

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF TABORA

AT TABORA

DC. CRIMINAL APPEAL NO. 35 OF 2022

*(From the District Court of Kaliua District at Kaliua Original Criminal Case
No. 10 of 2021)*

BERNARD S/O MSAFIRI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 05/6/2023 & 23/6/2023

BAHATI SALEMA, J.

The appellant herein **BERNARD S/O MSAFIRI** was charged before the District Court of Kaliua with unnatural offence against one Kulwa Cosmas, a male of 20 years old contrary to section 154(1)(a) and (2) of **the Penal Code**, Cap. 16.

Aggrieved with the impugned judgment, the appellant has raised five grounds of appeal as follows;

- 1. That, the case for the prosecution was not proved, against the appellant beyond reasonable doubt as required by the law.*
- 2. That, the learned trial magistrate erred in fact and law to convict and sentence the appellant without considering that in the testimonies of PW2, PW4 and the appellant himself in his defence evidence, "mens*

rea" of the offence charged was not established (not inferred from their testimonies).

- 3. That, PW4, the investigator of the case, did not reduce the confession, allegedly made by the appellant before her, into writings.*
- 4. That, the identity of the culprit was not established by the victim of the case (PW1) considering that the offence occurred in the middle of darkness.*
- 5. That, the defence of the appellant was not considered by the trial magistrate when composing the judgment.*

The appellant prays this Court to allow the appeal, quash the conviction, set aside the sentence and order for the appellant's release from prison custody.

Before dwelling on the merits of the appeal, I find it imperative to first summarize the facts of the matter. According to the testimony of PW1, Kulwa Cosmas testified that he shifted from Bariadi to Wachawaseme where he lived with his in-law Malelemba Madirisha who married his brother's daughter. Malelemba's house had two rooms and one sitting room. PW1 testified that they were three people sleeping in one room, all men in one bed and one mattress. PW1 stated that one was a relative, Bernard and the other begged for shelter from PW1's in-law. PW1 mentioned Bernard to be the one who begged for shelter and since he came they were sleeping together. On 6/1/2021 they went to plow hereafter went back home at 19hrs. PW1 took a bath and had his dinner and went to sleep as he was tired, he did not know the time when others came to join him. He had short pants, when he was awakened at 23hrs when he felt something penetrating his anus, when he touched it was Bernard's penis which penetrated his anus.

He found it with sperm. PW1 started quarreling with Bernard who denied raping him. PW1 awakened other fellows who tightened Bernard as he wanted to escape. PW1 was ordered to bend and PW1's in law saw the sperms into PW1's anus.

As it was night they fixed Bernard with ropes to wait for the morning but when they slept, Bernard escaped hence they made follow up and arrested him.

PW2, Cosmas Mashaka testified that he shifted to Isawima in 2019 and was hosted by his brother-in-law Malelemba. PW2 stated that they were five people living and Malelemba has one house with two bedrooms, they were sleeping three people in one room, PW1, Kulwa Cosmas, PW2, and Bernard on one bed. On 6/1/2021 at night they were sleeping all three in one bed and Bernard was sleeping beside the wall. Kulwa while sleeping awakened him saying that he was raped by Bernard. PW2 went to call his brother-in-law, when Bernard was asked he said he was dreaming and he begged for forgiveness. PW2 stated that all had short pants but they saw sperms into Kulwa's anus and Bernard had sperms into his penis, other sperms were on the bed, they fixed Bernard with ropes but later he escaped.

PW3, Malelemba Madirisha testified that he knew Bernard and Kulwa before. Both were living with him as relatives and Bernard went to live there as he begged for shelter. He stated that Bernard raped Kulwa Cosmas as they were sleeping in one room. PW3 was awakened by them and upon checking Kulwa he found sperms on his anus and some were on the bed, on Bernard's pants and when PW2 told to press his penis some sperm dropped. He was thereafter tightened up by ropes however he escaped. Upon follow up they

arrested him. When interviewed he denied but later on, he admitted and begged for forgiveness. He was sent to the vigilante then to the police station then took the victim to the hospital.

