

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 298 OF 2019

ALLY HASSAN MAKEFU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Morogoro at Morogoro]

(Hon. A.H. Waziri RM)

dated the 31th day of October, 2019

in

Criminal Case No. 25 of 2019

JUDGMENT

5th May, 2021 & 2nd May, 2022.

S.M KULITA, J.:

Ally Hassan Makafu, referred to as the Appellant in this appeal, was charged in the District Court of Mvomero for Unnatural Offence, contrary to the provisions of section 154 (1) (a) of the Penal Code [Cap 16 RE 2002]. It is in the particulars of offence that, on the 14th of December, 2018 at Mkindo area within the District of Mvomero, the Appellant had

carnal knowledge of "SH", (PW1) a boy of fifteen (15) years old against the order of nature.

The case of the prosecution as unfolded by the evidence of the victim (PW1) is that, on the fateful day, that is 14th December, 2018 the victim together with the Appellant were on the way to a place where Militia training were taking place. Unfortunately, the rain started. They decided to stop at the neighboring houses to let the rain stop. As the time was passing, they decided to return back home. PW1 went ahead stating that, when they reached at the cemetery area, suddenly the Appellant called him, slapped him three times and took him into one of the cemetery. Thereat, the Appellant sodomized him.

PW1 went on narrating that, after he was released by the Appellant, he started running while naked until he met with one, Mussa Mgesi who wanted him to dress his clothes, of which he did. On the next day while the victim was at home, PW4, the victim's grandmother noticed him walking improperly and decided to report the matter to her husband (PW2). PW2 interrogated the victim on the cause of his improperly walking and the victim disclosed what had happened to him. Following that information, the Appellant was arrested and the victim was issued with a

PF3 (Medical Examination Form). The Doctor (PW3) who filled the PF3 testified to have found bruises in the victim's anus.

The Appellant denied to have committed the offence, contending that on the material date, he was collecting bricks from somewhere Mgolole to the premises of Mussa Mgosi, after which he went back to his home. To the conclusion of the trial, the Appellant was accordingly found guilty, and upon conviction on the 31th of October, 2019 he was sentenced to life imprisonment.

Aggrieved with that decision, the Appellant preferred the instant appeal relying on six grounds which may be summarized into two grounds only, that is: **One**, the prosecution case was not proved at the required standard. **Two**, the Appellant was denied with the right to call his witnesses during trial.

Again, the appellant added other 10 grounds of appeal to supplement the former grounds of appeal. The same can be summarized as; **three**, the trial court relied on contradictory evidence of the prosecution, **four**, the victim failed to report the incident at the earliest possible opportunity, **five**, that there is adverse inference following non summoning of a material witness one Mussa Mgosi, **six**, the defense

evidence was disregarded, **seven**, PF3 was received and admitted in court un-procedurely, **eight**, the victim's age was not proved.

The Appeal was heard orally. While the Appellant appeared in person the Respondent (Republic) had the service of Ms. Monica Ndakidemu, learned State Attorney who resisted the appeal.

Submitting in support of the appeal, the Appellant decided only to adopt his grounds of appeal as his submission.

Ms. Monica Ndakidemu, State Attorney submitted in reply to the grounds of appeal that, page 20 of the proceedings proves that the Appellant was given a chance to call witnesses of his choice but he himself refrained to do so.

On the issue of contradictory evidence, Ms. Monica Ndakidemu stated that there is none. She stated further that, it was after PW4 had seen the victim walking improperly, when the said victim was suspected to have been sodomized.

She further stated that, the case was proved at the required standard. She denied conviction to have based on hearsay evidence. She also insisted that, during the arrest, when the victim appeared at the Appellant's presence, the Appellant without knowing that the victim had

been accompanied with other people, he acted like knowing what had happened between them before. The Counsel referred this court to page 6 of the typed proceedings of the District Court to prove his assertion.

Ms. Monica Ndakidemu added that, at the scene of crime there was no any other person to witness commission of the crime, but she insisted that, in sexual offences cases the evidence of a victim suffices to convict the accused person. To this, she referred the case of **Tumaini Mtayomba V. Republic, Criminal Appeal No. 217 of 2012 CAT, Mwanza**. She went further stating that, apart from the evidence of the victim herself, the evidence of the victim's relatives and that of the Doctor are enough to find the Appellant guilty of the offence.

Concerning the age of the victim, the State Attorney submitted that the same was proved to be 16 years old. He made reference to the testimony of PW4 who had testified to that extent.

