IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 8 OF 2022

(*Originating from the District Court of Korogwe in Criminal Case No. 18 of 2021)*

ALLY SALIMU MAKUBELI.. APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

Mansoor, J :
Date of Judgment- 29TH MARCH 2022

The appellant is the sole accused person in Criminal Case No. 18 of 2021 before Korogwe District Court. He stands convicted for the offence under section 154 (1) (a) and (2) of the Penal Code and sentenced to Life imprisonment. Challenging the same, he is before this Court with this Appeal.

The case of the prosecution in brief is as follows:- on diverse dates between June 2018 and December 2019 at Mtonga Chini Area in Korogwe District the accused had subjected a

boy of 13 years old (name withheld) to unnatural offence. The boy of 13 years old who is the victim testified before the Trial Court as PW2, and I shall refer to the boy as "PW2" or "the boy". It is the story of PW2, and his father who testified in Trial as PW1 that built up the case for the prosecution. The evidence of the Doctor PW3, the Headmistress (PW4), and the Investigator (PW5) were corroborative in nature of the case of PW2.

PW2 was born and raised in Korogwe District at Mtonga Chini Neighborhood, he did his primary school in Korogwe. He was taken to Olaleni Boarding School for Secondary Education; he was 13 years in 2021. PW2 joined the school in January but in March, while he was in the Dormitory, the Patron one Adolf Mushi, reported to the Headmistress that PW2 was demanding sex from the other students residing in the dormitory. The Headmistress one Victoria Julius Matoi, called the boy, interviewed him but the boy refused to say anything and did not mention anyone. The headmistress decided to call PW2's father and advised him to take his child home to keep close eyes to him as his son had shown strange behavior. PW1, the

father of PW2 took the boy home, he interrogated the boy, and the boy mentioned one Rama Kimaro, the neighbor, who has been subjecting him to unnatural offence since he was in standard 4, in 2017. PW1 and his wife reported the matter to the police but on their way back from the Police Station, PW1 asked his son if it was only Rama Kimaro who was sodomising him, the boy mentioned the accused herein. PW1 went back to the Police station and reported the accused as the perpetrator. PW2 told his father that the accused herein had subjected him to unnatural offence only two times, first time in June 2018, and second time in December 2019, an interval of almost one and a half years. PW2 in his evidence confirmed that he told his father that the accused had subjected him to unnatural offence twice, once in June 2018, and the second time in December 2019, but it was Rama Kimaro who has been doing it many times since 2017. It must be noted that the first person to be mentioned by PW2 is Rama Kimaro, the neighbor, but upon realizing that PW2 had mentioned him, he fled from the scene, and he is nowhere to be found to date. After reporting the incident to the police, they were given a

PF3, and the Doctor examined the boy. The Doctor who gave evidence as PW3 confirmed that the boy was penetrated as his anus was enlarged and had an infected wound in his anus which caused pus coming out from the wound. The boy was treated by antibiotics. The victim who testified in court as PW2 confirmed that it was Rama Kimaro, the accused, and a boy from boarding school called Joshua who had committed the evil act on him, and since the accused was their neighbor, he recognized him by showing the police the accused's residence which was a block away from the victim's father's house. PW5, who was a Police, took up the case for investigation and recorded the appellant's statements, he interviewed the boy who described the accused's room that it had pictures of the accused on the wall, a mattress, and a mosquito net, and when he went to inspect the room, he found the mattress, the mosquito net and the pictures of the accused hanging on the wall. The appellant never confessed in his statement to have committed the act on the boy. The appellant said he was framed as there was animosity between him and the boy's father as the TV of the boy's father was stolen, the boy's

father had asked the accused to find it and gave him Tshs 15,000 for finding the TV, and since he could not find or recover it, the boy's father held grudges against him, and suspected him to be the thief. The appellant also raised a defense of alibi stating that he was not in Korogwe in 2018, and 2019, as he was living in Dar es Salaam, he went back to Korogwe in the year 2021. His alibi was supported by the evidence of his father who testified as DW2, and his mother who testified as DW4, DW3 Revenatus Evarist, who is a neighbor and Alei Salim (DW4) also a neighbor. These witnesses of the Appellant also supported the story of the appellant that the father of the victim was suspecting the accused to be the thief and had asked him to look for the stolen TV, but the appellant could not find it, and since then, PW1, who is the father of the victim was holding grudges against the appellant. PW1, the victim's father confirmed the age of the victim, and birth certificate of the victim was admitted as Exh P1. The PF3 was admitted as Exhibit P2.

