IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

(DC) CONSOLIDATED CRIMINAL APPEALS NO. 45,46 & 47 OF 2021

(Originating from the Judgement of District Court of Iringa in Criminal Case No. 103 of 2018)

AMADEO S/O MNYENYELWA.....1ST APPELLANT

RICHARD MOSES LUHASI.....2ND APPELLANT

DEOGRATIUS NYENZA..... 3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: *28/02/2022*
Date of Judgement: *21/03/2022*

MLYAMBINA, J.

This is a consolidated appeal. All the Appellants have been dissatisfied by the judgement and sentence melted against them by the Iringa District Court (Chamshama -SRM) as (he then was) in Criminal Case No. 103 of 2018. They filed three different petitions of appeal on the same grounds and reasons.

During the hearing of the three appeals, it was the prudence of the learned State Attorney for the Respondent, Miss Alice Thomas that; all three

appeals be consolidated into one appeal. Her prayer was based on various decisions which shows all cases filed under the same transaction and same facts were consolidated into one case and the same proceeded for hearing. To bolster up her argunment, she referred the Court to three decisions, namely: **Bahati Bukombe v. Republic**, Criminal Appeal No. 568 of 2017, Court of Appeal of Tanzania, at Bukoba, p. 6; Criminal Sessions Case No. 41 of 2015 and Criminal Sessions Case No 46 of 2016, in which both cases emanated into one transaction, the Court granted and marked it as Criminal Sessions No. 41 of 2015. The prayer to consolidate Appeals: No. 45, 46 and 47 of 2021 was granted by this Court. Hence, this consolidated appeal.

Before the trial Court, the three Appellants were charged and convicted after being accused to abuse their fellow man sexually (Unnatural Offence) contrary to *Section 154(1)(a) of the Penal Code, Cap 16 [R.E. 2002] now [R.E 2019].* Upon hearing, they were found liable, convicted and sentenced to serve thirty years imprisonment. This appeal is against the conviction and sentence on the following grounds of appeal:

One, the Trial Magistrate erred in law and fact to convict and thereafter sentencing the Appellants basing on the evidence of PW1 (Victim) without directing his mind that such evidence was full of doubts, in the sense that how could the victim manage to identify the Appellant during the commission of the said offence while the offence was alleged to be committed at the night and the electricity light was off? Thus, the issue of authenticity of light in relation to identification of accused persons is not only matter of fact but also a matter of law.

Two, the Trial Magistrate erred in law and fact to convict and sentence the Appellants by invoking the principle of best and true evidence of the victim without considering that the principle cannot stand at all whereby the evidence of the victim adduced is incredible and unreasonable to support the principle. That is to say, how could the victim exactly calculate minutes of each Appellant used to sodomize him in a fateful situation?

Three, the Trial Court erred in law and fact to convict and sentence the Appellants without drawing adverse inference against prosecution side as to why they did not produce key and an eye witness (Justina). The later is the one who witnessed the act. Justina was not only present during the commission of an act but was said to be ordered by one of the Appellants to switch off the light before the commission of an offence.

Four, the Trial Court procedurally erred in law and fact to convict and sentence the Appellants basing on the evidence of PW2 (Doctor) without considering that such evidence was adduced in absence of an oath.

Five, the Trial Court erred in law and fact to convict and sentence the Appellants basing on the hearsay evidence of PW3 who was informed about the incidence but did not witness an act.

Six, the Trial Court erred in law and fact to convict and sentence the Appellants basing on the evidence of PW2 (Doctor) without considering enough professionalism details of the Doctor as expert witness. PW2 did not address the Trial Court where had he got that profession, experience and the level of his profession so as to prove his competence in relations to the evidence adduced.

Seven, the Trial Court erred in law and fact to convict and sentence the Appellants without considering that the Appellants were taken to the Trial Court with no police question statements so as to prove the procedural regularity in term of when the Appellants were taken caution statements and brought before the Court of law for Trial.

