THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 98 OF 2022

(Originating from the Court of Resident Magistrate of Mbeya at Mbeya Criminal Case No. 250 of 2020)

NURDIN HUSSEIN SADAM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 12/09/2022
Date of judgment: 29/09/2022

NGUNYALE, J.

The Resident Magistrate Court of Mbeya at Mbeya convicted the appellant Nurdin Hussein Sadam of Unnatural Offence c/s 154 (1) (a) of the Penal Code Cap 16 R. E 2022. The appellant was found guilty of having carnal knowledge of a boy aged 14 years old against the order of nature. To protect his modesty, I shall hereinafter refer him to the title "PW1" or the victim. The prosecution alleged that the appellant committed the offence on the 23rd September 2020 at Manga Veta area within Mbeya District within the City of Mbeya. The conviction of the appellant was based on evidence adduced by five witnesses and two

documentary exhibits. Upon his conviction, the appellant was sentenced to the statutory life imprisonment.

A factual account giving rise to the appellant's conviction as extracted from the records during trial is as follows: On the fateful date (23/09/2020) the appellant and the victim slept at the sitting room at their home around VETA area in Mbeya City. At mid night Leila Said the mother of the victim alleged that she witnessed the appellant having sex with the victim who was asleep against the order of nature. The mother asked the appellant as to why he was doing such evil act? The appellant while trembling asked for forgiveness lamenting that it was the devil which influenced him to do such illegal act.

The event was communicated to other people in the house and later in the morning was reported to police. The police arrested the appellant while attempting to escape to Dar es Salaam. He was arraigned to the trial court where he was convicted and sentenced as already stated.

The appellant was aggrieved with the order of conviction and sentence, he preferred the present appeal premising it to six grounds of appeal challenging conviction as meted by the trial court. When the appeal was called for hearing the appellant was under representation of Ms. Nyasige Kajanja learned Advocate and the respondent was ably represented by

Ms. Davice Msanga learned State Attorney. The appellants Counsel amended the petition of appeal to remain with two grounds of appeal namely; -

1. *That the trial court erred in law and fact when it convicted and sentenced the appellant in a case that was not proved beyond reasonable doubt.*
2. *That the trial court erred in law and fact for its failure to analyse evidence.*

The appellants Counsel in support of the appeal started arguing the first ground of appeal that it is said that the offence occurred on 23rd day of September 2020 where it was alleged that the victim was penetrated by the appellants penis against the order of nature. The evidence adduced could not prove the offence occurred on the alleged date of commission of the offence. The trial court could not analyse about what happened on 23rd day of September 2020. She referred the Court to page 15 of the judgment where the trial Magistrate said that the appellant was found twice penetrating his penis to the victim against the order of nature. It was the view of the learned Counsel that this piece of evidence was not among the particulars of the offence although the court used it to convict the appellant. If the trial court could have analysed well the evidence it would have realized that even the victim did not know if the event occurred to his body. What he knows about 23rd day of September 2020 is that he was awaked by his mother from

sleep and he heard the words from the mother that '*unafanywa ujinga huku umelala'* and he saw the appellant trembling.

Ms. Kajanja went on submitting that PW1 and PW2 told the court that on the fateful date there was wedding ceremony at their home whereby many guests slept at the sitting room. At the very sitting room there was no enough light for identification. If the court would have analysed well the evidence it would not end up to convict the appellate. PW2 said that after she found the appellant committing the offence, she called other people including Maya but it is not known what was done by those people. The evidence on record do not prove unnatural offence.

It was further submission of Ms. Kajanja that the appellant was convicted basing on the testimony of PW1, PW2 and PW3 which was so contradictory. PW2 said that he went to the sitting room where there was no light but she identified the appellant committing unnatural offence and he inspected the anus of the victim and found it discharging blood and sperms but PW3 said that the anus was discharging nothing and intact and not loosely by any means. Those contradictions according to the learned Counsel for the appellant raises serious doubt to the prosecution case. She referred the case of **Rashidi Kazimoto & another vs. R**, Criminal Appeal No. 158 of 2016 (unreported) the Court

of Appeal at Mwanza ruled that it is dangerous the court to rely on contradictory evidence.