During trial, to establish the charge, the prosecution examined 5 witnesses as P.Ws.1 to 5, exhibited Two documents as

Exs.P.1, which is the Birth Certificate of the victim, and Exh P2 is the Medical Examination Report of the victim (PF3). All the Five prosecution witnesses supported the case of the prosecution.

The charge relating to the alleged unnatural offence committed on P.W.2 is as narrated by PW2, the victim, that in June 2018, when one Rama Kimaro was sodomising him, the appellant was peeping through the window and saw the boy being sodomised. PW2, the victim said he saw the appellant peeping through the window and had asked him for help, but the appellant did not help him and went away. The next day, the appellant asked the boy to have sex with him, the boy agreed since the appellant threatened him that if he does not agree he will tell the leaders and his parents. Then after one and a half years, in December 2019, the appellant told the boy to come to his house to get fish "mboga", as the boy's father had told the appellant to get fish from the appellant's mother who is selling fish. Then the boy went to the appellant's house, he did not see the appellant's mother, but he saw the appellant outside the appellant's house. Then the appellant

asked the boy to help him get some luggage inside his room, then the appellant was hiding behind the door, and once the boy entered the room, the appellant shut the door, slapped the boy on the face, then the appellant undressed him and inserted his penis into his anus and thus committed unnatural offence for the second time. This occurrence was not witnessed by anybody else. Based on the evidence of P.W.2, the medical report as well as the evidence of PW1, the father of the boy, the trial Court convicted the appellant.

The appellant would assail the findings of the trial Court on the grounds that he is innocent, he was implicated since he had a dispute with the victim's father over a stolen TV. He also said in 2018 and 2019, he was not in Korogwe.

The learned State Attorney would oppose the contentions of the appellant. According to her, the evidence of P.W 1, and PW2 are consistent, cogent, and convincing, which cannot be doubted at any cost; The evidence of PW2 the victim was corroborated by medical report the PF3 which was admitted in court as evidence. There was also medical evidence of the

Doctor (PW3) who have supported the case of the prosecution. She said there was proof of penetration and the appellant was satisfactorily identified by the victim since he is the neighbor and a familiar person.

I have carefully considered the above submissions and perused the records.

There is no doubt that the medical report PF3 admitted in court as evidence, it was proved that the boy was subjected to unnatural offence by a monster man or even several people at different times. This was proved by a Medical Report and the Evidence of PW3, the Doctor. The boy is of tender age, and this was proved by the father of the Victim (PW1), and the school Teacher (PW4). The issue is whether the involvement of the appellant/accused is proved.

I shall begin by the evidence of PW2, the Victim, and it should be noted that I am fully aware of the cases cited by the Trial Magistrate in her Judgement, in which the principles in sexual offences cases and especially when the offences involve a minor, the best evidence is that of the victim. I understand

that in the case of **Saidi Majaliwa vs R Criminal Appeal No 2 of 2020 CAT, (unreported),** and the case of **Filbert Gadson @Pasco vs R, Criminal Appeal No. 267 of 2019, CAT (unreported),** the Court of Appeal set a principle that in sexual offences the best evidence must come from the victim, and the true and reliable evidence in sexual offences is that of the victim who is required to prove penetration. Also, the case of **Filbert Gadson Pasco vs R, Criminal Appeal No. 267 of 2019 (supra),** in which it was stated that if the evidence of the victim could stand alone to convict, there is no need to corroborate it.

But, in the above cited cases, the principle is not absolute, the Court of Appeal had qualified it, they say, and I quote " *after assessing the credibility of the evidence of the child of tender years, 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 mine).

In the above cited cases, the Trial Magistrate is cautioned, by the reasons ***to be recorded in the proceedings*** that he must assess the credibility of the evidence of the child, and to make sure that the victim's evidence is nothing but the truth.

