IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

DC CRIMINAL APPEAL CASE NO. 8 OF 2022

(Arising from Criminal Case No. 112 of 2021 of Kigoma District Court)

HAMIS S/O ELIAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

26/07/2022 & 29/07/2022

MANYANDA, J

Hamis Elias, the appellant, was arraigned before the District Court of Kigoma in Criminal Case No. 112 of 2021 charged with on offence of unnatural offences, contrary to section 154 (1) (a) and (2) of the Penal Code, [Cap. 16 R.E. 2019].

It was averred in the particulars of offence that on 20/06/2021 at Fidifosi Mwasenga area within the District and Region of Kigoma did have carnal knowledge of a boy aged 10 years, against the order of the nature.

The name of the boy is hereby withheld for purposes of protecting his identity per the Chief Justice's Circular No. 02 of 2018. He will only be referred to as the "*the victim*".

The appellant pleaded not guilty to the charge. After full trial the appellant was convicted and a sentence of imprisonment for a period of 30 years was meted on him.

He is aggrieved, hence this appeal.

At the hearing of the appeal the appellant prosecuted his appeal personally while the Respondent, Republic was represented by Mr. Robert Magige, learned State Attorney.

Before I dwell into the nitty-gritty of the appeal, let me narrate the background facts, albeit in a nutshell.

On 20/06/2021 at about 09:00 pm the victim a boy of 10 years old and his mother were at their hut along the bitumen road adjacent to their house selling fruits. At that the time on point, his mother went into their house for cooking food leaving the victim to take care of the fruit business. At the same time there came a male adult person who told the victim that he wanted big number of pawpaws. Since there were none, the victim rushed into their house and told his mother about the request. His mother and the victim went to the hut where they found the strange still waiting. The victim's mother directed him to a place where he could get the big number of pawpaws he needed. Then, the victim's mother went back into their house leaving behind the victim and the strange man. When

she was ready, the victim's mother went to the hut but she could neither find the victim nor the strange man. As a result, she launched a search during which she saw the victim coming back alone walking with difficult. Upon inquiring, the victim named the strange man as been a person who had sodomised him. His mother reported to police whereas a PF3 was issued and the victim got medically examined. He was found to have bruises in his outer and inner anal orifice. Later on, the appellant was arrested at Nazareth Market, Mwanga area in Kigoma Municipal in connection with the allegations of sodomizing the victim.

The appellant has raised a total of four grounds which may be summarized as follows:-

1. *That the trial resident magistrate erred in law and facts on failure to consider that the alleged offence was not proved on the standard as required by the trite (sic) of law that is beyond reasonable doubt;*

2. *That the trial court erred in law and fact in relying on visual identification fabricated by PW1 which is of weakest kind and unreliable to warrant a conviction on the appellant taking into account the alleged offence took place at the very night there was*

darkness, therefore if was not easy to identify the appellant per ***Waziri Amani vs. Republic*** *[1980] TLR 250.*

3. *That the trial magistrate erred in law and fact to convict the appellant based on hearsay evidence.*

4. *That the trial magistrate erred in law and facts in convicting the appellant without considering that there was identification parade to eradicate mistakened identity.*

Being a layman, the appellant had nothing to say other than to adopt his grounds of appeal and leaving it to the State Attorney to argue so that he would rejoin.

Opposing the appeal, Mr. Magige argued the grounds seriatim.

In respect of ground one where the complaint is that the offence was not proved beyond reasonable doubts, Mr. Magige submitted that the offence was proved to the required standard. He narrated the evidence adduced by the prosecution showing that the offence was proved. He started analyzing the testimony of the victim's mother who testified as PW1. Her evidence in short is that been a fruits monger, at the early night of the fateful night on 20/06/2021 she was at her hut built adjacent her house

along a bitumen public road light with electric lamps selling fruits. She was been assisted by her son who is the victim in this case. Then, as time went by she decided to go into her house to prepare food hence left the victim taking care of their business. No sooner than she left that a male person approached the victim who asked him if he could get large number of pawpaws. Since the victim didn't know where the fruits he was selling came from, he rushed to his mother inside their house to inform her about the stranger's request. PW1 came out together with the victim and met the stranger man whom she directed to a place where he could get the number of pawpaws he desired. Then, PW1 left back into her house leaving behind the two, that is, the victim and the stranger man. Later on, when she was through with food preparations, came out to follow the victim, she didn't find him. Efforts to trace him started during which she over heard from another person that the victim was seen escorting a man carrying pawpaws. Then the victim emerged from the dark crying and walking with difficult. The victim named the stranger man who was asking for pawpaws to be responsible with sodomizing him.

The victim testified as PW2, he explained supporting PW1 on how the stranger man met him and added that, that man requested him to escort by assisting him to carry the pawpaws. Then, after isolating him from

other people took him under a mango tree and sodomised him. He threatened him not to make noise or else he would drain away his blood in Kiswahili "*atamnyonya damu*". The victim was medically examined by PW3, a medical officer, and found to have bruises both on the outer and inside his anus.

