IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO 11 OF 2022

(Originating from Criminal case No. 42/2021, District Court of Same)

MGONJA CHAMBIHA @ROCK.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

23/9/2022 & 12/10/2022

JUDGMENT

MWENEMPAZI, J.

In the District Court of Same, the appellant Mgonja Chambiha @Rock was charged with one count namely unnatural offence contrary to **Section 154(1)(a) and (2) of the Penal Code [Cap. 16 R.E.2019]**. He was convicted and sentenced to thirty (30) imprisonment. Aggrieved, the appellant appealed to this court having seven (7) grounds of appeal. The following were the grounds:

1. *That, the learned trial magistrate grossly erred both in law and fact in convicting the appellant despite the charge being not proved beyond reasonable doubts against the appellant and to the required standard by the law.*

2. *That, the learned trial magistrate grossly erred both in law and fact in convicting the appellant despite there being no evidence of the victim of the alleged offence which is the best evidence in cases of this nature.*

3. *That, the learned trial magistrate grossly erred both in law and fact by holding that the victim could have not testified because he was mentally impaired while PW2, PW3 and the appellant testified that the victim is mentally fit but speech impaired and could communicate through signs. Therefore, being there a need of an expert on people with speech impaired so as to assist the court on receiving the victim's evidence.*

4. *That, the learned trial magistrate grossly erred both in law and fact in relying upon exhibit P1 (the PF3) to convict the appellant despite the failure by the trial court to address the appellant under section 240(3) of the CPA Cap. 20 R.E.2019.*

5. *That, the learned trial magistrate grossly erred both in law and fact in relying upon the cautioned statement (Exhibit P2) in convicting the appellant despite the same being taken outside the time prescribed by the law under Section 50(1) (a) of the CPA Cap.20, as the appellant was taken under restraint on 26.10.2020 at 12.00 am*

and the Exhibit P2 allegedly given by the appellant was recorded on the above-mentioned date at 4:45 which is almost 16 hours since he was taken under restraint.

6. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that the appellant was not positively identified by the PW2 since the conditions and circumstances at the scene of the alleged crime were not conducive for proper and correct identification.*

7. *That the learned trial magistrate erred both in law and fact in convicting the appellant but failed to note that the prosecution tendered in evidence the victim's clothes which were said to have faeces so as to prove that indeed the victim was found in the alleged situation.*

In order to appreciate the appeal before this Court, let me give a brief account of what transpired leading to the appellant's conviction. It was the prosecution case that on 26th October, 2020, when PW2 was heading to his farm guarding it from being destructed by wild animals, on his way, he approached to the appellant's house. While there he heard human yells and grunts as if someone was being beaten. PW2 therefore decided to draw close to PW2's window where such voice was coming from. Since

the window was open, PW2 switched on the torch he had and to his dismay, he managed to see the appellant sodomizing his son PW2. According to PW2 the appellant had pressed the victim at the wall, placed his elbow on the victim's neck and both were naked while the appellant had inserted his penis into the victim's anus. It was PW2's further evidence that, after witnessing such a filthy act, he moved aside and called the hamlet chairman (PW3) who advised him to call the neighbors. That PW3 called the appellant's neighbors who shortly arrived at the crime scene and started a commotion at the appellant's house. It was the neighbors who opened the appellant's door and upon entering into the house, they found the victim naked smeared with faeces and mucus at his anus, while the appellant was semi dressed with hanging trouser. PW3 also appeared at the crime scene and he was the one who called the police, and thereafter arrested and took both the appellant and PW2 to the police station. At the police, PW2 was issued with the PF3 and taken to Ndungu Health Center for medical examination, and upon examination, it was revealed that PW2 had bruises in his anus in addition to the mucus observed. Dr. Tatizo was the one who examined PW2 but he didn't appear in court the reason being that he was on studies and therefore WP.11213 DC Neema tendered a PF3 in court admitted as Exhibit P1.

PW5-H.91 DC Hamidu further testified that while at the police, the appellant was released on 26.10.2020 around 4:45pm for interrogation where he confessed to have committed the offence he is being charged with. Collaborating his testimony, PW5 tendered the cautioned statement admitted in court and marked as Exhibit P2.

