IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 72 OF 2020

(Arising from Criminal Case No 86/2020 of the District Court of Lushoto at Lushoto)

MUSSA SALIM @ BAKARI.....1ST APPELLANT

SALIMU JUMA RAMADHANI.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Mansoor J

Date of Judgement- 18th February 2022

Before the District Court of Lushoto at Lushoto, the appellants Mussa Salim Bakari and Salimu Juma Ramadhani were jointly and together charged with and convicted of the offence of Unnatural Offence contrary to section 154 (1) (a) of the Penal Code, Cap 16 R.E 2019. It was alleged that on 23rd of July 2020 at Makose Village within Lushoto District in Tanga Region, the appellants did have carnal knowledge of one H, a boy of 13 years old against the order of nature. They were subsequently convicted and sentenced to serve life imprisonment. Aggrieved by that decision

of the trial court, the appellants have appealed to this court, on the following grounds: -

1. *That the learned trial magistrate erred in law and in fact by failing to analyze that the charge sheet was defective as it lacks proper provision of law*
2. *That the learned trial magistrate erred in law and in fact by convicting the appellants basing on a very weak and unreliable visual identification that lack appellant's description during reporting the crime to the police*
3. *That the learned trial magistrate erred in law and in fact by failing to notice that the victim's age was 16 years old and not 13 years old since (PW3) victim's mother disclosed that (PW1) victim was born in 2004 therefore PW1 was not a boy of tender age, and his testimony was supposed to be adduced by oath or affirmation hence infringed Section 198 (1) of the Criminal Procedure Act (Cap 20 R.E 2002)*
4. *That the learned trial magistrate erred in law and in fact by failing to notice the credibility of PW1 was*

undermined by delaying reporting immediately this abhorrent crime to his mother (PW3) and to the authority

5. *That the learned trial magistrate was not scrupulous to notice palpable contradiction in the evidence of PW1 regarding the exact appellants who sodomised him (PW1) between the 1st and 2nd Appellant.*
6. *That the learned trial magistrate erred in law and in fact by failing to consider the defense of alibi which was adduced by the appellants*
7. *That the prosecution did not prove its case beyond reasonable doubt.*

Before probing into the determination of this appeal, I find it apposite to narrate, even though briefly, its factual background.

The victim's parents own a milling machine's business. The machine is operated by an employee. On 23rd July 2020, the employee got an emergency, he therefore reported the matter to the victim's mother, and they decided that the victim goes to

conduct business until its closing hours. The victim having finished the errand of the day at the machine, he took his way home. On his way to Makose Village where he resided, he was attacked by the two appellants whom he recognized as his fellow villagers. They covered his mouth with a piece of cloth, held his hands on a banana plant, undressed his clothes and made him bend forward. Thereafter, the second accused person inserted his penis unto his buttocks and sodomised him while the first accused person pinned him tight on the tree by holding his hands and legs. They released him later and he went back home. When he got back home, he did not tell his mother about what transpired, however he started feeling painful during bowel movements. On the next morning, his mother woke him up to go to school. He had no choice but to tell the whole story to his mother and revealed the appellants as the assailants. Thereafter they reported the matter to the police. At the police, a PF3 was issued with which the victim was taken to the hospital for examination. After examination, the PF3 was duly filled, and the matter was instituted in court. The PF3 was admitted as exhibit in court. That was in short, the prosecution's case.

The appellants relied on a defense of alibi whereby the first appellant Mussa Salimu stated that on the day of the incident he was at his workplace at a restaurant in Makose village throughout the day with one Mussa Rajabu and Ibrahim. He brought Mussa Rajabu and one Twahiru Awadhi to support his evidence that on the material date he never left his workplace. On his side, the second appellant stated that on 23rd July 2020 he was at home taking care of his siblings as his mother was not at home. One of his friends Eliuze Ezekiel joined him and had a sleep over at the second appellant's home. Eliuze was his witness in court to support his alibi defense.

