosecution called seven witnesses. PW1 and PW2 were the victims; PW3 their aunt, PW4 the legal aid provider who advised PW3 to take the victims to the police station. PW5 was the doctor who examined the victims, PW6 and PW7 were police Officers. The defence side had only one witness (the accused) who denied to had committed the offences.

The trial court was convinced with the prosecution case. The trial magistrate convicted the appellant and sentenced him to 30 years imprisonment. The appellant was aggrieved; he preferred this appeal on the following grounds:

1. *That the learned trial magistrate grossly erred in law and fact in convicting and sentencing the Appellant but failed to Note that, the*

case at hand was purely fabricated against the appellant and the minors (PW1 and PW2) were coached what to say before the Court, as the appellant cross-examined them and unearth (sic) the truth before the court.

2. *That, the learned trial magistrate grossly erred in law and in fact in convicting the appellant basing on a contradictory evidence from the key prosecution witnesses (PW1 and PW2). The contradictions which goes (sic) to the root of the case at hand and daunted the prosecution's case. As the PW1 in his chief-evidence said that, the Appellant inserted his manhood into his buttocks while PW2 looking. But the PW2 in her evidence in chief- said that, she never witnessed the Appellant doing "Tabia Mbaya" to Felix (PW1). (sic)*

3. *That, the learned trial magistrate grossly erred in law and in fact when she failed to grasp the fact that, PW1 and PW2 were self-confessed liars who were taught what to say before the Court. As PW1 said that he witnessed when the Appellant was doing "Tabia mbaya" to PW2. But PW2 said that, there was no body when the appellant was doing such an act, even his brother Felix (PW1) was not there.*

4. *That, the learned trial magistrate failed to be meticulous to note that the Victim who was said to be medically examined by PW5 was not the very one who testified in this case as PW1. Since PW5 testified that, the victim she attended (she never mentioned his name) and examined was quite often sodomised, but the PW1 in his evidence when cross- examined by the Appellant said the following;*

*"**Nikinya mavi yanabana hayatoki naumia**" if at all this witness (PW1) his sphincter Muscles were loose as a result of being frequently sodomised as narrated by the medical doctor, then how possible for the PW1 to be in a such situation of hardly defecating..." (sic)*

5. *That, the learned trial magistrate grossly erred both in law and fact in finding that, the PW2 possess of sufficient intelligence to justify the reception of her evidence, as she gave irrational answers to the question put to her by the trial Court. Therefore, the trial magistrate Misdirected herself in arriving on a such conclusion, hence, it cannot be said with certainty that, the provisions of section 127 (2) of the T.E.A were complied with (sic).*

6. *That, the trial Court failed to Note that, the case at hand was concocted against the appellant, as a result, they failed even to summon the Victim's parents (Father and Mother) so as for the appellant to fully cross-examine them to unearth the truth before the Court.*

7. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the Appellant and to the required standard by the law. (sic)*

During the hearing of this appeal, the appellant was unrepresented while the respondent was represented by Ms Grace Kabu the learned State Attorney. The appeal was argued by way of written submissions.

Supporting the first ground of appeal, the appellant blamed the trial magistrate for failure to note that the case was fabricated against him since the victims were cauched to testify what they said. That, during cross examination the said victims stated that they had been coached to testify that the appellant did bad act to them which was not true.

The second and third grounds are in respect of contradiction of the evidence of PW1 and PW2. The appellant submitted that PW1 while tesftifying said that the appellant was inserting his penis to his buttocks while PW2 was witnessing. PW2 said that she never witnessed the appellant doing such a thing to PW1. The appellant was of the view that this contradiction showed that their evidence was not true.

On the fourth ground of appeal, the appellant also faulted the trial magistrate for failure to note that the victim who medicaly was examined by the doctor (PW5) was not the one who testified in the case as PW1 since PW5 testified that the victim she attended (though not mentioned her name) was often sodomised. Unlike PW1 who when cross examined said that *"Nikinya mavi yanabana hayatoki naumia".* The appellant was of the view that PW1 was used of being sodomised that's why he alleged that he used to have pains while defecating. That, it was obvious that this case was fabricated against him.

