IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB-REGISTRY)
AT MWANZA
CRIMINAL APPEAL NO. 109 OF 2021
(Appeal from the decision of the District Court of Ilemela in Criminal Case No. 43 of 2021)

ANORD THOMAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd May & 4th July, 2022

DYANSOBERA, J.:

Before the District Court, the appellant was 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. Aggrieved, he has appealed to this court on the following grounds of appeal: -

1. *That the evidence of PW 3 was not properly admitted in terms of section 127 (1) (a) of the Evidence Act as amended by Act No. 6 of 2016*
2. *That penetration as essential ingredient to prove the charge was not legally and evidentially established by prosecution witnesses*
3. *That light being an important factor led to proper identification of person suspect to commit crime was totally neither established nor the source of it been attempted by the victim, thus become doubtful and unreliable.*
4. *That the evidence of PW 1, PW 2, PW 4 cannot be used to corroborate the evidence of PW 3 similarly the evidence of PW 5 cannot be acted upon as corroborative due to that the same did not implicate the appellant to have committed the offence charged.*

5. *That the trial court incurably and grossly erred in law and fact to convict the appellant while the evidence of prosecution was no weight to warrant a conviction against the appellant.*
6. *That the case against the appellant was fabricated, cooked up lack support which should not be considered and trusted also PW 3 was not credible in her evidence.*
7. *That the trial court erred in law and fact for failure to note that the indigent like the appellant was neither represented by Counsel under the Legal Aid Act, nor been informed of that right of any stage in court the act that led to unfair trial.*
8. *That the trial court erred in law to attach much weight to the testimony of PW 1, PW 2 and PW 3 who did not find the appellant in flagrante delicto sodomising PW 3, the complainant. Their evidence was hearsay which could not assist the court to convict the appellant.*
9. *That the evidence of PW 5 and documentary evidence PF 3 which was exhibit P 1 contained nothing weight to implicate the appellant in this offence and PW 5 did not demonstrate the method he used to examine the victim and now likely to was it for PW 5 to observe the internal bruises in the anal of the victim.*
10. *That the evidence of the appellant was not considered properly by the trial court while the case against the appellant was not proved beyond reasonable doubt.*

It was common ground at the trial that the victim (PW 3), a girl aged 9 years and was a STD III pupil at Gedeli "A" Primary School, is the daughter of Suizana Fumbuka (PW 1) and was born on 13th day of June, 2013. PW 4 Maria Fumbuka is the young sister of PW 1 and a co-parent of the appellant. She was residing with her children, her mother and the victim. PW 1 alleged that on 28th day of March, 2021, took the victim's clothes for washing purposes. She found them with stools

and on 30th day of March, 2021 the victim smelt of faeces. PW 1 then beat her and inquired what the matter was. The victim did not respond. PW 1's neighbours asked the victim four times what the problem with her was but she kept quiet. On that day, PW 2 one Agnes Damas, one of PW 1's neighbours took the victim into her room whereby PW 2 was told by the victim that at the time she went to sleep with PW 4, the appellant used to go to sleep there. The victim recounted to PW 2 that sometimes the appellant was sleeping with PW 4, his co-parent while at other times he was carnally knowing her against the order of nature and she alleged that she was carnally known three times at different occasions. PW 2 relayed this incident to PW 1 who took the matter to Buswelu Out Post. A PF 3 was issued and the victim was taken to Buzuruga Health Centre where PW 5 confirmed that the victim had an enlarged anus and there were bruises. The appellant was apprehended, taken to the Police Station and interviewed by PW 6. The appellant denied to have carnally known the victim against the order of nature. He was taken to court and was arraigned for the said offence.

The appellant denied having committed the charged offence. He told the trial court that on 31.3.2021 at about 1100 hrs. he was informed through telephone by PW 4, his co-parent, that their child was sick. At about 2100 hrs when he went to the house, PW 4 brought all the children and told him that they were longing for him. He was not pleased as he had a conflict with the family. PW 4 then went outside and when back, she was with a group of men who arrested him and beat him. He was taken to Buswelu Police Station where he was also assaulted. On 1st day of April, 2021, he was told by police officers that he had sodomised the child of his sister-in-law. He was later taken to Kirumba Police Station where he denied to have carnally known the victim against the order of nature. The appellant

disputed the evidence of PW3 and PW 4. He argued that the source of the case is that the appellant was claiming back his children.

The learned trial Resident Magistrate was satisfied that the evidence led against the appellant proved the case beyond peradventure and dismissing the appellant's claim that the case had been fabricated against him, convicted and sentenced him accordingly.

At the time of the hearing of the appeal, the appellant was unrepresented and Ms Margareth Mwaseba, learned Senior State Attorney represented the respondent.