PW4 Angela, the investigation officer testified that on 11/1/2021 she was assigned a case file on the offence by the OC- CID. During her investigation, she discovered that the accused was an employee of Malelemba Madirisha dealing with tobacco. PW5, Mussa Richard a clinical officer testified that on 8/1/2021 he received PW1, Kulwa Cosmas with PF3 who was claiming to have pain in his anus, he was escorted by Malelemba. He discovered that he had bruises on his anus and had a red colour and he concluded that there was some object penetrated his anus. The PF3 was admitted as Exhibit "P1".

In his defence the accused denied the allegation and stated that on 6/1/2021 he was arrested and charged with an unnatural offence.

At the hearing before me on 5/6/2023 the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Mr. Dickson Swai and Ms. Wivina Rwebangira learned State Attorneys. The appellant adopted the Memorandum of Appeal and when asked to expound on it, apart from denying to have committed the offence, he insisted that the case was framed. In his submission in chief, the appellant had nothing more to submit. He prayed the court to consider his grounds of appeal.

Responding, Ms. Wivina Rwebangira in her submission opposed the appeal. She supported the imposed conviction and sentence for the reason that the prosecution had proved the alleged offence beyond reasonable doubt.

Starting off with the first ground, she stated that the evidence came from the victim himself. Reinforcing her argument she cited the case of **Seleman Makumba V R, [2006]** TLR 379. She also stated that in the proceedings the victim, PW1 stated that "*Niliamka na niliamushwa na kusikia kitu*". This evidence of PW1 was substantiated by the evidence of PW2 who saw the sperms in his penis. PW3 also saw sperms on the anus of PW1 and also witnessed the sperms on the appellant and the bed.

Also, prosecution PW5, doctors, who examined the victim discovered that the anal of the victim had bruises and the PF3 was admitted as exhibit "P1". Therefore, it was proved to the hilt.

On the second ground of appeal that there was no men's rea. She submitted that in the case of **Hassan Bundala Swaga V R**, Criminal Appeal 2014 at page 4 the court has reiterated in many cases that the grounds which was not considered in the trial court should not be presented before the appeal. There is nowhere mens rea was stated in the trial court hence this court cannot discuss the same. However, upon traversing the proceedings, the counsel submitted that the accused had *mens rea* as when he was asked he told them that he was dreaming.

On the third ground of appeal, she submitted that PW4 did not reduce the confession allegedly by the appellant as an exhibit. Failure to tender confession does not occasion injustice. The learned state attorney submitted that not every piece of evidence is to be presented. The evidence of the victim is reliable since PW1 explained well and also PW4 explained that the accused himself admitted and did not cross-examine.

As to the fourth ground of appeal on the identity of the culprit. He submitted that this had no merit since the victim identified him and held his penis. PW1 and PW2 submitted that there was light and since they were 3.

On the fifth ground of appeal that his evidence was not considered. He submitted that the trial court on page 4 of the judgment evaluated and considered the evidence. In the event, she prayed the appeal be dismissed.

The appellant in his rejoinder submitted that the respondent's submission has no merit. The reason being that the prosecution witnesses had contradicted themselves since on the 1st ground, the case was not proved beyond reasonable doubt and PW1 and PW2 statements are contradictory as the evidence given by the witnesses was not good and no neighbor was there to prove and that he was employed by the PW3 there. He prayed his appeal be allowed.

Having heard from both parties, the issue is whether the appeal has merits or otherwise.

It is elementary that the onus is always on the prosecution to establish each of its allegations including the guilty of an accused person beyond all reasonable doubt. In **Daimu Daimu Rashid @ Double D Vs. R**, Criminal Appeal No. 5 of 2018 (CAT-unreported), and **Samson Matinga Vs. R**, Criminal Appeal No. 205 of 2007 (CAT-unreported).

On the 1st ground of appeal that the case was not proved beyond reasonable doubt, the learned State Attorney submitted that the evidence adduced by PW1, PW2, PW3 and PW5 proved the case against the appellant. The trial court found the evidence of those witnesses credible since they found the

appellant at the scene of the crime with sperms on his penis and upon asked he asked for forgiveness and they tightened him up but he fled and was arrested on the following day. PW1 testified that she was sodomized and both PW2 and PW3 and P5 testified hence that proves the offence against the appellant.

