IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO 114 OF 2022

BETWEEN

ATHUMANI BAKARI MBAGA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of Criminal Case No 135 of 2021 of the District Court of Bagamoyo at Bagamoyo, MMANYA, RM)

JUDGMENT

Date of Last order 04/10/2022
Date of Judgment 19/10/2022

A. Z. BADE, J

This appeal originates from the District Court of Bagamoyo sitting in Bagamoyo where the appellant, one Athumani Bakari Mbaga was arraigned charged with unnatural offence c/s 154(1) (a) of the Penal Code Cap 16 RE 2019.

Briefly, the facts giving rise to such arraignment can be discerned from the records of proceedings that on diverse dates from July 2020 to April 2021 within the district of Bagamoyo, and Coast region, the appellant did have carnal knowledge against the order of nature of a boy aged 15 years old

contrary to the law. The appellant denied these charges and a plea of not guilty was entered. This led the prosecution to call five witnesses to prove its case, amongst which are the mother of the victim, the victim of the offence, the hamlet leader ('Balozi'), a militiaman from SUMA JKT and a doctor.

At the end of the prosecution case, the trial court found the appellant with a case to answer and was called forth to enter his defense, where he mounted a defense of alibi with 3 witnesses including himself. At the conclusion of the trial, the appellant was convicted of the offence he was charged with; and was consequently committed to a sentence of life imprisonment.

Dissatisfied with the decision of the trial Court, the Appellant is now engaging this Court challenging his conviction and sentencing. The appellant thus filed four grounds of appeal which are:

1. That the trial magistrate erred in law and fact to convict and sentence the appellant without the prosecution to prove their case beyond reasonable doubt
2. That the trial magistrate erred in law and fact to convict and sentence the appellant basing on hearsay evidence which is hopeless and has no legal basis.
3. That the trial magistrate erred in law and fact to convict and sentence the appellant on contradictory evidences adduced by the prosecution

4. That the trial magistrate erred in law and fact to convict and sentence the appellant without providing reason for the decision which is contrary to the law.

The appellant has the services of Mr. Yusuf Mkanyali and Ms. Evaresta Kisanga; learned advocates, while respondent republic was represented by Mr. Clemence Kato, learned Senior State Attorney. On hearing of the appeal, the appellants sought leave of the Court to abandon one of the grounds of appeal and only argued three grounds of appeal.

Arguing the first ground of appeal, the appellant charged that in his testimony, PW2 stated that 27/01/2021 is the first time he was sodomized by the appellant while being threatened to be killed and that he was injured. He claimed further that he showed these injuries to the police officer, the police officer who is unnamed pp 10-12 of the proceedings of the trial court it was, but this unnamed police officer did not testify neither a PF3 showed on any injuries on his buttocks.

The appellant cited the case of **Majaliwa Ihemo vs Republic, Criminal Appeal No 197 of 2020** where it was held by the Court of Appeal that

"If a person alleges that he was injured he has to prove. And the person who could testify on it, he has to prove so."

The appellant explained further that while 27th January, 2021, was the first time he was sodomized, within diverse dates of February, and March and upto 24/04/2021, which are all different occasions that he testified that he was sodomized and one wonders was he being threatened to be killed all

this time? and he could still saw the appellant on all these different occasions since that first time he started and got threatened to be killed.

The appellant also highlighted on the issue of the PF3 as tendered by PW4, which stated that the victim's anus was not intact, and there was not any discharge. The issue is what caused the anus to be loose. The doctor PW4 testified that the victim child himself was the one who told her that he was sodomized; and not that he found it so. The report did not say why/ or how this was due to the appellant penetrating the victim.

They submitted that on p 16 of Ihemo's case there has to be good and cogent reasons to be shown in order to disbelieve a witness according to this Court in **Aloyce Maridadi v. Republic, Criminal Appeal No. 208 of 2016** (unreported), includes where such evidence appears to the judge or magistrate that it is improbable, implausible or where it is materially contradictory. As per the holding in Maridadi's case supra, the medical report did not prove any of the material facts proposed.

