IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 82 OF 2021

(From the decision of the District Court of Kinondoni in Criminal Case No. 205 of 2020)

FRANCIS ELIUD@ MNYAMWEZI .....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

Last order:1/12/ 2021
Date judgement: 9/02/2022

MASABO, J.:-

In the District Court of Kinondoni at Kinondoni, , Francis Eliud @Mnyamwezi, the appellant herein, stood charged with unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16 RE 2019]. It was alleged that on diverse dates between 20th January 2020 and 6th May 2020 at Kigogo Kati area, Kinondoni District in Dar es Salaam, he unlawfully had carnal knowledge of a 6 years old girl. Upon full trial he was convicted and sentenced to life imprisonment. Disgruntled by the conviction and sentence he is now before this court armed with five grounds of appeal as extracted bellow;

1. The trial court erred in law and fact by convicting and sentencing the appellant without considering that no evidence was adduced by the prosecution side to show that the appellant committed an unnatural offence;

2. The trial magistrate misdirected himself in law and facts by convicting and sentencing the appellant without considering that the evidence adduced by the doctor did not prove that the appellant committed the unnatural offence against the victim;
3. The trial magistrate erred in law and fact by upholding the uncorroborated and incredible evidence adduced by the victim and PW4 which is the basis for the Appellant conviction.
4. The trial magistrate erred in law and fact by upholding Exhibit P1 (PF3) as underlying support of the Appellant's conviction:
    i. The PF3 did not state or show if the Appellant's specimen were found on the victim's anus or that the appellant was directly involved in the cause of the said bruising
    ii. Exhibit PF3 showed that the victim had bruises on her anus which can be caused by any blunt object and not necessarily the appellant's penis.
5. The learned trial magistrate grossly erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt.

When the appeal was called on for hearing the Appellant was represented by Mr. Sedeni, learned advocate and the the Republic had the service of Ms. Jacqueline Werema, learned State Attorney.

Submitting in support of the first ground of appeal Mr. Sedeni argued that the evidence of PW1, PW2 and PW5 are hearsay hence inadmissible. It was argued further that the evidence of PW4 and exhibit P1 does not sufficiently support the conviction. He proceeded that the evidence of

PW4 offered no proof to the allegation that the appellant sodomised the victim. At page 18 of the proceedings PW4, the doctor who examined PW3, stated that the bruises might have been caused by a blunt object which can be anything. He proceeded further that there is nothing in Exhibit P1 to prove that the appellant committed the offence he stood charged before the trial court. Therefore, since the conviction was solely based on Exhibit P1 which does not link the appellant to the offence, this appeal be allowed because for the offence under section 154(1) (a) of the Penal Code to be proved, two things must be established, that is, *penetration* of the male organ and that *the victim was penetrated against the order of nature*. Thus, it must have been proved that PW3 was carnally known against the order of nature and that the person who committed the offence is none other than the appellant. Both elements were not proved.

On 2nd ground, Mr. Sedeni submitted that under section 47 of the Law of Evidence Act [Cap 6 R.E. 2019] the court is mandated to consider expert witness. In the present case, PW4 was the expert witness but, he did not prove the offence. Mr. Sedeni referred this court to the case of **Vumi Liapenda Mushi v R** Crim Appeal No. 327 of 2016, CAT where it was held that if the evidence of an expert witness is silent on whether the victim was sodomized, that mistake is fatal. He added that, to prove unnatural offence there must be proof of penetration of the male organ and carnal knowledge.

Mr. Sedeni argued further that PW3 and PW4 did not prove that it is the appellant who committed the offence. In page 14 of the proceedings, PW3

stated that she was raped 4 times and on the next day she was taken to hospital. The court ought to have drawn an adverse inference but it failed to draw the inference while it is incomprehensible how the victim who had been raped four times managed to walk back home. In addition, it was argued that, the first person to meet the victim after the incidence was her grandmother. This was a key witness but was not brought to court to testify. He cited the decision of the Court of Appeal in **Abubakar Msafiri v R,** Crim, Appeal No. 378 of t of 2017 and **Horombo Elikaria v R,** Crim Appeal No. 50 of 2005 (unreported) where it was held that failure to call a key witness affects the reliability of the victim's evidence and makes the prosecution's case to flop. He submitted further that, much as the evidence of a victim of sexual offence is the best evidence, it is crucial that it be corroborated by an eye witness or medical report. Since the evidence of PW3 was not corroborated, the trial magistrate ought to have warned himself before convicting the appellant but he did not. Fortifying his argument, he cited the case of **Moses Charles Deo v R** [1987] TLR 134 where it was held that in sexual offences evidence of the victim must be corroborated. He then summed up that since the evidence of PW1 and PW2 was hearsay and Exhibit P1 does not implicate the accused, the prosecution failed to prove its case beyond reasonable doubt.

