IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(DC) CRIMINAL APPEAL NO. 45 OF 2021

(From the Criminal Case No. 46 of 2021 of the District Court of Kigoma at Kigoma)

MISAGO SAMSON----------APPELLANT

VERSUS

REPUBLIC----------RESPONDENT

JUDGMENT

7/3/2022 & 25/3/2022

F.K. MANYANDA, J.

In this appeal, the Appellant, Misago Samson, is appealing against conviction of the offence of unnatural carnal knowledge and sentence of thirty years imprisonment imposed on him by the Kigoma District Court, hereafter referred to as "the trial Court'.

In the trial Court the appellant was charged with five counts of the offence of unnatural carnal knowledge on allegations that on divers dates between March, 2020 and January 2021 did have carnal knowledge against the

order of the nature of a child whose name, for purpose of protecting his identity, in this judgment will be referred to by a pseudo name; "JS" or simply as "the victim". The particulars of the offence allege that he did the unlawful acts five times.

After full trial, the Appellant was found guilty hence, convicted and sentenced as explained above. He has raised six grounds of appeal which basically boil to one complaint that the offence was not proved beyond all reasonable doubts.

Later on, the Appellant engaged an advocate who preferred three more additional grounds.

The said additional grounds carry with a legal complaint that the judgment and sentence is tainted with legal flaws.

At the oral hearing of the appeal, the Appellant enjoyed representation service of a learned advocate, Mr. Method R. G. Kabuguzi, on the other hand, the Respondent/Republic was represented by Mr. Shaban Juma Masanja, learned Senior State Attorney.

Mr. Kabuguzi started by arguing his additional three grounds which he argued them jointly. The Counsel submitted that the decision of the trial Court is bad for having legal irregularities because both the conviction and sentence are omnibus. He clarified that the Appellant was charged with

five counts, instead of making a finding on each count, the trial Court simply entered conviction generally and imposed one sentence of thirty years imprisonment instead of specifying the counts.

Whether the omnibus conviction and sentence prejudiced the Appellant, Mr. Kabuguzi submitted it in affirmation. He argued that the testimony of PW2 covers a period from March, 2020 to October, 2020 but the charges goes up to January 2021. In such circumstances the counsel was of the views that omnibus conviction covering the whole period from March, 2020 to January, 2021 is prejudicial to the Appellant because it covers untouched counts by PW2 testimony. PW2 is the victim and only eye witness to the allegations. The Counsel concluded that since the omnibus conviction and the sentence do not specify the counts the same is incurable irregularity.

As to the way forward, the Counsel was of the opinion that the case be remitted to the trial Court for retrial. He cemented his position by giving reasons that even the proceedings were poorly recorded such that they are vague. He pointed out the unclear areas as been. PW4 testimony that the Appellant gave oral confession. Also, he questioned the testimony of PW7 as been unclear.

Mr. Kabuguzi cited the case **Joseph Shaban Mohamed and Another vs Republic,** Criminal Appeal No. 178 of 2016 (unreported) in which the Court of Appeal of Tanzania gave guidance on the circumstances of ordering retiral, that the same is ordered where interest of justice enquires, but not to the prejudice of the parties.

In alternative, Mr. Kabuguzi argued jointly the grounds filed by the Appellant. He submitted that the charge was not proved to the required standard in criminal law, that is, beyond all shadows of doubts.

The Counsel submitted that the reason for the trial court to convict the Appellant did not base on evidence of PW7 but from non-existent evidence. The Counsel elaborated that PW7 did not speak the words used by the trial court at page 10 of the typed judgment which say: -

> *"In the PF3 the observation by the Medical Doctor was the victim's anal sphincter muscle reduced its strength (is loose) and there is sign of penetration".*

Moreover, the Counsel challenged the findings in the PF3 that it contains two alternative findings without pointing which one of them was the actual findings. According to the Counsel the PF3 gives two alternative findings on the cause of looseness of anal sphincter were infection or insertion of a hard object.

As to the confession, the Counsel submitted that the same was retracted by the Appellant because the Appellant was tortured. He submitted further that the trial court erred in disregarding the retraction of the confession on mere reasons that the Appellant failed to bring a witness to support him. The Counsel cited the case of **Michael Luhyile vs Republic** [1994] TLR 181 where it was *inter alia* held that: -

> *"it is always desirable to look for corroboration in support of a retracted confession before acting on it but a court may convict on retracted confession even without corroboration".*

Further to that Mr. Kabuguzi attacked the evidence by PW2 been a key witness by arguing that it is weak for failure to report immediately after the incidents even on repetition for intervals of months.

