THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 117 OF 2022

(Originating from the District Court of Momba at Chapwa, Criminal Case No. 196 of 2016)

DUMA ILINDILO PANGARASI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 06/09/2022

Date of judgment: 15/09/2022

NGUNYALE, J.

The facts which resulted to the appellant being charged with the offence of unnatural offence contrary to section 154 (1) (a) (2) of the Penal Code may simply be extracted from the records of appeal to stated that; on 7th day of November 2016 the victim of the offence was going home from school. He saw a person who was later identified as the appellant taking care of cattle. He was stopped by the said person but the victim was afraid because the area was a bit bushy and nobody was passing around. The appellant did hit him using a stick he was carried the act which made the victim to fall down. The appellant approached him and ordered him to

undress his cloths otherwise he will be killed. The victim undressed his uniform a short and pant, thereafter, the appellant had carnal knowledge to him by penetrating his penis to the victim's anus. After the act the appellant told him to run away. Upon reaching home the victim narrated the incidence to his father, the father told the villagers who moved around with the victim and arrested the appellant near to the place mentioned by the victim. The victim is the one who identified to them the appellant.

The particulars of the offence before the Court were that the appellant is charged that on 7th day of November 2016 at about day time at Mbao village within Momba District in Songwe Region, did have carnal knowledge to the victim/PW1 whose name is withheld for the purpose of hiding identity. Upon full trial the appellant was convicted and sentence to serve life imprisonment.

Aggrieved, he preferred the present appeal basing on nine grounds of appeal. In order for the grounds of appeal to make sense they are paraphrased as follows; -

1. *The trial court erred in law to convict and sentence the appellant without taking into account that PW1 failed to correctly identify the appellant because he was already under fear.*
2. *That the trial court erred in law and fact to convict the appellant basing on the testimony of PW1 the son and PW2 the father because their evidence was not corroborated by other piece of independent witness.*

3. *That the trial court erred to consider the evidence of PW3 which was not clear about penetration the major ingredient unnatural offence as such the bruises on the anus my be caused by the victim's fingers while scratching to the organ.*
4. *That the trial court erred to convict and sentence the appellant without taking into account that if he was taking care of the cattle where were the cattle handled to or who was the owner of the said cattle.*
5. *That the trial court erred to convict the appellant relying on the testimony of the victim who could not identify the appellant who was arrested because he is a Sukuma without proper identification.*
6. *That the trial court erred to convict the appellant without considering the distance from the scene of crime to the place of arrest, failure to do so the appellant was arrested on mere suspicious.*
7. *That the trial court did not take into account that PW3 was a liar because none of the witnesses PW1 and PW2 said that the victim was in bad condition.*
8. *That the trial court erred in law when convicted and sentenced the appellant without regarding that he was arrested without any stick as PW1 told the trial court that the Sukuma guy did hit him using a stick.*
9. *That the appellants defence was not considered by the trial court.*

The appeal was called for hearing on 6th September 2022 whereby the appellant appeared fending by himself while the respondent was represented by Ms. Prosista Paul learned State Attorney.

The appellant submitted that he was not identified instead he was just arrested as a Sukuma they just relied on what is alleged to be foot marks of his shoes popularly known as 'chachacha'. It was alleged that he was arrested by many people but those people were not called to corroborated

the testimony of PW1 and PW2. He did not commit the alleged offence the case is a framed one. They alleged that he was arrested taking care of the cattle but the whereabouts of the cattle after arrest is not stated. He insisted that he was arrested on mere suspicious and not commission of the offence.

The respondent attorney Ms. Prosista stated that he has heard the appellant but they do not support the appeal. She opted to argue the 1st 5th and 6th grounds of appeal as one ground because they are similar in content about identification. It was the submission of Ms. Prosista that the arguments of the appellant that he was not identified are not true because the victim mentioned his to the people who arrested the appellant. After he sodomized the victim the victim without delay informed his father and, they arrested the appellant near to the place he committed the offence. PW1 narrated the event to his father who examined him and noted signs suggesting that his anus was penetrated. Neighbours arrested the appellant after he was identified by the victim of the offence immediately after the act. She cited the case of **Peter Ephrahim @ Wasambu vs. R**, Criminal Appeal No. 386 of 2018 Court of Appeal of Tanzania at Mbeya where it was observed that the ability to name the suspect immediately after the act is relevant. The victim mentioned the

appellant immediately means he properly identified him so the 1st, 5th and 6th grounds of appeal are worth of being dismissed.