Eight, from the above-mentioned grounds of Appeal, it is doubtless that the prosecution side totally failed to prove their case against the Appellants beyond reasonable doubts.

At the hearing of this consolidated appeal, the Appellants were un-represented. The Respondent was represented by Ms. Radhia Njovu Learned State Attorney. The appeal was argued orally.

In their submission to defend their appeal, the Appellants only prayed for their grounds of appeal to be adopted as their submission.

In her reply submission, Ms Radhia for the Respondent, surprisingly, supported the appeal on the ground that there was no proper identification as it is required by the law. She cited the case of **Waziri Amani v. Republic**, Criminal Appeal No. 55 of 1979 (1980) TLR in which High Court gave ingredients of identification.

According to Ms. Radhia, in the case at hand, at page 16, PW1 (the victim) told the Court that the incidence was on 3rd September, 2018 at 10pm but failed to explain on how the accused persons sodomised him and not others. However, PW1 did not explain how he identified the Appellants. Thus, at page 18 of the proceedings the witness ended telling:

All accused did the offence to me and I know them before the day they did the offence.

The above being the case, Ms. Radhia conceded that; such evidence was not enough to identify the accused persons. Ms. Radhia went on to submit that; even at page 16, it is not certain if the sodomy was done before or after switching off the light. It was the found view of Ms. Radhia that, such identification is weak and it was not enough to convict the Appellants. In the light of such argument, Ms. Radhia maintained that; the 3rd ground has merits because the Appellants were not properly identified.

The Appellants had nothing to rejoin, rather, they insisted by praying their Appeal be allowed, Sentence and Conviction be set aside by quashing them.

Having visited and made consideration on the grounds and the submission adduced by the Appellants and reply from the Respondent. It should be noted that; the offence charged off is among of the offences which have turned to be a chronical disease in our society. The Court, therefore has asked itself one important issue; *whether the prosecution side proved their case at the required standard during the trial.*

The duty imposed to this Court, being the first Appellate Court, is to wear the shoes of the trial Court and re- evaluate the evidence adduced so as to make prudent decision which shall render the justice to all parties. That is the position in *inter alia* cases of **Jongoo v. Republic** [2010] 2EA 171, **Prince Charles Junior v. The Republic**, Criminal Appeal No. 250 of 2014 Court of Appeal of Tanzania at Mbeya, p. 13. Failure of the first Appellate Court to do so is not acceptable as it was said in the case of **D.R**

Pandya v. R [1957] EA 336. In the later case, the Court was of the following view:

> On the first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny and that failure to do is on error of law.

In resolving the above issue, it is the duty of this Court to visit the law which creates the offence upon which the Appellants were arraigned and convicted for, particularly *Section 154 (1)(a) of the Penal Code, Cap 16 [R.E. 2002] now [R.E 2019]* which provides that:

> Any person who- (a) has carnal knowledge of any person against the order of nature; commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

In the case at hand, the case was proved by the victim (PW1) in which he narrated how he was sodomised by the Appellants who are persons known to him for the long time. Such proof is evident at pages 16, 17 and 18 of the trial Court proceedings.

It is the trite principle of our laws that the true and best evidence in the sexual offence is that of the victim. Such principle was established in the case of **Selemani Makumba v. Republic** [2006] TLR 379, which is the recap of *Section 127(7) of the Evidence Act, Cap 6 [R.E. 2019].*

Moreover, the charge against the Appellants was proved because the evidence of the victim was supported or corroborated by the medical

doctor (PW2) who proved that the victim was sodomised. PW2 detected that the boy had bruises in the anus and internal bleeding as it can be observed at page 20 of the typed proceedings. Such kind of evidences was applied successfully in the case of **Shozi Andrew v. Republic** [1987] TLR 68 (CAT).

