IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

CRIMINAL APPEAL CASE NO. 2 OF 2023

(Originating from Namtumbo District Court, Criminal Case No. 54 of 2022)

VITUS SIMON NCHIMBI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

06/03/2023 & 17/03/2023

E.B. LUVANDA, J.

The Appellant above named was convicted by the trial court for unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap 16 R.E. 2019] and committed to jail for a term of thirty years, Aggrieved, the Appellant preferred this appeal with four grounds of appeal and in additional of two supplementary grounds as hereunder:

1. That, Hon. High Court, the trial court erred in law and fact to convict the Appellant relying heavily on doubtful evidence of PW3 when stated before the court that when he did medical examination to PW1 found bruises only inside the anus of PW1, but PW3 didn't found spermatozoa inside the anus of PW1 while PW2 stated before the court that, the incident took three minutes

and PW4 stated that after being informed about this incident, PW4 did inform OCS and PW1 was taken to Namtumbo health centre, so if it's true that the Appellant had unnatural sexual practice with PW1 as they claimed and PW4 said PW1 was taken to health centre on time how come PW3 didn't found any spermatozoa after he examine the victim?

2. That, Hon. High Court, the trial court erred in law and fact to convict the Appellant basing on uncorroborated evidence of PW1 and PW3 when PW1 stated that he was taken to Namtumbo Health Centre in the morning this means was on 23rd August 2022, while PW3 stated that, I quote "I recall on 22nd August 2022 at 10:00 AM." I was at my work place at Namtumbo Health Centre whereas I received PW1 as the patient" so which is which?
3. That, Hon, High Court, the trial court erred in law and fact to convict the Appellant basing on prima facie evidence of PW3 stated that on 22nd August 2022 at 10:00AM, received PW1 as the patient while PW2, PW4 and PW1 himself claimed that this matter occurred on 22nd August 2022 at 11:00 AM, so it's obvious PW3 was lying before the court of law.
4. That, Hon. High Court, the evidence in this case isn't material evidence because there is uncorroborated evidence from PW1,

PW2 and PW3 on when the incident took place (see page 25 on proceeding). PW4 stated before the court that, in the police lockup, there were seven male suspects but merely one suspect came before this Hon. Court as a witness.

At the hearing of appeal, the Appellant submitted that the trial court erred to convict him basing on the testimony of PW1 (victim) whose no spermatozoa was seen, although he alleged to have been taken to Namtumbo Dispensary, on time.

In response Mr. Venance Mkonongo learned State Attorney for the Respondent, submitted that the Appellant was charged for unnatural offence, that sperms is not among the elements for proving it. That non availability of sperms is not part of proving this offence, rather penetration to the victim. The learned State Attorney submitted that the victim explained to have been grabbed his neck, then the Appellant inserted his penis into victim's anus. He submitted that penetration was also proved by Michael Raymond (PW3) who examined the victim and saw bruises on the anus of the victim.

Actually the argument of the Appellant who queried on the missing or absence of sperms on the anus of the victim, is baseless.

The Appellant did not say which law presupposes presence of sperms to prove the offence of unnatural offence. The penal law specifically section 154 (1) (a) of Cap 16 (*supra*), simply provide for any person who has carnal knowledge of any person against the order of nature, commits unnatural offence. Herein, there is ample evidence of (PW1) victim that the Appellant forcefully inserted his penis into PW1 anus. PW2 who was an eye witness, testified that the act of unnatural offence lasted for about three minutes. PW4 who heeded to a call for help, upon arrival into a cell where PW1, PW2 and the Appellant including other five remandees were accommodated on that fateful night at dawn, saw PW1 crying and the later informed PW4 that he was sodomized by the Appellant. PW3 the medical officer confirmed via a PF3 exhibit P1, that PW1 sustained pain to rectum and perineum soon after being attacked, which according to his opinion could be caused by penetration of blunt object such as fingers, penis or even hard stool. Therefore a call for sperms is unfounded.

For ground number two, the Appellant submitted that the trial court erred to convict him based on uncorroborated evidence of PW1 who said he was taken to hospital in the morning and PW3 said he received PW1 in the night at 22:00 hours.

In response, the learned State Attorney submitted that, PW1 and PW2 explained that the incident occurred at 05:00 hours on 22/8/2022.

