**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO 18 OF 2022**

*(Originating from Criminal Case No 114 of 2021. In the District Court of Kilwa at Masoko)*

**SHAA SAID MBAWI .....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGEMENT**

*5/12/2022 & 27/2/2023*

**LALTAIKA, J.**

The appellant herein **SHAA SAID MBAWI** (herein after referred to as the appellant) was charged with the offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code Cap 16 RE 2019. He was arraigned in the District Court of Kilwa where he denied wrongdoing (pleaded not guilty). This necessitated full trial for the prosecution to prove the allegation and the appellant, then accused to prove his innocence. The prosecution paraded four witnesses with no exhibit.

Having been satisfied that the prosecution had proved the case beyond reasonable doubt convicted the appellant as charged and sentence him to life imprisonment. The appellant is dissatisfied. He has appealed to this court

by way of a petition of appeal with 5 grounds. The grounds are full of grammatical errors but for proper record keeping, I take the pain to reproduce them as follows.

1. *That, the trial court erred in law and fact in convicting and sentencing the appellant while the appellant pleaded not guilty to the offence charged because he did not committing (sic!) the alleged offence in question as it was fabricated on him by the prosecution side.*
2. *That, the trial court erred in law and fact in convicting and sentencing the appellant hence (sic!) there were no any evidence which were proved and any exhibit. So there were no evidence which conclusively proved the case beyond reasonable doubt because it is true, why PW4 failed to bring any exhibit before the trial court about the fact in issue.*
3. *That, the trial magistrate erred in law and fact to convict and sentencing the appellant due to the fact that there were no any caution (sic!) which were taken or exercised regarding the question of identification of victim at the material day and the time because the incident taken place (sic!) in darkness where the question of identification of applicant is usually more difficult.*
4. *That, the trial court erred in law and fact in convicting and sentencing the appellant basing (sic!) on hearsay evidence especially for those of prosecution sides (sic!) [PW1, PW3 and PW4] both of them (sic!) no one who witnessed the appellant committing alleged incident rather than to hear from victim himself.*
5. *That, the trial court erred in law and fact to convict and sentencing (sic!) the appellant hence the medical doctor examination did not examine (sic!) the victim so it was difficult to observe or to prove whether the victim has been sexually penetrated and this creates some rational doubts and may reason.*

On 17/8/2022 the appellant filed four (4) additional grounds of appeal as reproduced below:

(1) *That the trial court erred in law by failing to comply with the mandatory provisions of the Tanzania Evidence Act Section*

*127(2)(5) and (7) as amended by the Written Laws (Miscellaneous Amendment) Act No 2 of 2016*

(2) *That the trial Court erred in law and fact by failing to disclose that the appellant was in tried (sic!). The appellant failed to inter (sic!) the correct defence due to the fact that he didn't grasp the change (sic!) which he was to enter defence against.*

(3) *The trial court erred in both law and fact by convicting the appellant while the prosecution side was not to prove (sic!) their charge beyond any reasonable doubt.*

(4) *That the trial Court erred in law and fact by convicting and sentencing the appellant relying on incredible and unreliable evidence of PW3 (victim's mother.)*

When the appeal was called on for hearing on 5/12/2022 the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through Ms. Florence Mbamba, learned State Attorney. The appellant prayed that this court adopts his written statement expounding the grounds of appeal and prayed further that the learned state attorney be allowed to present first, and the appellant would, if conditions so dictated, make a rejoinder.

Submitting in relation to the first ground, Ms. Mbamba stated that the appellant had complained about the lower court's decision to convict him despite his plea of not guilty. She further explained that the appellant's plea of not guilty does not necessarily prevent a finding of guilt, as the prosecution has the obligation to present witnesses and prove the allegations against the accused. Ms. Mbamba referred this court to **section 229(1) of the Criminal Procedure Act Cap 20 RE 2022**, which requires the prosecution to call witnesses as soon as the accused pleads not guilty. In her opinion, this ground lacked merit and should be dismissed.

Moving on to ground two, Ms. Mbamba stated that she would be addressing the third additional ground of appeal jointly with second original ground in the petition of appeal. She explained that the appellant's complaint was about the lower court's conviction without any evidence of an exhibit to support the allegations against him. Ms. Mbamba noted that it was not a legal requirement for all cases to be supported by documentary evidence to prove allegations. In this case, the offense of unnatural offense falls under the sexual offenses category. The learned State Attorney argued that under section **127(6) of the Evidence Act Cap 6 RE 2022**, the victim's evidence alone is sufficient to support a conviction if the court evaluates the weight of the evidence.