Having traversed the court records, this court finds that the offence was sufficiently proved by the evidence adduced by PW1 and PW5. To prove an unnatural offence, the prosecution, PW5, a clinical officer proved the penetration of the appellant's male organ into the anal opening of the victim. To support that position in the case **Joel Ngailo v. R**, Criminal Appeal No. 344 of 2017 (unreported), where it was held that penetration of the victim's anal organ however slight is an essential ingredient of unnatural offence under section 154(1)(a) **of the Penal Code**, Cap.16[2022]. From that aspect, this court has no reason to fault the finding of fact of the District Court. According to the case of **Omari Ahmed v. Republic [1983]** TLR 52, this Court held as follows:-

"The trial court's finding as to the credibility of witnesses is usually binding on an appellate court unless there are circumstances on an appeal court on the record which call for a re-assessment of their credibility."

Another principle of law relevant to this appeal is that in sexual-related trials, the best evidence is that of the victim in **Selemani Makumba v. R**, [2006] TLR 379. I however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like the credibility of the prosecution witnesses, the reliability of their

evidence and the circumstances relevant to the case in point. See decisions in **Shabani Daudi v. R**, Criminal Appeal No. 28 of 2000 and recently in **Pascal Yoya Maganga v. R**, Criminal Appeal No. 248 of 2017 (both unreported). In this case, since at the time of the alleged offence the witnesses were present, it is critical that their credibility is impeccable and their evidence completely reliable.

As to the second ground of appeal in respect of *mens rea*, I subscribe with the respondents' argument that nowhere *mens rea* was stated in the trial court hence this court cannot discuss the same. In the case of **Emmanuel Josephat v. Republic**, Criminal Appeal No. 323 of 2016 (unreported) the Court stated that where grounds of appeal are raised in the Court for the first time, it will not entertain and determine them for lack of jurisdiction. Also, in **Hassan Bundala Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (unreported) it was held:

"It is now settled that as a matter of general principle, this Court will only look into matters which came up in the lower courts and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

On the third ground, PW4 did not reduce the confession allegedly by the appellant as an exhibit. Failure to tender confession does not occasion injustice. The learned state attorney submitted that not every piece of evidence is to be presented. The evidence of the victim is reliable since PW1 explained well and also PW4 explained that the accused himself admitted and did not cross-examine. In the case of **Amos Jackson vs. Republic**, Criminal Appeal No. 439 of 2008 [2022] TZCA 467 the court held, that failure

to cross-examine a witness on a certain relevant matter is deemed to have accepted the truth of the stated assertion.

Concerning the fourth ground on the identity of the culprit. This court noted that in the proceedings even though there was a contradiction on the light where PW1 stated there was a solar lamp and PW2 stated that there was a torch light, this does not go to the root of the case. In the case of **Dickson Elia Nshamba Shapwate and Another V R**, Criminal Appeal No. 28 of 2009 CAT (unreported). Since the evidence of PW1, the victim who held the appellant's penis was also corroborated by PW2 and PW3. I am of the considered view that this ground has no merit.

On the fifth ground of appeal that his evidence was not considered. As it was well articulated by the respondent and having traversed through the court records on page 4 of the judgment, I have noted that the trial court evaluated and considered such defence that he did not sleep at Malelemba on 6th but to Oscar but he never called him as a witness and also he admitted to having no quarrel with Malelemba but admitted to sleep at Malelemba for 6 months. The trial court has concluded that the defence evidence has not been able to raise any reasonable doubt in the prosecution case.

In the final analysis and for all the above reasons, the appeal is unmerited and it is hereby dismissed.

Order accordingly.



A handwritten signature in blue ink, appearing to read "A. Bahati Salema".

A. BAHATI SALEMA
JUDGE
23/6/2023

Court: Judgment delivered in presence of both parties.



**A. BAHATI SALEMA
JUDGE
23/6/2023**

Right of Appeal fully explained.



**A. BAHATI SALEMA
JUDGE
23/6/2023**