The Trial Magistrate states in her Judgement that she conducted voire dire test on the boy, under section 127 of the Evidence Act, and the boy understood the meaning of telling the truth and so, he was telling nothing but the truth. However, the Magistrate states, at page 30 paragraph 2 of the judgment, and I quote:

> "To wind up, in his defense, the accused person raised a doubt that his evidence of the victim (PW2) averred that when he was at school, he was sodomised by one Joshua and told his head teacher about the same, but the head mistress in her testimony contended that she had no information about that. In this issue I would like to comment that even though the testimony of the victim and PW4 there is some material departure, I find no reason to discredit the testimony of the victim (PW2)

because he was the one who experienced and saw what the accused person had done to him"

The Magistrate continued to say that she had assessed the demeanour, reliability, and credibility of the victim, and despite the departure, she was satisfied that the child victim was telling nothing but the truth and proceeded to convict the appellant. I noted not only that there was this departure from the evidence of the child, as noted by the Trial Magistrate in her judgement, the story of the child during the 2nd incident which occurred in December 2019 is also not clear and contradicting. The Child says the appellant was standing outside the house, and then he asked him to take the luggage's in the room, he did not say what luggages, and then he says, the appellant was hiding behind the door in his bedroom, and suddenly shut the door after he entered the room. There is some untruthfulness in the story of the child since the appellant could not be standing outside the house and then enter the room and hide. Thirdly, the boy says it was in a day light, but no one has heard or saw what happened. The prosecution also could not explain as to where the

appellant's parents were when this boy was being subjected to unnatural offence on a day light in the appellant's parents' house. It is through the evidence of the prosecution that the appellant was living with his parents at mama Rashidi's house. Meaning that there were many other people living at mama Rashidi's house but on that day of the incident, no one was home, and none explained if no one was home during the incident. This raises an eyebrow on the prosecution case and had shaken the credibility of the victim's story. Fourthly, the child testifies that he told his father about the schoolboy named Joshua who sodomised him at school, the father did not testify about Joshua at all, maintaining that the child never told his father about the boy at school called Joshua who sodomised him. Again, at first, when the boy was interrogated by his father, he mentioned only on person Rama Kimaro, and the first complaint filed at the police was to report Rama Kimaro. Apparently, the appellant herein was mentioned after further torture of the child from his parents as testified by DW1, DW2, and DW5, that they heard the parents of the victim torturing his son at night forcing him to mention the

people who have been sodomising him. Even after the torture, the boy kept mentioning Rama Kimaro, and soon after they took the boy to Police and on their way back from the Police, it was when the boy mentioned the Appellant herein. This raises doubts in the testimony of the victim regarding the involvement of the appellant in the commission of the offence. This case is based on circumstantial evidence, and since no one has seen the appellant doing the evil act on the boy, the circumstantial evidence needed to be clear, leaving no doubt to the court as to the guilt of the appellant. It is very unsafe to convict an innocent person basing on circumstantial evidence and therefore the court is required to receive clear, unbroken evidence to be able to convict. This has been stated in **Hamid Mussa Timotheo and Majid Mussa Timotheo vs. R (1993) TLR 125,** that in a case that proof depends on circumstantial evidence, the evidence must be straight, there should not be any doubt raised or contradictions or inconsistencies or missing links and that the *prosecution case which is based on circumstantial evidence could only be the*

best evidence when there is no missing links in the evidence, there is no contradictions or inconsistencies.

In cases of sexual assault against children, the first, and most important, piece of evidence, is always the statement of the child victim herself/himself. I understand that evaluation of the evidence of child witnesses, especially where the child is the victim herself/himself, is always a tricky affair. Combating, and, at times, conflicting, considerations come into play in such cases. On the one hand, there exists a presumption that a child of tender years would not, ordinarily, lie. The applicability, or otherwise, of this presumption, would necessarily depend, to a large extent, on the age of the child. No dividing line can be drawn in such cases; however, one may reasonably presume that a child of the age of four, or thereabouts, would be of an age at which, if questions spontaneously put to the child, the answer would ordinarily be the truth. As against this, the Court is also required to be alive to the fact that children are impressionable individuals, especially when they are younger in age, and are, therefore, more easily tutored. Thus, there must be precautions to be

exercised while evaluating the child evidence as the reason is that child witnesses are usually regarded as susceptible to tutoring; consequently, Courts in a number of cases cited above held that, where the Trial Court is satisfied, on its own analysis and appreciation, that the child witness before it is unlikely to be tutored, and is deposing of his own will and volition, it cannot treat such witness, or the evidence of such witness, with any greater circumspection, than would be accorded to any other witness, or any other evidence.

