IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 22 OF 2022

(Originating from Criminal case No. 02 of 2021 of Bukoba District Court (F. A. Kaijage RM)

FRANCE PASTORY MPIRA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

07/11 /2022 & 20/12/12/2022

E. L. NGIGWANA, J.

The appellant namely France Pastory Mpira was charged in the District Court of Bukoba sitting at Bukoba with two (2) offences; Unnatural offence contrary to section 154 (1) (a) of the Penal Code, [Cap 16 R. E 2019], now R. E 2022 (The Penal Code) and Indecent Assault contrary to section 156 (1) of Penal Code. In the trial court, it was alleged on the first count that the appellant on diverse dates of December, 2020 at Bilele Ward within Bukoba Municipality in Kagera Region, did have carnal knowledge of J.M against the order of nature (Identity concealed), a boy aged 15 years old.

As regards the 2nd count, it was alleged that the appellant on diverse dates of December, 2020 at Bilele Ward within Bukoba Municipality in Kagera Region, did unlawfully and indecently assault D.S (Identity concealed), a boy aged 15 years old.

The appellant denied the charges and as a result, the case proceeded to a full trial at which the prosecution paraded six (6) witnesses and tendered on exhibit to wit; PF3 while the appellant was the only witness for defense.

At the conclusion of the trial, the trial court found the appellant guilty hence was convicted. Subsequent to the conviction, the appellant was sentenced to life imprisonment on each count. Sentences were ordered to run concurrently.

The appellant was aggrieved by the decision of the trial court hence he knocked the doors of this court while armed with nine (9) grounds of appeal.

Though the grounds appear to be nine (9) in number, for purpose of clarity this court grasped the context and summarized the raised appellant's grounds of appeal into the following grounds;

1. *That, the charge sheet laid at the appellant's door was fatally defective whereby the irregularity is walled on the following areas*
   - *(a) The charge sheet failed to disclose the time of the incident being contrary to section 135 (f) of the CPA*
   - *(b) The charge sheet specified a non-existing provision of 131 as an outstanding provision without stating the enactment of the Penal Code contrary to section 135 (a) (ii) of the Criminal Procedural Act, Cap 20 R.E 2019*

2. That, the trial Magistrate erred in law and facts by convicting and sentencing the appellant while the charge had not been proved beyond reasonable doubt.

When this appeal was called on for hearing, the appellant appeared in person and represented by Mr. Ibrahim Mswadick, learned advocate while Mr. Amani Kilua learned State Attorney appeared for the Republic.

Expounding on the 1st ground of appeal, Advocate Mswadick submitted briefly that the charge which the appellant's conviction was founded is defective as it does not disclose dates as to when the offence was committed apart from merely alleging that it was " **on diverse dates of December, 2020**", thus no conviction can be founded on a defective charge.

On the 2nd ground, Mr. Mswadick submitted that; as per section 3 (2) (a) of the Evidence Act, [Cap 6 R.E 2022], and the case of **Jonas Nkize versus Republic** [1992] TLR 213, the standard of proof is that of beyond reasonable doubt. He argued further that the said standard had never been reached in the instant case. He added that the evidence of PW1 is to the effect that he obtained the information from one Super Mwombeki in relation to the evil deeds of the accused (now appellant) in December 2020 and on 31/01/2021, they set a trap and managed to arrest the accused. Mr. Mswadick added that according to PW5, a trap was set on 3/01/2021 in which PW5 alleged that the accused was found accompanied by one person called Gido, but the said Gido was not summoned to testify in court, likewise the investigator of the case, thus the court is entitled to

draw adverse inference on the prosecution side as stressed in the case of **Ester Aman versus the Republic,** Criminal Appeal No.69 of 2019 CAT (Unreported). He added that the evidence of PW4 is also not reliable.

He added that there is contradiction between the evidence of PW2 and PW3 as PW2 testified that she was born in 2004 while his mother testified that PW2 was born in 2005. That, PW2 testified that he was given Tshs 20,000/= by PW3 at 18:00hours while PW3 testified that he gave the said money to PW2 at 15:00hours. He added that it is the evidence of PW2 that he played in the pitch and lost the money there, but no person who was playing with PW2 appeared to testify. He added that according to PW3, PW2 was medically examined at **"Uswahilini"** while PW6 stated that he examined the victim at Zamzam Hospital.

Mr. Mswadick added that if at all the offence was committed against the PW2 in December 2020, as per his evidence, the fact that PW2 remained silent until 02/02/2021 evident that this case was fabricated, otherwise the matter would have been reported at the earliest stage. He went on arguing that failure to name the suspect at the earliest stage is fatal. The learned counsel referred this court to the case of **Daniel Severine & 2 Others versus The Republic**, Criminal Appeal No.431 of 2018. He added that, without a written cautioned statement, it cannot be alleged that the accused had confessed to have committed the offence. To support his argument, he made reference to the case **Republic versus Sprianus Angelo and 6 Others,** Criminal Session Case No.27 of 2017 HC-Bukoba (Unreported). The learned counsel concluded that, generally the prosecution had not proved the case beyond reasonable doubt, whereas

the benefit of doubt ought to be given to the appellant as per the case of **Jimmy Runangaza versus the Republic,** Criminal Appeal No.159 "B" OF 2017 CAT (Unreported).

