IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CRIMINAL APPEAL NO. 56 OF 2022

FRANK PHILIP MTEY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the District Court of Kilindi at Songe in Criminal Case No. 85 of 2021)

JUDGMENT

15/2/2023 & 7/3/2023

NDESAMBURO, J.:

In the District Court of Kilindi at Songe, the appellant was charged with unnatural offence c/s 154 (1) (a) of the Penal Code Cap. 16 R.E 2019 now R.E 2022 (Cap 16). It was alleged that on the 8th day of August 2021 at Tilwev - Muungano Village within Kilindi District in Tanga Region, the appellant did have carnal knowledge against the order of nature to one AH (concealing his identity), a man aged 49 years.

The appellant denied the charge against him. In proving its case, the prosecution paraded a total of three (3) witnesses, namely the victim (PW1), Abas Hussein (PW2) and Dr. Shukuru Abdallah (PW3). The prosecution also tendered one exhibit, the PF3.

The facts that led to the institution of the case against the appellant are that on 08th August 2021, the victim (PW1) went for a liquor drink in an unknown bar/club in the village. After some time, the appellant joined and requested liquor or tobacco. The victim replied that he had none. The appellant left. After some time, the appellant was back again and demanded liquor or tobacco. He received the same answer from the victim.

The appellant asked the victim to follow him to his home for liquor and tobacco. The victim acceded. The appellant served him liquor at his home until he fell unconscious. He found himself naked and bleeding from the anus when he gained consciousness.

He asked the appellant why he had sodomised him. The appellant kept adamant and instead dressed him in his clothes. After that, he carried him by his motorcycle and abandoned him off the road, where he slept until when unknown man assisted him to his home.

The next day PW2 took him to Kwediboma Police Station, where he was issued with the PF3 and then to the hospital for treatment. PW3 is the Doctor who received the victim on 13th August 2021. Upon examination, he noted that the victim's anus was out due to a hard

object being inserted inside. PW3 returned it to his usual position. He filled the PF3, which was tendered as Exhibit P1.

On 1st September 2021, the accused was arrested and charged. His defence was that he was at Kwediboma for business on the material date. He disputed having liquor with the appellant or saw the victim on the incident day.

Upon analysing evidence, the trial magistrate was satisfied that the prosecution had proved its case to the required standards. The appellant was therefore convicted and sentenced to 30 years imprisonment.

Dissatisfied with the conviction and sentence, the appellant has preferred a total of four grounds of appeal, namely:

1. *The learned trial magistrate erred in law and fact by failing to draw an adverse inference to the prosecution for failing to summon material witnesses.*
2. *The learned trial magistrate erred in law and fact by acting upon weak, unreliable, contradictory and uncorroborated evidence of PW1.*
3. *The learned trial magistrate erred in law and fact by failing to consider the defence of alibi of the appellant.*

4. The prosecution case was not proved beyond a reasonable doubt.

The Appellant, therefore, humbly prays this court to allow his appeal, quash the conviction, set aside the sentence, and set him at liberty.

On the 16th day of February 2023, the matter was argued through oral submissions. The appellant was self-represented, while Mr. Luck Kaguo, Learned State Attorney, represented the respondent.

In the cause of submission, the appellant implored the court to commence with the respondent but subject to reservation of his right to rejoin.

At the outset, Mr. Kaguo informed the court that he was not supporting the appeal. Starting with the first ground of appeal, he submitted that the court could not draw an adverse inference because section 143 of the Evidence Act, Cap 6 R.E 2019, does not state the number of witnesses required to prove a case. He supported his stand by citing the case of **Goodluck Kyando v Republic**, Criminal Appeal No.118 of 2003, where the court held that no particular number of witnesses is required to prove the case. He thus prayed this ground to be dismissed for lack of merit.