The appellant further charged that looking at PW2 testimony, who stated that on 24/04/2021 he was being sodomized by the appellant, and that he did these acts at his 'gengeni' (which is supposedly a public area). This statement is also implausible. At P 10 of the proceedings, PW2 is recorded to have said that he came home at 10pm at which point he was sent by his mother to buy a broom, and that the military officers had beaten him up, which mean to say the confession would not have happened but for the duress.

The appellant also questioned that while the offence happened on 24th of April, 2021, the appellant was arrested on 29th April, 2021 as per PW3 testimony. There is no any indication of force to apprehend the accused appellant, so why were there delays upto to 29th April 2021.

Further the appellant chimes that other than identifying the appellant's place (his house) the was no other identification of the appellant himself. Furthermore, while PW2 (the victim) stated that there was phone call exchange between him and the appellant and or his mother, the records of these phone communication were not brought in evidence.

Arguing the second ground of appeal, the appellant expound that the testimony is hearsay because PW2 is the one who explained the offence by virtue of being a victim of sexual offence to all the other witnesses.

Meanwhile, PW3 who is a hamlet leader only narrated the story as received, while PW4 – **Juma Jaffari** who is a SUMA JKT militia also related the story as heard from PW2. PW5 also had her report based on narrations by PW2- p 20 of the proceedings. As a matter of fact she was not proving that any offence was done him, but rather writing what was related to her by PW2. They cited the case of **Jonas Mkize vs Republic, 1992 TLR 213** which held that the prosecution has to prove its case without any reasonable doubt.

Further the appellant refer to section 154(1)(a) of the Penal Code Cap 16 RE 2019 that to prove this offence the ingredients are (1) penetration of the male organ and (2) the victim was penetrated against order of nature. Thus, it must have been proved that PW3 was carnally known against the order of

nature and that the person who committed the offence is none other than the appellant. Both elements were not proved.

The appellant made reference to the interpretation of section 127(6) of the Tanzania Evidence Act Cap 6 RE 2019 as labored by the Court of Appeal in the Ihemo Majaliwa's case supra, that where it stated

"... although the best evidence in criminal cases arising from sexual violence, is that of the victim of the abuse as per **Selemani Makumba vs Republic case** (supra), the above law requires that such evidence of the single eye witness, in this case the victim, must be credible. If the evidence is not credible it can not be relied upon to ground a conviction, even when the crime is sexual. That is in our view, a proper interpretation of the above provision".

Further as per the **Selemani Makumba vs R [2006] tlr 379,** it was urged that the court should also look at credibility, reliability and other relevance circumstances and not just the provisions of section 127(6) of the Tanzania Evidence Act.

On another note, the appellant question if the threat was apparent throughout the several times that the victim was being abused; and thus questions the credibility of this witness. At p 10 of the proceedings, PW2 is recorded to have called his mother using the appellant's phone – but no proof was tendered in that regard. Meanwhile, PW1 who is the victim's mother saw his son with the appellant, and this casts a doubt if the accused appellant really threatened to kill the victim of the abuse. Further on p 10

of the proceedings, contradictory statements are recorded of the testimony of PW1 and PW2 on the exact date that the victim had been abused.

The appellant expound that the contradicting statements are also forming part of the last ground of appeal, and thus let it be so taken by the Court.

On the other hand, the respondent took up to respond on the issues as implored by the appellant, but before that the learned state attorney on behalf of the republic brought to the attention of this Court an important issue on a point of law; that was not picked by the appellant side. He points to p 21 of the trial court's proceedings on the medical expert testimony, where the record show that PF3 was tendered by PP which is against the regulations and law and law on how evidence should be tendered in court that his contention is that the same should have been tendered by the person who had been sworn to give evidence.

He made reference to section 178 of Criminal Procedure Act cap 20 RE 2019. He reasoned obviously, the Public Prosecutor was not a witness; he was not supposed to give in evidence the said document (PF3). He made reference to the Court of Appeal decision in **Tizo Makazi** vs **Republic Criminal Appeal 532 of 2017** (unreported)where the Court held that "a prosecutor could not assume the role of the prosecutor and a witness at the same time. With respect, that was wrong....."

