THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 128 of 2021
(Originated from Court of Resident Magistrate of Songwe at Vwawa Criminal Case No. 138 of 2020)

NURU YARED SHONDE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 29th August & 19th September, 2022

KARAYEMAHA, J

This is an appeal by Nuru Yared Shonde against the decision of the Court of Resident Magistrates Court of Songwe at Vwawa, convicting him of the offence unnatural offence c/s 154 (1) (a) of the Penal Code [Cap. 16 R.E 2019] (the Penal Code) (now R.E 2022) and sentencing him to prison term of life imprisonment.

The particulars of the charges alleged are that on 1st September, 2020 at about 18:00hrs at Ruanda Village within Mbozi District in Songwe Region, the appellant unlawfully had knowledge of a boy of 12 years against the order of nature. For the sake of modesty and privacy,

I shall refer to him as "SD" or simply as PW1, the codename by which he testified at the trial

The substance of the case laid against him, which the trial magistrate accepted, showed that SD, Peter Sinjela (PW2) and Musa were friends and were the appellant's village mates. On 01/09/2020 PW2 and Musa escorted SD to cut rabbits grass in the latter father's farm. On their way they passed near a sugar cane farm and cut three for refreshing. In view of the evidence on record, the farm is near the appellant's house. On their way back home, the three friends saw the appellant who had a machete, catapult and knife. Musa called upon his colleagues to run. However, they could not be faster than the appellant who chased and caught them. On being interrogated about the sugar canes, they could not have satisfactory answers but seemed to the appellant as thieves. Since the sugar cane owner was always confronting the appellant's family as the one which was stilling his sugar cane, the appellant decided to punish them. He, first gave them a chance to choose the punishment or else would take them to their parents. The evidence reveals further that whereas PW2 chose to be taken to his parents, SD chose to be caned by the appellant because his father would cut him with razor blade. When the appellant took them to the

liver and asked them again to choose the punishment, the three friends proposed to give him some money. The appellant was unsure that they could get the money. Therefore, he ordered them to undress their clothes. After that order was complied with, according to SD and PW2, the appellant told SD to follow him leaving PW2 and Musa at the liver. After a short walk, the appellant told SD to stop and squat. Then the appellant inserted his penis into his anus. They stopped when SD asked to go for a long call. After that the appellant continued with his vile act. When the appellant finished, he asked SD to go wash himself. That is when he run crying. It was the prosecution evidence that on the way he met Paulo Elia (PW3). On probing him, SD told him that the appellant had sodomised him. PW3 took SD where the appellant was and arrested him. He then took the appellant to SD's father, Jimloji Sadani Halinga (PW4) and later to Village Executive Officer (VEO), namely, Tubuni Mwambega (PW5). The VEO gave them a letter and went to police where they were given a PF3. SD and PW4 went to Songwe Regional Hospital. At the hospital SD was examined by Sister Kalaba Mtafya (PW6) who found in SD's anus blood, sperms and faeces. PW6 conluded that SD was sodomized. She tendered the PF3 which was admitted as exhibit P1.

The appellant was interrogated by G.9533 D/C Noah (PW7) after he was arrested. The appellant's cautioned statement was recorded. PW7 tendered the cautioned statement which was admitted as exhibit P2.

The appellant disassociated himself from the commission of the offence. His defence evidence is identical to the story by SD, PW2 and PW3 except on the issue of sodomising SD. On responding to cross-examination, the appellant testified that he is 17 years old but had no document to prove that fact.

However, the trial court was convinced that the appellant was properly and dully linked with the commission of the offence of unnatural offence. He was consequently convicted and sentenced as shown above. Aggrieved, the appellant preferred the present appeal which has 8 grounds of appeal. However, I have examined them and found that the appellant's complaints boil down into three grounds which will be referred to as grounds one to three. The three grounds are paraphrased as follows, that **one,** the trial relied on the cautioned statement (exhibit P2) which was admitted by committing procedural irregularity. **Two**, the prosecution case was not proved beyond

reasonable doubt. **Three**, the trial court is faulted for passing a custodial sentence to a juvenile who was 17 years.

Hearing of the appeal pitted the appellant who fended for himself against Ms. Rosemary Mgeni, learned State Attorney, who advocated for none other than her usual client, the respondent.