Submitting on the second ground, the learned counsel stated that the evidence of PW1 was conclusive. He testified how the incident befell him and clearly said how the appellant acted before and after the incident. He knew the appellant for over ten years and mentioned him before PW2 and at the police station. He also submitted that the evidence of the Doctor (PW3) corroborated the evidence of the victim (PW1) as he found the victim's anus dispositioned.

He cited the case of **Goodluck Kyando** (supra) to demonstrate that every witness must be believed unless there are good reasons for disbelieving such a witness. He further argued that since the appellant case did not shake the prosecution witnesses' credibility, the trial magistrate was right to find out that the evidence of PW1 was credible and reliable.

Regarding the third ground of appeal on *alibi*, the learned counsel submitted that the appellant contravened sections 194(4) and (5) of the Criminal Procedure Act, Cap 10 R.E 2022,(CPA) for his failure to supply the prosecution with the *alibi's* particulars before the prosecution case was closed. He supported his argument with the case of **Kubezya John v Republic**, Criminal Appeal No. 488 of 2015, where the above provisions were well analysed.

Submitting on the fourth ground, the learned counsel stated that the prosecution did prove its case beyond a reasonable doubt. He argued that PW1 mentioned the appellant. He testified how he was taken out of the house by the appellant and immediately informed PW2 of what the appellant did to him. He also told the doctor (PW3) about what had befallen him. The PF3 also shows that his anus was out. Therefore, penetration was proved, especially by PW1 and the medical examination report.

He cited the case of **Seleman Makumba v Republic**, TLR 94 [1999] to establish that the evidence of medical report and evidence of the doctor can prove the sexual offence. He argued that the victim's evidence is the best evidence in sexual offences.

He finally prayed for this court to dismiss the appeal and uphold the trial court's conviction and sentence.

The appellant re-joined by arguing all grounds together. He stated that the prosecution failed to call the material witnesses. There was no single waiter or customer summoned from the bar to prove that the appellant was in the bar drinking liquor with the victim and that he left with him.

He also argued that the evidence of PW1 contradicts itself. For example, he testified that the appellant sodomised him, but before the doctor (PW3), he told him that people forced him to have an unnatural offence. Therefore, he faulted the evidence of PW1 for being unreliable. He also criticised the prosecution for relying on the evidence of the relatives and questioned why the village authority was not summoned.

The appellant further argued that his defence of *alibi* was not considered as he was not at the village on the material date, but he was at Kwediboma.

In rejoinder, Mr. Kaguo reiterated his submission in chief. He also admitted the existence of contradictions in the testimony of PW1. On the issue of relative witnesses, he submitted that it is well addressed in the cases of **Seleman Makumba** and **Goodluck Kyando (supra).**

From the submissions of the parties and the evidence on record, this court finds that the issue for determination is whether the evidence adduced by the prosecution was sufficient to prove the charge levied against the appellant.

In answering the above issue, the court will determine grounds one and two together and then proceed with the third and fourth grounds.

It is well settled that the prosecution must prove an accused person's guilt beyond a reasonable doubt, and an accused person does not assume any burden to prove his innocence: see the case of **Jonas Nkize v Republic** [1992] TLR 214.

Regarding ground number two, the appellant claims that the evidence of the victim is contradictory, unreliable and uncorroborated therefore, the trial court ought to have disregarded it.

This court is alive of the holding in **Selemani Makumba** (supra) that true evidence in sexual offence comes from the victim; however, for such evidence to be credible and reliable, it must be watertight and free from reasonable doubts.

The term beyond a reasonable doubt is not statutorily defined, but case laws have explained it. For instance, in **Magendo Paul & Another v Republic** (1993) TLR 219, the Court of Appeal held that:

> *"For a case to be taken to have been proved beyond a reasonable doubt, its evidence must be strong against the*

accused person as to leave a remote possibility in his favour which can easily be dismissed."

From the record, it is undoubted that the victim was sodomised. The evidence of PW1, PW3 and the findings in the PF3 is decisive. The court also agrees with the learned state attorney that a medical report and the evidence of a doctor showed show the victim was sodomised. However, a pertinent question is whether it was proved beyond reasonable doubt that the appellant sodomised the victim.

