

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 97 OF 2021

(Originating from Mlele District Court in Criminal Case No. 10 of 2021)

GERVAS JOHN MSABAHAAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of Last Order: 01/11/2022

Date of Judgement: 08/12/2022

NDUNGURU, J

This appeal arises from the decision of the District Court of Mlele at Katavi. The appellant Gervas s/o John Msabaha was charged and convicted in respect of the two counts, One count with regard to the offence of unnatural offence contrary to **section 154 (1) (a) and (2)** and second count in respect of the offence of grave sexual abuse contrary to section 138 C (1) and (b) and (2) (b) both of the Penal Code, Cap 16 RE 2019. He was sentenced to life imprisonment in respect of the first count and twenty

years imprisonment in respect of the second count which were to run concurrently.

Dissatisfied, the appellant is now preferring this appeal to this court, challenging the decision of the District Court in a petition comprised of two (2) grounds.

- 1. That, the trial court erred in law by discrediting the evidence of DW2 Anastazia Kalua.*
- 2. That, the trial court erred both at law and fact by convicting and sentencing the appellant basing on conflicting and feeble evidence by prosecution which had no value in proving the case beyond reasonable doubt as required by law.*

Briefly the fact of the case is to as follows: with regard the first count is that on 23rd Day of January 2021 at Kalovya village area within the district of Mlele in Katavi Region the accused person had carnal knowledge of the young boy aged 9 years old against the order of nature. With regard the second count is that on the same date and place for sexual gratification did force the young boy aged 9 years old to suck his penis.

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 before Mlele District Court and he further submitted that the evidence of PW3 the victim is very clear on what happened, that the appellant took him to the bush and threatened to kill thus managed to sodomise him. The evidence of PW3 was not shaken any way by the defence side. The evidence of PW3 is very credible as per the case of **Seleman Makumba V. Republic** (2006) TLR 369. That the evidence of PW3 is corroborated by the evidence of medical officer who examined the victim and found bruises in the anus, which to his evidence were caused by blunt object. Further he submitted that not only that PW1 told the court the way the appellant took the victim to the farm and that the victim named the appellant being the one who sodomised. It is his submission that the case was proved beyond reasonable doubt. The defence of alibi which Anastazia DW2 came to cement was not raised before. He for the appeal be dismissed in its totality.

In rejoinder, the evidence of DW2 was very important because she told the court that from morning to evening, he was with her at the farm. They dispersed each other at 5: hrs while the offence is alleged to have with the accused at 10:00hrs.

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 (PW3) when testifying before the trial court. When PW3 who is a victim in this case was testifying he had this to tell the trial court: -

I live at Kalovya with mama Eliza and I am a standard II student. I know the accused is called Gervas (pointing the accused) on 23/01/2021 I was in farm at Kalovya with mama Eliza and Rehema and Tambo, Derick. While there Gervas came. He told mama Eliza that her husband had given him Tshs. 3000/= to buy meat. He told mama Eliza to go and buy meat but instead mama Eliza told him to go with me. So went with him up to anthill (kichuguu). I went with Gervas while there he removed a knife and ordered me to kneel down. He told me to choose to be raped or slaughter. Then I told him. I chose to be raped. He told me to remove my trouser and he removed his too. He told me to hold the anthill. Then he inserted his penis in my anus. I felt pain but I did not shout because he threatened me. He just did it for a short time and told me to suck his penis so as to lubricate it. I sucked him from 11:00hrs to noon. While doing that he told me to tighten my anus. He told me not to tell anybody and in case I will tell anybody he will slaughter me.

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 he sodomized the victim and he was also sucked his penis by the victim.

As it can be noted also from above testimony of the victim, that he explained at the trial court on how the appellant took him to the anthill, threatened him by knife, undressed him before inserted penis in his anus. Therefore, it goes without doubt again the appellant sodomized the victim.

It was Mr. Kabengula's submission that, the cases of this nature, the best evidence comes from the victim and his evidence can ground conviction without further corroborated provided is credible. He cited to me the case of **Seleman Makumba vs. Republic** (supra) which insist that the victim evidence is enough to prove the case. I therefore subscribed to the above position and also satisfied with this part of evidence that the appellant sodomized the victim and did sexual abuse to the victim.

In respect of PF3 which was tendered by PW5 and admitted in court as exhibit PI before the trial court did clearly reveal that the anus of the victim had fresh bruises and penetration. PW5 who examined the victim

opined by informing the trial court that the victim anus had some bruises in his anus sphincter mucus and he was bleeding, and he concluded that the victim was penetrated by a blunt object which might be penetration of penis.

In addition, the evidence of PW1 who was with the victim on 23/01/2021 before the incident she testified before the trial court that the appellant came the farm area where they were doing farm activities. While there he came the appellant and he told him that he was sent by her husband to bring to her a wild meat which was by then at the bush. She told the appellant that she was busy thus she could not go. She told the appellant to go with the victim the appellant went with the victim, however he did not come back. It follows therefore, the evidence of PW1 was well corroborated by the evidence of PW2, PW4, and PW7

The appellant complained the trial court discredited the evidence of DW2 who testified that on 23rd day of January the appellant went to her farms and he was there until 17:00hrs doing farm works along with other 20 people.

In this case I have gone through the trial court judgement and I have noted that, the said court did consider the defence witness testimony. At

page 7 of the typed judgement the trial court the trial Magistrate referred to the evidence adduced by the appellant and his witness DW2. However, the trial magistrate was convinced that the evidence on the side of the prosecution was strong enough to prove the case beyond reasonable doubt. Thus, the evidence by the DW2 did not in any way shake the prosecution evidence bearing in mind the cases akin to this one the best evidence comes from the victim. Thus, allegation by the appellant is of no merit.

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 and did sexual abuse to the victim. It is my finding that even the second complaint by the appellant has no merit.

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 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. 2021