Regarding the fourth ground of appeal, it was submitted that exhibit P1 did not show that there was penetration by the appellant as the nature of the blunt object which penetrated PW3 was not stated. Hence, it remained unclear as to what caused the bruises found in the victim's anus. It was therefore, wrong to convict and sentence the appellant based on such weak evidence. With regard to the 5th ground of appeal it was argued that

the prosecution miserably failed its mandatory legal duty to prove the case beyond reasonable doubt. Based on the decision of the Court of Appeal in **Abubakari Msafiri v R**, (supra) and **Horombo Elikaria v R,** (supra), it was submitted and argued that the omission to call PW3's grandmother as witness was a fatal omission as it affects the reliability of the prosecution's case.

On her part Ms. Werema sternly objected the appeal and proceeded to submit that the prosecution evidence left no stone unturned in proof an unnatural offence against which the appellant stood charged contrary to section 154(1)(b) of the Penal Code. Penetration was proved by PW3 who eloquently narrated how the appellant penetrated her anus and her evidence suffices to prove penetration. With reference to the decision of the Court of Appeal in **Hassan Kamunyu v R,** Crim Appeal No. 277 of 2016, CAT (unreported) it was sternly argued that proof of penetration need not be a graphic description of how the penetration occurred. The victim was 6 years old on the fateful date and what she narrated before the trial court sufficiently demonstrated that she was penetrated against the order of nature by the Appellant whom she confidently identified during the trial.

In regard to the 3rd and 4th ground of appeal Ms. Werema argued that they are devoid of merit as in sexual offences the evidence of the prosecutrix is the best evidence. Fortifying her point, he cited the case of **Seleman Makumba v R** [2006] TLR 379. She then argued that medical evidence although relevant is not conclusive and does not override the evidence of the prosecutrix. She submitted further that credibility of the

witness is the monopoly of the trial court. As held in **Benedict Buyobe@ Bene v R**, Crim Appeal No. 354 of 2018, (CAT) it is the trial court that is best placed to assess the credibility of the witness and the trauma she went through. Moreover, she argued that Exhibit P1 and the evidence of PW4 was not meant to prove that the appellant is the one who committed the offence but to demonstrate what the doctor found and established in the course of medical examination. The authority in **Moses Charles Deo** (supra), is therefore inapplicable as it is outdated. It is sufficient that the PF3 stated that penetration was caused by a blunt object.

In regard to the 1st and 2nd ground of appeal, it was argued that, rape does not happen in public space as authoritatively stated in **Seleman Makumba v R** (supra). The victim identified the accused and he did not cross examine the same which is advantageous to the prosecution. Regarding the failure to call PW3's grandmother it was held that much as she was the first person to see the victim after the incident, her evidence would not have added any value as it was purely hearsay.

In his rejoinder Mr. Sedeni submitted that **Seleman Makumba's** case and **Benedict's case** are irrelevant to the instant case as they involved rape and not unnatural offence. He reiterated further that the victim's evidence must to be corroborated by an independent witness.

Having considered the rival submissions from the parties and the lower court record, I will now proceed to determine the appeal. The main issue emerging from the grounds of appeal and the submissions by the parties is whether the prosecution proved its case to the required standards. The

appellant stood charged of committing an unnatural offence. Thus, as correctly argued by his counsel, two things ought to have been proved, namely: *that the victim was carnally known against the order of nature and secondly* and that *the appellant herein is the one who committed the offence*. The burden to prove these two elements rested solely upon the prosecution (see **Jonas Nkize v R** (1992) TLR 213). Apart from leading evidence in proof that the victim was unlawfully carnally known against the order of nature the prosecution was duty bound to lead evidence and establish, beyond reasonable doubt, that the accussed is the one who committed the offence.

