THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

(DC) CRIMINAL APPEAL NO 04 OF 2022

(*Originating from Iringa District Court at Iringa*

Criminal Case No. 51 of 2019)

ZAKAYO MBWELWA ---------- APPELLANT

VERSUS

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

04/04/2022 & 27/04/2022

JUDGMENT

MATOGOLO, J.

The appellant Zakayo Mbwelwa has appealed to this court after been dissatisfied with both conviction and sentence passed against him by the trial court. He filed petition of appeal with a total of nine (9) grounds of appeal.

At the hearing the appellant appeared in person, while the Republic was represented by Alice Thomas learned State Attorney.

The appellant had two additional grounds of appeal viz:-

1. That, the evidence of the village chairman found at page 15 and also in the identification parade I was positioned on the last position instead of being placed in the middle position.
2. The evidence of the medical doctor contradicted itself as found at page 27 that failed to insert his finger because the anus was intact. But went on testifying that the victim was admitted after some days faeces was flowing from anus. The appellant prayed to this court to consider his grounds of appeal and allow his appeal.

Ms. Alice Thomas learned State Attorney who appeared for the respondent Republic supported the appeal due to deficiency of prosecution evidence.

The learned State Attorney pointed out the first problem to be issue of identification. The victim (PW1) failed to identify the appellant at the time she was asked by her mother as to who sodomized him.

In her evidence, the victim's mother stated that the victim did not even describe the appellant to his mother. He just said one brother but whose description was not made to his mother. His mother said the victim identified the appellant at the police station but he did not explain as to what type of identification was made. The victim's evidence and that of his mother contradict itself. While the victim said that he identified the appellant after being called at the village office only Maclina and Daria identified the appellant but at that time the victim was already admitted in hospital. The learned State Attorney said there are three scenario

regarding identification. To that she referred the case of ***Jumapili Msyete vs. Republic***, Criminal Appeal No. 110 of 2014 in which at page 1 4 the Court of Appeal gave three scenario for identification:-

(i) Visual identification for a person/witness who see the culprit for the first time.

(ii) Identification by recognition for persons who knew each other before.

(iii) Voice identification if the victim is familiar to that voice.

The learned State Attorney said the victim does not fall in any of the three categories, she said it is doubtfully if the appellant is the one who committed the offence against the victim. The learned State Attorney submitted further that at the time the victim was taken by the appellant he said he was together with Maclina and Daria. But the two children were not called as witnesses to appear and testify in court. Only the statement of Maclina was tendered in court by PW5. But in tendering that statement the procedure spelt out under S. 34B(1) and (2) of the Evidence Act was not followed. There was no notice filed ten days before the said statement was tendered in court. But also there was no reasons given for tendering the statement by the one who recorded it instead of the witness herself appearing in court to testify. She said the prosecution violated that procedure thus rendering the evidence of PW5 baseless and of no legal strength.

The learned State Attorney submitted further that PW3 in his evidence said he called all young men in the village office so that the two

children Maklina and Daria could identify the person they saw together with the victim.

However PW3 did not explain as to why he took that action. But the two children did not even describe the appellant before the youths were called for identification.

Ms. Alice Thomas went on submitting that PW4 the medical doctor in his evidence stated that he found bruises in the victim's anus but the muscles were tight such that he was unable to penetrate his finger. He stated further that he admitted the victim for three days after discharge him. He required the victim to return to hospital after one week. He stated further that after the victim has returned to the hospital, upon examining him PW4 found the sphincter loose and unable to control faeces. The learned State Attorney said the evidence of PW4 contradict itself. For the first time PW4 said the sphincter mussles were intact, but after a week it became loose and unable to control faeces from flowing out.

The leaned State Attorney said there is doubt in the prosecution case and that the prosecution did not prove the offence against the appellant beyond reasonable doubt, especially on the issue of identification of the appellant by the victim himself and the corroborating witnesses. She prayed to this court to allow the appeal.

The appellant had nothing to rejoin.