When parties were invited for the hearing, it was the appellant who got us under way. His submission was general and a repetition of what is contained in the substance of the petition of appeal. He, however, lamented further that the cautioned statement was admitted without conducting an inquiry apart from the fact that he objected it. He lamented further that he was excessively sentenced while he was 17 years at the time of committing the offence. He took the view that he deserved a small punishment of corporal punishment as per the Child Act. Finally, he said that the prosecution case was not proved beyond reasonable doubt.

Ms. Mgeni commenced her submission by intimating her position of opposing the appeal. However, she supported in full grounds 4 and 5. She also indicated that the prosecution case was proved beyond reasonable doubt.

I embark on the disposal journey by taking on board matters considered by Ms. Mgeni on ground 4 (ground one in a new format) in which the appellant faults the trial Court on procedural irregularity in admitting exhibit P2. Led by the trial Court's record, it is apparent that the appellant's cautioned statement was tendered by PW7. From the trial Court's record, it is clear that when PW7 prayed to tender it, the appellant informed the trial court at page 30 of the proceedings as follows:

> ***"Accused**: I have objection on the signature as I did not sign it. I stayed there four days in the police custody being threatened to be injured so that I could sign it but I rejected. I did not sign the document."*

After conceiving the objection, the trial court had this say:

> *"As regards the fact that the accused denies the cautioned statement, inquiry as to the matter be conducted."*

I think, with respect, that although the trial magistrate considered the issues of establishing the voluntariness of the cautioned statement, he later diverged. It seems the Public Prosecutor tilted the mind of the trial Magistrate. After submitting that the objection invited the Court to sympathise with the appellant and having stated that the appellant did

not deny giving the statement and the thumb print were the appellant's the trial court without dealing with the part of threats, he gave the ruling dismissing the appellant's objection. The trial Magistrate proceeded to admit it. Thereafter, the trial Magistrate proceeded recording the evidence.

In this case the voluntariness was in fact hotly contested, the appellant contended that *"he stayed in the police custody for four days, threatened to be injured"* was not a light objection. This issue was not resolved in the appropriate manner for as far as the record goes the trial magistrate did not hold any inquiry.

The trial Court gave a surprising ruling by predicating on the issue of the appellant's signature and left out issues of torture. My stance is boosted by the fact that the accused was not given the opportunity to be heard on the nature of the torture and threats levelled at him. Moreover, the burden of providing the voluntariness of the statements was upon the prosecution and no onus lay on the defence to prove their involuntariness. Section 27(2) of the Evidence Act [Cap. 6 R.E 2022] is clear on that. Neither the prosecution nor the defence was heard on the question and I think it is correct to say that the ruling of the learned Resident Magistrate was without legal basis.

This was wrong both in law and practice. The constant practice which, in my considered opinion, has crystallized itself into law is that when the accused repudiates the cautioned statement, the main case is to be stopped and conduct an inquiry with an intention to establish the voluntariness or otherwise of the statement through evidence. This position was emphasized by the Court of Appeal of Tanzania in **Twaha Ally and 5 others vs. the Republic**, Criminal Appeal No. 78 of 2004 CAT- DSM (unreported) that:

> *"If the objection is made after the court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

This trite position has endured for long and no magic can reverse it. In this case no inquiry was conducted. In my considered opinion the trial magistrate was not better positioned to appreciate all the circumstances in which the confession was retrieved from the accused person hence a gross shortcoming. In whole, the effect of non

compliance with the legal procedure ends in expunging the statement. In the event, exhibit P1 is hereby expunged.

The issue in the 2nd ground is whether the prosecution case was proved beyond reasonable doubt, I have carefully considered whether there was sodomy committed on the victim (PW1). On this I shall be guided by the evidence of PW1, PW2 and PW6 and the law.

The law on sodomy is very clear. Section 154 (1)(a) of the Penal Code makes it an offence (of unnatural) for any person to have carnal knowledge with any person against the order of nature. Section 154 (1)(a) provides as follows:

> *"154. -(1) Any person who-*
>
> *(a) has carnal knowledge of any person against the order of nature;*
>
> *.... commits an offence."*

Of course, like in rape cases for the purpose of proving sodomy, penetration however slight, is sufficient to constitute carnal knowledge and must be proved beyond reasonable doubt and not inferred.

