IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 34 OF 2022

(*Originating from Criminal Case No. 54of 2021 of Kishapu District Court*)

TINE CHRISTOPHER@ MBEMBELA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the last Order: - 13th February 2023
Date of the Judgment: -7thMarch, 2023

MASSAM, J.

This is an appeal emanate from Criminal case No. 34 of 2022 of Kishapu District Court whereby the appellant Tine Christopher was charged with an offence of Unnatural Offence contrary to sections 154 (1) (a) & (2) (e) of the Penal Code [Cap 16 RE 2019].

The brief facts leading to this appeal are that on 1st day of June 2021 at around 13.00 hours at Maganzo village within Kishapu District in Shinyanga Region appellant unlawfully had a canal knowledge of his step daughter one Dorcas D/o Deus a girl of 7 years old against the nature.

The prosecution established the facts that on 1st June 2021 at around 13.00 hours at Maganzo accused person was at home while his wife one Pendo Sylvanus who is a victim grandmother was preparing lunch, accused person [appellant] went to the bathroom inside the unfinished building and started to call the victim to bring him soap, victim took the said soap to the accused person/appellant but later on his wife found him having carnal knowledge with victim against the order of nature, on 10th June 2021 the accused person was arrested at Maganzo and taken to Kishapu police station for further investigation and on 15th June 2021 the accused person was brought to the court to answer his charge.

In the trial the prosecution paraded 3 witnesses namely Dorcas Deus (PW1), Pendo Sylvanus (PW2), Dr Mariana Bruno (PW3) who tendered PF3 as the exhibit). The defense side had one witness (the appellant) without exhibit.

The court heard the case in its findings and found appellant guilty to the alleged offence and convicted to serve a life sentence. Appellant aggrieved with both conviction and sentence he thus lodged this appeal on the following grounds;

1) *That, the learned trial Magistrate court erred in law and fact to accept the PF3 as an exhibit from an expert which was processed 10 days past after the alleged offence occurred[the offence occurred on 1/6/202i and PF3 was filed on 11/6/2021.*
2) *That, the alleged offence was not well established by the prosecution side, refer the case of Gerald Simon @samaganga v republic high court of Shinyanga [unreported]*
3) *The trial court Magistrate totally erred in law and facts to misapprehending the nature and quality of the prosecution evidence against appellant which did not prove the charge beyond reasonable doubt.*
4) *That the trial court. Magistrate erred in law and facts to accept the contradictory evidence of Pw1 and Pw2 see page 2 of the copy of judgment]*

5) *That the trial magistrate occasioned a serious miscarriage of justice when she failed to evaluate, consider or give weight to the appellants evidence that he did not sodomize pw1.*

6) That the prosecution side did not prove the alleged offence beyond the reasonable doubts.

The appellants prayed to this court to admit his four supplementary grounds of appeal to be part of his submission and the court admitted it as follows

(1) *That the learned trial magistrate failed to request for PF3 to the prosecution side in which a doctor testify before the court that her grandfather diseased and found to be haven't any disease hence it is not true*

(2) *That the learned trial magistrate erred in law and fact to asked me the evidence that I explained to the court that my marriage has a long time conflict and this case has been prepared to smear me politically, the crisis has reached all levels such as the local village government and primary court as well sadly when he was reading the* judgment *in the court that I did not bring any evidence when the one who should be asking me is the court.*

(3) *That the learned trial court magistrate rejected the letter from the head teacher from Ibaza Primary Court to the headmaster of Maganzo stating that he should receive the student continue with his studies so that she does not behind the lessons when the systems of prem been okay she will be transferred accordingly, the letter was received on 20/4/2021 and her prem number is 20200506401.*

(4) *The learned trial magistrate failed to understandPw1 evidence she did not even know my name but she was given that information on 10/6/2021 when she arrived at the court on29/7/2021,shementioned even the names of my parents as she had already been taught.*

When the appeal called for hearing, the appellant appeared in person whilst the respondent/ Republic, represented by Ms. Glory Ndondi learned State Attorney. By the court consent the appeal was urged orally.

Appellant in support of his appeal he submitted that he prays his grounds of appeal to be adopted as it is and this court to left him free as the evidence of prosecution was weak and fabricated, as he did not do that offence, also the prosecution side did not call the said Pastor Emanuel Yohana, no street leader to testify to the court while they were the ones

who PW2 went to complain to them. Also no PF3 was tendered to the court to prove the same

Again he added that he did not taken to the hospital, no investigator of the case called to the court, The reasons of fabricating this case was to remove him from the leadership as he was a chairman. He said he was charged for their personal interest. With thus he prayed the court to allow his appeal and left him free.