Also, the evidence of the victim was corroborated by the WEO where the incident occurred (PW3). The later immediately mentioned the Appellants when asked to do so as per page 20 of the typed trial Court proceedings. This being the case, the Court believes that the Appellants are the one arrested for the offence they were charged with.

The Court is aware with the ingredients provided for in the case of **Waziri Amani v. R** *(supra)* on the weakness of visual identification, but in the case at hand, this Court is of the settled view that the victim properly identified the Appellants due to the following reasons:

One, the Appellants and the victims knew each other for a long time and therefore the issue of mistaken identification is totally eliminated.

Second, the Appellants invaded the victim while there was enough light to see each other and after the mouth of the victim was covered, the order to switch off the light was given as it can be observed at page 16 of the typed trial Court proceedings.

Third, the Appellants did not cross the victim on the issue of identification during the trial, that's why, I am surprised for the Respondent to support this appeal on such ground which was not raised at the trial Court. The act of the Respondent was contrary to the principle laid down in the cases of

Cyprian A. Kibogoyo v. R Criminal Appeal No. 88 of 1992, **Paulo Nchia v. National Executive Secretary, Chama Cha Mapinduzi and Another**, Civil Appeal No. 85 of 2005 (both unreported). In the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 at page 5, the Court observed that:

> As a matter of principle, a party who fails to cross examine witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial Court to disbelieve what the witness said.

Thus, the allegation of poor or improper identification raised by the Appellants and supported by the Respondent is an afterthought. See the case of **Hatibu Gandhi and Others v. Republic** [1996] TLR 12.

Moreover, someone may claim that, after the light being switched off, it was difficult for proper identification. Probably, it may be true, but in this case, the circumstance is different because there is no any raised reasonable doubt that the Court should not believe the victim. It is already settled principle that in the matter of identification, it is not enough merely to look at the factors favouring accurate identification. Equally important, it is the credibility of the witness. The condition for identification might appear ideal but that is not guarantee against untruthful evidence as per the case of **Jaribu Abdallah v. Republic** [2003] TLR 271. As I said, there is no reason advanced by either the Appellants nor the Respondent herself to doubt the victim. In the case of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39, the highest Court of this land observed that:

> The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliabilities the same way as unexplained delay or complete failure to do so should put a prudent Court to enquiry.

The Appellants have also raised the point that their conviction and sentence was reached without drawing adverse inference against prosecution side as to why they did not produce key and an eye witness (Justina) who witnessed the act by not only being present during the commission of an act. Thus, Justina was said to be ordered by one of the Appellants to switch off the light before the commission of an offence. I find such argument to lack weight because the prosecution is the primary judge of whether a witness is unworthy of belief. It is the prosecution to choose the witness she needs. In the case of **Separatus Theonest @ Alex v. Republic,** Criminal Appeal No. 138 of 2005 at Mwanza (unreported), the Court held *inter alia*:

> ...As is clear from Court's holding in Aziz Abdallah, the prosecution has discretion as to which witnesses should be called. After all, it is settled that even the evidence of a single witness, if believed, would be sufficient to prove a fact. This is so because, the evidence has to be weighed and not counted...

Therefore, even if the evidences of the rest of the unsworn Doctor, was not relied upon as his evidence had no probative value for being given without swearing, the evidence of the victim alone was sufficient enough to

convict the Appellants. Indeed, Medical doctor cannot be the sole witness to prove sodomy. There was also corroborative evidence of PW3.

In the circumstance of the above, the Court is of a settled view that the prosecution side had proved their case at the required standard, beyond reasonable doubt. This appeal is hereby dismissed for lack of merits. The conviction and sentence melted by the trial Court is hereby upheld in its entirety. It is so ordered.

Y.J. MLYAMBINA

JUDGE

21/03/2022

Judgement pronounced and dated 21st March, 2022 in the presence of the Appellants in person and in the presence of learned State Attorney Matiku Nyangero for the Respondent. Right of Appeal fully explained.

Y.J. MLYAMBINA

JUDGE

21/03/2022