It is now a common principle that true evidence on sodomy must be given by the victim. The rationale behind this principle, in my considered opinion, is simple to comprehend. It is that, the victim of the

incident is actually the one who witnessed and knows what transpired and the one who felt what was inserted in his/her anus. In the circumstances of this case, I borrow the wisdom of the Court of Appeal in cases of **Seleman Makumba vs. Republic** (supra) and **Julius John Shabani vs. Republic**, Criminal Appeal No. 53/2010 CAT, Mwanza (Unreported)

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant that there was penetration."*

In this case, as rightly submitted by Ms. Mgeni, there is cogent evidence from PW1 and PW2 that on the incident date they met the appellant on the way to their homes. The appellant intended to punish them after learning that they had stolen sugar canes. One of the punishments was to order them undress their clothes. It is also proved by PW1 and PW2 that shortly after undressing he took PW1 to the bush. PW1 unshaken and without meandering testified that when they got in the bush, the appellant ordered him to squat. No sooner had PW1 squatted than the appellant inserted his penis in his anus, causing severe pains. PW2 heard the cry but thought PW1 was being beaten.

PW3 was the first to interrogate PW1 when he found him crying. PW1 told him that the appellant had sodomised him.

PW6 who examined PW1 corroborated his evidence. She said that on examining PW1, she noted that blood, sperms and faeces were oozing out of his anus. PW6 findings were that SD was penetrated by a blunt object hence sodomized. Her evidence reflects the contents of exhibit P1. Therefore, the issue whether PW1 was raped has been answered affirmatively.

The next issue is who sodomised him. The determination of this issue, I trust, will answer the major issue whether the prosecution case was proved beyond reasonable doubt. In relation to the issue, whether or not it was the appellant who committed the sodomy, there arises a need to clearly evaluate the evidence on record and establish whether it was the appellant who committed the act. I doing this I shall be conforming to the guiding principle that this being a first appeal, it is in the form of rehearing. In that regard, this Court is enjoined to re-evaluate the entire evidence on record by reading the evidence and subjecting it to a critical analysis before making a decision of upholding the trial court's decision or arriving at its own conclusion. This fabulous principle was lucidly stated in the case of **Napambano Michael @**

Mayanga vs. Republic, Criminal Appeal No. 268 of 2015 (unreported) in which the Court of Appeal held:

> *"The duty of first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court's decision or may be different altogether."*

In the present case, it was the evidence of PW1 and PW2 who informed the court that it was the appellant who told PW1 to follow him in the bush. By then it was still during the day at about 18:00hrs. The appellant and the witnesses stayed together for considerable amount of time choosing punishments and promising to pay him money. Both sides have similar story. I have no good reason to doubt PW1 who said the appellant was the one who took him to the bush leaving behind PW2 and Musa. I also have no good reason to doubt him that when they got in the bush, he was with the appellant not any other person. PW3 was also the one who arrested the appellant who had left the victim in the bush and joined PW2 and Musa. All along, PW1 mentioned the appellant first to PW4 and next to PW5 and later at police station. On the strength of the evidence on record, I am comfortable to hold that the person who sodomised PW1 was the appellant.

The findings above, give answers to the complaint aired up by the appellant that the prosecution failed to prove the case beyond reasonable doubt. On this area the cardinal principal is that the prosecution is duty bound to prove two important elements in discharging its duty of proving the case beyond reasonable doubt as was observed by the Court of Appeal in the case of **Maliki George Ngendakumana vs. Republic**, Criminal Appeal No. 353 of 2014 (Bukoba) (Unreported) that:

> *"... it is the principle of law that in criminal cases the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it was the accused who committed it".*

In the instant case cogent evidence was led demonstrating that the offence of sodomy was committed and the perpetrator was none other than the appellant. From the above findings, I find the second ground of appeal with no merits. It is henceforth rejected.