Ms. Mbamba referred to page 6 of the lower court proceedings, which showed that PW1, the victim, had narrated how the event took place, and how he had identified the appellant, who was his uncle, beyond any reasonable doubt. She argued that the ground that there was no documentary or written evidence had no merit, as the evidence of the victim alone was sufficient to support the conviction. She concluded by requesting that the ground be dismissed.

Ms. Mbamba stated that on **ground three,** the appellant complained about the court's conviction without any identification made by the victim, taking into consideration that the incident occurred at night. She explained that this complaint was not true, **as per the lower court's proceedings, particularly on page 6,** where PW1, the victim, testified how he identified the appellant as his uncle, whom he lived with. Ms. Mbamba referred to page 7 of the proceedings, where the appellant did not cross-examine PW1, who

was of the view that the appellant did not know him. This indicated that they agreed that the victim was his uncle, and that the appellant was able to identify him. Ms. Mbamba argued that this ground was an afterthought of the appellant and requested that it be dismissed.

Ms. Mbamba stated that **on ground four,** the appellant's complaint was that the lower court had erred in convicting him based on hearsay evidence from PW2, PW3, and PW4. However, she argued that this was not true. She clarified that all the witnesses provided direct evidence.

The learned State Attorney referred to PW2's testimony and explained that he had testified based on observation. On page 9 of the lower court proceedings, averred the learned State Attorney, it was indicated how PW2 came to realize that PW1 had been sodomized. On the day of the incident, PW2 saw the victim, PW1, coming out of the room of the accused person while naked and going into the toilet. PW2 then went into the appellant's room and found him with a piece of cloth wiping out a part of the bedsheet.

Ms. Mbamba also mentioned that PW3's testimony was like that of PW1, and that PW2 had told her, the mother of the victim, about the incident. She noted that the legal requirement as per **section 62 of the Evidence Act Cap 6 RE 2022** had been met since all the witnesses provided direct evidence. Ms. Mbamba concluded that this ground had no merit and prayed that it be dismissed.

The learned State Attorney **clarified on ground 5** that the appellant complained that the lower court had erred in convicting him without medical evidence of the victim's examination. She stated that as per the court records

in section 6, PW1 testified that he was called by the accused in August 2021, and upon entering the room, the appellant told him that he wanted to rape him. When the victim tried to resist, the appellant threatened to beat him up if he told anyone about it. Thus, the victim did not report the incident. On page 9, PW2, the victim's brother, testified that on the fateful day, he saw the victim coming out of the appellant's room naked. He went to the appellant's room and found him wiping the bed with a cloth. PW2 reported what he had seen to the appellant's father, who promised to handle the matter. However, when nothing was done, PW2 informed his mother about it. PW3 testified on page 13 that he discovered the matter and found the appellant with the victim's father, where he confessed to the offense. Ms. Mbamba prayed that the appeal be dismissed and that the court takes into account section 122 of the Evidence Act Cap 6 RE 2022, which allows the court to re-evaluate the evidence according to circumstances and human conduct in a particular case.

Regarding the additional grounds, the appellant's complaint was that the court had convicted him without *vore dire* examination of PW1 while adducing his evidence. **Ms. Mbamba agreed with the appellant's assertion, as per page 6 of the proceedings** of the lower court, where PW1 began testifying without any examination being conducted to establish whether PW1 would tell the truth and promise to tell the truth. However, Ms. Mbamba strongly argued, the ground was not sufficient reason for acquittal as the offense had already been proven, that the appellant had unnatural canal knowledge with the victim. Ms. Mbamba objected to the appeal as per the grounds raised.

It was time for the appellant. He told the court that he would start with the first ground, which was that he denied wrongdoing because he did not commit the offence. He then went on to say that on the second ground, there was no evidence presented in court to prove his guilt beyond a reasonable doubt. He added that there were no exhibits to prove the allegations against him, and if it were a true case, **PW4** (the police investigator) would have tendered exhibits to prove the case.

The appellant also mentioned the third ground, stating that the event lacked genuineness because there was no legally recognized process to arrest him on the material day. He further informed the court that the claim that the event took place at night had not been mentioned in the lower court. The fourth ground, according to the appellant, was that the lower court had focused on hearsay evidence. He explained that all prosecution witnesses, except for PW1, had not witnessed him committing the offense against the victim, but had heard about it from the victim.

The appellant then addressed the fifth ground, explaining that the lower court had erred because the victim was taken to the hospital and the doctor received him and interrogated him. However, according to PW4, the doctor was unable to examine the victim. The appellant questioned whether the exhibit that the victim had been unnaturally harmed was obtained, and he added that the doctor never appeared in court as a witness to explain why he or she failed to examine the victim.