He prayed for the appeal to be allowed.

Replying to the appeal Mr. Masanja opposed it and supported the conviction and sentence.

He conceded that the judgment contains the irregularities complained of by the Appellant that it was wrong for the trial court to convict and sentence the Appellant without specifying the counts. However, he quickly pointed out that the irregularities are curable because the sentences can

be ordered to run concurrently. He conceded further that there was no evidence touching the fifth count; it was not proved.

On reflection, the Senior State Attorney resorted to retrial in case the irregularities are found to be incurable. He argued that the evidence is water tight; hence the matter be remitted back to the trial court for proper convicting and sentencing.

He cited the case of **Aloyce Thomas vs Republic**, Criminal Appeal No. 8 of 2016 9unreported) where it was held that the proper remedy in such circumstances is to have the matter remitted to the trial court for it to properly convict and sentence the accused.

The Senior State Attorney pointed the evidence supporting the charge to be that of the victim relying on the famous case of **Selemani Maumba vs Republic** [2006] TLR 379 where it was held by the Court of Appeal of Tanzania that the true evidence of penetration comes from the victim in sexual offences. Mr. Masanja added further that PW2, the victim, is corroborated by the evidence of PW7, a medical officer, who examined the victim and found that the anal orifice was loose and was penetrated by a blunt object. Mr. Masanja defends PW2 testimony by arguing that, been a small boy, he was scared by the threats offered by the Appellant to him that he could harm him if he told anybody about the incidents.

The Senior State Attorney insisted that the confession by the Appellant was properly acted upon by the trial court. However, he quickly pointed out that, even if the confessional evidence is expunged, still the available evidence sufficed to prove the charge.

As to retiral, the Senior State Attorney conceded the position of the law that it is ordered where the evidence is believed and proved the charge.

He cited the case of **Samwel Marwa Roswe @ Masaba vs Republic**, Criminal Appeal No. 220 of 2014.

The State Attorney prayed the appeal to be dismissed. He also prayed for enhancement of the sentence to life imprisonment because the victim was a child below the age of eighteen (18) years. In alternative, he prayed for the case to be remitted to the trial court for proper conviction and sentence only not trial.

Then Mr. Kabuguzi rejoined basically reiterating his submissions in chief. He added conceding on the position of the law that the best evidence of penetration in sexual offence cases comes from the victim, but insisted that the victim must be credible. He argued that, in this matter, PW2 credibility is wanting.

Those were the submissions by the counsel for both sides. It suffices to say that I am thankful to them as both with the usual zeal and eloquence argued their positions. It is my turn now to determine this matter.

From the submissions of the Counsel I gather that there is no dispute that the trial Court convicted and sentenced the Appellant without specifying as to which of the five counts the conviction and sentence were entered. The Counsel lock horn as to what is the remedy.

Mr. Kabnuguzi, the Counsel for the Appellant opined that the irregularities are serious and incurable. The reasons he gave are that the evidence especially that of the victim did not touch the fifth (5^{th}) count. This fact is admitted by the State Attorney. Mr. Kabuguzi observed that the conviction and the sentence been so omnibus prejudiced the Appellant. On his side the State Attorney tries to severe the fifth count attempting to convince this court that the conviction was limited to four counts not all five counts.

This Court agrees with the counsel for both sides that the judgment of the trial court is bad in law for the omnibus conviction and sentence. There is plethora of authorities on this position of the law. In the case of **Barton Mwakipesile vs Republic,** [1965] 1 EA 407 the then East Africa Court of Appeal said as follows;

"When there are more than one count, each must be dealt with separately by the Court, rather than passing on one omnibus sentence".

See also the case of **Republic vs Temaeli Nalompa [1971] HCD. 442** and **Jumanne Ramdhani vs Republic** [1992] TLR 40.

In the latter case this Court, Hon. Masanche, Judge, as he then was, held that;-

"It is unlawful to award omnibus sentence. Each count must receive a requisite sentence. The magistrate may then decide to order the sentence to either run concurrently or consecutively depending on the nature of the charge and the evidence unfurled at the trial".

Although the authorities discussed above concern sentence, the same principle applies to omnibus convictions.