The appellant also complained that PW1's evidence was not corroborated. I have given this complaint a deserving weight. In view of section 127 (6) of the Tanzania Evidence Act, [Cap. 6 R.E.2019] the court is warranted to base conviction on the evidence of the victim of

rape without any corroboration, as long as the court is satisfied that the witness is telling the truth. I am further of the view that it is a settled principle that in sexual offences the best evidence must come from the victim herself. See the case of **Seleman Makumba vs. Republic,** [2006] TLR 379, **Mawazo Anyandwile Mwaikavaja vs. Republic**, Criminal Appeal No 455 of 2017 and **Ally Ngozi vs. Republic,** Criminal Appeal No 455 of 2017 (all unreported).

The third ground is that the appellant was aged 17 years when he committed the offence but was punished to serve a life imprisonment. Ms. Mgeni implored this court to consider section 154 of the Law of the Child Act which abhors custodial sentence to accused persons below the age of 18 years. She was therefore of the view that the trial court strayed into errors when it failed to consider the evidence regarding age or conducting an inquiry.

It is quite clear that, upon conviction, the appellant was sentenced to life imprisonment. The sentence assumed that the appellant was an adult of above eighteen years of age. This was done by the trial Court by making reference to the charge sheet, admitted in court on 07/09/2020. The undisputed appellant's evidence is that he was 17 years on 19/5/2021. Since the judgment was delivered on

30/6/2021 less than a month from the date of defence, the appellant was still 17 years. This means at the time he committed the offence he was under 18 years old. This fact ought to have transferred the trial Court's attention to section 116 and 119 not 154 of the law of the Child Act and pass a fitting sentence that takes cognizance of the appellant's age as correctly observed by Ms. Mgeni. This he did not do.

In **Masanja Charles vs. Republic**, Criminal Appeal No. 219 of 2011 (unreported), the Court of Appeal restated principles that the trial court ought to be mindful of, when passing a sentence. These principles are emphasized the fact that a sentence would be considered irregular and unlawful:

- *Where the sentence is manifestly excessive or is so excessive as to shock,*
- *Where the sentence is manifestly inadequate,*
- *Where the sentence is based upon a wrong principle of sentencing,*
- *Where the trial court overlooked a material factor,*
- *The period the appellant had been in custody pending trial.*

The superior Court was quite categorical that sentencing is a sole discretion of the trial court and the appellate court can only interfere these principles are not conformed to. It held:

"We have cautioned ourselves and be mindful of the well settled principle that we should not interfere with the discretion exercised by a trial court while imposing a sentence except where it is apparent that the circumstances show that the trial court acted upon a wrong principle or erred both in law and factual analysis leading to the imposition of a manifestly excessive sentence."

As I labour to get the sense of what may have befallen the trial Magistrate as to indulge in this anomaly, I get the feeling that may be, the he had doubts about the appellant's age. If this feeling makes sense, the best recourse that he had was to call for evidence which would establish the appellant's age, thereby settling the matter before he proceeded to pronounce the sentence. This is a fortified position in our country and decisions to that effect are not paltry. In **Emmanel Kibona & Others vs. Republic** [1995] TLR 241 (CAT) it was held that:

"Evidence of a parent is better than that of medical doctor as regards that parent's child's age. Where age can't be assessed accurately the benefit of doubt must be given to the accused."

Thus, if the trial Magistrate was still in doubt with respect to the appellant's age, the benefit of that doubt ought to have been accorded to the accused person who is now the appellant.

Since the trial Magistrate's sentence defied the principles, choosing instead to walk the route of excessiveness, this court is justified, under section 388 of the Criminal Procedure Act [Cap 20 RE 2019] to interfere with his discretion and set aside the sentence. Setting aside of the sentence would require me to substitute it with an appropriate sentence which, in terms of sections 116 of the Law of the Child's Act which dictates that the appropriate sentence is not custodial but to discharge him conditionally on entering cognizance. I would prefer to even impose corporal punishment because the appellant was the 1st offender bearing in mind the gravity of the offence. I note, however, that corporal punishment is a penalty of a lesser degree than a one year and more than two months prison term that the appellant has so far served since he was sentenced on 30/06/2021. I am of the considered view that the prison term so far served, by far, exceeds the pain of corporal punishment and it adequately covers what I would order in substitution.

Consequently, I set aside the sentence and order that the appellant be set free with no other punishment in respect of his conviction, unless he is detained for other lawful reasons.

It is so ordered.

DATED at **MBEYA** this **19th** day of **December, 2022**

J. M. KARAYEMAHA
JUDGE