About the 2nd ground of appeal that the court erred to rely on the evidence of PW1 and PW2 without corroboration the State Attorney submitted that the law is very clear that under section 143 of the Evidence Act there is no specific number of witnesses to prove the case before the court of law what is important is credibility of the witnesses. The two witnesses PW1 and PW2 were credible and reliable witnesses. She was of the view that since this is a sexual offence the true and best evidence comes from the victim relying on the authority of Suleman Makumba vs. R (2006) TLR 379. The evidence of PW1 alone was enough to ground conviction.

In the third ground of appeal that the testimony of PW3 is false because he could not establish that there was penetration the State Attorney said that such complaint is an after though because the appellant never cross examined on the same during trial especially about bruises. She prayed the Court to dismiss the ground of appeal.

The learned State Attorney did not end there, he went on submitting that the complaint about cattle has nothing to do with the offence, it should be dismissed also because the cattle were not relevant in proving the offence. The seventh ground of appeal also she stated that it should be

dismissed because PW3 testified that the boy was very week when presented to him. He examined his anus and found bruises which suggested penetration by blunt object. The child was weak by any means.

In the 8th ground of appeal he complains about stick that he was not arrested with it. On this ground the State Attorney prayed the Court to dismiss it because the evidence is very clear that he was found with a stick and he committed unnatural offence.

About the last ground of appeal which bears a complaint that the appellants' evidence was not considered it was the submission of the learned State Attorney that his evidence was well considered and found to be of no weight. The defence evidence could not shake the prosecution case.

In the brief rejoinder the appellant insisted that the prosecution evidence is not true.

After having summarised the argument of both sides and a thorough perusal of the trial court records, I find five issues to be determined.

In the 1st,5th and the 6th grounds of appeal the first issue is whether the appellant was identified. The appellant complaints are that; he was not properly identified at the scene of crime because the victim was in fear,

the victim identified the appellant as a Sukuma thus the appellant was arrested on suspicion of being a Sukuma and not as a person who committed the offence charged.

The credibility of the identifying witness in this case was not questionable. The victim mentioned the assailant on the same day in a short time duration to his father when he reached home. Thus, the complaint that he was in fear on that day which lead him to fail to identify the appellant has no merit. In the case of **Marwa Wangiti** (supra) the court observed that;

> *"The ability of a witness to name a suspect at the earliest opportunity is in all important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry".*

The allegation by the appellant that he was arrested on suspicious by being identified as a Sukuma by the victim and not in description, it is my view that the complaint has no merit. Because the evidence of the victim was very direct and the offence was committed during day time, thus there is no any mistaken as to identity, the same was held in the case of **Emmanuel Samson V. The DPP**, Criminal Appeal No, 264 of 2018.

Furthermore, the victim was able to explain to PW2 the place where he met with the appellant, it was at a bushy area when the victim was coming back from school. The appellant threatened the victim and ordered him

to undress his clothes and inserted his penis in the victim's anus. The victim in this case at hand also without any doubt describe the appellant by name as a Sukuma and the clothes he wore during that day, red shirt and chachacha on his foot with blue colour. PW1 described the same thing to his father when he narrated about what the appellant did to him. In the case of **Cosmas Chaula V. Republic,** Criminal Appeal No.6 of 2010(unreported) it was stated that;

> *"... it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such person is arrested. The description should be on attire worn by a suspect, his appearance, height, colour and/ or any special mark on the body of such a suspect".*

Therefore, there is no doubt that the appellant was properly identified by the victim at the scene of crime. The evidence of PW1 and PW2 testified what they saw. The appellant was arrested on the same day near the place where the offence was committed. The victim was the one who directed PW2 and others the appellant in the forest where he was arrested. Therefore, the complaints have no merit, I concede with what has been submitted by the respondent counsel that the appellant was correctly identified without a colour of doubt.