Having carefully read the appellant's grounds of appeal in both the petition of appeal as well as additional grounds, also the trial court

proceedings, I am of the same position by the learned State Attorney. It is trite law that in criminal matters, the burden of proof lies on the prosecution throughout, the same does not shift to the accused person. This was clearly explained in the case of ***Mohamed Said Matula vs. Republic (1995) TLR 3.***

In this case, as it was rightly pointed out by the learned State Attorney, the prosecution did not discharge their burden of proof for the following reasons;

Firstly, there are doubts on the appellant's identification. The victim did not state whether he was familiar with the appellant so as to be able to recognize him at the commission of the offence. He could not mention his name apart from saying one brother. He did not explain whether he identified the appellant upon seeing him (visual identification) nor did he explain if the identification was voice identification. The victim did not meet the prerequisite conditions laid in ***Jumapili s/o Msyete case*** (supra).

Secondly, there has been contradictions on the prosecution evidence/witnesses. What the victim told the court is different to what his mother said more worse is the testimony of PW4, she said on the first day the victim was sent to him he examined him and found bruises in his anus. However the anus mussle sphincter were intact such that he was unable to penetrate his finger. But a week later when the victim went to the hospital as scheduled PW4 found the victim's anus loose and the mussle sphincter were unable to control faeces, faeces were flowing out without control.

But another thing is that the prosecution did not call important witnesses on their part, Macklina and Daria who are said to be together with the victim at the time he was taken by the appellant. Those were very important witnesses. Failure to call them the trial court was entitled to draw inference adverse to the prosecution as it was held in the case of ***Hemed Said vs. Mohamed Mbilu (1984) TLR 113,*** where the court held:-

> *"... where for undisclosed reason, a party fails to call a material witness on his side the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the part's interests".*

The same position was taken by the Court of Appeal of Tanzania in the case of ***Aziz Abdallah vs. Republic (1991) TLR 71*** where it was held:-

> *"The general rule and well known rules is that the prosecutor is under a prima facie duty to call all those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reasons been shown, the court may draw an inference adverse to the prosecution".*

In the present case there is no reason advanced as to why such important witnesses Maklina and Daria were not called, this also create doubt to the prosecution case.

Another issue pointed by the learned State Attorney is failure to call Maklina, instead the prosecution side tendered her statement under Section 34B (1) and (2) of the Evidence Act. The learned State Attorney castigated that procedure, firstly the relevant procedure was not followed. The procedure is provided for under Section 34B (1)(2) of the Evidence Act.

The same provides:-

> *"34(1) in any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is or may be, a witness shall subject to the following provisions of this Section, be admissible in evidence as a proof of the relevant fact contained in it in lieu of direct oral evidence.*
>
> *(2) A written statement may only be admissible under this section*
>
> *(d) if before the hearing at which the statement is to be tendered in evidence, a copy of statement is served by or on behalf of the party proposing to*

tender it on each of the other parties to the proceedings

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence".

It should be also noted that all requirements provided for under Section 34 B must be complied with cumulatively.

The prosecution did not comply with the requirements above reproduced that made the evidence intended of no legal effect. It has been noted that there has been contradiction in the prosecution evidence. It is trite law that where it happens that there are contradictions, or inconsistency in the prosecution evidence, the same must resolved. In the case of ***Mohamed Said Matula vs Republic*** (supra). The court held:-

"(i) where the testimonies contain inconsistence and contradictions, the court has a duty to address the inconsistences and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradiction are only minor, or whether they go to the root of the matter".

There is no doubt that these contradictions in the prosecution evidence are not minor but go to the root of the matter such that it cannot be safely said that the prosecution proved its case beyond reasonable doubt justifying appellant conviction. The available doubts ought to be resolved for the appellants benefit.

I therefore concur with the learned State Attorney in her submission and thus find merit in this appeal, the same is allowed, the conviction against the appellant is hereby quashed and the sentence of thirty (30) years imprisonment metered against the appellant is set aside. The appellant is to be released from the prison custody immediately unless held for other lawful causes.

DATED at **IRINGA** this 27th day of April, 2022.

F. N. MATOGOLO

JUDGE.

Date:	27/04/2022
Coram:	Hon. F. N. Matogolo – Judge
Appellant:	Absent
Respondent:	Jackline Nungu – State Attorney
C/C:	Charles

Jackline Nungu – State Attorney:

My Lord I am appearing for the Respondent. The appellant is present and appeal is for judgment we are ready.

COURT:

Judgment delivered.

F. N. MATOGOLO

JUDGE

27/04/2022