Ms. Glory in her reply, she submitted that she did not support the appeal, as in their side they did prove their case beyond the reasonable doubt. On her submission she prayed to join grounds 3 and 6 and argued jointly. She stated that the appellant said that prosecution failed to prove the charge against the appellant, but in her side, she is saying that by looking the evidence of all witnesses plus the exhibit P1 prove the charge against the appellant. Starting with the evidence of Pw1 [victim] said that on 1/6/2021 was playing with her fellows and the appellant called her that to bring him soap; and put his penis to her vagina when appellant continued to do so her grandmother found them.

She added that the evidence of Pw1 was credible and sufficient as the best evidence in the sexual offences are the ones who comes from the

victim as well elaborated in the case of **Selemani Makumba V Republic** TLR 379, she continued stating that Pw1 was a child ,so section 127[6]of TEA R.E 2019 complied with.

Ms. Glory continued to say that the evidence of Pw1 was supported with the evidence of Pw2 [her grandmother] who informed this court that she found appellant in the bathroom who was with the victim putting on her pant, Pw2 asked appellant what was he doing with appellant but he said nothing until Pw1 who told her that she was raped by the appellant. Again she said that the evidence of Pw2 was supported with the evidence of Pw3 who was a clinical officer who investigated the victim [Pw1] and found her in good condition physically and mentally but in her secrets parts and her anus was open and sphincter muscles was not intact, no discharge found ,later she checked her if she had infected by the sexual diseases and finds negative and she filled PF3 form she said that if she saw the said PF3 will recognize it as it has her signature which was admitted as exhibit P 1.so according to that Pw1 did prove penetration which is the important ingredient of sexual offences.

In reply of the 1st ground of appeal she prayed to consolidate it with supplementary ground of appeal no 1 that the trial court failed to request

for PF3 which was processed after ten days after the alleged charge occurs, she replied that it is true that the PF3 was processed after ten (10) days elapsed but the court did not erred to admit it because the law did not restrict the same, also it true that the said matter was not reported to the investigative offices but to the relative of appellant as there was conflict between the appellant and Pw2.

She added that if this court will see that the PF3 to be expunged the evidence of Pw1 will stand as the best evidence comes from PW1.Also the appellant in cross examination he asks nothing about the tendering of exhibit. In replying to the 4th ground of appeal which appellant complained that the court erred in law to consider the contradictory evidence of Pw1 and Pw2 which show that Pw2 at that day was preparing lunch so she don't see any contradiction, she pray the said ground of appeal to be dismissed, In ground no 5 appellant said that in his case there was miscarriage of justice the court did not consider his defense, but she replied that the court did consider his defense as no evidence was brought to counter the evidence from prosecution.

Another complainant which raised by the appellant was failure of the court to admit the letter from Ibaza Primary School, she replied that the

court objected it as it had no the signature from the authority which deals with transfer.

Again the appellant raised an issue of prosecution to fail to call the important witnesses, on this Ms.Ndondi replied that the witness which called was enough to prove their case beyond the reasonable doubt as elaborated in the **section 143 of R. E2022** *this states that there was no need to call many witnesses to appeal to court to prove the charge*, so the witnesses number is required to prove any fact. With thus she said the said ground is baseless with no merit in law.

Having carefully considered the both parties' submissions, appellant grounds of appeal and the respondent in opposition, I find myself duty to pass through the records and learn what was transpired to lead the court to convict and sentence the appellant.

Before I venture to the merit of this appeal let me in summary narrate the short story on how the offence committed as per court's records. Actually, the centripetal evidence to prove that victim was sodomized by the appellant, is from the testimonies of Pw1,Pw2 and Pw3 which their story are as follows that;

On 1/6/2021 about 13:00hrs PW1 was outside playing with her friends, her grandmother Pw2 was inside preparing the lunch, her grandfather [the appellant] was in the bathroom called the victim to bring the soap, upon reach to the bathroom appellant took off her clothes and put his mdudu into her anus when that act was continued her grandmother came and check her to the anus, she felt pain, later on PW2 her grandmother reported the matter to the police station.