The appellant was arrested later on in connection with the offence he was charged with.

Mr. Magige opined that it was the evidence of PW1 and PW2 of visual identification which was water fight that supports the conviction of the appellant. That, there was enough light from the solar electric lamp fixed on a pole stuck on the road at their fruit selling hut that enabled both PW1 and PW2 to identify the appellant. Later on, the appellant was arrested.

Mr. Magige opined further that the testimony of a medical officer, PW3 corroborated PW2 evidence that he was carnally known against the order of nature. Moreover, Mr. Magige pointed out a procedural defect on evidence taking that PW2, been a child of tender years, his testimony ought to have been received after promising to tell the court truth and nothing as per requirement of section 127(2) of the Evidence Act, [Cap. 6 R.E. 2019].

However, he quickly pointed out that, that defect was cured because PW2 testified on oath.

Mr. Magige went on arguing that the offence was proved beyond all reasonable doubts through the testimonies of PW1, PW2 and PW3 who are witnesses to be believed. He referred this court to a case of **Goodluck Kyando vs. Republic** [2006] TLR 363 where the Court of Appeal insisted that every witness is entitled to be believed unless there are cogent reasons to disbelieve him or her. He stressed that in this case there are no reasons to disbelieve these three witnesses.

As regard to ground two, the complaint is that, the testimony of PW1 on visual identification is unreliable, the trial court erred to believe it against the law stated in the case of **Amani Waziri vs. Republic**, [1980] TLR 250.

Mr. Magige argued that the visual identification testimonies of PW1 and her son, the victim, PW2, were reliable. PW2 testimony is that there was a solar electrical lamp stuck along the bitumen road, it was bright enough and with high intensity to enable them identify the stranger. That, through that light, the distance of four paces and time of about for minutes enabled water tight identification as they were able to describe the attire of that stranger been a coat.

As regard to the complaint in ground three that the evidence was hearsay, hence unreliable Mr. Magige opposed that the evidence is not hearsay because the identifying witness PW1 and PW2 stated that they vividly saw the stranger who later on came to be the appellant. Hence their evidence was direct evidence because they testified what they saw and felt.

On the complaint in ground four about inappropriateness of the identification parade, Mr. Magige submitted that there was even no need of that parade because the identifying witnesses duly identified the appellant at the scene of crime. That it was through their identity that the appellant was arrested at the Nazareth market, not identification parade. It could have been different if the appellant was arrested by police on a different day and then PW2 called to identify him.

Mr. Magige added that the appellant did not cross examine PW1 and PW2 about the identification parade. The issue of identification parade has been raised in this appeal. He was of the view that this issue is an afterthought. He referred this Court to the case of **Issa Hassan Uki vs. Republic**, Criminal Appeal No. 129 of 2017 where the Court of Appeal stated that failure to cross examination by a part on material issues is taken to have accepted the facts concerning that issue. He prayed the appeal to dismissed.

On sentence Mr. Magige submitted that the sentence of 30 years imprisonment is unlawful, the proper one is life imprisonment. He prayed this court to invoke its revisionary powers under section 366 (1)(a)(ii) of the CPA to enhance the sentence from 30 years to life imprisonment.

In rejoinder the appellant stated that on the fateful time he was in another street of a walking distance of 15 to 20 minutes or 4 to 5 minutes by boda boda, therefore he could not have committed the offence.

Moreover, the appellant said that he cross examined PW3 about his report in PF3 and PW3 said he did not find any blood or sperm in the victims anus. He prayed his appeal to be allowed.

As it can be seen in this appeal, the complaint is centered on the evidence which basically is that of visual identification. In the circumstances I will determined all four grounds of appeal generally. PW1 just as PW2, been the mother of the victim and the victim himself allege to have identified a stranger man who purported to seek for huge number of pawpaws on the fateful night.

It is trite law that visual identification is the weakest evidence and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before

it is absolutely water tight. This was the holding in the case of **Waziri Amani vs. Republic,** [1980] TLR 250.

As to what amount to "*water tight identification*", the Court of Appeal stated in the case of **Sosthenes Myazagiro @ Nyarushashi vs. Republic,** Criminal Appeal No. 276 of 2014 (unreported) as follows;

> *"Water tight identification in our considered view entails among others the following:-*
>
> *i. Long the witness had the accused under observation;*
>
> *ii. What was the estimated distance between the two*
>
> *iii. If the offence occurred at night, which kind of light existed and what was its intensity*
>
> *iv. Whether the accused was known to the witness before the incident*
>
> *v. Whether the witness had ample time to observe and take not of the accused without obstruction such as fear of attack, threat and the live which may have interrupted the latter's concentration".*

In the current case, gauging the conditions listed in the case above, it can be seen that the evidence of the identifying witnesses PW1 and PW2 fall for short. I say so because both PW1 and PW2 testimonies tells it that the incident took place at night. That they depended on light from electric solar lamp on a pole erected along the bitumen road. However, they didn't tell the intensity thereof.