In this appeal both appellants appeared in person while the respondent was duly represented by Ms. Regina Kayuni, learned State attorney. On 06th September 2021 it was agreed by both parties and blessed by the court that this matter be conducted by way of written submissions.

Submitting jointly in support of the grounds of appeal, the appellants firstly claimed that the charge sheet was defective for lacking proper provision of law. Elaborating, they stated that

since evidence shows that the one who sodomised the victim was the second accused person, then it was wrong to charge them both with a similar charge. Also, that the charge was defective for not containing subsection 2 of Section 154 which was relevant to the circumstances. They cited inter alia, the case of **Mussa Mwaikunda vs R** (2006) T.L.R 387 to the effect that an accused person must know the nature of the case facing him.

Regarding the second ground, the appellants assert that the identification at the scene of crime by the victim was a very weak and unreliable visual identification not enough to sustain conviction. They claimed that since the event occurred at 1900 hours it was not enough to say that there was moon light without describing its intensity and that the victim resided in the same village as the appellants is not enough proof.

On the third ground about contradicting evidence about the age of the victim, the appellants claimed that such contradiction between the age of 13 years or 16 years goes to the root of the matter. According to them this also affected the way the victim's evidence was taken by making him promise to tell the truth only as if he was a child of tender years instead of affirming.

On the other ground, the appellants faulted the district court for not noticing that the victim delayed in reporting the matter at the earliest opportunity to his mother and the authorities. According to them, the matter was reported on the 28th of July 2020 while the offence is alleged to have occurred on 23rd July 2020.

Submitting further, the appellants blamed the trial court for not according to weight to their alibi defense. Explaining, they said that the honorable magistrate simply ignored that defense. In the end they summed up that the case against them was not proved to the tilt and prayed to be left at liberty.

Responding, the republic via Ms. Regina Kayuni opposed the appeal in its totality. In the upshot her submission was that the charge sheet was not defective as the relevant section was that with which the appellants were charged and convicted with i.e., Section 154(1) (a). Concerning the issue of identification, it was the learned state attorney's take that the same was proper and sufficed to ground a conviction. She cited the case of **Abdallah Rajabu Waziri vs Republic,** Criminal Appeal No 116 of 2004 at page 10 where the Court of appeal regarded even a matchstick light as enough to give light to identify the culprits. About the

age of the victim, the Ms. Kayuni maintained that the best witness to give evidence as to the proper age of a child is the mother. If the mother stated, he was 13 years of age then that is the victim's age. She cited the case of **Boniface Alistedes vs The Republic,** Criminal Appeal No 346 of 2019 where it was observed that best evidence as to the age of the child comes from the parents. Regarding the delay in reporting the incident, the republic submitted that it was reasonable for the victim to feel scared of telling his mother about the incident early. Concerning contradictions on who among the appellants sodomised the victim, it was the respondent's stance that the contradiction was normal and did not affect the prosecution case. About alibi defense, she submitted boldly that it was rightly disregarded by the court as no notice was given before hand on the intention to rely on it.

Summarily, the respondent submitted that the case against the appellants was sufficiently proved to the required standards in criminal cases that is beyond reasonable doubt and hence the appeal should be dismissed in its entirety.

In their rejoinder, the appellants reiterated their previous submissions which I will not delve in retelling.

I have had ample time to canvass through the record of this appeal as well as submissions by both parties. The offence with which the appellants are jointly and together charged is that of Unnatural Offence which is against Section 154 (1)(a) of the Penal Code, Cap 16 of our Laws Revised Edition of 2019. The section provides; -

> *Any person who-*
>
> *(a) has carnal knowledge of any person against the order of nature; or 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.*

Ground one of this appeal faults the charge sheet for being defective. I have seen the charge sheet which was read and explained to the accused persons on the 28th of July 2020 at the District Court of Lushoto in Lushoto. This is how it was; -

