

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 112 OF 2022

(Originated from Criminal Case No. 42 of 2022 of the District Court of Musoma at Musoma)

WARIOBA KAROLI @ RYOBA..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

24th & 30th May, 2023

M. L. KOMBA, J.:

This appeal arises from the decision of the District Court of Musoma at Musoma (the trial court) in Criminal Case No. 42 of 2022. In the core, the appellant was convicted and sentenced thirty years imprisonment for the offence of having carnal knowledge against order of nature (sodomize) contrary to section 154(1) (a) of Penal Code, Cap 16 [R. E. 2019].

Brief facts of the case goes like this, it was 1st of January 2022 along Nyasho area within the District of Musoma in Mara region, two persons (appellant and other one who is not subject of this appeal) had canal knowledge of one man (victim) against the order of nature.

It is from record that on 01/01/2022 the victim who testified as PW1 was at his grandmother's place commonly known as 'kwa Makoba' drinking local beer and celebrating a new year. After he was satisfied with celebration he decided to sleep on the same place, outside the house as they did not open for him. By that time local beer bar was closed. Then he saw two people Papaa and Warrioba who were approaching him. They took him to local bathroom and they did sexual intercourse against order of nature (sodomised him) one after another while holding his neck so that he cannot make noise. He immediately informed his relatives who did that to him. On 02/01/2023 PW2 (Joseph Musa) took him to police station then to Government Hospital where he was attended by PW4 (Doctor Regina).

Doctor informed the trial court that he attended the victim on 02/01/2022 by making physical checkup and laboratory test and discover the anus hole was big which suggest he was sodomised. He filled PF3 and released the victim who was accompanied by his uncle. Appellant was arrested by PW2 and the other accused was arrested by PW3 who was WEO of Nyasho. First accused person informed the court that it was the second accused who did that as he witnessed the second accused zipping his trouser in the local bathroom.

The trial court was satisfied that the case was proved against the second accused (now the appellant) and the first accused was acquitted. The appellant was convicted and sentenced to thirty years imprisonment and was ordered to pay Tsh. 2,000,000/ as a compensation to victim. He was dissatisfied and decided to appeal to this court fronting eight (8) grounds of appeal to wit;

- (1) Since proof of penetration as required by section 130 (4) of the penal code was not established by PW1, first accused or the PF 3, there was no proof of sodomizing.
- (2) The conviction based on PW1's testimony was bad because he did not Pass out as credible.
- (3) The medical findings found on PF 3 had no scientific justification so they were unreliable
- (4) The prosecution failed to establish by the evidence the time alleged the crime as well as the condition in which PW1 was before the act.
- (5) The court did not resolve the question of visual identification in an unfavorable condition.
- (6) **THAT**, the trial court erred in law and fact to convict and sentence the appellant by not reassessing exhaustively the circumstances under which the identifying witnesses alleged to see and recognize the appellant at the fateful night they failed to describe the attire he put on the fateful night.
- (7) **THAT**, the credible of the co-accused was not properly scrutinized as

to why they decide to go to the street chairman instead of asking the PW I's grandmother the owner of the local bear" who was closer to the incident.

(8) **THAT**, the case was not proved beyond all reasonable doubt.

During hearing of this appeal, the appellant was remotely connected from Musoma Prison, stand solo unrepresented, while Respondent, the Republic was represented by Mr. Nico Malekela, State Attorney.

In support of the appeal, the appellant did not have much to say. He prayed this court to adopt his petition of appeal. It was adopted.

Mr. Nico Malekela responded all grounds separately while registering their position that they object the appeal by the appellant. On the 1st ground about the penetration, he submitted that under S. 130 (4) Cap 16 is to the effect that penetration however slight is enough to prove the offence of rape. Although the section is about rape but the offence was unnatural offence. He said doctor after examined the victim he found a big hole in his anus and the size of the hole suggested the victim was sodomized. Victim had the marks which was not normal that show there was penetration on the meaning of unnatural offence.

On the 2nd ground he submitted that PW1 was credible witness because when he gives his testimony the court had no question and it was not proved that he has any mental disorder. The CAT in various cases insisted the credibility of the witness. One of them is the case of **Godluck Kyando vs. Republic** (2006) TLR 363 and that the prosecution value the evidence of the PW1 and pray this court to find the ground has no merit. On the 3rd ground it was his submission that according to PW4 who examined the victim apart from other things, PW4 explained he went to school in 2005 and awarded Diploma in Medical Certificate by the time he attended the victim he was in the field for 20 years. He concluded by saying PW4 is professional and that this ground is lacking merit.

About the time the said crime was committed which is found in the 4th ground, it was his submission that prosecution managed to explain via PW1 at page 6 when the victim said the date 01/01/2022 during night and explained how they sodomized him and there after he failed to walk, the day and time was explained and condition thereafter was narrated. And therefore according to him the ground is devoid of merit.

The issue of visual identification as listed in ground no. 5 and 6 State Attorney confirmed that it is true the offence was committed at night and

the witness manage to identify the appellant and referred this court to page 7 when the victim explained there was electricity light and he know the accused before the crime as they do business on selling old iron (scrapers) and the other one they are used to drink alcohol in different areas. He said the victim explained further they undress his clothes and sodomize him. This show the distance was so close, almost zero distance and this make him to identify them easily. He cited that decision of CAT in **Masamba Musiba vs. Republic**, Criminal Appeal No. 138 of 2019 at page 24 where the court said recognition is more assured and more reliable than identification. Victim know the appellant before the crime.