As to the duration, PW1 said it took her about four (4) minutes. PW2 though might have escorted the stranger man he does not tell the light on the way until under the mango tree where assault took place such a place is notoriously dark.

It is also common to both PW1 and PW2 that the assailant was a stranger man to them. Mr. Magige, the State Attorney argued that PW1 and PW2 identified the stranger man by his attire he put on at the incident night. I have navigated through the record and I could find no anywhere neither PW1 nor PW2 testimonies felling peculiar features of identification including attire. PW1 stated in her testimony at page 9 of the proceedings as follows;

> *"The victim called me at the local shop and told me that there is a customer who want to buy many papaya [pawpaws] I went with him to the shop and found the accused there with a bicycle, he demanded a lot of papaya [pawpaws] and I directed him where to get them, he went away and returned at home and leave (sic the victim alone at the shop."*

Later on, PW1 returned at the shop after completing cooking food and found her son missing. Upon search, later PW2 emerged, after interrogating PW2, PW1 narrated what PW2 stated as follows;-

"He named the accused by saying the man who came to ask for many papaya [pawpaws]"

Then, PW1 concluded her identity of the stranger man in the following words;

"I can identify the accused very well because while he was asking for many papaya [pawpaws] I talked to him for more than (4) minutes, I was so close to him about three (3) foots (sic) from him and there was solar light from the road which had enough light. I did not know him before, he is the one in court dock today".

PW2 testified about the above arrival of the stranger and calling of PW1 to attend him, he stated as follows;

"Around 09:00 hours the accused came and wanted to buy many papayas [pawpaws] I went to call my mother to come and talk with him. My mother told him that she has little papaya [pawpaws] ... my mother went home. After five minutes the accused came and bought some papaya [pawpaws] he then asked me to escort and carry those papaya [pawpaws] and said he will pay me later, I went with him..."

On identification PW2 stated as follows;

"When interrogated me I told them that the one who came to buy many papaya [pawpaws] did sodomize

me by that time I didn't know his name but I identified him as the one who came to buy many papayas [pawpaws] later on I came to know his name as Hamis Elias".

In cross examination PW2 stated that the assailant wore a coat and the appellant when on dock put on a coat. However, PW2 did it tell even the colour of the coat, let alone style or design of the said coat.

As it can be seen the testimonies on identification are wanting. There is no any peculiar feature described by the identifying witnesses. That even the attire is inadequately described by PW2.

This explains how such identification could not enable police defect the stranger man and failed to arrest him until when PW2 pointed at the appellant at Nazareti Market purporting to be the stranger man who sodomized him.

In law early description of an assailant is taken to add credence on identifying witness. In a recent case decided in 2021, the case of **Bernard Thobias Joseph and Another vs. Republic,** Criminal Appeal No. 414 of 2018 the Court of Appeal made reference to the case of **DPP vs. Mohamed Said** and Another vs. Republic Criminal Appeal No. 432 of 2018 where it reiterated its observation in the case of **Omari Iddi Mbezi**

and 2 others vs. Republic, Criminal Appeal No. 227 of 209 (all unreported) where it had stated as follows;

> *"the witness must make full disclosure of source of light and its intensity, explanation of the proximity to the culprit and the witness and the time he spent on the encounter, description of the culprits in terms of body build, complexion, size and attire. Additionally, the witness must mention any peculiar features to the next person that comes across which should be repeated at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence of identification of the suspect at the identification of the suspect at the identification parade and during the trial to test the witness's memory".*

Demonstratably, PW1 and PW2 evidence fall far short of meeting the criteria set up in the cases above.

It was imperative for PW1 and PW2 to have described the features that helped them to identify the stranger immediately to the next person they met. Then such description could have been used to described the stranger before police when the report was made. At the identification parade using the said features could have been used to identify the

stranger man. Then, at the accused's dock in court the same features be used to describe the accused so as to test the memory of the witness.

Now due to weak identification by the identifying witnesses can the trial court be said was correct to rely on it and found a conviction as suggested by Mr. Magige. In my strong view, the answer is in negative. Identification was not water right. There was no description of the assailant at the earliest opportunity and hence identification credibility is shaken.

In the result for reasons stated above I find that the appeal has merit. That means the charge against the appellant was not proved beyond all reasonable doubts.

Consequently, I do hereby quash the conviction and set aside the sentence of 30 years imprisonment imposed on the appellant. I order the appellant to be released from prison unless otherwise lawfully held.

Order accordingly.

Dated at Kigoma this 29th day of July, 2022.

MANYANDA

JUDGE9