In that case, the PF3 form fails the admissibility test, and this Court can expunge it off the record. He also explained that if the same is expunged off the record, the oral testimony of the witness should stay and be accorded weight and credence for what it is worth, as he reasoned the evidence put

forth orally by that witness would deserve credence because the witness testified under oath.

Back to the grounds of appeal, the learned state attorney expound in response to the first ground of appeal thus; it is the legal position in sexual offences as per the case of **Selemani Makumba vs R** (supra) where it was held that the victim's evidence is the best evidence. He urges that PW2 narrated the incident well and in detail – p 10 of the proceedings – that they met at **Gengeni Bongwa** (which is an address) that the two were friends, that they had a relationship, and so there was no point of reporting the threat to be killed.

The learned state attorney countered further that PW2 is a credible witness, from the way he introduced the appellant to the way he went on to narrate what the Appellant did to him. He also explained the number of times that they were doing these abominable acts, there is consistency and coherency of his testimony he urges, and thus the witness should be accorded weight and credence, making reference to the case of **Goodluck Kyando vs Republic, Criminal Appeal no 363 of 2006** which states that witness credibility is tested by his coherence and consistency. He urges that the witness in this case does meet these qualities, which means to say he is enough to prove the case beyond reasonable doubt.

In response to the 2nd and 3rd grounds of appeal, which he argued together, the learned state attorney expound that there were no contradictions in the evidence recorded neither was it all hearsay evidence.

He reasoned that since the key witness; the victim of the offence, has been credible in his testimony, and that the law is clear on how to treat this testimony which is the best evidence being that of the victim.

On issue of penetration, he argues that even if there is no evidence by the medical expert to prove penetration, he urges the court to look at the victim's evidence and find it to be enough proof of the commission of the offence. In **Wambura Kiginga vs Republic, Criminal Appeal 301 of 2018** the Court of Appeal of Tanzania made an observation that where the victim and the perpetrator had a relationship. Why would the victim report the appellant and not any other person he asks? The similarity between the two cases is that the appellant and the victim of the offence had a relationship even though this victim here had to confess under duress.

The learned state attorney urges this Court to dismiss the appeal, uphold the district court conviction and sentencing and let the appellant serve his sentence.

In rejoinder, the appellant was brief; while they supported the representation by the learned state attorney regarding the fate of irregularly admitted PF3, which was not only irregularly tendered as an exhibit but also not read over in court after it was received in evidence, they added.

The appellant insisted that PW2 was not exactly consistent. The area as explained in p 26 of the proceedings of the trial court in appellant's testimony where the genge was explained to be the business of the appellant which is at Bong'wa rather than an address as represented by the learned state attorney. The appellant is adamant that the prosecution did not prove its

case and there was neither coherence nor consistency in the testimony. Meanwhile, the appellant insisted that the issue of friendship was not proved, neither was it proved that they know each other. The appellant implored this court to quash the district court conviction, set aside the sentencing and set the appellant free.

Having looked at the submissions of both parties, together with the evidence and record of the proceedings, I am now in the position to analyze the arguments put forth against the record of the proceedings and judgment of the trial court, and determine the appeal before me.

To start with, I think the issue that need to be determined is whether the testimony of the victim of the offence being the PW2 credible enough to be able to base the conviction on. This to me is crucial because I am alive to the fact that the evidence of the victim of the sexual offence is the best evidence. So is what is offered by the victim of the offence the best evidence? and is it able to sustain the conviction? This is so because on the three grounds of appeal, the appellant's complaint is about the prosecution basing their case on contradictory, hearsay evidence which could not prove their case to the required standard.

As correctly argued by the appellant's counsel, two things ought to have been proved, namely: that the victim was carnally known against the order of nature; and secondly, that the appellant herein is the one who committed the offence. The burden to prove these two elements rested solely upon the prosecution This is the position in **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 appellant is the one who committed the offence. In my considered opinion, none of these duties were fulfilled satisfactorily by the prosecution.