In reply Mr. Msanga declared his stance that they do not support the appeal because they strongly believe that justice was done. The offence was proved by the eye witness PW2 and corroborated by PW1. The appellant asked for forgiveness before PW2 after he was found committing the offence. PW3 detected that there was penetration. There was oral confession from the appellant and sough to be forgiven. The issue of identification in this case is irrelevant or immaterial because the victim and the appellant were living and sleeping together. There is no possibility of mistaken identity. Oral confession is the best evidence, in the case **of Haruna Mlupeni & another vs. R**, Criminal Appeal No. 259 of 2007 (unreported) at Tabora confession to one's guilty is best evidence. The evidence of both sides was properly analysed by the trial court and ended with a fair decision. There was no contradiction and best evidence comes from the victim. The appellant did not cross examine about identification and penetration which means he accepted the truth to it. The fact that the offence was committed while the victim was asleep is not a problem because after he was awaked, he detected that penetration was affected, corroboration was corroborated by PW3

the Clinical Officer. To that end the respondent's attorney prayed the Court to dismiss the appeal for lack of merit.

In a brief rejoinder the appellant Counsel reiterated the submission in chief and she insisted that the offence was not proved beyond all reasonable doubt. She submitted that on the fateful date it is admitted that many people slept at the sitting room now how the offence occurred in presence of other people.g

Having considered the rival submissions from the parties and the lower court record, I will now proceed to determine the appeal. The main issue emerging from the grounds of appeal and the submissions by the parties is whether the prosecution proved its case to the required standards or not.

The Unnatural Offence under section 154 (1) (a) of the Penal Code to be proved, two things must be established through evidence, that is, **one** penetration of the male organ and **two**, that penetration was against the order of nature. The burden to prove these two elements rested solely upon the prosecution (see **Jonas Nkize v R** (1992) TLR 213). Apart from leading evidence in proof that the victim was unlawfully carnally known against the order of nature the prosecution was duty bound to lead evidence and establish, beyond reasonable doubt, that

the accused is the one who committed the offence. This means that it must be proved that PW1 or the victim was carnally known against the order of nature, and that the person who abused him is nobody but the appellant.

In the present case the testimony of PW2 as submitted by the appellants Counsel is to the effect that the victim was penetrated by the appellant against the order of nature on the mid night of 23/09/2020. The testimony that he was penetrated was corroborated by the testimony of PW3 the Clinical Officer who filled exhibit No. P2. The Clinical Officer noted bruises around the anus but there was not discharge of any kind. PW1 in his evidence said that he was unaware of what happened to him on 23/09/2020 other than what he was told by his mother that he was sodomized. He was awaked by his mother who told him that he was being penetrated by the appellant. The mother started to check the victims' anus. To prove sodomy PW1 relied on the alleged previous acts of the appellant against him. In short, the evidence of the victim about what happened on 23/09/2020 is not concrete to prove unnatural offence. It is a settled law that in criminal cases involving sexual offences the most credible testimony is that of the victim. In the case of **Suleman Makumba vs R** (2006) TLR 379

the true evidence of rape comes from the victim. In the instant case the testimony of the victim is too weak, it would be unfair to ground conviction basing on such third-party evidence. The testimony of PW1 is to the effect that there were many people at their home on the very day because there was a wedding ceremony. It will be unsafe to rely to the testimony of PW2 that there was penetration without the direct testimony of the victim. Even the alleged oral confession involved the same witness PW2 who alleged that she witnessed penetration.

The existing expert opinion which suggests that there was penetration against the order of nature would be meaningful in corroborating the testimony of the victim. In the circumstance where the evidence of the victim is shaking it remains a doubt as to whether penetration occurred on 23rd September 2020 as alleged in the charge sheet or not. It is essential that, to prove unnatural offence there must be proof of penetration of the male organ and carnal knowledge. The submission by the learned State Attorney is very attractive but not very relevant on establishing existence of penetration on 23/09/2022 per charge sheet. Be it as it may, the doubts give a benefit to the appellant because penetration was not proved.

Having said and done, the court has been satisfied that the offence was not proved beyond all reasonable doubt the standard required in criminal justice. conviction is hereby quashed and sentence set aside, I order immediate release of the appellant unless lawful held with another lawful cause. Order accordingly.

Dated at Mbeya this 29th day of September 2022.

D. P. Ngunyale
Judge