Pw2 narrated that, she is the grandmother of Pw1 who is eight years old. Appellant who is in the court is her husband, She testified that on 1/06/2021 about13.00 hrs. she was at home preparing lunch , her husband came from his work he change his clothes a few minutes ,she heard her husband calling Pw1 who was outside playing with her fellows, after a while she went out to look for "mbanio" and saw her husband holding Pw1 with arms on her ambit taking her inside the bathroom, she was not worried as the appellant is his grandfather, so he continued with her business later on she noted that it was too silent in the bathroom, so she make a follow ups outside where Pw1 and her fellows were playing and ask them but they told her that Pw1 is inside the bathroom, so she went to the bathroom and found appellant dressing up the Pw1 and his penis was

erected, when she asked what he was doing he said that he was helping Pw1 to wear her clothes, but Pw1 told her that she was sodomized by appellant, she inspected the Pw1 to her vagina and found her vagina was wet with material contain male sperms and after that a appellant followed him to talk to her but she refused ,later on she reported the matter to appellants young brother one Peter Mbembe and later on to the village chairman of Nguzo Mbili and Rev, Yohana Emanuel of KKKT Maganzo who told her that the said act was superstition, on 9/6/2021 they had some conflict with appellant who insulted her and told her to report anywhere , so she went and report to the police station, that day she slept to the house of hamlet leader and victim was taken to Kolandoto Hospital for checkup with one policeman called Mary.

In cross examination she said that in that bathroom there was no water, and she said that concerning that issue she informed another neighbor including appellant's brother. PW3 said that she was clinical officer at Kolandoto Hospital that on 11/6/2021 at around 15.00hrs she was at the office where Pw1 came escorted with police woman, she gave her PF3 to fill and tell her that to check her if she was sodomized ,Pw3 did checked her private parts and her anus was open and sphincter muscles

was not intact ,there was no discharge and her vagina was normal, later on she checked her if she was infected with sexual diseases and found out she was negative, so she filled the PF3 which was admitted as exhibit P1.That is the short story from the testimonies of prosecution witnesses.

After being seen the above short story, the main issue I think I need to determine is **whether the prosecution proved the offence of Unnatural Offence against the appellant to the standard required by the law**.

Being the first appeal, I am guided by the principle elucidated in the case of **D. R. PANDYA v R** (1957) EA 336 that as the first appellate court has an obligation to reconsider and revaluate the evidence on record by looking both testimonies of witnesses together with exhibits. The duty of this court is to see whether the prosecution proved the case in a standard required by law, this court will be guided by the principles In **Joseph John Makune v. Republic**, 1986] TLR 44, it was held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is cast on the accused to prove his innocence. There are few well known exceptions to this principle,

one example being where the accused raises the defence of insanity in which case, he must prove it on the balance of probabilities"

In the light of the above question and basing the grounds of appeal of the appellant, I think the main issue to determine is whether Prosecution failed to prove the case beyond reasonable doubt. But for me, I take grounds no 2,3,4,5 and 6 and join them and determine together as they form similar facts to be determined basing the appellant's complaint that, the case was fabricated and they failed to proof their case beyond reasonable doubt, he complained that there are witnesses who were not called to testify to the court who are very important ,he mention one Pastor Emanuel Yohana ,and hamlet leader who Pw2 went to complain to them were not called, Prosecution side in their reply they told this court that there was no restriction in calling the witnesses as the said three witnesses called proved their case beyond reasonable doubt.

Also she added by considering that the best evidence comes from the victim, who proved the said case, this court is aware that the best evidence comes from the victim but the mentioned witness was important to be called ,by looking the evidence of Pw2 shows that she reported the matter to the appellant's young brother one Peter Mbembela, Pastor

Emanuel Yohana and hamlet leader but no one was called to testify what Pw2 went to complain to them, their evidence could collaborate the evidence of Pw1 and Pw2.Also there was a piece of evidence which show that PW2 and appellant had some conflicts concerning the alleged offence which was attended in the family level but thus why they did not report the matter at the fist time until on 9/6/2020 when PW1 decided to report the said matter to police station but no one was called by the prosecution side to testify about it to strengthen their evidence. The mentioned witnesses above this court saw them to be important to be called as elaborated in the case of **Aziz Abdalla vs Republic** (1991) TLR 71 which stated that the *general and well known rule was that the prosecutor is under prima fade duty to call 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 being shown, the court may draw an inference adverse to the prosecution.*

This court is aware that no particular number of witnesses is required for the proof of any fact but this court insisted the mentioned witnesses

were very important to be called as elaborated in the case of **Yohanis Msigwa v Republic,** (1990) TLR 148, it was stated that:-