I am well aware of the legal position that obtains through section 127(6) of Tanzania Evidence Act that the learned state attorney put forth, but I am inclined to the argument and propounded legal position by the counsel for the appellant who made reference to the interpretation of section 127(6) of the Tanzania Evidence Act Cap 6 RE 2019 as labored by the Court of Appeal in the Ihemo Majaliwa's case supra, where the Court took a stance that

"... although the best evidence in criminal cases arising from sexual violence, is that of the victim of the abuse as per **Selemani Makumba vs Republic case** (supra), the above law requires that such evidence of the single eye witness, in this case the victim, must be credible. If the evidence is not credible it cannot be relied upon to ground a conviction, even when the crime is sexual. That is in our view, a proper interpretation of the above provision".

Further as per the **Selemani Makumba vs Republic,** (supra) it was urged that the court should also look at credibility, reliability and other relevance circumstances and not just the provisions of section 127(6) of the Tanzania Evidence Act.

Also it is tritely held that witnesses are entitled to credence, unless there is good cogent reason not to believe a witness. Good and cogent reasons to be shown in order to disbelieve a witness according to this Court in **Aloyce**

Maridadi vs Republic, Criminal Appeal No. 208 of 2016 (unreported), includes where such evidence appears to the judge or magistrate to be improbable, implausible or where it is materially contradictory.

It is my considered view that in looking at the reliability and credibility of the victim of the offence evidence in the instant case, the said story was obtained from the victim the first time through duress, having endured beatings by militiamen on his mother's instructions, designed to induce good behavior (sic). There is nothing in the record of the extent of any of these beatings, nor is it recorded anywhere in the proceedings, at which point PW2 gave in and decided to talk about the acts of sodomy that he sustained. There is no inquiry to establish whether these acts of sodomy are the cause or result of the good or bad behavior that the mother had complained of earlier, and his deciding to tell on the acts for which he was previously threatened to be killed if he tells. Again, when PW2 related that he was injured by the appellant with a "chanuo" on his buttocks (which is a sharp wooden, plastic or steel pointed object that is used to comb the hair), which were reported to an unnamed police officer, no one seemed interested to inquire further on the nature of these injuries, and the trial court made no inference negative or otherwise of this testimony.

Then again, PW2 does not explain in detail how he was being sodomized, was he forcefully taken or would go willingly, and the circumstance of all the occasions that these acts were done to him, were they happening on the same place etc. neither was there any identification of the appellant. Further, PW2 stated on being reexamined, that the family of the accused person were away in Mwanza when these acts were happening to him (p. 11 of the

proceedings) The question is were they away in Mwanza the whole time from 27/01/2021 or were they away during the last episode before he got the beatings and confessed. All these questions do not add up in evidence.

Turning to PW1 testimony, it is recorded on p 7 and 8 of the proceedings that the she testified while contradicting herself on his knowledge of the accused, thus, she acknowledged to know the accused, then she said she did not know the accused, then she reverted and said he was their neighbour, then she said she knows the accused to be his son's friend, and back to not knowing the accused at all. Again, she is recorded to have been told by PW2 that the appellant was not around for the past three days before his arrest, that he was at Bunju. This was from what she was told by PW2 as well as her own communication with the appellant through a phone call she made to the appellant. The fact that they found out the accused had been away in Bunju is a point that I shall come back to.

And now I would like to evaluate PW5 evidence which was spared from being expunged from the records of the proceedings. That is to say, while this court would always otherwise accord weight and credence to the medical expert evidence, I find his testimony to be a retell of what has been said by the victim of the offence PW2 or his mother PW1. Other than being recorded as saying at p 20 "....in my examination I found that truly he was unnaturally abused" everything else is a retell of either what the mother said or what the victim said. There are no observations made and recorded by the good doctor in terms of the state and or condition of the victim's parts that he examined including his anus if that is what he examined, or whether there was found any fluids or bruises or anything else so to speak; let alone the

fact that there is any link that it is the appellant who must have abused the victim; which is the least of what is expected to be observed and testified by the doctor as a medical expert.

