

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 57 OF 2021

*(Originating from Criminal Case no 85/2020 in the District Court of Kilwa
Masoko at Masoko)*

STEPHEN TRIPHONE BORA.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

Date of Hearing: 07/02/2022

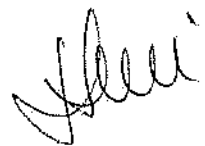
Date of Judgment: 18/03/2022

JUDGMENT

Muruke, J.

At the District Court of Kilwa at Masoko, Stephen Triphone Bora was charged for an offence of unnatural offence. He was convicted, thus sentenced to serve life imprisonment. Being dissatisfied he has filed present appeal raising grounds articulated in the memorandum of appeal.

On the date set for hearing appellant who was in person, thus requested court to adopt his ground of appeal as his submission in support of the appeal. Respondent being represented by G. Magessa Learned State Attorney did not object appellant prayer, thus court ordered Respondent Counsel to submit replaying appellant grounds of appeal, with appellant right of making rejoinder if any.



It was submitted by respondent counsel on ground one that, appellant complained is on lack of evidence to ground conviction. PW1 the victim testified that she identified the appellant as he knows him before the incident, there was no mistaken identify. Appellant spent sometime with the victim PW1. Victim mentioned appellant immediately after the incident, it is strong evidence that proved that appellant was identified by the victim, insisted Learned State Attorney for the respondent, who request ground one to be dismissed for lack of merits.

Respondent counsel submitted on ground two that, appellant complain is on evidence of hearsay. That is not right. It is not hearsay evidence that grounded conviction. Victim testified in court to have canal know against the order of the nature, by appellant, whom he know him as fried of his brother before the incident. PW3 proved that victim (PW1) was un naturally known, it was not hearsay evidence. Ground 2 lacks merits, insisted Learned State Attorney.

On ground three (3) Learned State Attorney submitted that, complaint is on confusion of dates. There is nothing like confusion of dates. Incident took place on same day that victim reported.

Respondent counsel submitted on ground four (4) that, appellant complaint is failure by trial court, to take on board the defence evidence by the appellant. Defence of appellant was regarded by trial court. More so defence of alibai was not supported by any evidence. Trial court was right for not regarding evidence of alibi.

Complaint by appellant on ground 5 and 6 is on none reliability of prosecution witnesses. Learned State Attorney insisted that, all the prosecution witnesses were reliable worth of being believed. In totality



Learned State Attorney, requested for dismissal of appeal for lack of merits.

In rejoinder appellant insisted that, time in which incident took place is not mentioned. Witnesses differ in time. Appellant requested thus court to allow his appeal.

Having heard both sides, issue raised on ground one is whether, there was sufficient evidence to ground conviction.

It is worth nothing that, appellant was charged for an offence of unnatural offence, having carnal know PW1 the victim against the order of nature. For a charge of unnatural offence to be proved, there must be penetration of male organ in the anus of the victim and such penetration however slight, is sufficient to constitute the ingredients of sexual intercourse.

PW1 the victim, testified at page 10 to 11 of trial typed proceeding that,
"As that person undressed me, he also forced me to bend forward while 221is machete was on the ground, he then had carnal knowledge of me against the order of nature, he did so by using his male organ and inserted it on my back. I felt pain, I asked for forgiveness if at all I have done so, he stopped me while threatening to kill me"

The above piece of evidence of PW1 (victim) is supported with evidence of PW3 medical doctor who examined P1 victim after being taken to hospital. He testified in terms of trial court proceedings at page 15, that,
"On 06/10/2020, the student namely Susan was brought at the Health Centre by VEO, and her sister, Suzan was complaining of having pain on her anus. I examined her and observed she had bruises, in the inner and outer part, wounds on both parties dozing blood, bleeding".

Further at page 17 of the typed trial court proceedings PW3 testified that,



"In my observation, I noticed fluid at the anus area, normally that area does not discharge such fluid, the referred fluid were sperms of a man.

From the evidence of PW1 and PW3 it is clear that PW1 was sexually abused against the order of the nature.

According to the evidence PW1 the victim she identified person who wanted to rape her after being sodomized.

At page 11 second paragraph, he is recorded to have said.

"After the conduct, that person ejected his male organ and ordered me to lie on the ground, I refused and decided to run away. He pursued me and managed to get hold of me. At that time he uncovered his face as he removed his cap on his head I recognised him to be Stephen Bora. I that person by name because he once stayed at my sister's residence, my sister is called Maria Kasiani. There was bright moon light during the incident.