The record show clearly that in discharging this duty, the prosecution called five witnesses. But, as correctly argued by Mr. Sedeni, evidence rendered by the first two witnesses was mainly hearsay. As for PW1, save for the disposition that he is the one who reported the incident to police, collected the PF3 and accompanied PW3 to hospital, the rest of his account was hearsay evidence. The evidence of PW2 who is the prosecutrix's aunt was similarly hearsay as she was not at the scene. All what she told the court is what she was told by the prosecutrix. The evidence of PW5 was similarly hearsay. As hearsay evidence is of no value, the evidence of these three witnesses is discredited.

Upon discrediting the evidence of these three witnesses, we are left with the oral testimony of PW3 who is the prosecutrix, oral testimony of PW4, the doctor who examined her and a PF3 which was admitted in court as Exhibit P1. Mr. Sedeni has passionately argued that none of these ably implicated his client.

Before I proceed further, I will provide a brief summary of this evidence. PW3 told the court that the incident happened in a house where they were all alone. The appellant undressed her and having also undressed, he inserted his 'mdudu' in her anus. After the incidence, she went home and disclosed the ordeal to her grandmother. Later on, she was taken to police, collected a PF3 and was medically examined by PW4. On his side, PW4 narrated that on 9/5/2020, he medically examined PW3 and found that there were bruises around PW3's anus and that it had pulsating and mid lose orifice which suggested the muscle was a bit loose as a result of being penetrated by a blunt object. The PF3 tendered by PW4 and admitted as Exhibit P1.

Reverting to the grounds of appeal, in the 1st, 2nd and 3rd ground, the appellant has challenged the evidence of PW3 and PW4 as non-credible and incapable of sustaining a conviction as it was not corroborated. In his submission, Mr. Sedani has sternly challenged the credibility of PW3's evidence on the following grounds: **First,** it is not possible that after being raped 4 times she managed to walk; **two,** PW3's grandmother of who was the first person to meet her after the incidence was a material witness but was not called as a witness and **three,** her evidence was uncorroborated. While mindful of unpleasant repetitions, I find it pertinent to restate the proof required in the offence against which the appellant stood charged in the lower court. As stated earlier on and as correctly held by the trial magistrate, for the conviction on unnatural offence to be metered, two things must be proved, namely, the victim was carnally known against the order of nature and second, the accussed in the one who committed the offence. The first element is deemed to have been proved if the evidence rendered by the prosecution establishes that there was

penetration of the accused's penis into the victim's anus. As correctly submitted by the state attorney, the law is now settled that, proof of penetration need not be a graphic description of how the penetration occurred (**Hassan Kamunyu v R**, Crim Appeal No. 277 of 2016, CAT (unreported), **Joseph Leko v R** Criminal Appeal No.124 of 2013, CAT. It is similarly settled that, *penetration,* however slight suffices as proof of rape (see **Enock Matatala vs R** (Criminal Appeal 468 of 2019. Whether or not the victim sustained bruises or had her movement impairment is immaterial. Confronted with a complaint akin to the one raised by the appellant herein, the Court of Appeal in **Daniel Nguru & Others v. R,** Criminal Appeal No. 178 of 2004 (unreported) underscored that penetration is not proved by presence of semen or bruises on the body of the victim. As the same principle is applicable in unnatural offences, the appellant's complaint that the victim managed to walk on her self acter the incident baseless.

Regarding the omission to call PW3's grandmother as witness, the law is not concerned with the number of witnesses produced but the value and credibility of the evidence adduced by such witnesses (see in **William Kasanga v R**, Criminal Appeal No 90 of 2012 (unreported) and **Yohanis Msigwa v R** [1990] TLR 148. Section 143 of the Evidence Act, specifically provides that no specific number of witnesses is required to prove a case. Parties to the case are thus at liberty to decide the specific number of witnesses they need to produce. This liberty is however not absolute. It need be exercised cautiously not to omit the key witnesses whose absence may negatively affect the case. As correctly argued by Sedani, failure to call a key witness may negatively affect the reliability of the victim's evidence and consequently make the prosecution's case to flop (see

Abubakar Msafiri v R, (supra) and **Horombo Elikaria v R** (supra). Underlining this principle in **Aziz Abdallah vs Republic** [1991] TLR 7 the Court thus:

> "... the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to 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 instant case, I am of the considered view that, whereas there is no dispute that the victim's grandmother was the first person to meet the victim after the incidence and to her narration, she was not a material witness. Her evidence would have met the fate of PW1 and PW2's as similar to the evidence of these two witnesses, she was not at the scene and her testimony before the court would have been entirely premised on hearsay. As hearsay evidence attracts no value, the testimony of this witness would have added no value to the prosecution's case. Accordingly, no adverse inference can be drawn from the failure to call such a witness whose evidence would have certainly been discredited.