STATEMENT OF THE OFFENCE

UNNATURAL OFFENCE: Contrary to Section 154 (1) (a) of the PENAL CODE (Cap 16 R.E 2019)

PARTICULARS OF THE OFFENCE

MUSSA S/O SALIMU @ BAKARI and SALIMU s/o JUMA *are jointly and together charged on 23rd day of July 2020 at Makose Village within Lushoto District in Tanga Region did have carnal knowledge of one H a boy of 13 years old against the order of nature.*

Without further redo, I find that the charge sheet, regarding the subsection (1) (a) was in alignment with the offence with which the appellants were alleged to have committed. Subsection 2 of section 154 would have been relevant if the victim was below ten years of age which is not the case here.

Under this same ground, the appellants also complain that since it's the second accused person only who according to evidence was said to insert his penis in the victim's buttocks then it was not proper to charge both appellants with the same offence. The law on parties to offences is provided for clearly under the Penal Code, Cap 16 R.E 2019. This law provides scenarios for group of persons who are considered as principal offenders. It goes as; thus, -

22.-(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the

offence and to be guilty of the offence, and ***may be charged with actually committing*** *namely-*

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) A person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission the act or omission would have

constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or the omission.

Having quoted the law above, the first appellant having aided the second appellant in committing a crime by holding the boy's hands and legs, becomes as an offender as the one who sodomised the victim. In that matter, the first ground of appeal totally crumbles.

Sailing to the second ground on identification. Appellants faults identification that it was very weak and unreliable. The respondent avers that the appellants were properly identified. I must admit that Identification in cases of this nature, can be very tricky. It is true that the evidence of visual identification is the weakest type of evidence. This has been stated in several cases including **Waziri Aman V Republic (1980) TLR 250.**

It is without doubt, the determination of this case wholly depended on the issue of identification by PW1 who was the only witness at the scene of crime [illegible]. The offence was committed at 19.00 hrs. In my view, there is no way that a culprit will ever

identify himself readily while committing a crime as serious as this. He will be more careful in concealing his identity to evade criminal responsibility. As correctly submitted by the respondent while submitting against the appeal to this matter, courts have at times relied on the light of a matchstick as enough to support visual identification. (See the case of **Abdallah Rajabu Waziri vs Republic** (Supra)).

The 1st appellate court rightly convicted the appellants relying on the evidence of visual identification of PW1 by their names, and that they reside in the same village, and also that there was moonlight aiding him to identify them which was enough. In this regard the second ground of appeal is without merit.

The complaint about the age of the victim will not belabour this court much. It has been held numerously by the highest court of the land that evidence as to proof of age can be given by the victim, relative, parent medical practitioner, or where available, production of birth certificate. (See the case of **Isaya Renatus vs. the Republic, Criminal Appeal No. 542 of 2015, CAT** *(unreported)).* In **EDWARD JOSEPH VS REPUBLIC,** Criminal Appeal No. 19 of 2009 (unreported), the Court said Evidence of a

parent is better than that of a medical Doctor as regards the child's age. In **IDDI S/O AMANI VS REPUBLIC,** Criminal Appeal No. 184 of 2013 (unreported), the Court was confronted with a scenario whereby, the appellant claimed that no birth certificate was tendered to prove the age of the victim. The Court relied on the evidence of the father as being in a better position to prove the age of the victim who was his daughter..

In this case PW2 insisted not once that her son was 13 years of age despite her ignorance on the years. I take that the mixing up and contradictions regarding years of the victim being born whether in 2004 or 2006 were minor and do not go to the root of the matter considering the victim's mother is a village woman who is most probably uneducated. Luckily, the contradiction did not even affect the manner of PW1 giving evidence as he was affirmed after stating that he understood the nature of oath. In that case, the third ground fails as well.

Concerning delay in reporting the incident, I think this averment is not supported by evidence available as it is well seen in proceedings that the victim on the first day was afraid of telling

his mother on that same night but on the next morning when he was required to go to school by his mother, he had to break the news to her as he was feeling painful in his anus. 24 hours did not pass from when the incident arose to when the victim reported to his mother. This cannot be regarded as delay and hence this ground too fails.