A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered under section 127 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any

other competent witness and there is no likelihood of being tutored.

The evidence of PW2 should have been evaluated more carefully, and upon reevaluation of the evidence on record, and in particular the discrepancies pointed out herein above, it is apparent from the records that the Trial Court erred in regarding the child as a reliable witness. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped, and molded, but it is also an accepted norm that if after scrutiny of their evidence the court concludes that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In the case at hand the child victim explained the events of the crime with improvements. At first, he did not report the incidence until it was discovered by the schoolteacher many years after the incident. The child was tortured by his father to mention the person who subjected him to unnatural offence, he mentioned Rama Kimaro, who could not be apprehended. Then it was Rama Kimaro who was reported to

the police but later, as the Court does not know what happened at the Police Station, the child mentioned the Appellant. Again, the Child mentions one Joshua his fellow student, and said he had told his father and the teacher about Joshua, but the teacher testifies that she questioned the child, but the child refused to say anything, and this proves that the child only mentioned the appellant after being tortured or may be tutored.

The evidence of this boy should have been evaluated more carefully with greater circumspection because his evidence was tainted with discrepancies and inconsistencies. When there is such evidence on record, it cannot be ruled out that a child has been tutored, the court can reject his statement partly or fully. An inference as to whether child has been tutored or not, can be drawn from the contents of his deposition, and in this case his deposition was conflicting and hence the trial court ought to have looked for evidence, direct or circumstantial, which may lend assurance to his testimony. Evidence must be weighed and not counted. Conviction can be recorded on the sole testimony of the victim, I agree, but only

if his evidence inspires confidence and there is absence of circumstances which militate against his veracity.

I understand and agree that the evidence of the victim of sexual offences, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the victim, however, the evidence of the victim in this case cannot inspire the court on the involvement of the accused in the act, and the court needed to find corroborative evidence. The evidence available on record is that the victim was subjected to unnatural offence, but the involvement of the appellant in the commission of the offence remained doubtful.

It is the duty of the prosecution to establish the case beyond reasonable doubt but it is not the duty of the appellant to establish his innocence. This has been held in the case of **Aburaham Daniel V Republic**, Criminal Appeal No.6 of 2007 that:

> *"In any case the appellant had no duty to establish his innocence. Even if his defence was found to be weak, and even if he was found to be untruthful, the*

prosecution still had the duty to prove his guilt beyond reasonable doubt..."

The appellant raised two defenses, he was implicated by the victim's father since there was animosity and secondly, he raised the defense of alibi. The appellant was unrepresented during trial, and he could not have known the requirements of giving notice of the defense of alibi as required in section 194 of the Criminal Procedure Act. The appellant raised the defense of alibi at the earliest opportunity and the prosecution witnesses were confronted with the said defense. The appellant said in the year 2018, and 2019 he was in Dar es Salaam. The prosecution could not bring any witness to prove that he was never in Dar es Salaam, but he was in Korogwe.

The plea of alibi, in the facts of the case, required adequate consideration by the learned Trial Magistrate. It is trite that the defense witnesses are entitled to equal treatment with those of the prosecution. The defense evidence cannot be

discarded by an instinctive disbelief in the credibility of defense version.

In the case of **Binay Kumar Singh Vs. State of Bihar (1997) 1 SCC 283,** the nature of the defence of alibi and standard of proof required to discharge the said defense was enunciated in the following words: -

> "The Latin word alibi means "elsewhere", and that word is used for convenience when an accused takes recourse to a defense line that when the occurrence took place, he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by a mere fact that the accused has adopted the defense of alibi. The plea of the accused in such cases need to be considered only when the

burden had been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counterevidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows therefore, that strict proof is required for establishing the plea of alibi."

First, the burden of proving commission of offence by the accused to fasten the liability of guilt on him remains on the prosecution and would not be lessened by a mere fact that the accused had adopted the defense of alibi. The plead of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defense of alibi.