In the second issue basing on the second ground of appeal, is on corroboration. The issue is whether there is a need of corroboration of evidence of PW1 and PW2. The appellant complaint is that the evidence of PW1 and PW2 was not corroborated from non-family members such as neighbours, headteacher, hamlet chairperson or village chairman. The law is settled under Section 143 of TEA there is no number of witnesses required to prove a fact. In the case of **Yohanis Msigwa V. Republic** [1990] T.L.R 148, it was stated that;

> *"There was admittedly a one eye witness in this case. Her evidence is not however detracted from because of that fact alone. As provided under s.143 of the Evidence Act, of course no particular number of witnesses is required for the proof of any fact. What were important here were PW1's opportunity to see what she claimed to have seen, and her* ***credibility.*** *Mr.Mwakilasa concedes it was broad daylight and, as Mr.Sengwaji remarked, the learned trial judge was positively impressed by PW1 as a witness. We ourselves find no reason to doubt the* ***veracity*** *and* ***reliability*** *of PW1's testimony. We are satisfied that the appellant was quite properly convicted on the evidence and we accordingly dismiss the appeal".*

Indisputably, the prosecution is to call witnesses who prove their case. As submitted by the respondent counsel that what is important is credibility of the witnesses and not number of witnesses. She further submitted that the prosecution case had a number of four witnesses, the victim, father of the victim, doctor and an investigator. Their evidence was found to be worth by the trial court and there was coherence in their evidence. This

was held in the case of **Shaban Daudi V. Republic**, Criminal Appeal No. 28 of 2001(unreported) where the court stated that;

> *"The credibility of a witness can also be determined in other two ways, that is, one, by assessing the coherence of the testimony of the witness and two, when the testimony of the witness is considered in relation to the evidence of other witnesses".*

Thus, in the case at hand the witnesses were credible in their evidence. what stated by the victim are the same as what testified by other witnesses.

It is my view that when the testimony of the witnesses available is essential to prove their case and there is no adverse inference in their evidence, there is no need to corroborate the evidence of other witnesses who did not witness the act. The evidences of the witnesses aforementioned by the appellant are not important in this case because they are not the material witnesses in this case.

It was argued by the respondent's attorney that the best evidence in sexual offences is from the victim and he cited the case of **Sulemani Makumba** (supra). Therefore, the only evidence of the victim may ground conviction. Hence the second complaint has no merit.

Turning to the third and seventh grounds of appeal the appellant claim that PW3 failed to explain his qualification and failed to establish

penetration as the major ingredients of rape and unnatural offence because bruises on the anus may be caused even by the victim fingernails while scratching the organs and that PW3 is a liar. Having perused the trial court record, the PF3 which was tendered by PW3 is clear that it was filled by the Assistant Clinical Officer. The said document (exhibit P1) its content was not read aloud before the court. This is not the complaint by the appellant and it was not even noticed by the learned state attorney who represent the respondent. It is a settled law that whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted evidence, before it can be read out in court, this was held in the case of **Robinson Mwanjisi and 3 others V. Republic** [2003] TLR 218. The aim of reading and explaining the contents of the document by the one who tendered it is to enable the accused to know the details and to enable him to give a focused defence. The appellant complaint that PW3 failed to explain his qualification, was not argued by either party. In the court record PW3 when testified before the court did not state his qualification, he state that he is working at Kamsamba Dispensary and he examined the victim and found that he was carnally knowledge and he found bruises and blood on his anus. But in the PF3 he introduced himself as the clinical officer. Thus, in my opinion this is an afterthought because the appellant did not cross examine the

witness (PW3) when testified before the court. All in all, whether PW3 state his qualification or not, the same did not affect the competence and the value of evidence. Also, the same did not prejudice the appellant. In my view the victim was medically examined by the competent medical personnel whose report should be accorded weight by this court supported with oral evidence he testified.

In the issue that PW3 failed to found any penetration which is the major ingredients of rape and unnatural offence as such bruises on anus may be caused by the victim's fingernails while scratching to his organs. I concede with the respondent's attorney that the same was proved by PW3 when testified before the court that he found bruises and blood on the anus of the appellant. Thus, the issue raised by the appellant is an afterthought the same was not raised when he cross examined PW3.