On his defence, the appellant who gave his testimony under oath, totally refuted to have committed the alleged offence and went on pointing the weaknesses on prosecution evidence. As per his defence, the appellant alleged that PW2 is his son. That he cannot speak but he is mentally normal and therefore can also testify before the court. Concerning the cautioned statement tendered before the court, it was the appellant's argument that the same was made under force as he was beaten and forced by the police officers to confess.

At the hearing, the appellant was not represented and opted to rely entirely upon his grounds of appeal and submission as filed in court. Ms. Mary Lucas the learned Senior State Attorney appeared for the respondent where she supported the conviction and sentence by the trial court.

Submitting to the grounds of appeal, the appellant argued them simultaneously while abandoning the 7th ground of appeal.

Starting with the 1st ground of appeal, it was the appellant's contention that the victim in the alleged offence did not testify on the mere reasons given by the trial magistrate that he is dumb and mentally impaired who cannot utter audible and comprehensive words. She further alleged that the victim cannot even reply to the sign language, as a result decided to disqualify him from testifying. The appellant further argued that, his conviction was solely based on the evidence adduced by other prosecution witnesses and not the victim who is the key witness in sexual offences. That, if at all the victim was mentally impaired, there could be a medical report or an expert to give an account on that. Otherwise, the appellant further suggested for the experts on speech impaired person, who could have assisted the court to reach the justifiable findings before disqualifying the victim from testifying.

It was the appellant's further submission that in sexual offences the main elements which must be proved in court includes penetration and identification of the perpetrator. That in the case at hand, the trial magistrate had to take all the steps expounded by the law when extracting the evidence from the victim assisted by an expert so as to prove all elements of the alleged offence. That failure by the prosecution side to

take down the evidence of the victim who is the key witness renders the prosecution case to crumble.

The appellant also submitted on the issue of PF3 admitted by the trial court. According to the appellant, the said PF3 was admitted in contravention of Section 240(3) of CPA as the same was tendered by the investigator who was neither the medical doctor examined the victim, nor the maker of the said PF3. That the trial Magistrate was supposed to address the accused on such procedure but didn't do. He therefore prayed for the PF3 to be expunged from records.

As per the cautioned statement admitted in court, it was the appellant's argument that the same was taken out of time contrary to Section 50(1) (a) of CPA which instructs the time within which a cautioned statement should be taken. That PW3 alleged that the appellant was arrested on 26.10.2020 at 12:00 am whereas the statement was recorded on the same date around 4:45pm which is almost 16hours. The appellant therefore prayed for the cautioned statement to be expunged from records.

Contrasting the appellant's submission, it was the respondent's submission that the case against the appellant was proved beyond reasonable doubts as the prosecution witnesses testified as to how the

accused person committed an offence. That the accused person was caught red handed by one of the prosecution witnesses who testified as PW2. That all witnesses proved the essential elements of an offence including penetration. Ms. Mary further argued that while PW2 testifying in court, the appellant didn't cross examined him the act which implies that he admitted what PW2 testified. Supporting her argument, the Learned Senior State Attorney cited the case of **Nyerere Nyague v. Republic, Criminal Appeal No. 67 of 2010, CAT** (Unreported).

Regarding the victim's evidence, Ms. Mary further argued that, as it was held in the case of **Selemani Makumba**, concerning the best evidence in sexual offence cases, the same is distinguishable in the apparent case. That in this case, the victim is not mentally fit as observed by the trial magistrate at p.5 of the typed proceedings. Therefore, the evidence of penetration will now come from the witnesses who saw the appellant committing an offence. Ms. Mary further submitted that, PW2 and PW3 described the appellant to be the one who sodomized the victim and it was PW2 who saw him having sexual intercourse with the victim. That PW3 also interrogated the victim who communicated to him by pointing his finger to the accused person. Finally, it was the Learned State Attorney's submission that since the appellant was caught red handed,

the evidence of PW2 and PW3 suffices to prove an offence against him. She therefore prayed for the appeal to be dismissed as it lacks merit.

In his rejoinder, the appellant reiterated his submission in chief.

After going through the proceedings, the judgment and the grounds of appeal filed, I do agree that this appeal has merits on some aspects as it will be explained herein the judgement. In making my findings I will merge the grounds of appeal raised into one major part of procedural matters, the central issue being whether the prosecution side have proved its case to the required standards of law.

