IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 113 OF 2021

(Originating from Criminal Case No. 73 of 2022 of the Resident Magistrate's Court of Kagera at Bukoba)

FARIDU AMIRI---------- APPELLANT

VERSUS

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

JUDGEMENT

Date of Last Order: 03/03/2022

Date of Judgment: 11/03/2022

Hon. A. E. Mwipopo, J.

The appellant namely Faridu Amiri was charged and convicted by the Bukoba Resident Magistrate's Court for unnatural offence contrary to section 154 (1) (b) of the Penal Code, Cap. 16 R.E. 2002. It was alleged that the appellant on 14th June, 2016, at Kabwela Hamlet, Bunazi Village, within Misenyi District in Kagera Region did unlawfully had carnal knowledge of an animal to wit a female goat. The prosecution called total of 7 witnesses and tendered three exhibits to prove its case. After the trial court found the appellant with a case to answer, the

appellant testified in his defence under oath. In its judgment, the trial Court convicted the appellant for the offence charged and sentenced him to serve 30 years imprisonment.

The appellant was aggrieved by the decision of the District Court and filed the present appeal against the decision. In his petition of appeal, the appellant has raised a total of four grounds of appeal as provided hereunder:-

1. *That, the exhibit P2 (cautioned statement) was not read loudly to appellant after it was admitted hence bad in law.*
2. *That, the exhibit P3 (extra judicial statement) also was improperly admitted without being read loudly to appellant after its admission contrary to the law.*
3. *That, no DNA test report was brought in Court as evidence to prove whether the said sperm which alleged to be discharged from the animal vagina was indeed from the appellant or it was caused by animal penetration.*
4. *That, the prosecution witnesses had material discrepancy to prove if the appellant was properly identified and committed the said rape wit female animal.*

The appellant who appeared in person submitted on the 1st and 2nd grounds of appeal that the Cautioned Statement – Exhibit P2 and Extra Judicial Statement

- Exhibit P3 were not read over to the appellant after these exhibits were admitted. The said Exhibit P2 was recorded without following the requirement of the law as he was forced to sign the Cautioned Statement. He said that he was arrested on 14.06.2016 and the Cautioned Statement was recorded on 16.06.2016 and was brought to court on 04.11.2016.

On the 3rd ground of appeal, the appellant submitted that the Doctor who testified that he tested the sperm found in the victim's vagina did not say if the said sperm was of the appellant or was connecting the appellant to the offence.

The appellant said on his 4th ground of appeal that the prosecution witnesses was contradictory and contradicted the charge. It was submitted that the charge sheet was defective as the offence which the appellant was charged with is unnatural offence but the evidence adduced shows that the appellant did have carnal knowledge of an animal to wit a female goat. For that reason the appellant did not know what was the offence he was facing, was it unnatural offence or to have carnal knowledge of the animal.

The appellant went on to submit that the trial court convicted and sentenced him without considering his age. The appellant testified to be born in 1999 which means at the time of incident he was below 18 years, but the trial court demanded him to produce birth certificate. He said that the certificate of birth was produce by his parents, but still the trial court decided not to consider it. He added that the

trial court did not consider appellant's defence in the judgment and sentenced him to serve imprisonment. The trial court did not consider in its judgment that the appellant know nothing about the incident.

In reply, Ms. Happiness Makungu, State Attorney who appeared for the respondent, objected this appeal. She submitted on the 1st and 2nd ground of appeal jointly that the cautioned and extra judicial statement were admitted as exhibit P2 and P3 and were not read over to the appellant. The remedy for the omission is to expunge the exhibits from the record. Even after expunging the document, she said that, still the evidence is sufficient to prove the offence against the appellant.

On the third ground of appeal, the counsel said that it is true that D.N.A test was not conducted. She argued that D.N.A test is not a mandatory requirement in proving the offence. There was other sufficient evidence from PW2 and PW3 from page 5 – 8 of the typed proceedings proved that the appellant did have carnal knowledge of the animal to wit goat. PW2 and PW3 are eye witnesses who saw the appellant having carnal knowledge of the animal. Also, there is testimony of the Doctor who examined the goat and said that the animal had bruises and sperms were coming from the animal's vagina. The PF3 after it was admitted was not read over to the appellant. But even if the report was expunged from the record, still the remaining evidence was sufficient to prove the offence.