In reply, Amani Kilua, learned State Attorney submitted that in sexual offences, the best evidence comes from the victim therefore, in the instant case, the evidence of PW2 and PW4 being the victims, is sufficient. He added that, according to section 143 of the evidence Act, the prosecution side is not obliged to summon all witnesses since what matters is not the number of witnesses testified but the quality of the evidence adduced. He also submitted that failure to name the suspect at the earliest possible stage is not automatically fatal as per the case of **Godson Danny Kimaro versus Republic,** Criminal Appeal No.54 of 2019 CAT (Unreported) whereby one week delay was found not fatal because the said silent was explained. As regards the issue of contradiction, Mr. Kilua admitted that they do exist but they do not go to the root of the matter. He added that PW2 was medically examined at Zamzam Hospital as per PF3 which was admitted in court without any objection. He added that even the second count was proved to the required standard since PW4 was a credible witness.

In rejoinder, Mr. Mswadick stated that, the offences under which the appellant was charged attract life sentence thus the standard of proof should not be lightly taken.

Having carefully considered the grounds of appeal and heard submissions of both parties, the only major issue for determination is whether this appeal is meritorious.

It must be noted that, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2022 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The High Court of Tanzania speaking through Katiti J (as he then was) in **Jonas Nkize v.R (Supra)** *held that,*

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

The test applicable was well stated in the famous South African case of **DPP versus Oscar Lenoard Carl Pistorious,** Appeal No. 96 of 2015, as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate

to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may be simply ignored".

In this matter, this is the first appellate court. Describing the duty of the first appellate court, the Court of Appeal of Kenya in the case of **David Njuguna Wairimu versus Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus Republic**, Criminal Appeal No.341 of 2017 CAT (Unreported)

In doing so the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that; a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence

or on a misapprehension of the evidence or the trial court acted on wrong principles.

Before touching the issue of evidence, it is apposite to address the complaint by the appellant that the charge was defective. It is common understanding that in criminal law, the corner stone of any criminal case is a charge. The charge is both a heart and a brain of a criminal justice and a fair trial which plays the role of informing the accused person on the nature of the accusations and allow him or her to prepare his or her defence, and assist the court to determine whether it has jurisdiction and prepare the procedure to be applied during the trial. See **Iliney Molaskus and Another versus the Republic,** Criminal Appeal No23 of 2022 HC-Morogoro (Unreported).

Section 132 of the Criminal Procedure Act Cap.20 R.E 2022 provides that;

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

The charge should also comply with section 135 of the CAP in which section 135 (f) provides as follows;

"subject to any other provision of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission of any kind ***to which it is necessary to refer in any charge or information*** *in*

ordinary language in such manner as to indicate with reasonable clarity the place, time, thing, matter, act or omission referred to"

Addressing the herein above provision, the Court of Appeal of Tanzania in the case of John **Stephano & 5 Others, versus the Republic**, Criminal Appeal No. 251 (Unreported) had this to say;

"*The here in above provision connotes that the necessity to describe time in a charge sheet or information arises where time is of essence in proving the offence. Construing the provision otherwise would render all charges and information pertaining to offences whose time of commission is unknown, defective....In here, the time of the commission of the offence was addressed in the prosecution evidence and the appellants had time in their evidence to address it. In the event, variance between the charge and evidence in respect of the time at which the offence was committed is immaterial."*

Being guided by the herein above decision of the Court of Appeal, and considering the fact that time is not of essence in proving unnatural offence or Indecency assault, the complaint that the charge is defective for not mentioning specific time of the commission of the offence is immaterial provided that the month and the year was mentioned.

Upon reading the charge carefully, I asked myself whether it was proper to charge the two offences in a single charge. As a matter of law, where a person is accused of having committed several offences, such offences can only be charged in a single charge sheet if they were committed in the course of the same transaction or in one single act. Where offences were

committed at different dates and places extending over a very considerable period of time and there is nothing to show that they were continuous offences, they must not be charged in the same charge sheet (See B.D. Chipeta Magistrate's Manual Law Africa page 12). In other words, where the offences are not founded on the same facts, or do not form part of the series of the same or similar character are charged in the same charge sheet, the same will definitely be ruled improper as it amounts to misjoinder.

In this case, though no dates and exactly time has been mentioned, the evidence of PW2 and PW4, the show that offences were committed at different dates and places extending over a very considerable period of time and there is nothing to show that they were continuous offences, thus, in my view, there was misjoinder.