The third contention that the prosecutrix evidence needed corroboration materially contradicts the current position of the law. With respect to the counsel, much as I agree with him that expert witness is relevant, it is neither conclusive nor mandatory. His submission is erroneously premised on an old position which no longer applies in our jurisdiction. The current position is provided for under ssection 127 (6) of the Evidence Act [Cap 6 RE 2019] under which is it is explicitly stated that;

> (6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth. [emphasis added]

This position has been cemented by a plethora of authorities from the Court of Appeal and these include, **Mohamed Haji Alli v. DPP**, Criminal Appeal No. 225 of 2018; **Ramadhani Said Omary v R**, Crim Appeal No. 63 of 2016; **Galus Kitaya v. The Republic**, Criminal Appeal No. 196 of 2015; **Juma Mohamed v. Republic**, Criminal Appeal No. 4 of 2011; **Ramadhani Samo v. Republic**, Criminal Appeal No. 17 of 2008; **Selemani Makumba v. Republic** [2006] TLR 379; **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006. In all these cases, the Court of Appeal has maintained that evidence of the prosecutrix in sexual offences is the best evidence and, if found to be credible, it suffices to sustain the conviction.

Therefore, much as I agree with the counsel that expert evidence is relevant, it is neither conclusive nor mandatory. As stated in **Godi Kisangela v. R Godi Kisangela v R** Court of Appeal of Tanzania, Criminal Appeal No. 10 of 2008 and the authorities above, courts are no longer bound by the evidence of medical experts because such witnesses

are most often not the actual witnesses to the incident and their evidence mainly constitute opinions. A conviction on rape or unnatural offence would be sustained even in the absence of medical evidence.

Luckily in the present case, such evidence, comprising of oral testimony of the doctor who examined PW3 and PF3, was available. The appellant has attacked this evidence and his main argument is that, it did not implicate him as it never conclusively established that the blunt object which penetrated PW3 was a penis and if yes, the appellant's penis. As alluded to earlier on, the evidence of PW4 shows that, while conducting a physical examination on the prosecutrix she found that her anus had bruises and there was spinster pulsating and mild lose orifice which suggests that the muscles were a bit loose and that the prosecutrix was penetrated by a blunt object. I agree with Ms. Werema that the purpose of the evidence of an expert is not to prove the guilty of the accused but to show whether there was penetration and this was successfully achieved through the testimony of PW4 and the PF3 which was admitted as Exhibit P1.

Having tackled the points above, the final question to be answered is whether in the light of the findings above, there is sufficient evidence to sustain the conviction and sentence metered against the appellant. I will hastily answer this question in the affirmative because the credibility of the evidence of the prosecutrix in this case which is the best evidence, is impeccable and reliable hence sufficient of sustaining a conviction even in the absence of corroboration. In my scrutiny of the record, I have observed that her eloquent account before court was not controverted.

She ably identified the appellant and explained the heinous encounter with him while pointing out that the appellant 'raped' her in anus with a 'mdudu'. She not only explained how the appellant undressed her and undressed himself but also identified where the appellant's 'mdudu' resides and where she was 'raped'. Her account remained consistent even after cross examination.

Under the premise, I see no reason to fault the lower court's findings considering further that, apart from being credible, reliable and sufficient of sustaining conviction without corroboration, PW3's story is corroborated by PW4 and Exhibit P1 which jointly establish that she was penetrated by a blunt object.

In the foregoing, I sustain the conviction and sentence and dismiss the appeal in entirety.

DATED at DAR ES SALAAM this 9th February 2022.

X _____

Signed by: J.L.MASABO

J.L. MASABO
JUDGE