The appellant also disputed the age of the victim, claiming that it was different from what was mentioned in the case. He argued that if it were

true that the age was correct, the prosecution would not have failed to tender evidence to prove such age, such as a birth certificate or clinic card. Moreover, the prosecution, despite all the evidence tendered, still had weaknesses in proving the case. According to the appellant, in the entire case, only verbal exchanges were made, and the medical examination report, PF3, and birth certificate were missing.

The appellant further informed the court that PW3, the mother of the victim, was not a truthful witness, but the court trusted her. He explained that she had testified that when she met him and asked him about the incident, he had accepted it, which was not true. Additionally, PW3 had told the court that he knew nothing about the incident except what she was told by PW2.

The appellant then disputed the evidence presented by PW4, the police detective, who had explained that the victim had told him that he met the appellant on the way, and that was when he called him and sodomized him. The appellant claimed that this evidence was not true because, as per PW1, the victim, the incident took place at home. The same witness (PW4) had also made a false testimony that the victim told him that he was sodomized ten days before, that is, on the 29th of September, while the victim himself had told the court that he did not know when the incident happened but only remembered it was in August.

Regarding PW2, the victim's brother, who had told the court that on the fateful day, he was alerted by an alarm by the victim who was crying out, the appellant argued that it was obvious that PW2 had lied in court.

According to PW1, during the incident, the appellant had gagged him with rags, and he failed to raise an alarm as there were rags in his mouth. The appellant concluded by praying that the court find him not guilty and order that he be set free.

Having dispassionately considered submissions by both parties and carefully examined the lower court records, I cannot help but start my analysis by a clarion call to learned magistrate to be especially careful while dealing with offences that attract life imprisonment. Indeed, the standard of proof for all criminal cases whether it is punishable only by a one-month jail term or life imprisonment, is the same namely beyond reasonable doubt. Nevertheless, it is obvious that the longer the sentence the higher the stakes. This calls for extraordinary efforts to wade through the prosecutorial narrative and take nothing for granted. In this poorly investigated and I must say poorly prosecuted case, the court sentenced the appellant to life imprisonment with very little if any evidence to warrant conviction. This is not how criminal justice operates.

As alluded to above, conviction in this case is based wholly on circumstantial evidence. The learned magistrate started penning down his judgement by a disclaimer that he was not going to mention any names because the witnesses were all members of the same family and he thought it was important to protect the identity of the victim. Well-intentioned but I must admit that that's where the entire judgement became rather blurry and the reasoning fuzzy. The learned magistrate has gone beyond the minimum standards provided for by the **Model Law and Related Commentary on**

**Justice in Matters Involving Child Victims and Witnesses of Crime** (United Nations Office on Drugs and Crime, Vienna 2009.)

The scenario as randomly narrated by prosecution witnesses is that the PW1 was seen walking out of the appellants room naked. I think the learned magistrate should have given some thoughts to this blanket claim. It is on record that the PW2 and the accused were living in the house inhabited by men only. The victim, on the other hand, was a frequent visitor to his "uncles" to watch television.

The narrative that PW2 was surprised to see the victim walk out of the accused room naked, headed to the toilet and went back to the same room doesn't sound convincing. The age of the victim namely 13 only helps in solidifying the grounds of appeal. It is hard to envision a 13-year-old going back to the same room he was unnaturally known and spend several days without telling anyone about the heinous act.

As alluded to the learned magistrate based his conviction on circumstantial evidence. No exhibit whatsoever was tendered. It is thus an opportune moment to remind ourselves that in our jurisdiction circumstantial evidence must be to the effect that the inculpatory facts must not be capable of any other interpretation than that the person in the dock is guilty of the offence charged. See among other authorities **Bahati Makeja v. The Republic**, Criminal Appeal No. 118 of 2006, CAT (unreported). **Mathias Bundala v. The Republic**, Criminal Appeal No. 62 of 2004, CAT (unreported) **Wallii Abbdallah Kibutwa, Kadili Ahmad and Happy Balama v. The Republic**, Criminal Appeal No.127 of 2003, CAT

(unreported) and **Shabani Abdallah v. The Republic**, Criminal Appeal No.127 of 2003, CAT (unreported)

All said and done, I allow the appeal. I order that the appellant **SHAA SAID MBAWI** be released from prison forthwith unless otherwise held for another lawful cause.

It is so ordered.

**E.I. LALTAIKA**
**JUDGE**
**27/2/2023**

**Court**

Judgement delivered under my hand and the seal of this court this 27th day of February 2023 in the presence of Mr. Enosh Gabriel Kigoryo, Counsel for the respondent Republic and the appellant.

**E.I. LALTAIKA**
**JUDGE**
**27/2/2023**

**Court:**

The right to appeal to the Court of Appeal of Tanzania fully explained.

**E.I. LALTAIKA**
**JUDGE**
**27/2/2023**