

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(SUMBAWANGA DISTRICT REGISTRY)**  
**AT SUMBAWANGA**  
**DC. CRIMINAL APPEAL NO. 78 OF 2021**  
**MAHAMUDU S/O ALLY @ MUDDY CHAGA ..... APPELLANT**  
**VERSUS**  
**THE REPUBLIC ..... RESPONDENT**

(Appeal from the decision of the District Court of Sumbawanga at Sumbawanga)

(J. O. Ndira, RM)

Dated 25<sup>th</sup> day of August 2021

In

Criminal Case No. 62 of 2021

**JUDGMENT**

25/05 & 05/08/2022

**NKWABI, J.:**

After hearing both sides, the respondent and the appellant, the trial court was satisfied beyond reasonable doubt that the appellant had carnal knowledge of I.E.M. a girl aged 14 against the order of nature. Thus, the trial court convicted and sentenced him on unnatural offence contrary to section 154(1) (a) of the Penal Code, Cap, 16 R.E. 2019. He was sentenced to life imprisonment. Following injury and psychological torture to the girl, the appellant was ordered to pay compensation at T.shs 2,000,000/=.

The facts of the case leading to the prosecution and conviction is that on 24/03/2021 when PW3's parents were away from home, the appellant called PW3 a girl aged 14 to his room where he forced her to bend down against her will. Thereupon, the appellant had carnal knowledge of her against the order of nature. The parents of PW3 came back home on 25/03/2021. On 28/03/2021 when her parents were back home, she told them about the incidence. Then, the matter was reported to the authorities which lead to the arrest of the appellant and then prosecution. The delay in reporting the matter was explained that it was due to the threats of the appellant.

As indicated above, the appellant was arrested and sent to PW4 (the hamlet chairman) one Edwin Anatoli Meza whereby he pleaded with PW4 to end the matter in PW4's office so that he can pay for the act.

The defence of the appellant that he did not commit the offence was not accepted by the trial court. The trial ended in his conviction and sentence.

Seriously aggrieved with both the conviction and sentence, the appellant has approached this Court so that it overturns the decision of the trial court and

sets him free. Six justifications of appeal, prompted the appellant to advance to this Court as listed hereunder:

1. *"That, the trial Court erred in law point and fact by convicting and sentence the appellant while the case against the appellant were not proved beyond reasonable doubt as required by the law.*
2. *That, the trial Court erred in law point and fact to convict and sentence the appellant basing on the prosecution evidence while misobserved that the PW3 as victim she testified before the Court that the incidence was occurred on 24.03.2021 but the matter was reported to the victim's father on 28.03.2021 almost four days the something which is unusual and it brings doubts in the eye of law.*
3. *That, the trial Magistrate Court misdirected himself to convict and sentence the appellant by believing exhibit P3 which tendered by PW5 as a Doctor while he fail to testify before the Court the instrument used to examine the victim in order to make the Court to certify if the victim was sodomized by the appellant and ended drawn a nully conviction for the appellant.*

4. *That, the trial Court erred in both conviction and sentence for the appellant without taking into consideration that there was no caution statement tendered before the Court or police officer who was investigator of this case in order to prove the allegation as required by law.*
5. *That, the trial Court erred in law point and fact by convicting and sentence the appellant relying on the evidence adduced by PW1, PW2 and PW3 while misobserved that all prosecution witness was a family member only sine there was no any neighbour who appeared before the Court in order to authenticate if the appellant is the one who sodomized the victim.*
6. *That, the trial Court erred in law point and fact by convicting and sentence the appellant without considering the defence which adduced by the appellant and other defence witness and ended drawn a nully conviction for the appellant."*

Once the appeal came up for hearing, the appellant appeared in person, unrepresented while the respondent was represented by Ms. Marietha Maguta, learned State Attorney.

In submission in chief, the Appellant urged this Court to adopt his grounds of appeal as his submissions. Then he prayed for justice.

In response to the appeal, Ms. Maguta clearly stated her position that she supports the conviction and sentence of the appellant. On the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal, she maintained the respondent had witnesses and PW3 is the victim. She added, the evidence of PW3 is corroborated by the evidence of PW1 and PW2 as well as PW4 where he orally confessed. PW5 medically examined the victim of the offence. Due to that evidence, Ms. Maguta contended, they proved the case as per **Seleman Makumba V. Republic** [2006] T.L.R. 374. She also stated that the victim explained why she did not report the matter immediately as she was threatened. The grounds of appeal be dismissed, urged Ms. Maguta.

As to the complaint that witnesses were family member, Ms. Maguta stressed that there is no law that precludes that. She observed, PW4 and PW5 are not family members. She prayed the ground of appeal be dismissed.