A question that follows is what are the effects of omnibus conviction and sentence. In my understanding of the law and the authorities cited above, is to render both the judgment and sentence so imposed illegal and it is incurable irregularities. The way forward is to have the matter remitted to the trial court so that it can enter conviction and sentence properly, because there is not conviction and sentence in law.

However, as rightly submitted by Mr. Kabuguzi and conceded to by Mr. Masanja, it is a position of the law that the matter can only be remitted back where this court is satisfied that there is cogent evidence in support of the charge. It cannot be remitted back where there is no evidence holding up the charge. This was the holding in the case of **Joseph Shaban Mohamed and Another vs Republic (supra)** in which the Court of Appeal of Tanzania followed a decision of the erstwhile East Africa Court of Appeal in the case of **Fatehali Manji vs Republic** [1966] EA 343 where it was held Inter alia that:-

> *"...in general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for purposes of enabling the prosecution to fil up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to be blame, it does not necessarily follow that a retrial should be ordered; each case depend on it a particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where the interests of justice require it an should*

not be ordered where it is likely to cause an injustice to the accused person".

It follows, therefore, in this appeal a question is whether there is cogent evidence to support the charge.

The evidence adduced at the trial by the prosecution which was believed by the trial court and used to convict the Appellant can be grouped into three areas namely, testimony of the victim PW2, evidence of a medical officer PW7 and confessional oral statement.

Mr. Kabuguzi has challenged the testimony of PW2 arguing that it is unreliable for reason that of delay in naming the Appellant for about a year without reasons.

He also attacked the evidence of PW7 on two reasons that he didn't specify the cause of anal sphincter looseness whether it was due to infection or penetration of a hard object. As to confessional oral statement the Counsel argued that the same was repudiated by the Appellant who testified that he admitted the accusations in order to save his skin from torture administered on him by the militia peoples on orders of the Village Chairman.

On his side the Senior State Attorney argued that the testimony of PW2 is reliable and credible relying on the authority in the case of **Selemani**

Makumba vs Republic (supra). As to the testimony of PW7 the Senior State Attorney argued that the same proves penetration because PF3 establishes penetration. The Senior State Attorney admitted that the confessional statement was retracted but argued that the two pieces of evidence sufficed.

I have dispassionately considered the urging submissions of both sides. Let me start with the testimony of PW2. It is on record that the allegations of the Appellant carnally knowing the victim against the order of nature started in March, 2020 and ended after were reported in January 2021.

The five acts were perpetrated at interval of several months. Between the first and the second acts, the interval was of five (5) months, that is, between March 2020 and August 2020, the second interval is of one month, that is August, 2020 and September, 2020 to October, 2020 and the last interval is of four months from October, 2020 to January 2021.

In all these intervals the incident was neither reported nor discovered by the victim's relatives. It was until in January, 2021 that the victim became weak hence suspect of illness led to inquisition in which the victim is said to have revealed the incidents.

The reason for revelation is said to be fear due to threats imposed on the victim. Can in such circumstances the victim's evidence be said that it is

reliable so as to fit in the authority in the case **Selemani Makumba (supra)?** In my firm opinion, the answer is in negative, I say so because considering the duration of the incidents which took place about eleven (11) months and the intervals, it fails to make sense that such delay of reporting or discovery of the incident is justified.

It is recorded in evidence that after every act in the interval the Appellant inflicted threats to the victim; the Senior State Attorney argued that it is because the victim was a child it was scared to report.

Upon my perusal of the evidence of PW1, the victim mother, the victim was aged 17 years old at the time of commission of the offence, and the Appellant was 22 years old.

In absence of evidence of continued eminent threats by the Appellant to the victim say by use of a lethal weapon, in my opinion, the victim whom age difference is about four (4) years from that of the Appellant, it is not too big to inflict such fears in the victims mind even after been released from the incident. In fact, according to their ages, makes it possible for the victim of defending himself or even revenging against the Appellant. I fail to find justification for the victim to remain silent for a period of 11 months of evil acts perpetrated on him. In the circumstances of this case, the allegations of threats are implausible; it is my firm opinion that the

authority in the case of **Selemani Makumba (supra)** is inapplicable in this case.

It is trite law that though it is true that the best evidence in sexual cases comes form the victim, such evidence must be treated with great care and it is to be looked at in its entirety.

