IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 58 OF 2021

(Originating from Criminal Case No. 646 of 2016 of Moshi District Court)

BAKARI YAHAYA AUSENI @ MSAMBAA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

20/02/2023 & 28/2/2023

SIMFUKWE, J.

This is an appeal by Bakari Yahaya Auseni @ Msambaa (the appellant) against the decision of the District Court of Moshi in Criminal Case No. 646 of 2016 in which the appellant was convicted of unnatural offence contrary to **section 154 (1) (a) and (2) of the Penal Code (Cap 16 R.E. 2002)**. He was sentenced to thirty (30) years imprisonment. The offence was said to have been committed by the appellant on 12th September 2016 at Kotela Mamba within Moshi District in Kilimanjaro Region.

It was the prosecution's case before the trial court that on the fateful date at about 12:00hrs PW1 sent PW2 (the victim) who is a mentally retarded person to the shop to buy salt. It was stated that PW2 did not return until

evening about 18:30hrs. PW2 alleged that while on the away to the shop, he met with the appellant who told him to go to his home place and wait for him. Thereafter, the appellant arrived and sodomized PW2. At home, PW2's relatives were looking for him without success. On his arrival home, PW2 narrated the tragedy to his mother. The matter was reported to the police station and the victim was taken to the hospital. At the hospital, the victim was examined by the Doctor (PW4) who, according to his testimony the anus sphincter muscles were loose which suggested that the victim was penetrated with a blunt object.

In his defence, the appellant denied to have committed the offence in question. However, he admitted that he met PW2 on the fateful date and beat him as he didn't want PW2 to go at his home because PW2 was known to be a common victim of sodomy at Mamba Kisambo. That, after two weeks the appellant was apprehended by a militant at the market place suspected to had sodomised the victim

The trial court disbelieved the appellant's defence. It found the prosecution case credible. Hence, the appellant was convicted and sentenced to serve 30 years in prison. Also, the trial court ordered the appellant to compensate the victim Tshs 300,000/= after the completion of his sentence.

The appellant was aggrieved and filed this appeal relying on five (5) grounds. However, in his submission, he dropped four grounds of appeal and remained with only one ground of appeal which reads:

> *That, Honourable Trial Magistrate erred in law and in fact by refusing to allow the Appellant to recall witnesses as it was demanded by the appellant.*

At the hearing of the appeal which was conducted through written submissions, the appellant who had legal representation of advocate Emanuel Antony, submitted to the effect that the trial magistrate erred in law and in fact by refusing to allow him to recall witnesses as he demanded. He argued that as seen at page 42 to 49, in the course of the proceedings the appellant engaged an advocate who requested to recall PW1 and PW2 on the reason that the defence of the appellant would have touched matters which needed explanation from the said witnesses.

Mr. Emanuel opined that; page 15 to 17 of the trial court proceedings suggest that it was PW1 who took initiatives to ascertain the commission of offence but when PW2 was testifying at page 18 stated that his mother did nothing; it is his sister who made a follow up at the homestead of the appellant. Thus, evidence of the victim contradicts with the testimony of PW1. According to Mr. Emanuel, that alone would suffice for the trial magistrate to allow the recalling of the two witnesses. Reference was made to the case of **Francesco Tromontano vs Republic [1999] TLR** (HC) Dar es Salaam which held that:

> *"Where an accused person makes a demand to recall a witness, the magistrate has no discretion to refuse to recall him even if he is convinced that the nature of the evidence does not so require."*

The learned counsel expounded that, since the appellant was a lay person who engaged an Advocate in a late stage of prosecution, then the trial court ought to consider that there would be matters to consider on prosecution side which would have touched the defence evidence. He gave an example of a question of the appellant beating the victim which Mr. Emanuel opined that it was crucial to be raised when the prosecution

was conducting its case since at page 7 of the trial court judgment the trial magistrate referred to it.

It was further explained that the defence was premised in the grudges between the appellant and the victim's mother who reported the incident to the police after the appellant had beaten the victim. Thus, it was the duty of the appellant to raise such issue when the prosecution was conducting its case on the point of incriminating him of beating the victim to sodomizing him.

Mr. Emanuel averred further that refusal by the trial court to allow him to recall PW1 and PW2 denied the appellant the right of fair trial.

It was further elaborated that making the defence while the prosecution is proving its case is a legal principle known by professionals and not lay persons. Thus, when the appellant decided to engage an advocate, he was supposed to be given the opportunity to make his case and enjoy the established principle.

Also, the learned counsel argued that the act of the trial magistrate to comment on failure by the appellant to raise the issue of beating the victim during prosecution case while she was the same magistrate who refused the recalling of PW1 and PW2 amount to unfair trial. The appellant prayed the court to order retrial so that he will be afforded the right of fair trial.