There is no doubt that from the evidence of PW1 she clearly identified appellant from the 1st incident of sodomy to the attempted rape, where he removed face cover and cap. She had time to identify the appellant. Equally so, appellant mention appellant to PW4. Thus, appellant was well known to the victims prior to the incident, therefore there was no mistaken identify. Court of Appeal at Arusha in the case of Lazaro Felix Vs. Republic Criminal Appeal no 42/2003 (unreported) at page 4 of the Judgment held that,

"We are of the settled view that since the appellant was known to PW1 for a long time there was no possibility of the witness mistaking the identity of his assallant even through the light that was used for identification was from a torch.

To this court PW1 adequately identified appellant as being the person who sodomized her. Thus, ground one of appeal lacks merits.



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Ground two of appellant petition of appeal lacks merits. Evidence available is not hearsay. PW1 the victim, PW3 the doctor who examined PW1, both proved that, appellant was canal known, against the order of the nature. PW1 victim identified appellant who sodomized her, and about to rape her. She mentioned the appellant then accused immediately to PW4 and PW2. Legally mentioning of assailant immediately by the witness is evidence of reliability of the witness. There is nothing like hearsay evidence. It is evidence of PW1 victim, PW3 Doctor who examined the victim, that mostly grounded conviction.

According to the records, there is no confusion of the dates as claimed by the appellant on ground 3 of appeal. Victim was sodomized on 6th day of October 2020 at Kilanjelanje, Kilwa District, Lindi Region. None of the witnesses said different dates. The incident took place in the night.

The following day they reported to Village Executive Officer, then to police, where victim was given PF3 to go with it to the hospital. There is no contradictions at all on the dates. This ground lacks merits, accordingly dismissed.

Appellant complaint on ground 4 is devoid of any merits. Appellant defence was taken on board as seen at page 18 of the trial court judgment at paragraph two particularity that:

"In defence evidence, the accused conceded to know the victim, her brother and elder sister PW4 but he raised the difference of alibi that on 6th October he was at home Kikanda – Mpingo Village while the incident occurred at Kilanjelanje".

At page 19 trial court went on considering accused defence now appellant, as here under:-

"In the instance case, having raised the defence of alibi, the accused did not assume any burden of proving the case, but he was enjoyed to bring evidence to support his alibi so as to establish a reasonable doubt. The

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accused did not bring any witness or tender any document to show beyond his mere statement that he was not at the scene of crime Kilanjelanje on the fateful night. On 6th October 2020 he was at Kikanda Mpingo Village. The evidence show Kikanda area is located nearby Kilanjelanje area. There is no evidence in support of his alibi to show he did not went to Kilanjelanje on the fateful night for any cause and fled back to Kikanda in the same night".

The above quoted part of Judgment is clear evidence that, accused now appellant evidence was taken on board. Thus ground 4 four lacks merits.

Ground 5 and 6 all is on none reliability of prosecution witnesses. These two ground are bound to fail. PW1 the victim and PW3 Doctor who examined PW1 both proved that PW1 was sodomized. Not only their testimony was not challenged even during Cross examined by the accused now appellant, but also PW3 tendered PF received as exhibit P1 being documentary evidence that proves that, PW1 was sodomized.

Issue as to who sodomized PW1 the victim is answered by PW1 herself the victim. Her evidence was not shaken by the accused now appellant, even during cross examined. She mentioned appellant to PW4 without hesitation. Appellant by being mentioned immediately after the incidence, proves reliability of the evidence of PW1. Thoughts the defence evidence, there is no any allegations let alone proof that, there was misunderstandings between the appellant and PW1 or her relatives. More so, appellant admitted that PW1 brother is his friend who managed to trace him at his parent home following the incident. Thus, PW1 and accused, now appellant had no any quarrel, for her (victim) to make false allegations against the appellant. If anything, it is unshaken evidence of 4 prosecution witnesses that has grounded conviction.



In totality evidence of the prosecution witness were straight forward substantial to ground conviction. Thus, ground 5 and 6 lacks merits. In the end, all the grounds by appellant lacks merits, thus dismissed. Appeal is devoid of merits, thus dismissed.

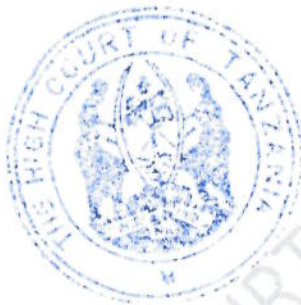



Z. G. Muruke

Judge

18/03/2022

Judgment delivered in the presence of appellant in person and Learned State Attorney W. Ndunguru For the Respondent.




Z. G. Muruke

Judge

18/03/2022