> *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen and his/her credibility".*

Ms Glory opposed the ground that the prosecution failed to prove the case as per standard required, she pointed that PW1, PW2, PW3 and Exhibit P1 testified to the satisfactory that appellant condomized the victim by puling his penis in the anus of the victim. This court in perusing the court record finds out that Pw1 who was the victim said that appellant put his penis in her vagina, so this court is asking itself if the word" to put 'meant" to "insert" the act which proof penetration and it is among of the ingredient of the rape case, This court finds out that victim said nothing about the penetration which was the key ingredient of the sexual offences, as the word put cannot stand as insert and that cannot proof the offence of rape in the issue of penetration as elaborated in the case of **Mathayo Ngalya @ Shaban vs. Republic** Criminal Appeal no 2006 (unreported)

the court held that *"the essence of the offence rape is penetration of the male organ into vagina ,That for the offence of rape it is out most important to lead evidence of penetration and not simply to give general statement alleging that rape was committed without elaborating what took place".*

Also the prosecution side insisted that the evidence of Pw1 did collaborated with the evidence of Pw2 but this court finds out that the evidence of Pw2 did not collaborate with Pw1 as Pw2 was not the eye witness she did not saw appellant sodomizing the Pw1 but she saw appellant undressing the Pw1 her under pant, and when pw2 asked appellant what was he doing after found them to the bathroom he said that he was helping him. so she did not witness the appellant but Pw1 told her that appellant did so, PW2 said that she went to the said bathroom because she heard nothing from the bathroom and became worried ,and decided to go there , so this means that when appellant sodomizing Pw1 did not cry for help the act which could cause to be rescued.

Again appellant complained in his 1st ground of appeal that the evidence of Pw3 was not reliable as was taken 10 days after the said

alleged offence happened, Ms Glory agreed on that and telling this court if exhibit P1 wishes can be expunge it because they will remain with the evidence of Pw1 which is the best evidence, This court is in support with the prosecution submission that the best evidence comes from the victim as elaborated in the case of **Seleman Makumba v Republic TLR 386,** which in this case the court satisfied that even in absence of the testimony of PF3 there was sufficient evidence on record to convict. But because prosecution side had no objection from appellants prayer that the said evidence and exhibit to be expunged, this court is hereby expunged it as prayed.

I am aware that no particular number of witnesses is required for the proof of any factas **Yohanis Msigwa v Republic** (1990) TLR 148, it was stated that:-

"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen and his/her credibility."

Again, in **Amiri Hassan Kadura vs The republic**, Criminal Appeal No. 271 of 2013 CAT at page the court stated that;

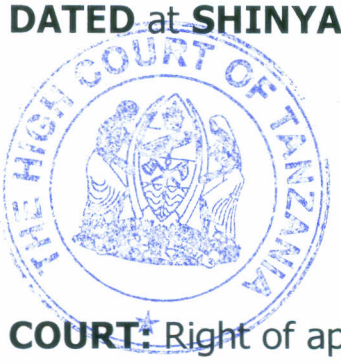
The law provides that adverse inference may be drawn when the persons omitted to be called as witnesses are within reach and no sufficient reason is shown by the prosecution. See - Aziz Abdallah v Republic (1991) TLR 71 and Yohana Chibwingu v Republic, Criminal Appeal No. 117 of 2015, CAT (unreported). In the instant case, no reason has been provided for not calling the sisters of the appellant. We are of the considered view that they are an important link in the sequence of events

In light of the above issues, and for the failure of the PW1 to elaborate well what happened to the bathroom on the said date in order to prove the offence unnatural offence which appellant was alleged with ,and failure of the prosecution to call the family members who attended the alleged conflict between appellant and Pw2, also the investigator of the case ,one Pastor Emanuel Yohana and hamlet leader, who PW2 went to complain to them, raises adverse inference to the doubt that appellant did not commit the offence alleged ,With thus all grounds of appeal raised by appellant have merit.

In upshot, as I have demonstrated in the light of this appeal, I find that all grounds of appeal had carried the center point of doubt which this court took time to discuss the same in detail.Given the circumstances, I allow the appeal against the conviction of Unnatural offence, quash the conviction and set aside the sentence given. Appellant should be left free forthwith unless for any legal cause.

It is so ordered.

DATED at **SHINYANGA** this 7th day of March, 2023.



R.B. Massam
JUDGE
7/03/2023

COURT: Right of appeal explained.