IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(DC) CRIMINAL APPEAL NO. 67 OF 2022

(Original Criminal Case No. 49 of 2021 of the District Court of Kondoa at Kondoa)

ALLY NASSORO MAJALA @

MZEE WA PAZO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

09/11/2022 & 15/12/2022

MASAJU, J.

The Appellant, Ally Nassoro Majala @ Mzee wa pazo, was charged, tried and convicted of **Unnatural Offence** contrary to section 154(1)(a) and (2) the Penal Code [Cap. 16, RE 2019] in the District Court of Kondoa. Consequently, he was sentenced to serve life time in prison and pay the victim compensation to the tune of Tsh.500,000/=. Aggrieved by the conviction and sentence, the Appellant has sought the present appeal before this Court.

His Petition of Appeal contains five (5) grounds of appeal which appears to be interrelated and can be reduced into one main ground, namely; that the trial Court grossly erred in law and fact by convicting the Appellant basing on insufficient evidence by the Prosecution.

When the Appeal was called for hearing, Mr. Denis Lazaro, the learned Counsel represented the Appellant whilst Ms. Bertha Kulwa, the learned State Attorney represented the Respondent Republic.

The Appellant initially opted to argue the five grounds of appeal in two sets. Thus, he combined the 1st and 5th grounds into one ground whereas the 2nd, 3rd and 4th grounds into another ground of appeal. Next, he prayed to adopt the grounds in the amended Petition of Appeal so that they form part of his submissions in support of the appeal.

In respect to the 1st and 5th ground, the Appellant stated that the trial Court erred in law when it applied the victim of crime (PW1)'s evidence to convict the Appellant while the same had been adduced illegally before it. He clarified that, such evidence was adduced in contravention of section 127(2) of the Evidence Act [Cap 6, RE 2019]

because the witness did not promise to tell the truth and not lies before the trial Court. The Appellant stated further that, the remedy is to expunge such evidence from the record of proceedings. To fortify his argument, the Learned Counsel referred this Court to the case of **John Mkorongo James v. The Republic** (CAT) Criminal Appeal No. 498 of 2020, Dar es salaam Registry (unreported).

Concerning the 2nd, 3rd and 4th grounds, the Appellant submitted that the prosecution case was not proved beyond reasonable doubt upon expunging the victim of crime (PW1) evidence. That, the hearsay evidence by PW2, PW3, PW4 and PW5 cannot warrant conviction. He submitted that, PW3 tendered PF3 ('Exhibit P1') which reveals that the offence was committed on 19/05/2021 but particulars of the offence on the charge reads that the offence was committed in August, 2020. Further, he argued that, the PF3 (Exhibit P1) does not state the cause of the alleged bruises or lacerations. And that, *"weak anal tone"* as observed by the doctor on the PF3 does not explain how it relates to the offence.

The Appellant went on submitting that, the offence was allegedly committed on August, 2020. The accused was arrested on the 23rd day of May 2021. He argued that such inordinate delay on the arrest creates doubt according to the case of **Ramson Peter Ondile v. The Republic** (CAT) Criminal Appeal No. 84 of 2021, Dar es salaam Registry (unreported). On the strength of his submissions, the Appellant prayed that the Court be pleased to allow the appeal, quash the conviction, set aside the sentence and the consequential order thereof.

The Respondent Republic contested the appeal. Responding to the 1st and 5th grounds of appeal, she argued that even though Section 127(2) of the Evidence Act [Cap 6, RE 2019] was not complied with the trial Court could still reach conviction if satisfied that the witness was truthful and the evidence was credible in terms of Section 127(6) of the Evidence Act [Cap 6, RE 2019] as per the guidance in **Wambura Kiginga v. The Republic** (CAT) Criminal Appeal No.301 of 2018, Mwanza Registry (unreported). Finally, she prayed the appeal be dismissed because there were other witnesses (PW2, PW3, PW4 and PW5) whose evidences were credible. On the issue of delay in arresting

the Appellant, the Respondent Republic stated that it was caused by fear of being killed, for the Appellant had threatened them.

In rejoinder, the Appellant maintained his submissions in chief together with his prayer that the Court be pleased to allow the appeal. That is all what was shared by the parties in this appeal.

The Court is of the considered position that, the prosecution case before the trial court was not proved to the required standard; *to wit,* beyond reasonable doubt since their evidence was neither truthful nor credible. The Respondent Republic conceded to the fact that the evidence of the victim of crime (PW1) was taken contrary to section 127(2) of the Evidence Act [Cap 6, RE 2019] however she urged the Court to find the same is curable under subsection (6) of the same provision by citing the decision of **Wambura Kiginga.** The Court remains unconvinced by the call of the Respondent Republic and further stresses on the elementary principle of law that *"each case must be decided largely on its own facts and that the core function of Courts is to ensure that justice is done by whatever means"* as patently and distinctly applied by the Court of Appeal in several cases, **Wambura**

Kiginga and **Ramson Peter Ondile** case inclusive. Thus, relying on the above principle, it is the finding of the Court that, the illegally adduced evidence of the victim of crime (PW1) is not curable under section 127 (6) of the Evidence Act [Cap 6, RE 2019]. This is because the victim (PW1)'s evidence portrays no exceptional and meritorious circumstances that justify remedying non-compliance of section 127(2) the Evidence Act [Cap 6, RE 2019] under subsection (6) of the said section.