The counsel then submitted on the last ground of the appeal that the charge sheet show that the appellant was charged for the offence of unnatural offence Contrary to Section 154 of the Penal Code. She said that the particulars of the offence revealed that the appellant did have carnal knowledge of the animal. The prosecution evidence proved that the appellant committed the offence. Thus, the charge was proper and in accordance with the law.

The counsel submitted on the issue raised by the appellant in his submission that the trial court failed to consider his defence. She said that the particulars of the offence in the charge sheet shows the appellant was aged 18 years. Also, the appellant said that his age is 18 years when asked by court before he took oath, but in his testimony he said that he was born in 1999 which means he was 17 years. The trial Magistrate stated in his judgment that the appellants relatives produced his birth certificate after the defence case was closed for that reason the trial court did not consider it.

In his rejoinder, the appellant said that if Exhibit P2, P3 and P4 are expunged from record, the remaining evidence is not sufficient to prove prosecution case. The testimony of PW2 contradicted the charge sheet hence there was confusion. Then he retaliated his submission in chief that his defence on the age was not considered by the trial court.

From submissions from parties and the evidence in record, the issue for determination is whether the appeal has merits.

In determination of this appeal, I will go through each ground of appeal of the appellant. Starting with the first and the second ground of appeal, as it was submitted by both parties the record reveal that the cautioned statement – Exhibit P2 and extra judicial statement – Exhibit P3 were not read over to the appellant after it was admitted by the trial Court. The respondent counsel said that the remedy for the omission is to expunge those documents. I agree with the counsel for the respondent that the appellant had the right to know the contents of the document after it was admitted as an exhibit. Failure to read the document after its admission makes that evidence to be not valid. The Court of appeal was of the same position in the case of **Omary Kassim Mbonde v. Republic**, Criminal Appeal No. 175 of 2016, Court of Appeal of Tanzania at Dar Es Salaam, (Unreported), where it held that:-

> "..... *because the cautioned statement attributed to the appellant was not read to him in the present matter, such evidence was invalid."*

Consequently, I find exhibit P2 and P3 are invalid and I they are expunged from the record.

The appellant said on the 3rd ground of appeal that the Veterinary Officer – PW7 did not conduct DNA test to prove that the said sperm which alleged to be

discharged from the animal vagina was indeed from the appellant or it was caused by animal penetration. The counsel for the respondent in her reply she said that D.N.A test is not a mandatory requirement in proving the offence and that there was other sufficient evidence in record. I agree with the counsel that it was not mandatory for the prosecution to conduct DNA if they have other evidence which is sufficient to prove the offence. Thus, this ground has no merits.

Submitting on the 4th ground of appeal, the appellant said that the prosecution witnesses was contradictory and it contradicted the charge as result the charge was defective. He said due to contradiction he did not know the offence he was facing if it was unnatural offence or to have carnal knowledge of the animal. The counsel for the respondent said that there was no contradiction whatsoever as the appellant was charged for unnatural offence for having carnal knowledge of the animal. I have perused the record and the charge sheet shows that the offence which the appellant was charged with in the trial Court was unnatural offence contrary to section 154 (1) (b) of the Penal Code, Cap. 16, R.E. 2002. The particulars of the offence reveal that the appellant did have carnal knowledge of a female goat. I have read the section the appellant was charged with and it states as follows:-

"154.-(1) Any person who-

(a) .....; or

(b) has carnal knowledge of an animal; or

(c) .....,

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."