On the 7th ground the appellant believe that he was convicted because the co accused mentioned him. State Attorney was of the view that the offence against the 1st accused was not proved and not otherwise. He said there is nowhere in the judgment it was written that the conviction of the appellant was due to the submission of the co accused. This is normal when the case is not well narrated the court usually acquit the accused and that is what happened. It was his general submission and prayer this court to find the decision of the lower court was correct worth to be upheld and the appellant to continue serving his sentence in prison.

When given another time for him to address this court as rejoinder the appellant had nothing to inform this court.

I have duly gone through the petition of appeal and argument done by the State attorney. I find to be prudent first to analyse the issue of credibility of PW1, the victim as modelled by State Attorney. PW1 was the important witness in the trial as his evidence is the best. See **Selemani Makumba vs. Republic** [2006] T. L. R 379, **Shani Chamwela Suleiman vs. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022; **Mohamed Said vs. The Republic**, Criminal Appeal No, 145 of 2017, CAT at Iringa (unreported).

PW1 gave his evidence under oath and explained what happened in that particular time. That he saw the appellant and his fellow approaching him, with the aid of electric light he recognized them. At page 7 the victim explains the light and that he knew appellant before the day he committed that crime. Victim was in his senses and he kept the story constant at examination in chief and during the cross examination where he narrated how the appellant was dressed. This court finds this witness credible as was decided in the case of **Godluck Kyando vs. Republic** (supra). I find 2nd, 5th and 6th grounds to be devoid of merit.

The 1st and 3rd grounds are about complaint of appellant over professionalism. Victim was taken to hospital and was attended by PW4 who is a medical practitioner having an advanced Diploma in Medicine. She informed the trial court that she attended the victim by both physical and laboratory test and find the victim was not infected of sexual transmitted diseases including HIV this is according to Exh. P1. It was explained that anus opening of the victim was wide, that is hole was too big not on natural state. Medical Practitioner evidence was collaborated by PW1 who informed the court that he was sodomized by the appellant. Being found with lager opening of the anus it's a proof that there was penetration on that part of the body hence unnatural offence. This court don't see the need of not believing the profession of PW4 while the law under section 240 of the CPA direct that document tendered by the profession need to be recognized;

240.-(1) In any trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing the same held the office or had the qualifications which he possessed to hold or to have when he signed it.

This medical practitioner, PW4 testified against what he saw during examination of the victim. Her findings resulted to the criminal offence which is clearly seen in CAP 16 thus;

154.-(1) Any person who-

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

The offence as molded in the penal Code is restricting carnal Knowledge against nature.

Moving to another ground, at page 7 just as submitted by State Attorney the victim explained during trial that it was night hours after he was tired of celebrating new year he decided to sleep. That means he was in good condition celebrating new year, when appellant committed the offence, at 5 paragraph victim explains he was in bad condition he could not even manage to stand. That show after the crime his condition changed and in the morning

he was taken to police then hospital. From this analysis I find ground no. 4 to be devoid of merit.

Ground no. 8 the appellant is complaining of the testimony of his co-accused as to why he informed the street chairman instead of informing the victim's grandmother. The evidence of co-accused was taken as a collaboration of what the victim informed the court. What was considered in the judgment is that, the first accused saw the appellant zipping his trouser. It is correct that the incident was reported to street leader but that was done after the first accused saw the grandmother of the victim that means grandmother was aware of the crime done to his grandson. From my analysis I find this ground is devoid of merit.

The last ground raised by the appellant is that the offence was not proved beyond reasonable doubt. This is the general principle in criminal offences that the offence must be proved beyond reasonable doubt. In the case of **John Makolebela vs. Kulwa Makolobela and Eric Juma @ Tanganyika** [2002] T.L.R. 296 the Court held that:

'A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal

offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt'.

More over the court in the case of **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007, CAT at Mtwara (unreported) the court went further to providing the meaning of the stated principle that;

'What it means, to put is simply, is that the prosecution evidence must be strongly as to leave no doubt to the criminal liability of an accused person.'

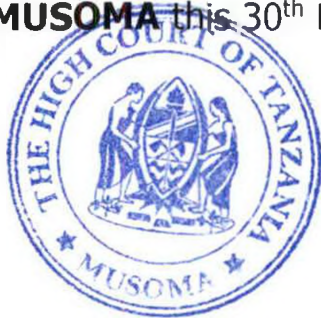
In the case at hand, victim was examined and was professionally confirmed that his anus was widen which suggested he was sodomized. The remaining question was who sodomized the victim. The victim's testimony being the best, he explained what happened on the fateful night and mentioned the appellant at the early stage. His evidence was collaborated by PW2 that the appellant was mentioned by the victim. Moreover, the testimony of the victim was further collaborated by Bernard (papaa) who was co accused who saw the appellant zipping his trouser at the scene. Identification and recognition of the appellant was done in accordance to the law as there was electricity light at the place where victim saw the appellant and manage to mention even his attire of that day. Appellant was identified at the early stage.

In this case, prosecution left no doubt in proving the offence against the appellant and I find the last ground to be non-meritorious.

In the upshot, I find the whole appeal devoid of merit and I dismiss to its entirety.

Right of appeal explained.

Dated in **MUSOMA** this 30th Day of May, 2023



NK
M. L. KOMBA
Judge

Judgement delivered in chamber while appellant was remotely connected from Musoma prison and Mr. Thawabu Issa represented the Republic.

NK
M. L. KOMBA
Judge

30/05/2023