Before reacting to the raised issue, I wish to restate the obvious that the burden of proof in criminal cases lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. See the case of **George Mwanyingili v. R, Criminal Appeal No. 335 of 2016, CAT Mbeya** (Unreported).

Starting with the irregularities pointed in this appeal, it was the appellant's submission that the case was not proved beyond reasonable doubts as the trial magistrate only relied on the evidence of the PW2, PW3 and therefore convicted the appellant without the victim's testimony. The appellant further averred that it was the trial Magistrate's observations that the victim was mentally impaired without any justifiable proof as no

expert was called to prove such findings. Moreover, the appellant also contended that the trial Magistrate's findings varied with the prosecution witnesses' testimonies who testified that the victim can communicate by signs. The appellant therefore concluded that there was a need for an expert of speech impaired persons to be called so as to assist the court in recording the victim's evidence, failure of which renders the charge not to be proved.

On the other hand, Ms. Mary who appeared for the Republic had the view that even with the absence of the victim's statement, the evidence of PW2 and PW3 suffices to warrant conviction against the appellant as he was caught committing an offence. Besides, the evidence of PW2 and PW3 was collaborated with the PF3 and the cautioned statement of the appellant, all admitted in court and marked as Exhibit P1 and P2 respectively.

As it has been rightly submitted by the parties, it is a well-known legal principle that the best evidence in sexual offences comes from the victim. This is per Section 127(7) of the Evidence Act, Cap. 6 R.E 2019. See also the case **Anselimo Kapeta v Republic, Criminal Case No 365 Of 2015 at Pg. 10 which cited the case of Selemani Makumba**

v Republic, Criminal Appeal No. 94 of 1999, where the court stated that best evidence of rape case should come from the victim.

Despite the acknowledgement that the evidence of a victim is of the utmost importance in sexual offences case, the law is also very clear on situations where the victim is incapable of testifying. In the case of **Haji Omary v. Republic, Criminal Appeal No. 307 of 2009, CAT (Unreported)** the court observed that;

> *"The law recognizes that there are instances where charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased. Senility, tender age, or disease of the mind may prevent a victim from testifying in court (See Section 127 of the Evidence Act).*

However, before concluding that a witness is unable to testify, the court has to first ascertain if he is competent or not.

In the instant case, the charge is silent as to the state of mind of the victim. It is therefore obvious that while taking the victim's evidence, the court had to caution itself as to the state of mind of the victim. Despite the trial court's observation that the victim was mentally impaired no other evidence supported this finding as PW2 and PW3 narrated that they communicated with the victim through sign language where he was able

to show them what the appellant did to him. Even if the victim was really mentally impaired, the position has been always that unsoundness of mind shall not by itself invalidate the competency of the witness to testify in court. This is in accordance with **Section 127(6) of the Evidence Act,** which states;

> *"A person of unsound mind shall unless he is prevented by his condition, from understanding the questions put to him and giving rational answers to them, be competent to testify".*

While we are aware that apart from the court's observation nothing else in the record reveals the mental status of the victim, it is my view that the trial court upon becoming aware that the victim was mentally retarded, it was duty bound of addressing the issue of mental status of the victim especially the competence and reliability of her evidence within the lines of **Section 127(6) of the Evidence Act,** in an endeavour to ensure the trial against the appellant is fair, failure to do so has led to an incurable irregularity.

Further, the appellant also pointed the procedural irregularity on how the PF3 was tendered in court. The appellant's concern was the violation of Section 240(3) of the CPA which requires the court to address

the accused person of his right to examine the doctor who attended the victim.

Passing through the trial court's proceedings, it is obvious that this procedure was ignored by the trial Magistrate, as the records reveals that after PW4's testimony, it was the Prosecutor's submission that the witness relied on Section 240 CPA to tender the PF3 as a custodian in place of the Doctor who is pursuing his studies. After such submission the trial court proceeded with the procedure of tendering the exhibit, which was later admitted and marked as "Exhibit P1". Since the trial Magistrate didn't address the appellant in accordance with **Section 240(3) CPA**, the PF3 admitted is thus expunged from the record of the proceedings.