To my view this ground lack merit. PW1 and PW2 testified on similar account of facts that the incident occurred at about 05:00 hours on 22/8/2022. PW3 stated to have received and attended PW1 on 22/8/2022 at 10:00 hours.

As such the said discrepancy is an illusory, or attributed by failure on the part of the Appellants to appreciate time format.

Equally an argument by the Appellant that PW3 stated to have received PW1 on 22/8/2022 at 10:00 AM, while PW1, PW2 and PW4 said the incident occurred on 22/8/2022 at 11:00 AM. As alluded by the learned State Attorney, the appellant is confusing himself to read twenty four hours format. Actually the testimony of PW1, PW2 and PW4 is clear from ambiguity, as all explained that the incidence occurred at 05:00 hours on 22/8/2022. PW3 stated to have received PW1 at 10:00 AM. Therefore the alleged discrepancy is not there.

On ground number four, the Appellant complained as to why only one witness PW2 was summoned out of seven remandees who were at the scene.

Responding to this ground, the learned State Attorney submitted that no law which dictate prosecution to summon a specific number of witnesses. He cited section 143 of the Tanzania Evidence Act, [Cap 6 R.E. 2019], **Kubezya John vs. Republic**, Criminal Appeal No. 488/2015 C.A.T. Tabora. I ascribe to the submission of the learned State Attorney as a correct position of the law. There is no hard and fast rules as to a specific number which prosecution are supposed to summon to prove a certain facts, what is important is credibility of a particular witness. In the case of **Kubezya John** (*supra*) at page 19, the Court of Appeal ruled, I quote,

> *"The evidence alone by PW3 was enough to prove that fact even without the militiaman not being called to testify. It is elementary that under the provision of section 143 of the Evidence Act, Cap 6 of the Revised Edition, 2002, no particular number of witness is required for the proof of any fact"*

Herein, the evidence of PW1 was corroborated by PW2. PW2 was a credible witness. Therefore, this ground is unmerited.

On his supplementary grounds, the Appellant submitted that Pw1 and PW2 failed to prove the offence, by failure to mention the Appellant by his name while they were in the same cell at police.

In response, the learned State Attorney, submitted that the Appellant was charged alone, PW1 managed to identify him. That PW1 did not mention the Appellant by his name because they just meet at police lock up where people don't stay long unlike at prison.

It is true that PW1 made reference by referring the appellant as the accused, as alluded by the learned State Attorney, at the dock the Appellant was alone.

The situation could be different if there were more than one accused person at the dock. Also during cross examination, PW1 was honest that he don't not know the name of the Appellant, he only recognize him by face. But still PW1 identified the Appellant by the name Mnyampala, as he used to introduce himself in the lockup when he was threatening PW1.

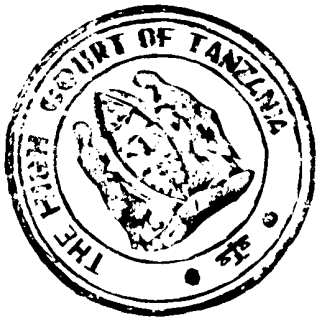
On the last ground, the Appellant submitted that PW4 said the incident occurred on 21/8/2022 while PW1, PW2 and PW3 said it occurred on 22/8/2022.

In response, the learned State Attorney submitted that PW4 when mention a date 21/8/2022 is a date he reported at work at 22:00 hours, then PW4 said at 4:45 am he put on solar electricity and at 05:00 hours he heard a shout for help.

It is true that PW1, PW2 and PW3 stated that the incident occurred on 22/8/2022. PW4 mentioned only time at 05:00 hours without mentioning a date. But as submitted by the learned State Attorney, PW4 alleged to have reported at work on 21/8/2022 at 22:00 hours, then at 4:45 am while PW4 was still progressing with his night shift, he put on solar light and at 5:00 am he heard an alarm for help from remandees. By necessary implication, when PW4 said at 5:00 am it connote that he was making reference progressing time from the date when he reported at work on 21/8/2022 at 22:00 hours. To my view, entertaining the argument by the Appellant will be akin as saying hours were running retrogressive anticlockwise.

Suffices to say all grounds of appeal are without substance. The trial court convicted and sentence is upheld.

The appeal is dismissed.



E.B. LUVANDA

JUDGE

17/03/2023