While the Defense Counsel, Ms. Monica admitted that the PF3 was not read out after its admission, she was quick to urge this court that even if the PF3 is going to be expunged, the Doctor's testimony still remains intact that the victim's anus was found with bruises following the sodomy act.

Again, Ms. Monica agreed that the defense case was not considered during the judgment analysis, but she added that, the said ground has no merits at all as the testimonies of the prosecution witnesses has proved the case beyond all reasonable doubts. He prayed for the appeal to be dismissed.

In rejoinder the Appellant stated that, this case is just fabricated against him. He added that, he was arrested on the third day after the alleged incident.

This was the end of both parties' submissions.

I have taken into consideration both parties' submissions, the referred authorities, available records and the rival issues as well. I am prepared to determine the grounds of appeal one after the other by picking them randomly.

It is undisputed fact that the evidence available provides that, the matter was not witnessed by any third person during its commission. Also, it is not in dispute that, the offence came to be reported on the second date after the commission of it. However, we have the principle of law that, the ability of PW1 naming and reporting the accused person's act at the earliest possible opportunity is an assurance of his reliability. See,

Swalehe Kalonga & Another v. Republic, Criminal Appeal No. 45 of 2001, CAT, where it was observed;

"... the ability of a witness to name a suspect at the earliest possible opportunity is an important assurance of his reliability. "

See also, **Jaribu Abdallah v. Republic [2003] TLR 271** and **Marwa Wangiti Mwita & Another v. Republic [2002] TLR 39**; In **Marwa Wangiti Mwita** (supra), this Court observed thus:

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

This duty of early reporting by PW1 was breached. As the prosecution evidence was to the effect that, during the commission of the offence the victim was of 15 years of age, I am in wonder as to why the victim of such age failed to report and name the Appellant as soon as he got an opportunity. Be it noted that the Appellant has put it an issue and it is the fact that his arrest had taken long after the commission of the

offence. At this juncture alone, I find the evidence of the victim (PW1) is still wanting.

Further, the record shows that, after the victim was released, he ran away naked up to when he met with one Mussa Mgesi who ordered him to wear his clothes.

I am alive with the position of the law that in the sexual offences cases like this one, the evidence of the victim suffices to convict the accused person as per **Tumaini Mtayomba** (supra). Also, I am alive with the position of the law that, it is the prosecution who have the discretion to choose and call witnesses, and that it has no obligation to call each and every witness. See **Yohana Msigwa V. R, [1990] TLR 148 (CA)** and section 143 of the Evidence Act. But it is also the requirement of the law that, adverse inference may be made where the persons omitted to be called as witnesses are within the reach, but have not been called without sufficient reason being shown by the prosecution. See, **Aziz Abdallah V. R [1991] TLR 71.**

The records, through the testimony of PW3, the Doctor who examined and filled the PF3 shows that, while examining the victim he found bruises around his anus, but he failed to know the cause of the said bruises. With the availability of that testimony, as the evidence of PW1 is

wanting for failure to name and report the incident at the earliest possible opportunity, I find it that, Mussa Mgesi was a material witness for the prosecution case at the lower court. It was a must to be called so as to corroborate what PW1 has testified. He is the only person who could tell the court whether on the material date and time he met with the victim running while naked. He is the one who could tell the court as to whether the victim on the material date and time was running away from the direction where the cemetery place is located. He is also the one who could tell the court whether he was the one who ordered the victim to put on his clothes.

These sufficient pieces of information lack in this case, and there are no reasons for the prosecution side not to call the said Mussa Mgesi as their witness. In my view, Mussa Mgesi could be an important link on the evidence relating to the occurrence of the offence and commission of the offence by the Appellant.

Failure to call Musa Mgesi who PW1 alleged to have seen him running from the cemetery place while naked on the material date and time, is a very serious omission in the case of the prosecution. It leaves a lot of important questions unanswered. These unanswered questions create serious doubts which must be resolved in favor of the Appellant.

In the event, I find that the conviction of the Appellant was unsafe. This ground is sufficient to dispose of the appeal. Hence, I allow it. The conviction is hereby quashed and the sentence set aside. Unless, he is held for some other lawful cause, I hereby order the immediate release of the Appellant from prison.



S.M. KULITA
JUDGE
02/05/2022

DATED at DAR ES SALAAM this 2nd day of May, 2022.



S. M. KULITA
JUDGE
02/05/2022

