IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.17 OF 2022

(Originating from the District of Kilwa at Masoko in Criminal Case No.75 of 2021, Hon. A.M. Mkasela, RM)

RAJABU YUSUFU LITANDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

26/9/2022 &31/10/2022

LALTAIKA J.

The appellant herein, **RAJABU YUSUFU LITANDA,** was arraigned in the District Court of Kilwa at Masoko where he was charged with the offence of unnatural offence contrary to section 154(1)(a) of the Penal Code [Cap. 16 R.E. 2019] now the R.E. 2022. It was alleged that on 26th day of June 2021 at Banduka Village within Kilwa District in Lindi Region the appellant did have carnal knowledge of one AOA against the order of nature.

On 29/06/2021 the charge was read over and explained to the appellant who pleaded not guilty. After a full trial, the trial court was convinced that the prosecution had proved the case against the appellant beyond reasonable doubt. Henceforth, the court convicted the appellant to serve a thirty (30) years imprisonment term.

Dissatisfied, the appellant has lodged this appeal premised on the following grounds of appeal: -

(i) *That, the trial court erred in law and fact in convicting and sentencing the appellant basing on the evidence of prosecution side which had a lot of reasonable doubts while the appellant pleaded not guilty to the offence charged.*

(ii) *That, the trial court erred in law and fact in convicting and sentencing the appellant basing on hearsay evidence especially for those of prosecution sides witnesses (PW2 and PW3) both of them no one who witnessed the appellant committing the alleged incident rather than to hear from the victim herself.*

(iii) *That, the trial court grossly erred in law and in fact in convicting and sentencing the appellant without being satisfied on the identification of the appellant. This is due to the fact that the alleged offence was committed at night time and the victim left the area which were there by the appellant seeing him by using electric light hence the incident occurred soon after the victim leaving the area and it was in dark places hence it is a trite law that when the offence was committed at night these must be a proper identification to identify who committed the offence.*

(iv) *That the trial court in law and fact in convicting and sentencing the appellant with the incredible and unreliable evidence regarding that the alleged incident occurred during the night time hence an electric light which were used by the victim on identifying the appellant and it was before the incident and then after the incident occurred after the victim leaving the place hence can made a totally circumstantial evidence and does not make water tight evidence for the appellant to be convicted regarding the offence is of serious in nature.*

When the appeal was called on for hearing on the 26/9/2022 the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through Mr. Wilbroad Ndunguru, Senior State Attorney.

The Appellant prayed that the state attorney would come first as it would enable him to follow his arguments more closely. The learned Senior State Attorney had no objection thus he took the floor.

Mr. Ndunguru objected to both the sentence and conviction, stating that the appellant was charged with Unnatural Offence contrary to section 154(1)(a) of the Penal Code Cap 16 RE 2019, and the victim was Abrahamani Omari Alfan who was then 25 years old. He mentioned that the District Court of Kilwa at Masoko (A.M. Mkasela, RM) convicted the appellant and sentenced him to serve 30 years in prison and pay a compensation of TZS 2,000,000 as per section 348A of the Criminal Procedure Act Cap 20 RE 2019 as per the judgement delivered on 22/11/2021.

The learned Senior State Attorney submitted that the grounds of appeal, both original and additional, did not hold water. He argued the 1st, 2nd, and 3rd grounds of appeal jointly, stating that they were all to the effect that the case was not proved beyond reasonable doubt. He then moved on to finalize with the 4th ground, which was centred on credibility of the witnesses.

Mr. Ndunguru forcefully submitted that the prosecution had proved its case beyond reasonable doubt with direct evidence from PW1 Abrahamani Omari Alfan, who was the victim. He further explained that the witness had narrated that he was with the victim on the eventful day and after drinking jointly they decided to go back to their respective homes. On their way back, the learned Senior State Attorney averred, the appellant demanded money from the victim, which was a debt of 5000. The victim did not have that money, so he was attacked and sodomized by the appellant.

It was Mr. Ndunguru's submission further that penetration in an unnatural way against the victim was supported by one **Donald Cyprian Kavirondo, Clinical Officer**, who had testified that he observed the victim and could see bruises on the anus as well as sperms. Mr. Ndunguru stated that the weight of the prosecution case was on the identification of the appellant and the credibility of the victim who was PW1.

The learned Senior State Attorney averred further that identification of the victim met the requirements in the case of **Waziri Amani v. R** [1980] TLR 250 and referred to the case of **Raymond Francis v. R.** [1994] TLR 100. He explained that the appellant did not cross-examine any of the PWs, which is tantamount to acceptance. Mr. Ndunguru emphasized that that the first to third grounds of appeal had no merit.

Regarding the 4th ground, Mr. Ndunguru maintained that there was no problem with identification and the appellant did not cross-examine. He further explained that the victim was credible, and the court had taken into consideration the coherence and demeanour of the witness. Mr. Ndunguru cited the case of **Nyakuboga Boniface v. R.** Crim App 434 of 2016 CAT, Mwanza on credibility of witnesses.

It was Mr. Ndunguru's submission that the evidence of the victim alone, if credible, is sufficient to convict even in the absence of any other corroborative evidence because sexual offenses happen in secret.

Mr. Ndunguru stated further that in the instant matter, the evidence of the victim, which was corroborated by that of **PW4 (clinical officer),** was sufficient to convict the appellant.

The learned Senior State Attorney then addressed the two additional grounds of appeal and submitted that the witness mentioned was not important and his absence had not affected the proceedings. He argued

that section 143 of the **Evidence Act Cap 6 RE 2022** was to the effect that no specific number of witnesses was required to prove a case, and therefore, the ground had no merit.