The Magistrate was convinced that the prosecution was able to prove the case beyond reasonable doubt and considered the alibi but disbelieved it. The Magistrate, however, did not say why he disbelieved the four witnesses who supported the alibi of the appellant. She simply said, the appellant ought to have produced the bus tickets to prove that he travelled to Dar es Salaam.

Evidence was produced and four witnesses were examined to substantiate his plea of alibi which has been discarded without any basis. The witnesses are closely related to the appellant, one was his father, and another was the appellant's mother and in fact all has been discarded as unreliable. The defense of alibi was proved by the defense, and it was the duty of the prosecution to prove to court that in the month of June 2018, and December 2019, the appellant was in Korogwe and not Dar es Salaam or elsewhere. Nothing was forthcoming from the evidence of the prosecution and even during cross examination of the witnesses for the defense to warrant the Magistrate to discard the defense witnesses.

The evidence of prosecution is to the effect the appellant committed the crime in June 2018 and December 2019. There was only a presumption that he was in Korogwe. The Court is not permitted to convict anybody based on presumption, however convincing it might be. This was held in the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda vs. R (2006) TLR page 395**, where the Court of Appeal held that

"In criminal charge suspicion alone however, grave it may be is not enough to sustain a conviction or the more so, in a serious charge of murder."

This is a criminal trial. The burden of proof always lies on the prosecution side and the proof must be beyond reasonable doubt.

So far as the question of alibi is concerned, when the presence of the concerned accused is satisfactorily established, the Court would be slow to believe the counter evidence unless it is of such quality as would create a reasonable doubt on the minds of the Court that the prosecution version was not cogent. The prosecution could not establish beyond reasonable doubt that it was the accused who committed the offence and that in June 2018 and December 2019, the accused or appellant was in Korogwe. Trial Court had not given any reasons as to why it discarded the defense of alibi put forward by the defense. In any case since the prosecution failed to establish the presence of the appellant during the two days of the commission of the

offence, it was an error on the part of the Trial Magistrate to convict the appellant based on the weakness of his defense.

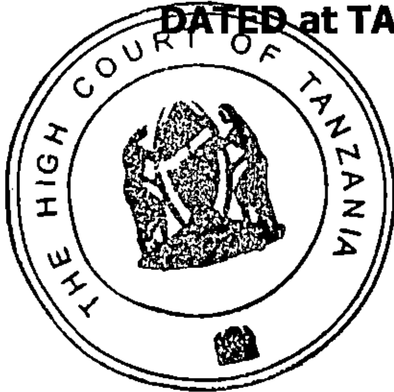
Again, there was proof given at trial by the appellant and his two witnesses DW2 and DW3 of the animosity between him and the victim's father. It is true that pw1's TV was stolen, and PW1 was suspecting the appellant to be the thief, he even asked the appellant to find the TV and paid him Tshs 15,000 for the job but since the appellant could not find it, PW1 held grudges against him. This evidence has shaken the evidence of the prosecution, and the prosecution failed to discredit the evidence of the defense.

In totality, without being swayed by what happened to the victim, for which I condemn seriously, and the perpetrator of such evil crimes deserves severe punishment, but in this case, and from the evidence on record, the prosecution failed to bring home the guilt of the accused/appellant.

Consequently, the conviction and sentence passed by the Trial Court is hereby quashed and set aside. The appellant ALLY

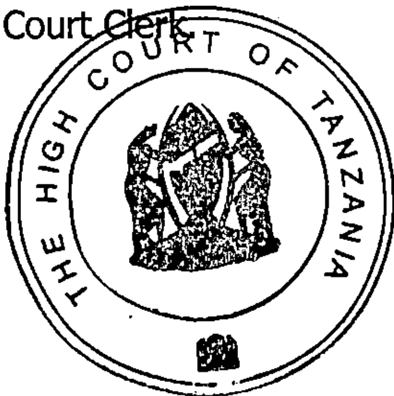
SALUM MAKUBELI is acquitted and shall be released from imprisonment, unless held for any other lawful cause.

DATED at TANGA this 29TH day of MARCH 2022



L. MANSOOR
JUDGE
29TH MARCH 2022

Judgement delivered in Court today in the presence of the Appellant, MR. JAMES PALLANGYO State Attorney for the Respondent Republic and MR. ABUBAKARI JUMANNE the Court Clerk.



L. MANSOOR
JUDGE,
29TH MARCH 2022