On his part, Ms. Grace Kabu the learned State Attorney, representing the Republic, did not support the appeal. She submitted to the effect that the issue of recalling PW1 and PW2 was determined in the ruling of the trial court from page 44 to 49 of the trial court proceedings. It was the opinion of Ms. Grace that if the appellant was dissatisfied with the said ruling, he

should have appealed against the same and seek remedy before this court before proceeding with his defence.

Elaborating the provision of **section 147(4) of the Evidence Act**, the learned State Attorney was of the firm view that recalling of a witness is the discretion of the court which discretion has to always be exercised judiciously for the interest of justice. That, the permission by the court to recall a witness is not automatic; there should be reasons to satisfy the court that a witness should be recalled and the reasons depend on circumstances of each case. That, the circumstances of this case were well determined by the trial magistrate in the ruling which was not appealed against by the appellant hence this appeal.

Rebutting the appellant's prayer of ordering retrial, the learned State Attorney submitted that the appellant has failed to show errors, omission or irregularity in the proceedings or judgment of the trial court which has in fact occasioned a failure of justice as per **section 388 of the Criminal Procedure Act [Cap 20 R.E 2022]**.

In her final analysis, the learned State Attorney submitted that since PW2 was competent witness to testify as per **section 127(1) and (5) of the Evidence Act** and as per the finding of the trial court at page 27 of the trial court proceedings that PW2 is a witness of unsound mind; upon examining him the trial court found that he was capable of testifying as he understood questions and gave rational answers. Thus, the ground of appeal raised by the appellant lacks merit. She prayed the court to uphold the findings of the trial court as well as the imposed conviction and sentence.

I have carefully considered the submissions made by the learned counsel for appellant and the learned State Attorney for the Respondent Republic. The appellant raised one ground of appeal. He faulted the trial magistrate for refusing him to recall witnesses PW1 and PW2. The issue is ***whether the raised ground of appeal has merit.***

The learned State Attorney disputed the raised grievance and argued that the same was determined by the ruling of the trial magistrate whose remedy was to appeal against it. She added that recalling of the witness is the discretion of the court which should be exercised judiciously.

At page 42 of the typed proceedings of the trial court, the learned defence counsel prayed to be allowed to recall PW1 and PW2 for further cross examination. After hearing the learned defence counsel and the learned State Attorney on the issue of recalling PW1 and PW2, the trial court refused this request giving the following reasons: **First,** late engagement of an advocate is not a sound reason since the accused was not denied the right of representation. **Second,** that the accused had ample time to cross examine PW1 and PW2. **Third,** the fact that evidence of PW1 and PW2 were not clear to the defence counsel even after perusal of the record does not amount to sufficient reason for recalling the witnesses who had already testified.

Section 147(2) of the Evidence Act (supra) provides for recalling of the witnesses. It provides that:

> *"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination and if it does so, the parties have the right of*

further cross-examination and re-examination respectively."

The above provision has used the word *'may'* which presupposes that it is the discretion of the court to permit a witness to be recalled for further cross examination.

The appellant is moving this court to interfere with the discretion of the trial court in recalling the witnesses. In the case of **Mbogo and another vs Shah [1968] 1 EA 93** (CAN), it was held that:

"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice;"

Basing on the reasons advanced by the trial magistrate in her ruling and considering the fact that it is the discretion of the court to grant the prayer of recalling the witnesses, I am afraid to temper with the discretion of the learned trial magistrate. The reasons advanced in the ruling, suggests that the trial magistrate exercised her discretion judiciously and there is no any misdirection in legal matters as the trial magistrate cautioned herself that the discretion vested on her should be exercised judiciously.

As rightly ruled by the trial magistrate, the appellant was present when PW1 and PW2 were testifying. He definitely had an ample time to cross

examine them. The fact that the appellant was a lay person is not excusable in law as the latin maxim states ***ignorantia juris non excusat.*** Apart from that, the learned counsel for the appellant was engaged while the prosecution case had not been closed. He was present when PW4 testified and he is the one who submitted that the appellant had no case to answer after closure of prosecution case. It is on record that, after two adjournments of the defence hearing that's when the learned defence counsel prayed to recall the said witnesses. In the circumstances, I support the findings of the trial court that praying to recall witnesses at that stage was an abuse of court process having in mind the fact that the matter had taken long in court.

The appellant tried to persuade this court that there was discrepancy on prosecution case particularly on testimonies of PW1 and PW2 on the issue as to who made follow up of the incidence. However, I am of considered opinion that there is no reasonable possibility that the noted discrepancy would have caused the prosecution case to crumble since it does not take away the fact that the victim was sodomised.

In the final analysis, I am absolutely convinced that the trial magistrate was justified in her conclusions of fact and law in refusing to recall PW1 and PW2. For the foregoing reasons the appeal is dismissed.

Dated and delivered at Moshi this 28th day of February, 2023

It is so ordered.

THE HIGH COURT OF

S.H. SIMFUKWE

JUDGE

28/02/2023