On the fifth ground of appeal, the appellant condemned the trial magistrate for finding that PW2 possessed sufficient intelligence to justify reception of her evidence without considering the fact that she gave irrational answers to the questions put to her by the court. Thus, the court misdirected itself in arriving on such conclusion since it cannot be said

with certainty that the provision of **section 127(2) of Tanzania Evidence Act** was complied with.

The appellant emphasized that the case was fabricated against him on the reason that he had a relationship with the victims' mother. That, the husband of the victim's mother was not happy with their relationship so he decided to take the victims and collided with his sister who coached the children to testify the said evidence. The appellant contended that such reasons made the victims' mother and father not to testify before the court knowing that the truth will be known.

The appellant prayed the court to allow the appeal and acquit him.

In reply, the learned State Attorney from the outset supported the appeal basing on the second and seventh grounds of appeal.

The learned State Attorney submitted to the effect that, it is the cardinal principle of law that the best evidence in sexual offences comes from the victim as per the case of **Selemani Makumba vs Republic [2006] TLR 380**. She argued that in the instant case the victims (PW1 and PW2) who were the key witnesses their evidence have contradictions which go to the root of the case.

To substantite the said contradictions, the learned State Attorney referred to the trial court proceedings at page 6 where PW1 testified that:

> *"Uncle Jabiri used to put me on bed ordered me to lay with my stomach then he insert his dudu to my 'matakoni kwangu' while Bertha looking. Then inserted the said dudu lake to Bertha 'huko mbele na huko nyuma kwa Bertha kwa kunyea."*

On the other hand PW2 at page 7, last paragraph of the proceedings testified that:

"I was alone when he did tabia mbaya to me, my brother Felix was not there."

The learned State Attorney submitted further that when PW1 was cross examined at page 6 of the proceedings testified contrary to what he said during examination in chief, that is, *"I have never seen anything bad you did to Bertha."*

In conclusion, Ms Grace submitted that since there are serious contradictions between the evidence of PW1 and PW2 who are the only key witnesses in this case whom their evidence would connect the appellant to the offences committed, then the case was not proved beyond reasonable doubts.

I have carefully examined the trial court record, the grounds of appeal and the parties' submissions, my task is to ascertain whether the appeal has merit as contended by the appellant and supported by the learned State Attorney for the respondent.

The learned State Attorney supported the appeal on the second and seventh ground of appeal. That, there is contradition in prosecution evidence in respect of PW1 and PW2's evidence. While testifying, PW1 told the court that the Appellant inserted his penis into his buttocks in the presence of PW2, while PW2 in her evidence said that she had never witnessed the appellant doing bad manners to PW1.

It is trite law that there is material and normal discrepancy. Material discrepancy is not excusable since the same touches the root of the case while normal discrepancy is excusable since it doesn't touch 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."*

In the instant matter, the issue for determination is whether the noted dispcrepancy goes to the root of the case. I am convinced to conclude that the noted discrepancy touches the root of the case since the same touches the credibility of the victims who are the material witnesses in so far as the offences charged against the appellant are concerned. Once the credibility of a witness is shaken then the prosecution case cannot stand. In the case of **Shaban Daud v. The Republic, Criminal Appeal No. 28 of 2000 (unreported)** it was stated that:

> *"... Credibility o f a witness is the monopoly of the trial court only in so far as demeanor is concerned, the credibility of a witness can be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in*

relation with the evidence of other witnesses, including that of the accused person."

In this case the credibility of PW1 when assessed with the evidence of PW2 is shaken since they had different story as demonstrated by the appellant and the learned State Attorney. Moreover, PW1 while testifying as seen at page 6 of the typed proceedings was quoted to have said that:

"My Aunt told me to tell the court this story. She saw me I had wound. Then told me to say so."

The above quotation also raises reasonable doubts on part of the prosecution. Therefore, as contended by the appellant under the 7th ground of appeal, it goes without saying that the prosecution failed to prove the case against the appellant in all the three counts beyond reasonable doubt.

From the foregoing analysis, I am satisfied that this appeal has merit. It is on the basis of the above reasons that I allow this appeal. Conviction against the appellant on all three counts is hereby quashed and sentence set aside. I hereby order the immediate release of the appellant from custody, unless held for other lawful reasons.

It is so ordered.

Dated and delivered at Moshi this 5th day of July, 2022.

S. H. SIMFUKWE

JUDGE

5/7/2022