

**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**DC CRIMINAL APPEAL NO. 76 OF 2020**

*(Originating from Nkasi District Court Criminal Case No. 70 of 2017)*

**TITHO S/O SOLWE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

*Date of Last Order: 04/11/2022*

*Date of Judgment: 08/12/2022*

**NDUNGURU, J**

This appeal arises from the decision of the Nkasi District Court at Namanyere. The appellant Titho s/o Solwe was charged and convicted of the offence of unnatural offence contrary to section 154 (1)(a) and (2) of the Penal Code, Cap 16 RE 2019. He was sentenced to life imprisonment.

Dissatisfied, the appellant is now preferring this appeal to this Court, challenging the decision of the District Court in a petition comprised of eight (8) grounds.

Briefly the fact of the case is to as follows: That on 19<sup>th</sup> day of June, 2017 at around 16:00hrs at Mashete village within Nkasi District in Rukwa Region the accused person did have carnal knowledge to one XM aged 10 years old against the order of nature. The name is felicitous to hide his identity

When the appeal was called on for hearing, the appellant appeared in person, unrepresented; whereas the respondent/Republic had the service of Mr. Kabengula – learned state attorney.

The appellant adopted the petition of appeal as submitted to this court and he had nothing to add. The learned state attorney opposed the appeal and he argued that the case against the appellant was proved beyond doubt.

As pointed out above, the appellant raised eight (8) grounds of petition of appeal of which may be reproduced as herein under: -

***1. That, the Hon. Trial Magistrate grossly erred in law and facts for failure to hold that the prosecution case was not proved beyond reasonable doubt against the appellant.***

***2. That, the trial court grossly erred in law and fact for convicting the appellant basing on the prosecution***

- evidence which are fully tainted with contradiction, confusion, doubt and ill will.***
- 3. That, the whole trial court proceedings and decisions are fully tainted with the whole proceedings and judgements of the trial court.***
  - 4. That the trial magistrate grossly erred in law and fact for convicting the appellant basing on the exhibits which was admitted contrary to the law thus having poor evidential value.***
  - 5. That the trial magistrate grossly erred in law and facts for convicting the appellant basing on the prosecution evidence only.***
  - 6. That trial magistrate grossly erred in law and facts for convicting the appellant basing on the extraneous matters.***
  - 7. That the whole trial court proceedings and judgement are fully of double standard.***

As pointed above when the case was called for hearing the appellant was unrepresented and he fully adopted the petition of appeal and he had nothing to add when he was called upon to make submission.

As regards ground two of appeal, Mr. Kabengula – State Attorney objected the appeal as the case against the appellant was proved beyond

doubt and he further submitted that PW1 testified clearly on the way the offence was committed at the bush where he was grazing. PW1 told the court the way he rushed to his grandfather to report on the event/offence naming the appellant to be the culprit. The chain of event does not have any contradiction. PW2 told the court the way he examined the victim and the findings that there were bruises in the anus of the victim.

As regards the third ground, it was his submission that there was no any illegality or irregularity in the proceedings except at page 14-15 where PW4 was not cross examined. It was his submission that even if the evidence of PW4 is expunged still there is sufficient evidence to sustain. He thought it was a typing error.

As regard the fourth ground he conceded with the appellant. He argued that it is true that when exhibit P1 was tendered by PW2 the same was not read to the appellant, he prayed for the exhibit P1 be expunged, however he submitted that the evidence of PW2 remain intact.

As regard the fifth ground he submitted that the appellant was given an opportunity to defend but he said he left it with the court this is evidence on page 17 of the typed proceedings. The appellant was informed his right to defend but waived his right.

As to the sixth ground, he submitted that the ground is devoid of merit. The record is clear that conviction and sentence were based on the facts, evidence and law only and nothing else.

As to the seventh ground he submitted that all procedures were adhered to there was no double standard. On the eighth ground he submitted that the appellant was given right to defend and was given opportunity to mitigate. But the appellant had no mitigating factor to tell the court. the court could not force to defend and mitigate.

Lastly, he submitted that the case against the appellant was proved beyond reasonable doubt PW1 told the court the way he was sodomised and reported immediately to his grandfather and PW2 who examined the

I have keenly followed the arguments of the appellant and that of Ms. Kabengula- State Attorney for the respondent/Republic during the hearing of this appeal. I have as well read between lines the appellant's grounds of complaint and the entire proceedings of the trial court.

The question comes to this court for determination is whether the prosecution side has proved the case beyond reasonable doubt before the trial court.