Arguing in support of the appeal, the appellant reiterated that he had filed ten grounds of appeal and added that no leader was involved when he was being arrested. He argued that the first prosecution witness said that she was living with the child and that when she went to wash clothes of her child, she found them with faeces. It was his further argument that his wife who was living with the child denied to have seen anything fishy on the victim non the victim. The appellant faulted the evidence of relatives which was not corroborated by an outsider and emphasized that the charge sheet did not indicate the day and time the alleged offence was committed as the charge sheet indicated, *"siku isiyojulikana"*

With respect to the PF 3, the appellant contended that it took a long time for it to be filled in the PF3. The same appellant informed this court that not even a single teacher where the victim was schooling testified that the victim was passing stools uncontrollably.

The appellant wondered how he could have carnally known the victim thrice without being noticed. He maintained that the case against him was a concoction.

In response to the appellant's submission, Ms Mwaseba urged the court to decline the appellant's invitation that he was not present at the crime scene particularly where the appellant failed to comply with the provisions of section 194 of the Criminal Procedure Act by giving notice to rely on the alibi. She submitted that under Section 143 of the Evidence Act, there is no number of witnesses required to prove a case and that the court could even rely on the evidence of the victim only to convict the appellant.

As to why the victim did not reveal that she had been sexually abused, learned Senior State Attorney argued that the appellant was threatening her with the knife. With regard to the effect of carnal knowledge against the order of nature the victim experienced, Ms Mwaseba was emphatic that the doctor proved that the victim was passing stools uncontrollably and the sphincters were lose. controllably. She further argued that there was evidence that the victim was smelling faeces.

On the appellant's complaint that the trial court failed to comply with section 127 (2) of the Evidence Act, it was submitted for the respondent that the law is clear that the victim can swear or promise to tell the truth and the record shows that the victim swore to that effect. This court was referred to Criminal Appeal No. 301 of 2018 between **Wambura Kiginga v. R.** to support her argument and was told that if any error, it was the error committed by the court and not the witness.

As far as penetration is concerned, Ms Mwaseba pointed out that the victim was clear that the appellant was inserting his dudu at her anus which proved that she was carnally known against the order of nature and that this fact was supported by the Doctor who medically examined the victim. They knew each other prior to the incident. On the appellant's complaints in the 4th, 5th and 6th grounds, learned Senior State Attorney contended that the offence the appellant

was facing did not mandate the Republic to look for a lawyer to defend him and the appellant did not asks for any legal assistance and denied of it.

Ms Mwaseba insisted that the best evidence in rape cases comes from the victim and such evidence suffices to convict the appellant. She urged the court to find the 8th and 9th ground of appeal baseless insisting that the case against the appellant was proved beyond reasonable doubt concluding that the conviction and sentence cannot be faulted.

The appellant insisted that he was not conversant with the law and prayed to be set free.

Having considered the record of the trial court, the grounds of appeal and the submissions of either side, the pertinent issue to be resolved in this appeal is whether or not the case against the appellant was proved to the required legal standard, that is beyond reasonable doubt.

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.

In the first place, no witness testified to have seen the appellant carnally knowing the victim against the order of nature not even PW 1 who is the victim's mother nor PW 4, the person who is alleged to have been sleeping with the victim. Apart from the evidence of the victim, the evidence of the rest witnesses was, to say the least, a hearsay and therefore unreliable.

Second, on the evidence of the victim, it was alleged in the charge sheet that the offence is alleged to have been committed from February to March, 2021 and that the prosecution seems to suggest that the appellant carnally knew the

victim thrice on different occasions. There is no dispute that it is not until on 30th day of March, 2021 when PW 1 wanted to wash the victim's clothes that is when she discovered that the clothes were with stools. PW 1 was clear in her evidence that on that day, she asked the victim was the matter was but did not respond. PW 1 beat her but she said nothing. PW 1's neighbours asked the victim four times what had befallen her but the same victim kept quiet. PW 4 who was sleeping with the appellant as her love they having begot two children was clear in her evidence that it not until on 31st day of March, 2021 when she was told that the victim had been carnally known by the appellant. In other words, the victim did not divulge to anybody if the appellant was carnally knowing her against the order of the nature until the discovery of some faeces on her clothes by PW 1.

The Court of Appeal in the case of **Marwa Wangiti Mwita and Another v. The Republic**, Criminal Appeal No. 6 of 1995 (unreported) had the following to observe: -

> *"The ability of a witness to name a suspect's name at the earliest opportunity is an all-important assurance of his reliability".*

In the case under consideration, the facts indicated in record do not establish that the victim who testified as PW 3 was a reliable witness and her evidence was truthful. In such circumstances, the principle propounded by the Court of Appeal in the case of that in rape cases the best evidence is that of the victim is inapplicable

Third, the victim was clear in her evidence that during the act, she was not telling the appellant that she was feeling pain.

Taking the appellant's defence into account, it is clear to me that the case was a mere concoction and the recount to court by the victim and PW 4 seems to have been tailored. In other words, there was no sufficient evidence on which a conviction could be founded.

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

4.7.2022

This judgment is delivered under my hand and the seal of this Court on this 4th day of July, 2022 in the presence of the appellant and the learned Senior State Attorney for the respondent Republic, Ms. Dorcas Akyoo.

Rights of appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA
MWANZA

W.P. Dyansobera

Judge