The only eyewitness who testified to that effect was the victim (PW1). Having analysed his evidence, the trial magistrate found out that he was a credible witness since his evidence was consistent. However, with due respect, this court faults his findings. This is because PW1's evidence was contradictory and unreliable. There are two contradicting versions. In his testimony, he testified that it was the appellant who sodomised him and the same was told to PW2, who also testified to that effect. However, before the doctor (PW3), he informed him that people forced him to have unnatural sexual intercourse.

While the court is aware that contradictions by a witness or between witnesses may not be avoided in cases, however the contradiction in the instant case is not a minor but a major one which

goes to the root of the matter as it has affected the credibility and reliability of PW1 who claimed that the appellant sodomised him. From the two contradicting versions, it cannot be stated with certainty that the appellant sodomised the victim.

Besides, the prosecution failed to call material witnesses to corroborate PW1's evidence as raised by the appellant in his first ground of the appeal. A passer-by whom PW2 mentioned witnessed the appellant walking him to his house and later assisted him and took him home from the road where the appellant abandoned him after being sodomised. This person was a material witness who could prove that the appellant was in the area and took the victim to his house. On page 8 of the typed proceedings, while being cross-examined, PW1 replied:

> *"I have a witness who saw you when you take me (sic) in your house, and the same witness sent me at home after met (sic) me on the road."*

On the same page of the proceedings, the victim replied that a neighbour was in the appellant's house. However, the neighbour was not summoned by the prosecution. This neighbour could prove that the victim was indeed in the appellant's place where the alleged offence

occurred, bearing in mind that in his examination in chief, the victim testified that he was intoxicated to the amount of not knowing what was happening.

The referred two people were material witnesses whom the prosecution could not summon without any explanation. Therefore, failing to summon them, the trial court should have drawn an adverse inference. The Court of Appeal in **Chacha Matiko @ Magige v The Republic**, Criminal Appeal No. 295 of 2020, was confronted with a situation where the prosecution did not summon the material witnesses. The court observed as follows:

> *"The witnesses we have listed above but who, for unknown reasons, were not called by the prosecution could have cleared some of the doubts we have pointed out above. This is a fit case in which the High Court ought to have drawn an adverse inference against the prosecution".*

On the strength of the above, the court finds the first and second grounds of appeal with merit.

Regarding the third ground of appeal, the appellant claims that the trial magistrate failed to consider his defence of *alibi*. The law

regarding the defence of *alibi* is well settled in our jurisdiction. **First**, the law requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the case hearing: section 194 (4) of the CPA. **Second,** where the said notice cannot be given at that early stage before the hearing, the said person is obliged to furnish the prosecution with the particulars of the *alibi* at any time before the prosecution closes its cases: see section 194 (5) of CPA. **Third**, should the accused person raise the defence of *alibi* much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence: see section 194 (6) of CPA.

With due respect, this court does not concur with the appellant's argument that the trial magistrate did not consider his defence of *alibi*. In addressing this issue, the trial magistrate disregarded his defence of *alibi* because the appellant failed to adhere to the provision of sections 194 (4) and (5) of the CPA.

From the trial magistrate's reasoning, it is clear that his defence of *alibi* was considered and rightly discarded. Indeed, it was not a genuine *alibi* but an afterthought. In **Masoud Amina v R** [1989] TLR 25, the Court denied the accused's defence of *alibi* because the

accused did not issue a notice and did not call the witness who was with him.

Finally, and having ruled out the first and second grounds positively, and as reasoned herein above, it goes without saying that the prosecution failed to prove its case beyond the required standards.

All that said, this court finds the appeal with merit and allows it. Accordingly, the conviction is quashed, and the sentence imposed is set aside. The appellant is ordered to be at liberty unless held there for any other lawful cause.

It is so ordered.

DATED at **TANGA** this 7th day of March 2023.

H. P. NDESAMBURO

JUDGE