All in all, the court of Appeal in the case of **Masalu Kayeye V. The Republic,** Criminal Appeal No. 120 of 2017 CAT, Mwanza cited with approval the case of **Edward Nzabuga V. Republic**, Criminal Appeal No.136 of 2008 (unreported), consider whether expert opinion or production of medical report (PF3) overrides oral evidence by witnesses who witnessed the event and physically examined a matter. The court further state that the offence of rape or penetration, can be proved orally

and without an expert opinion or oral evidence by experts, that is to say without a doctor who examined the victim and testified in court and/or tendering a PF3. This observation was made by the Court in the above cited case of **Edward Nzabuga** (supra) in which we quoted with approval the observation of the High Court Judge in that case when it went for first appeal, which went thus: -

> *"The issue here is whether only medical evidence is acceptable or admissible in proving penetration or physical injuries to the vagina or body of the victim respectively .I'm afraid that courts of law have been gripped with some sort of phobia to expert opinions in particular medical evidence which they hold to be superior to the opinions or evidence of ordinary people, some of whom have got experience on what they are talking about It smacks of academic arrogance to doubt the evidence of a woman, an adult, like the sixty two year old PW1 Nahemi Sanga in the case at hand when she says that the appellant's penis penetrated into her vagina, simply because a medical report, of a doctor who was not only present at he scene and did not experience the thrust of the penis of the rapist, but depending only on the presence of spermatozoa and bruises in the vagina of the victim to reach his opinion. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary".*

Therefore, the oral evidence by PW1 and PW2 as summarized above, in my view, sufficiently proved that the victim was penetrated by nobody but the appellant.

On the issue that the trial court erred to rely on the evidence of PW3 because he is a liar on the fact that the child was brought in the hospital while he was carried by the family members. But the same was not testified by other witnesses. The same has no merit in this case because whether the victim was carried by his parents when he was brought in the hospital or not is not fatal in this case to prove the offence of unnatural offence. Even if it was not testified by other witnesses because it is not one of the ingredients of the offence charge. Thus, the ground has no merits.

In the fourth and the eight ground of appeal that the appellant was found while grazing cattle but it was not testified to whom those cattle were handled and if the said cattle was his property or was just a casual labour, and that the appellant was arrested without any stick as PW1 testified that the Sukuma guy hit him by the stick. In this case at hand the appellant was charged with the offence of unnatural offence, whereby the main factor to consider is whether there was penetration which was caused by the appellant. Those complaints which are claimed by the appellant are not fatal to prove the offence of unnatural offence. The ingredients of the offence were proved by the evidence of PW1 and PW2. The evidence of PW1 and PW2 is very crucial to prove the case against

the appellant. PW1 narrated the story to his father (PW2) who checked the victim and found him with human faces on his anus hence neighbours came and they started to make follow-ups, where they found the appellant in the place with heavy forest while grazing cattle. PW3 after he examined the victim, he also confirmed that he was sodomized. Therefore, the evidence established by PW1, PW2 and PW3 prove that he was sodomized. From the evidence of PW1 there is no doubt that the victim was sodomized by the appellant. By applying the best evidence rule, that in sexual offences the best evidence is from the victim. This was held in the case of **Selemani Makumba vs Republic** [2006] TLR 379 particularly at page 384 that ;

> *"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".*

Therefore, the allegations by the appellant have no merit.

In the last ground of appeal, the appellant complaint is that the appellant defence was not considered by the trial court, after perusal of the court record at page 9 of the impugned judgement the trial court considered the evidence of the appellant at great length. The trial court found the appellant defence was weak and failed to shake the evidence adduced by the prosecution witnesses. The general rule is that the burden of proof in

criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs, and that the accused has no duty of proving his innocence, this was held in the case of **Nyeura Patrick V. Republic**, Criminal Appeal No. 73 of 2013, CAT (unreported).

At the end, the Court has found that the trial Court was right to rule in favour of the respondent that the appellant committed unnatural offence contrary to section 154 (1) (a) (2) of the Penal Code. That being the position, the appeal has no merit, it is hereby dismissed entirely for lack of merit.

Dated at Mbeya this 15th day of September 2022.

D. P. Ngunyale
Judge