IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

RM. CRIMINAL APPEAL NO. 22 OF 2022

JOSEPH S/O PAULO @ KANSATO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Court of the Resident Magistrate of Katavi at Mpanda)
(F. U. Shayo, RM)
Dated 17th day of March 2022
In
Criminal Case No. 13 of 2022

JUDGMENT

20/07 & 22/08/2022

NKWABI, J.:

The appellant stood trial in the trial court for unnatural offence contrary to section 154(1) (a) of the Penal Code, Cap, 16 R.E. 2002. He was allegedly committed the offence to a boy (PW1, A. S. T.) aged 13 years. It was claimed that on unknown date the appellant, on the permission of the father of A.S.T. went to Kakese with PW1. There, he lodged a guest house wherein during the night the appellant had sexual intercourse with PW1 against the order of nature. On the next day, they came back. On being asked by his father for failure to come back the previous day, PW1 kept quiet. The matter went viral when his colleagues predicted he was sexually molested by the appellant.

Word about it reached the police who arrested the appellant. In the trial, the appellant disputed having committed the offence. The trial court was satisfied with the evidence on the prosecution, convicted him and sentenced him to life imprisonment.

Dissatisfied with both conviction and sentence the appellant filed this appeal to this Court to protest his innocence. He lodged with this court a petition of appeal comprising 6 justifications of appeal.

1. That, the trial court erred at law by convicting the appellant on the victim's story who had no explainable reasons for his delay in reporting the matter.
2. That, the trial court erred at law by giving weight hence convicting the appellant on the Medical Examination Report conducted on 02.02.2022 i.e. more than sixty days from the day the said sexual offence is said to have been committed!
3. That, the trial court erred at law by believing the police story hence convicting the appellant without summoning and hearing the boy who is said to have informed the sports teacher, neither did they summon, the sports teacher who are said to have set in motion the saga.

4. That, the trial court erred at law to admit and work upon it the extra-judicial statement which was made before a person who is not a Judicial Officer.
5. That, the trial court erred at law by admitting and working upon the caution statement which procured and taken contrary to law.
6. That, the trial court erred at law by convicting the appellant of a case not proved beyond reasonable doubt required by law.

In fact, the hearing of this appeal was conducted by way of oral submissions. The appellant appeared in person, unrepresented, while the respondent was duly represented by Ms. Marietha Maguta, learned State Attorney.

Opening the submissions for and against the appeal, the Appellant contended that the offence was not reported at the earliest possible opportunity. He added, the examination of the victim was done 60 days after the alleged incidence. Also, the charge was not proved beyond reasonable doubt. He then prayed this Court adopts his grounds of appeal as his submissions. He lastly prayed that his appeal is found to be meritorious and he be acquitted.

In response to the argument of the appellant, Ms. Maguta informed this Court that she supports the conviction and sentence. Then, she went on to maintain that in the trial court, there were three types of evidence. Expert evidence, direct evidence of the victim and a confession statement which confession statement he made to the police.

On the 4th ground of appeal, which is about the Extra- judicial statement Ms. Maguta asserted that it was recorded by W.E.O. His evidence is at page 21 of the court proceedings. She said, section 58 of Magistrates Courts Act provides that extra-judicial statement may be recorded in primary court and District Court. The Guideline of Chief Justice (C.J) mention the Executive Officers in District Council. She pointed out that a Justice of Peace has to be assigned by a District Magistrate. The evidence is silent to that effect. She let this Court to expunge it from the Court record as it was improperly recorded. I agree with Ms. Maguta. I expunge the extra-judicial statement from the court record.

Ms. Maguta urged, however, that they have a caution statement of the appellant, which the appellant did not object its admission. On my consideration, the caution statement too was recorded contrary to the law

outside the prescribed four hours without permission/ extension of time by the officer empowered to extend the time. The appellant was arrested during day time, but the caution statement was recorded at 22:00 hrs to 23:00 hrs. The caution statement too has to be expunged from the court record. I proceed to expunge it.

Now, the very crucial question that remains unresolved is whether the charge was proved beyond reasonable doubt. The appellant does not believe that the charge sheet was proved beyond reasonable doubt because the matter was not reported at the earliest possible opportunity and some material witnesses were not called to testify.

On her side Ms. Maguta strenuously submitted that they proved the charge beyond reasonable doubt basing the oral evidence of the victim. She referred this Court to the decision of the Court of Appeal in **Seleman Makumba V. Republic [2006] TLR 379** which held that the best evidence is that of the victim. The victim's evidence is corroborated by the evidence of the Doctor who examined, also, there is the evidence of the father of the victim, Ms. Maguta added. As to the other grounds, that are 1, 2, 3 and 5 Ms. Maguta argue them together. She maintained on those grounds of

appeal that the delay of reporting was explained that he was threatened, but told his friends. The medical examination supported his evidence, pointed out Ms. Maguta. She then rested her submissions.

Reinforcing his submission in chief, the Appellant asked this Court gives due consideration of his grounds of appeal and acquits him.

Since this is the first appellate Court, I am entitled to re-evaluate the evidence in this case as per **C. 6237 P.C. Edwin and Another v Republic** [1985] TLR 31 (HC). Having considered the submissions of both parties, with respect, I accept the lamentation of the appellant that the charge was not proved beyond reasonable doubt because material witnesses were not called to testify as said by the appellant and indeed, material exhibit was not brought to the court which is the guest register for the court to satisfy itself that truly the appellant spent his night at the said guest house. This omission to bring material witnesses and exhibit entitles this Court to have adverse inference against the respondent's failure to procure them. See **Godson Hemed v. Republic,** [1993] T.L.R. 241.

Again, the delay in reporting the incidence has no plausible reasons. Even the failure to know exactly when the incidence happened on which day, raises eyebrow because the father of the victim had even the occasion to communicate with the appellant on phone. No explanation as to what happened to the phone call register of the father of the victim.

The above reasons dispose of the appeal in favour of the appellant, thus, allow the appeal. I quash the conviction and set aside the sentence. I order the appellant be set free from prison unless held therein for another lawful cause.

It is so ordered.

DATED at **SUMBAWANGA** this 22nd day of August 2022.

J. F. NKWABI

JUDGE