In sexual offences, the best evidence comes from the victim as per position established in the case **Selemani Mkumba versus R** [2006] TLR 379.The decision of the Court of Appeal in the case of **Makumba** (Supra) is very clear that true evidence in sexual offences comes from the victim, but the same Court while addressing the evidence of the victim in sexual cases in the case of **Mohamed Said versus Republic,** Criminal Appeal No.145 of 2017 (Unreported) observed that;

"We think that it was never intended that the word ***of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness....."***

It is really dangerous to convict on the evidence of the victim alone. This is dangerous because human experience has shown that in sexual cases, victims do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. The emphasis here is that, in order to convict an accused person basing on the evidence of the victim, the trial court must be satisfied that what the victim has testified is nothing but the truth, because what matters in evidence is not the number of witnesses testified but the quality of the evidence presented before the court. See section 143 of the evidence Act, Cap 6 R: E 2019.It follows therefore that the witness must be a credible witness.

However, it has to be noted that the credibility of witness is the monopoly of the trial court. In **Shabani Daudi versus Republic,** Criminal Appeal No. 28 of 2000 (unreported) the court held: -

"The credibility of witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person".

According to the evidence of PW1, the offence which was committed by the accused was attempted unnatural offence. Part of his evidence reads as follows;

Nilishuhudia mshitakiwa akiwa anavua suruali, alafu anamwambia Gido Mwombeki kwamba waanze, ndani ya chumba kulikua na taa ya umeme, hapo tulipiga dirisha ili kumshitua mshitakiwa asifanye hilo tendo, ndipo mgambo Selemani Bashiru aliruka ukuta wabfensi na kuingia ndani ya fensi kulipo chumba walimokua..."

PW2, who alleged before the trial court that he had 17 years old, testified that he was sodomized by the accused person and the incident took duration of for 30 minutes. It is common understanding that the contradictions or inconsistencies in evidence by witnesses are capable of vitiating the prosecution evidence if they go to the root of the case. This is the stand in a number of decisions including the case **Dickson Elias Nsamba Shapwata & Another versus Republic,** Criminal Appeal No.92 of 2007 where the Court of Appeal held inter alia that;

"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter".

In the matter at hand, contradiction between the evidence of PW1 and PW2 as to whether the offence was really committed by the accused or not is not minor as it goes to the root of the matter.

It is also trite law that, failure of a witness to name the suspect immediately weakens his or her credibility. See **Daniel Severine versus Republic (Supra).** The court of Appeal in the case of **Marwa Wangiti**

and Another versus Republic, Criminal Appeal No.6 of 1995 had this to say;

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

In his evidence, PW2 told the trial court that when the offence was committed against him, he told nobody until 2/2/2021 when he was asked by the police officer to narrate any offence if any committed against him by the accused. There is no plausible evidence as to why PW2 did not mention the accused at the earliest possible time. To that extent, his credibility has weakened.

Moreover, the law requires the prosecution to call material witness(s) to prove the case against an accused person, failure of which, entitles the court to draw an inference adverse to the prosecution. In the case of **Azizi Abdallah v. Republic** [1991] T.L.R. 71 it was stated that:

"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

In the case at hand, the prosecution had failed to call material witnesses including the investigator of the case and Mr. Gido who was alleged by PW1 that he was in the accused room when the accused attempted sodomize PW2, thus the trial court ought to have drawn an inference adverse to the prosecution.

In the case at hand, it was alleged that PW6 was examined by a medical practitioner, as per PF3 to wit; **Exhibit P1,** but the said exhibit had neither police station seal nor hospital seal, thus its authenticity is questionable taking into account the evidence of PW3 who told the trial court that PW2 was examined at **"Uswahilini"** while PW6 said he examined him at Zamzam Health Centre. The examination was done on 12/02/2021 while the offence was alleged to have been committed in December, 2020.

Furthermore, there was no cautioned statement or extra-judicial statement or reliable oral confession to prove that the accused had confessed to have committed the offence. In his defence, the accused person disputed to have committed the offences saying that he was arrested on political grudges.

It is trite that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense case. **See Kerstin Cameron versus R** [2003] TLR 84, **and** JOHN **S/O Makolobela Kulwa Makolobela & Erick Juma @ Tanganyika versus R** [2002] TLR 296.

In the trial court, the prosecution had not proved their case beyond reasonable doubt, thus, as stated by Mr. Mswadick, the appellant ought to

have been given the benefit of doubt. In other words, the required strength of the prosecution case was missing. In the premise, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of life imprisonment on each count meted against the appellant. I further order for an immediate release of the appellant from prison custody unless held for some other lawful cause. Order accordingly.

Dated at Bukoba this 20th day of December, 2022

E.L. NGIGWANA

JUDGE

20/12/2022

Court: Judgment delivered this 20th day of December, 2022 in the presence of the appellant & his Advocate, Mr. Ibrahim Mswadick, Mr. Amani Kilua, learned State Attorney for the Republic, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Sophia Fimbo, B/C.

E.L. NGIGWANA

JUDGE

20/12/2022