Replying to the complaint made by the appellant that the witness PW5 did not explain which implement he used to examine the victim, Ms. Maguta was of the firm opinion that there is no such legal requirement and also there is neither legal requirement for a caution statement to be tendered nor the investigator to testify. This ground of appeal is baseless, implored Ms. Maguta.

It was also the reply of Ms. Maguta that the defence of the appellant was well considered in the judgment of the trial court which defence was based on alibi. She prayed the ground of appeal be found wanting in merits. She finally prayed the entire appeal be dismissed as it is meritless.

Given by this Court the opportunity to make a rejoinder, the Appellant stated that the chairman is the grandfather of the victim he would implicate him. He was merely added. I cannot also trust the evidence of the doctor. I pray my appeal be allowed.

I have to start the determination of this appeal by considering and deciding the last ground of appeal in which the appellant complains that his defence was not considered. The defence which was adduced by the appellant and

the evidence of other defence witnesses hence the conviction and sentence were illegal.

It was the view of Ms. Maguta in rebuttal submission that the defence of the appellant was well considered in the judgment of the trial court. His defence was based on alibi. She prayed this ground of appeal be found wanting in merits.

I agree with Ms. Maguta that this ground of appeal is unmerited. This is because from page 8 to page 10, the learned trial magistrate considered the defence of the appellant. If he reached at a wrongful conclusion, that is another matter, which can be dealt with when I will be considering and determining the 1<sup>st</sup> ground of appeal. I would also add that this Court is entitled even in circumstances where a trial court did not consider the defence of an accused person, to step into the shoes of the trial court and appraise the evidence of the accused person and come to its own conclusion. See **Jafari Musa v. DPP**, Criminal Appeal No. 234 of 2019, CAT (unreported).

The next ground of appeal for my determination is the 5<sup>th</sup> one which is to the effect that, the trial Court erred in law point and fact by convicting and sentencing the appellant relying on the evidence adduced by PW1, PW2 and PW3 while failed to observe that all prosecution witness was a family member only since there was no any neighbour who appeared before the Court in order to authenticate if the appellant is the one who sodomized the victim.

Ms. Maguta was not impressed by this ground of appeal. She maintained that there is no law that precludes that. She pointed out that PW4 and PW5 are not family members. Let this ground of appeal be dismissed, she pressed.

Without much ado, I am impressed by the submission by Ms. Maguta on this ground of appeal. Indeed, there is no law that precludes family members to testify. See **Mahamudu Mbeta v. Republic**, Criminal Appeal No. 154 of 1978 (Unreported) (HC) (MBEYA). Samatta, J., as he then was. What is important therefore is the credibility of witnesses. The 5<sup>th</sup> ground of appeal thus crumbles to the ground.



Next I determine the 4<sup>th</sup> ground of appeal which goes, that the trial Court erred in both conviction and sentence for the appellant without taking into consideration that there was no caution statement tendered before the Court or police officer who was investigator of this case in order to prove the allegation as required by law.

Ms. Maguta did not buy this ground of appeal, so does this Court. Ms. Maguta contended, quite rightly, that there is neither legal requirement for a caution statement to be tendered nor the investigator to testify. As such I agree, this ground of appeal is baseless. The reason for not purchasing the 4<sup>th</sup> ground of appeal is not far-fetched. See the decision of the Court of Appeal in **Goodluck Kyando v Republic, [2006] TLR 363**, (CA) the Court held:

*"The appellant also complained that the police officer who conducted the investigation was not summoned to give evidence. ... This being a criminal case, the burden lies on the prosecution to establish the guilty of the appellant beyond all reasonable doubt. ... This in own view, is not dependent upon the number of witnesses called upon to testify ... It is trite law 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. Their testimony was not challenged."*

It is trite law that where a suspect does not wish to give a statement, that suspect is not to be forced to make a statement. It is the duty of the police to investigate the offence and come up with evidence if possible and prove the offence. Proof of the offence does not depend on a caution statement of an accused person. It could be based on other piece or pieces of evidence. The fourth ground of appeal has no merit. It crumbles to the ground.

I now revert to consider the 3<sup>rd</sup> ground of appeal. On this ground of appeal, the appellant complains that, the trial Magistrate Court misdirected himself to convict and sentence the appellant by believing exhibit P3 which tendered by PW5 as a Doctor while he failed to testify before the Court the instrument used to examine the victim in order to make the Court to certify if the victim was sodomized by the appellant and ended drawn a nully conviction for the appellant.