As for the cautioned statement there was another irregularity that the same was taken out of time. The trial court's records shows that the statement was taken on 26/10/2020 around 4:45 PM. From PW2 and PW3's evidence, it has been alleged that the incidence took place around 12 AM. The evidence further reveals that the accused was immediately arrested after the incidence and taken to the police station. No reasons were advanced as to why the accused's statement was recorded that late. As precisely submitted by the appellant, it is also my view that the recording contravened the dictates of **Section 50 (1) (a) of the CPA,**

Cap 20 R.E. 2019. The provision allows the police to interrogate a suspect within four (4) hours of his arrest. Despite the time indicated on the cautioned statement showing when PW5 started recording the appellant, there was no further evidence showing when the appellant was brought to the Police station. **See: Abdallah Ramadhani v DPP, Criminal Appeal No. 219 of 2009, p.4 CAT (unreported).**

With the above-mentioned observation, the appellant's cautioned statement is also expunged from records.

Having done with the procedural irregularities, the question to ask ourselves is whether the remained evidence suffices to warrant the appellant's conviction.

The records clearly show that, apart from the victim of this case, there were other witnesses who testified as eye witnesses. Since their evidence is direct, and considering the fact that the appellant was caught *in flagrante delicto*, it is obvious their evidence to prove an offence was sufficient.

In the cited case of *Haji Omary vs. The Republic, Criminal Appeal No. 307 of 2009, Court of Appeal of Tanzania at Arusha* it was observed there are instances where a case may be proved without there being testimony of the victim. This is also common in cases such as murder

cases. In the instant case we have a person who was able to witness the act in progress and sought assistance of the people who verified after they had managed to open the door by force to rescue the victim. This is direct evidence whereby the appellant was found in the act. Pw2 testified as follows:

> *"...as I was passing by the accused house which I pass as the route to the farm, I heard yelling sounds as grunts by a person as if one is being beaten. I was surprised as to what was happening and decided to go to the window on the house where the voice came from, and the window was open and outside there was moonlight but I had a torch then I lit it and directed it towards the room whereby I saw the accused sodomising(sic) Kiondo Mgonja his son. The accused pressed the victim against the wall and had pressed his elbows on the victim(sic) neck and had undressed the victim and himself inserting his penis in the victim (sic) anus..."*

The witness, PW2 testified further that he sought assistance to rescue the victim from the acts of the accused. He sought the assistance of the local leadership who advised to wake up the neighbors, who convened at the scene and he accounts as follows:

"The people came and managed to open the door and entered the house where by we found the victim naked and had faeces and mucus at his anus. When then clothed the victim."

PW3 Hamis Ally Boha is a Chairman of Minazini hamlet from 1995. He testified, I will quote the relevant part, as follows:

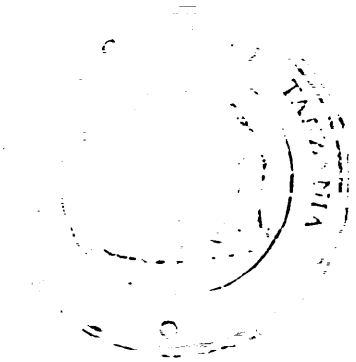
"I arrived at accused house and found many people and the accused as well as the victim were surrounded by the villagers... I inquired from the accused if he has committed the said offence he denied and the victim through signs he elaborated that his father carnally knew him against order of nature."

PW2 also testified that when the police came advised them that the victim should not be bathed and should be taken to the police station for PF3 so that he is taken to hospital.

The question lingering in my mind is given the faults shown herein above and the evidence available after sieving out the faulted pieces of evidence, whether there is evidence proving the charges against the accused person beyond reasonable doubt. In my view, the answer is in the positive. The accused was seen *in flagrante delicto* sodomizing the victim by PW2 through the window which was open; and when people forced the doors of the house to be opened, they found both the accused still naked and

the victim had faeces and mucus on his anal opening. The police who went to the scene advised on how to preserve the evidence. Therefore, there was penetration and the person who perpetrated the sodomy is the accused person, as he was seen by PW2. I therefore agree to the submission by the learned state Attorney that the offence was proved beyond reasonable doubt.

Under the circumstances the appeal has no merit as far as conviction and sentence for the commission of the unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap. 16 R.E. 2019. The appeal is therefore dismissed. It is so ordered.



T.M. MWENEMPAZI

JUDGE

12/10/2022