To start with, this court find it is prudent to revisit the evidence adduced by the victim himself (PW1) when testifying before the trial court. When PW1 who is a victim in this case was testifying he had this tell to tell the trial court: -

**I live at Mashete with my grandfather who is known as Lupiga, I used to help my father to graze goats. On 19/06/2017 at around 16:00hrs. I was at bush area while grazing goats. While there one Titho came whom found me sitting down. Titho removed his penis and penetrated his penis in my anus, he closed my mouth while sleeping down or laying me down, after he finished that rape, he escaped and he run to the bush and I decided to look after or grandfather-Lupiga. Is when my father decided to look after him, he was arrested and tighted his hands, he was tighted by my father-Mashaka then he brought at Namanyere station for more procedure. Then I was taken at Hospital. The accused person here is the one whom raped me (**

**the witness identified the accused). At the Hospital,  
I was diagnosed and then I was allowed,  
discharged to go home until the next day.**

With the above quoted testimony of the victim before the trial court, it goes without doubt that, the appellant was properly identified by the victim. The appellant was well known to the victim given circumstances that it was during the day time and the appellant mentioned the appellant name immediately to his grandfather after the incident. The ability to name a suspect at earliest opportunity renders assurance to his credibility as per the case of **Marwa Wangiti & Another vs Republic** [2002] TLR 39.

The victim testimony at the trial court explained on how the appellant had sex with him against the order of nature. He told the trial court that having found him in the bush the appellant how the appellant removed his penis and penetrated it into his anus. Therefore, it goes without doubt again the appellant sodomized the victim.

The cases of this nature, the best evidence comes from the victim and his evidence can ground conviction without further corroboration provided is credible. He cited to me the case of **Seleman Makumba vs. Republic** [2006] TLR 379 and **Mbaga Julius vs Republic** Criminal Appeal

No. 131 of 2015 (unreported) and **section 127(7)** of the Evidence Act, Cap 6 RE 2019 which all insists that the victim evidence is enough to prove the case. I therefore satisfied with this part of evidence that the appellant sodomized the victim.

In respect of PF3 which was tendered and admitted as exhibit PI before the trial court, it was wrongly admitted by the trial court as rightly submitted by the learned State Attorney and also the ground was raised by the appellant in his petition of appeal as fourth ground. I subscribe to what learned state attorney submitted and this court expunge exhibit P1 for being wrongly admitted.

In addition, the evidence of PW3 testified before the trial court that he was informed by the victim that he was sodomised by the appellant and also when he interrogated the appellant, he admitted to have committed the offence. The testimony of PW1 is further corroborated by the evidence of PW5 a police officer.

The appellant complained the trial court to ground conviction based on the prosecution evidence which tainted with contradiction, confusion and ill will. Having subjected the entire evidence as adduced in the trial court I have not seen any contradiction and confusion on the part of the



witness's testimony. I find the second ground of appeal is devoid of substance. The same to third ground, also the ground is of no merit, the only irregularities found were in respect exhibit P1 which was wrongly admitted and witness PW4 who was not cross examined. This evidence was expunged by this court, the remain evidence proved the case to standard required by law.

It is a position of the law that in cases akin to this one the best evidence is that of the victim. The trial court only considered the evidence of the victim and that of the PW3. This court found that there was no extraneous matter raised by the trial court to ground conviction. Therefore, this ground of complaint lacks merit.

Going through the trial court proceedings, the appellant was given a right to put his defence, however, he opted not to defend the case as he left the matter to the court to determine. Also, well no double standard was applied by the trial court in hearing of the case. The opportunity to defend and mitigate the case was there as rightly submitted by the learned State Attorney. Thus, the seventh and eighth grounds also do not stand.

Given my findings above, the victim evidence in this case is very clear on how the appellant was identified by the victim and thereafter what the

appellant did to him. He therefore sodomized the victim. The evidence of the victim is corroborated by that of PW3.

In the premise, this court find that the case was proved beyond reasonable doubt. All grounds of appeal have no semblance of merit as cases of this nature involving sexual offences the best evidence comes from the victim himself/herself as elaborated in the case of **Seleman Makumba vs. Republic** [supra], also **section 127(7) of the Evidence Act, Cap 6. RE 2002** [supra] provides the same position, in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of sexual offence.

The appeal is dismissed in its entirety.

It is so ordered.



  
**D. B. NDUNGURU**

**JUDGE**

**08/12/2022**