The Court of Appeal held in the case of **Issa Juma Iddrisa and Another vs Republic** [2020] 1 TLR 365 as follows: -

> *"It is settled principle that the best evidence in cases of rape comes from the victim. However, such evidence should not always be taken wholesome and believed for innocent persons may end up in jail in the event of untruthful complaints by unscrupulous victims. The victims evidence therefore, need be treated with great care so as to determine her credibility"*

The court went further stating that;

> *"It is trite law that in assessing a witnesses credibility his or her evidence must be looked at in its entirety, to look for inconsistences, contradictions and or implausibility or if its entirety consistent with the rest of the evidence on record".*

As it can be gleaned form the evidence on the record, the evidence of PW2 is implausible and it is supposed to be corroborated by other cogent independent evidence.

In this case the corroborative evidence is alleged to come from PW7, the Medical Officer who examined the victim. His report contained in the PF3 was admitted as exhibit P2. My examination of exhibit P2 shows that the same was filled on 4/2/2021 when the victim was taken to hospital. This was about a month since discovery of the incidents by PW3, there is no reason for accounting of the delay.

Secondly, the offence filled in the PF3 which is alleged to have been committed is written as "kulawiti" (carnal knowledge against the order of the nature) and general information obtained by the Medical officer from interviewing PW1, the victim mother, is recorded in item (1) as "sexual assault". Description of the physical injuries on the anus in part C of the PF3 is written as "anal sphincter is loose; tender"

The remarks of the Medical Officer is that "there is sign of penetration". This is the evidence of PW7 according to PF3 (exhibit P2).

In his testimony the Medical Officer who testified as PW5 stated that he was informed by the victim's mother that the victim was sodomized.

The chain of evidence above suggest that the Medical Officer conducted examination and made his findings in influence of the story told to him. Lastly, the Medical Officer, found that the sphincter muscles were loose

and then went on elaborating that muscle looseness in anal sphincter may be a result of infection or insertion of hard object.

As it can be seen apart from failure of providing the basis of his findings as an expert, PW7 failed to pin point the root cause of sphincter muscles looseness. He gave two options for cause of looseness of the sphincter muscles without pointing the actual cause in relation with the case before him.

In his report, PF3 (Exhibit P2), PW7 gave a conclusion of signs of penetration without further elaboration; it was important to explain the basis of his findings and tell "actual findings" not "signs of findings".

Experts are required to give the grounds of their findings. See the decision of the Court of Appeal of Tanzania in the case of **DPP vs Shida Manyama @ Selemani Mabuba,** Criminal Appeal No. 285 of 2002 (unreported).

It is the findings of this court that the evidence of PW7 is wanting. It is so because PW7 had prior history of the allegations he ought to have given the basis of finding. Moreover, he ought to have specified the cause of looseness of the sphincter muscles between infection or hard object penetration, not only in his report, but also in his testimony.

Therefore, the testimony of PW7 is weak, it can not corroborate another weak evidence.

It is trite law that evidence needing corroboration cannot itself corroborate another evidence. See the case of **Mkubwa aid Omari vs SMZ** [1992] TLR 365 where the Court of Appeal of Tanzania held as follows: -

> *"PW4 was a witness whose evidence needed corroboration before it could be acted upon. Such evidence which requires corroboration could not itself corroborate accomplice evidence."*

In the case of **Aziz Abdalah vs Republic** [1991] TLR 71 the Court of Appeal explained the purpose of corroboration in the following words.

> *"the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which as evidence is sufficient and satisfactory and credible".*

In the case at hand, the evidence of PW2 is found to be weak and the corroboration evidence from PW7 is weak, therefore from the authorities referred above, the evidence adduced by the prosecution is weak.

It is the finding of this Court that the evidence adduced by the prosecution in proof of the charge against the Appellant is deficient.

It is from the findings above that there is no need of remitting the file back to the trial court for retrial, a situation which will enable the prosecution to fill up the gaps, a move which is prejudicial and against fair trial to the Appellant.

In the upshot, for reasons stated above, I do hereby allow the appeal, quash the conviction and set aside the sentence of thirty (30) years imprisonment imposed on the Appellant.

Consequently, I do hereby order that the Appellant be released from custody forthwith unless otherwise lawfully held in connection with other lawful purposes.

It is so ordered.

F.K. MANYANDA

JUDGE

25/3/2022