The fifth ground is a repetition of what has already been determined above concerning parties to offence and therefore it will be of no use in recapping. The sixth grievance is on the defence of alibi not being considered. The law on alibi defence as provided under Section 194 of the Penal Code states; -

(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.

(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish reasons before the prosecution case is closed.

(6) Where the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence.

In the case at hand, the appellants did not give notice regarding their intention to rely on alibi defence. The trial magistrate at page 11 of her judgment explained clearly why she accorded no weight to such a defence. Given the clarity of law under Section 194(4- 6) of the Penal Code, I find no reason to disturb the trial court's findings on this matter.

Lastly, the appellants aver that the case was not proved beyond reasonable doubt. While perusing the record, I recognised that both appellants did not dispute the facts under paragraph 3 of facts read to them by the prosecution during preliminary hearing. This can be readily seen at pages 6-8 of the typed proceedings. The facts were read to them, and they signed in compliance to Section 192(3) of the Criminal Procedure Act, R.E 2019.

These facts contained an account of everything that happened to the victim on 23rd July 2020 at 19:00 hrs that is being carnally known by the appellants against the order of nature. The

appellants agreed to the truthfulness of these facts and endorsed their signatures. They were served with the proceedings and the judgment in preparing this appeal and they have never complained of this matter. This only means that what is contained in the MEMORANDUM OF UNDISPUTED FACTS is true. Therefore, the appellants cannot be heard disputing this fact now.

Further, in one case of **ALI ABDALLAH RAJABU V SAADA ABDALLAH RAJABU & OTHERS** (1994) TLR 132 it was held, inter alia that

"It is the trial court which is better placed to assess their credibility than an appellate Court which merely reads the transcript of the record".

Also, in the case of **OMARI AHMED V R** (1983) TLR 52 it was stated

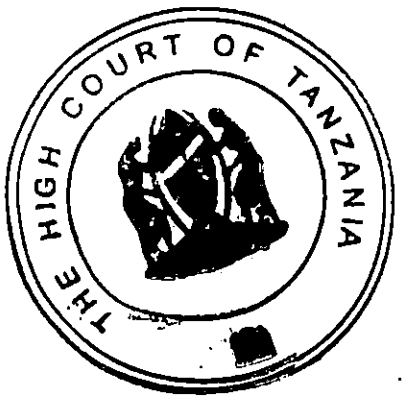
"the trial court's finding as to credibility of witnesses is usually binding on an appeal Court unless there are circumstances on the record which call for a reassessment of their credibility".

In this case I find no reason at all to disturb the trial court's finding on the credibility of evidence of PW1 and the rest of the witnesses and this is one of those cases in which the best evidence has come from the victim himself above the medical report and the rest of evidence adduced in the trial court.

On the other hand, I am a bit concerned about the sentence imposed upon the appellants, that of life imprisonment. This implies a jail term for the convicts' entire life remaining. The appellants are young boys aged 28 and 21 years respectively. The law under section 154 (1) (a) with which they were convicted provides for alternative sentence between 30 years imprisonment and life imprisonment. Since both appellants are first time offenders, and also noting that they have been in prison custody since 28.07.2020 as remands and since 29.09.2020 as convicts; Pursuant to Sections 29 (a), and 30 (1) of the Magistrates Courts Act, Cap 20 R.E 2019, the sentence of life imprisonment imposed upon the appellants is hereby reduced to thirty years imprisonment starting from the date they started to serve their imprisonment term on 29.09.2020.

In view of what is stated above, I hold that having dismissed the appeal by the two appellants herein, the conviction is confirmed. However, the Sentence is revised, and Each of the Appellant shall serve a Sentence of 30 (Thirty) Years Imprisonment.

Delivered at Tanga, this 18th day of February, 2022.



L. MANSOOR

JUDGE

18th February 2022