It is my considered opinion that the role of the expert opinion on sexual offences such as this one is to prove the ingredients of the offence in terms of section 154(1)(a) of the Penal Code Cap 16 RE 2019. To prove this offence the ingredients are (1) that there was penetration of the male organ; and (2) the victim was penetrated against the order of nature. Thus, it must have been proved that PW2 was carnally known against the order of nature, and that the person who committed the offence is none other than the appellant. Both elements were not proved.

PW5's testimony offered no proof to the allegation that the appellant sodomised the victim, or any link that prove that the appellant committed the offence he stood charged before the trial court. In that case I see no probative value on the testimony of this witness whatsoever, and thus it is my finding that the same should not be accorded any weight at all.

The court ought to have drawn an adverse inference but it failed to draw the inference while it is incomprehensible how the victim is linked with the appellant in the charged offence, because there are multiple chances that the appellant is not the assailant of the victim of sexual abuse particularly so as the confession of the victim was a result of duress.

All of these testimony do have material contradiction, do not corroborate each other, or appear to be implausible and or obtained under duress; all of

which makes the prosecution case not proved beyond reasonable doubt against the appellant.

On the other hand, I am also aware that a person charged of an offence has a reasonable obligation, and he is by common sense under the circumstances, to clarify his position on a charge levelled against him for the prosecution to be able to understand the theme of the accused's defense. This was observed by the Court of Appeal of Tanzania in the case of **John Madata v. Republic, Criminal Appeal No. 453 of 2017** (unreported) "It is common knowledge that although the accused has no duty to prove his innocence, he is expected to make the theme of his defense known so as to make the trial fair even to the prosecution, and we think this theme may be deduced from the line of cross examinations or notices such as when the said accused intends to raise a defense of alibi." See also Mohamed Katindi v. R, [1986] T.L.R. 134, Hatibu Ghandhi and 8 Others v. R, [1996] T.L.R. 12 and Diamon Malekela Maunganya v. R, Criminal Appeal No. 205 of 2005 (unreported).

In this regard, from the proceedings of the trial court, PW2 and PW1 are recorded as saying they knew of the accused being away in Bunju for the three days prior to his being arrested. So PW2 was sodomized on 24/04/2021, was beaten up and forced to confess on 25th/04/2021 and was likely arrested on 26/04/2021.

This, in my considered view, correlates with what the accused said on his unnotified defense of alibi. The PW1 and PW2 pieces of evidence complements the appellants defense that he tried to mount. I think the trial court did not adequately address or overlooked these pieces of evidence as

they cast a shadow of doubt befitting inquiry as was held by the Court of Appeal in the Ihemo Majaliwa's case (supra). Even though the defense was mounted unprocedurally, the trial court ought to have drawn some inferences on the probability that the accused person was away. As the principle in our criminal jurisprudence have it that "the burden is on the prosecution to prove its case, no duty is cast on the accused to prove his innocence. **Joseph John Makune vs Republic [1986] TLR 44.**

Further in **Selemani Yahya @Zinga vs Republic, Criminal Appeal No 533 of 2019 (**unreported**)** it was observed that:

> "The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including that of the accused"

In the final analysis, I find the testimony not to be credible enough to ground a conviction particularly in the absence of further corroborative evidence against the circumstances of this case. It can not be said that the evidence of the victim of the offence is enough on its own on the instant case to make a fair reliance on section 127(6) of Tanzania Evidence Act Cap 6 RE 2019.

Consequently, I allow the appeal, quash the conviction of the appellant and set aside the sentence of life imprisonment.

I further order immediate release from prison of **Athumani Bakari Mbaga** unless he is held there for any other lawful cause.

It is so ordered.

DATED at DAR ES SALAAM, this 19th day of October, 2022.

A. Z Bade
JUDGE
19/10/2022

COURT: Judgment is delivered by Hon. Nyembele, DR in the presence of Appellant in person and his advocates Mr. Yusuf Mkanyali and Ms. Evaresta Kisanga, and Mr. Clemence Kato learned state attorney for the Respondent this 19th day of October 2022.

Right of appeal is explained.

Signed