Ms. Maguta rejected this ground of appeal, and properly so. Truly, there is no requirement in law for the doctor to tell which instrument he used. In any case the evidence of the doctor acts as corroboration for already strong evidence of the prosecution like in this case. Even if that piece of evidence is disregarded, just for the sake of argument, the other pieces of evidence ground conviction. For those reasons, I dismiss the 3<sup>rd</sup> ground of appeal

On the 2<sup>nd</sup> ground of appeal, the appellant complains that, the trial Court erred in law point and fact to convict and sentence the appellant basing on the prosecution evidence while it failed to observe that PW3 as victim she testified before the Court that the incidence occurred on 24.03.2021 but the matter was reported to the victim's father on 28.03.2021 almost four days the something which is unusual and it brings doubts in the eye of law.

In respect of the 2<sup>nd</sup> ground of appeal, I am persuaded by Ms. Maguta's submission that the respondent had witnesses and PW3 being the victim. The evidence of PW3 is corroborated by the evidence of PW1 and PW2 as well as PW4 where he orally confessed. PW5 medically examined the victim of the offence. Due to that evidence, they proved the case as per **Seleman Makumba V. Republic** [2006] 374. Ms. Maguta insisted that the victim

explained why he did not report the matter immediately as he was threatened.

I totally accept Ms. Maguta's position because, the explanation given by the victim of the offence is plausible because her parents were not at home during the incidence which made it possible for the appellant to commit the offence. Further the appellant threatened her not to tell anyone. In the circumstance, the complaint by the appellant in the 2<sup>nd</sup> ground of appeal is baseless and is rejected by this Court.

I have already decided on the other grounds of appeal, the appellant remains with one ground of appeal in stoke which he believes would set him free. That is the 1<sup>st</sup> ground of appeal which he phrased that, the trial Court erred in law point and fact by convicting and sentencing the appellant while the case against the appellant was not proved beyond reasonable doubt as required by the law.

Ms. Maguta was certain that the 1<sup>st</sup> ground of appeal advanced by the appellant has no bases. She did so in conjunction with the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup>.

Ms. Maguta forcefully asserted that they had witnesses and PW3 is the victim. She also maintained that the evidence of PW3 is corroborated by the evidence of PW1 and PW2 as well as PW4 where he orally confessed. PW5 medically examined the victim of the offence. She then fortified her stance by the decision of the Court of Appeal of Tanzania in **Seleman Makumba V. Republic [2006] 374.**

I have already dismissed the complaint in respect of that the witnesses on the prosecution side were relatives, so is the rejoinder submission by the appellant. I have also dismissed the complaint by the appellant in respect of the evidence of PW5 the doctor who attended to the victim of the offence. Now, the pertinent question at this juncture is whether the respondent's case against the appellant was not proved beyond reasonable doubt just as the appellant is maintaining in the 1<sup>st</sup> ground of appeal.

I have also determined that the defence of the appellant was duly considered by the trial court and dismissed as it did not purchase it. The defence of the appellant was based on an alibi. It turned therefore, in this case, that the case was to be determined on the credibility of witnesses as stated in the

case of **Sangaru Lugaira Mathias v. S.M.Z.**, Criminal Appeal No. 183 of 2005 C.A.T. (Unreported):

*"The basis of the conviction was the dying declaration of the deceased and the admission of the appellant to PW1, PW2, PW3 and PW6, the officers*

*It was a matter of credibility and acceptance of the evidence. As said before, the evidence was accepted by the trial Chief Justice.*

It is worthy to note here that the appellant made an oral confession before PW4 the hamlet chairman. That oral confession is acceptable in law. That is the position in **Posolo Wilson @ Mwalyego v Republic**, Criminal Appeal No. 613 of 2015 (CAT) (unreported) where it was stated:

*"On the foregoing analysis, we find the two oral statements imputed to the appellant were, for all intents and purposes, valid confessions in terms of section 3 of the Evidence Act, [Cap. 6 R.E. 2002] and that they were sufficient by themselves to have founded the appellant's conviction of rape."*

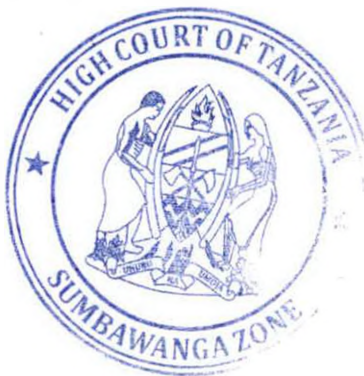
The trial court that heard the witnesses of both parties was satisfied that the prosecution witnesses were credible and based on their evidence, it


dismissed the defence of alibi maintained by the appellant. I do not have any ground to fault the findings of the trial court. Therefore, the lamentation by the appellant that the was not proved beyond reasonable doubt is unmerited. That ground of appeal fails.

Consequently, I conclude by dismissing the appeal for it being devoid of any merit. The conviction entered and sentence meted out to the appellant by the trial court are upheld.

It is so ordered.

**DATED** at **SUMBAWANGA** this 5<sup>th</sup> day of August 2022.



  
J. F. NKWABI  
**JUDGE**