First, the victim (PW1)'s evidence narrative was not chronological rather a back-and-forth narration as seen on the record of proceedings wherein PW1 stated that; "*...she was coming from school, the Appellant gave her sweet and chewing gums, when the Appellant called him, he was at the backyard of his house, he gave them drinking water, she was Swalehe Amiri Tesa, they both slept, at that time he had taken them inside the house at the sitting room..*". This thread of narration leaves a reasonable mind troubled on the victim (PW1)'s memory capacity if not sincerity due her non-flowing narration.

Second, the victim (PW1)'s evidence appears unworthy of credibility. For instance, during examination in chief she stated that when the Appellant inserted his penis into her anus, she felt an aching feeling as seen on the record of proceedings. In her cross examination, she inadvertently stated that when the Appellant penetrated into her anus, she could not call for help because she was asleep. And when re-examined she stated that it is not at all times that she fell asleep. The victim of crime (PW1)'s evidence was not worthy of truth and credibility in terms of section 127 (6) of the Evidence Act, [Cap 6 RE 2019] and section 115 (3) of the Law of the Child Act, [Cap 13 RE 2019].

Third, the Appellant consistently denied the committing the offence as seen in his evidence in chief (defence), when cross-examined and even when he cross examined other witnesses. His rebuttal is in some way perfected by the victim (PW1) evidence where she closed her evidence in chief. Therein, she ardently stated that the Appellant only did the act on August 2020 and not 2021. This piece of evidence destroys the offence charged as it does not significantly match the rest of the prosecution case. Thus, the Court maintains a view that, even if

section 127(2) had been complied with the prosecution account in the instant case largely appears contrived, it is not intact and falls short of grounding a conviction. On that noting, the Court is constrained to expunge the illegally adduced evidence of PW1 from the record of proceedings as it is hereby done so.

Having expunged the victim (PW1)'s evidence, the remaining evidence is insufficient and cannot form basis of Appellant's conviction. The evidences of PW2, PW4, PW5 are hearsay and incapable of incriminating the Appellant of the offence charged. Mr. Bakari Ramadhani (PW2), the victim's father was merely informed about the alleged offence. Likewise, PF 20107 Inspector Waziri Nyagwa (PW4) and Ass. Inspector Magreth (PW5) being police officers only received information about the alleged offence. No one saw the Appellant committing the offence charged. The testimony of Doctor Florence Hillary (PW3) who filled the Medical Examination Report, PF3 (Exhibit P1) is to the effect that when she examined the victim (PW1)'s anus there were bruises and lose tone in her anal sphincter suggesting that the victim was sexually abused by being inserted an object in her anus.

Certainly, this testimony does not establish that it was indeed the Appellant's penis which penetrated into the victim (PW1)'s anus. This is because from the Medical Examination Report (Exhibit P1) authored by Doctor Florence Hillary (PW3) on 24/05/2021 it is shown that she observed; bruises or lacerations, no discharge and lower weak anal tone thus she finally remarked *"weak anal tone"*. Under such premise, her testimony in the trial court that the victim was penetrated by an object was fairly an afterthought. The Medical Examination Report (Exhibit P1) does not even indicate the cause of the bruises or lacerations observed. It is unknown whether the victim (PW1)'s anus was penetrated or not. And if yes, by what thing?

Further, the Court finds the testimony of Doctor Florence Hillary (PW3) unresolved. Reference to this be made on the record of proceedings whereby in her evidence in chief, she stated that; *"... so even if a person is abused a year time those defects are seen and during examination, I did insert a finger and I did not face any resistance which is totally abnormal".* When crossed examined by the Appellant she stated that; *"the bruises were a result of a recent activity of an object*

being inserted in the victim (PW1)'s anus". This piece of evidence leaves much to be desired as it reflects the findings as of 24/05/2021 (for an offence committed on 19/05/2021 as explained in the PF3, Exhibit P1) while the victim of crime (PW1) testified that the Appellant committed the alleged offence on August 2020 only and not 2021 as seen on the record of proceedings and so as stated in the particulars of charge sheet. Taking into account such delay in arraigning the Appellant and there being neither truth nor credible evidence it cannot be told with any degree of certitude as to whether the alleged sexual offence did take place as alleged by the prosecution.

The prosecution case against Appellant was therefore not proved beyond reasonable doubt. The appeal is hereby allowed accordingly. His conviction and sentence meted by the trial court are hereby quashed and set aside respectively. The Appellant shall be released from prison forthwith unless otherwise held for another lawful cause.

GEORGE. M. MASAJU

JUDGE

15/12/2022