Mr. Ndunguru stated that he would finalize his submission by addressing the two additional grounds. On the first additional ground, the learned Senior State Attorney averred that the appellant had criticized the prosecution for failing to summon an important witness, namely the owner of the local bar. He argued that the witness was not important and that his absence did not affect the proceedings. He cited **section 143 of the Evidence Act Cap 6 RE 2022**, which stipulates that no specific number of witnesses is required to prove a case, and that even a single witness is sufficient. He stated that the prosecution had focused their attention on the credibility and evidence of PW1, and that the ground had no merit.

Mr. Ndunguru added that had the witness come, he could have added value to the identification, which is vital in the case. However, the victim had explained in detail how he identified the appellant as they knew each other before, and therefore, the ground of appeal had no merit and he prayed that the same be dismissed.

On the second ground, Mr. Ndunguru further stated that the appellant was blaming the court for failing to administer the oath to the 4th Prosecution Witness. The learned Senior State Attorney disagreed. He presented that the court records showed that PW4 had taken the oath as per **Section 98(1) of the Criminal Procedure Act Cap 20 RE 2022**, and that a copy of the typed proceedings was in his file. While trying to go through the file to prove his point, the learned Senior State Attorney noted that on page 3 of the record, PW4 was sworn and affirmed.

Mr. Ndunguru conceded that according to Section 198(1) of the CPA such a practice was not proper.

Having conceded to the anomaly, Mr. Ndunguru noted that it was not up to the court to choose which one of the two to go by. In his opinion, the evidence offended the cited section, and he prayed for it to be expunged. He agreed with the second additional ground of appeal.

Mr. Ndunguru explained that the evidence of the victim remained intact and could sustain a conviction if the court found that the identification was proper, and the witness was credible. He cited Section 127(6) of TEA Cap 6 RE 2022, which allows a court to value the evidence of one witness. He concluded that he prayed for the appeal to be dismissed, and for both conviction and sentence and the order of TZS 2,000,000 to be upheld.

It was time for the appellant to respond albeit in a brief rejoinder. He prayed the court to scrutinize the victim's evidence. He mentioned that the victim testified to seeing him at Rajabu's local bar at around 9 PM where they shared drinks before the victim left and was later attacked. The appellant pointed out that the victim's testimony, as well as the testimonies of PW1, PW2, and PW4, had inconsistencies, such as the date of the incident and the time the victim was attended by the clinical officer. He argued that these inconsistencies proved that the evidence was unreliable and possibly fabricated. The appellant prayed the court to allow his appeal and set him free.

I have dispassionately considered arguments by both sides and laboriously scrutinized the lower court records. There are two issues that need my analysis: credibility of PW1 (the victim) and identification of the appellant (then accused.)

It is not disputed that the appellant and the victim new each other. In fact, the victim owed the appellant money. On the fateful day they both went to drink *wanzuki* at at a local bar "Kilabu" known as kwa Rajabu. These are adults. They were both drunk. One who owed the other reports that when they left the kilabu in the previous night, his fellow drunkard sodomized him. I think this is a very loose narrative. The learned trial magistrate needed to be especially careful in analysing the evidence brought forward.

I am alive of the settled legal position articulated in the case of **Selemani Makumba vs. Republic** [2006] TLR the best evidence on sexual offences come from the victim but in this case the victim and the appellant were not in a particularly smooth relationship. He was also drunk and simply guessing if not imagining what might have befall him on the fateful night.

I am also alive to the fact that PW1's evidence is corroborated with the evidence of PW4 (Donald Cyprian Kavilondo) a clinical officer who examined the victim and found that he was "anally penetrated by penis". Unfortunately, this does not clear doubts on who exactly sodomized the victim. It turns the whole prosecution evidence into circumstantial evidence. See **Samwel Marwa @ Ogonga vs The Republic**, Criminal Appeal No.74 of 2013, CAT Mwanza (unreported).

This brings me to the second issue namely identification of the accused. At page 7 & 8 of the typed proceedings PW1- testified that: -

> *"On 25/06/2021 around 20:00 hours I came from home I went to Rajabu's club. I drank (sic) alcohol I was with Rajabu Yusuph Litanda, seller of alcohol and one woman. There at the club there were electrical (sic!) lights, I identified Rajabu Yusuph Litanda. I know him we live in the same village.*

I went out around 24:00 hours. I was not drank (sic!), I was conscious. While I was going Rajabu Yusuph Litanda followed me. Rajabu Litanda is here before this court ..."

The above testimony raises very serious doubts on identification of the appellant. It should be noted that the duo left their drinking spree in the midnight. The alleged assault and sodomy took place 200 meters from the "electrical" light from Rajabu's bar. No one else witnessed the heinous act. Worse still both the appellant and the victim were drunk and more or less of the same age. I don't see a compelling connection capable of clearing any doubts and ground conviction.

In the upshot, I allow this appeal. I hereby quash the proceedings of the lower court. I set aside the sentence of 30 years imprisonment and nullify the order for payment of TZS 2,000,000 as compensation to the victim. I order further that the appellant **RAJABU YUSUFU LITANDA** be released from prison forthwith unless he is being held for any other lawful cause(s)

It is so ordered.

E.I. LALTAIKA

JUDGE
31/10/2022

Court

This judgement is delivered under my hand and the seal of this court this 31st day of October 2022 in the presence of Mr. Enosh Gabriel Kigoryo, State Attorney and the appellant who has appeared unrepresented.

E.I. LALTAIKA

JUDGE
31/10/2022

Court:

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE
31/10/2022