The above cited section shows that the offence of unnatural offence under section 154 (1) (b) is committed by a person to have carnal knowledge to an animal. Thus, the charge sheet was in accordance with the law. The prosecution were able to prove the offence against the appellant. The testimony of PW2 and PW3 show that they caught the appellant doing the unlawful act. These two witnesses are eye witnesses who caught the appellant on the act. In their testimony they said that they saw the appellant naked, on top of the female goat and appellant's penis was inside the vagina of the animal. Their evidence is supported by that of the PW1 and PW7. PW1 who is the owner of the goat testified that PW2 and PW3 called him after they caught the appellant having carnal knowledge of the goat. He went to the scene where he saw the appellant undressed and the goat was discharging sperm from vagina. PW7 testimony is that he examined the goat and observed that was in tension. He said that the goat vagina had bruises and was discharging sperm. All these evidence proved without doubt that the appellant committed the offence. Thus, the trial Court was right to convict the appellant for the offence he was charged with.

The appellant said in his submission that his defence that he was aged 17 years at the time of incident was not considered by the trial Court. The appellant testified on oath that he was born in September, 1999 and he said that even his clinic card which was submitted by his parents to Court later on which proves that he was born in September, 1999 was not considered by the trial Court. The counsel for the respondent said that the particulars of the appellant in the charge sheet and the trial Court recorded before the appellant took oath that he was aged 18 years. She said that this proves that the appellant was aged 18 years at the time of incident. The trial Court considered the age of the appellant in page 5 of the judgment and decided to disregard the defence for the reason that the appellant's clinic card which was submitted by his relative was submitted after the case has already been closed.

However, I do not agree with the trial Court's decision to disregard the appellant's clinic card. The reason is that the appellant testified on oath that he was born in September, 1999 which means that at the time of incident he was below 18 years. This contradicted the prosecution allegation on the age of the appellant which was not proved as the same is found in the personal particulars of the accused person in the charge sheet and in the appellant's preliminary information recorded by the Court before the appellant testified. These were not conclusive proof of the appellant's age. The record does not show if the appellant

admitted his age when the particulars of the accused person was read over to the appellant or during the preliminary hearing. Also, it is a practice that the witness before taking oath has to provide some of his/ her current age, residence and religion. The said current particulars of the witness are recorded for the purpose of the Court to satisfy itself that the witness is competent to testify. It is not appellant evidence on his age.

In such circumstances where there was contradiction in the information about the age of the appellant which may affect the sentence, the trial Court could have received such evidence it thinks fit to help it to impose a proper sentence. In the present case, there was appellant's clinic card which was submitted to the trial Court by appellant's relatives. The trial Court was supposed to it consider it for the purpose of sentencing. This is in accordance with section 236 of the Criminal Procedure Act, Cap. 20, R.E. 2019, which provides that:-

> *"236. The court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed."*

From above cited section, the subordinate Court may receive evidence before passing sentence in order to inform itself as to proper sentence to be passed. Thus, if the trial Court considered the appellant's clinic card which proved that the appellant was born on September, 1999, it could have not sentenced the appellant to serve 30 years imprisonment. The reason is that the appellant being

bellow the age of 18 years at the time the offence was committed, he has to be considered as a child under section 4 (1) of the Law of the Child Act, Cap. 13, R.E. 2019. The said law (Law of the Child Act) provides in section 119 (1) that notwithstanding any provisions of any written law, a child shall not be sentenced to imprisonment. As the evidence from the appellant clinic card proved that the appellant was aged bellow 18 years when he committed the offence, the trial Court was prohibited from imposing custodial sentence to the appellant. Thus, the sentence imposed by the trial Court was against the law.

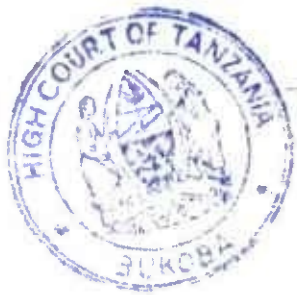
Therefore, the sentence of 30 imprisonment which was imposed to the appellant by the trial Court is hereby set aside and I order for the immediate release of the appellant from prison otherwise held for other lawful cause. It is so ordered.

A.E. Mwipopo

Judge

11/03/2022

The Judgment was delivered today, this 11.03.2022 in chamber under the seal of this court in the presence of the Appellant through video conference and in the presence of the counsel for the Respondent.



A. E. Mwipopo

Judge

11/03/2022