IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 179 OF 2022

(*Appeal from the decision/Judgment of Kigamboni District Court at Kigamboni before Hon. Josiah SRM dated 29th August, 2022 in Criminal Case No. 79 of 2021*)

DPP ..... APPELLANT

VERSUS

FRANCIS LEOPOD MSITA ..... 1ST RESPONDENT

NASSORO RAMADHANI VYALE ..... 2ND RESPONDENT

JUDGMENT

17th May & 28th June, 2023

MWANGA, J.

In the District Court of Kigamboni at Kigamboni the two respondents mentioned above were charged of Unnatural Offence Contrary to Section 154(1) (a) and (2) of the Penal Code, Cap. 16 [R.E 2019]. The particulars of the offence were that; on diver's dates between February, 2021 to October, 2021 at Midizini area within Kigamboni District in Dar es Salaam Region the respondents Francis

Leopod Msita and Nassoro Ramadhani Vyale did have carnal knowledge of a boy of 11 years against the order of nature.

The prosecution produced a total of three witnesses and one documentary exhibit. In the results, the respondents were acquitted of the charge against them. The trial court had the following observations. **One,** there were no connections with a child becoming fat and growing breasts because of being sodomised. **Two,** the PF3 which was tendered as exhibit P1 that the victim had loose sphincter indicating that a blunt object was inserted in the victim's anus; however, that does not necessarily prove that it was the accused persons penis which was inserted therein. **Three,** moral behaviour of the victim matters in assessing credibility of the witnesses. **Four,** the victim is not of good morals as he has been sleeping outside the house and kept meeting people who may have taken him in supernatural powers. **Fifth,** it is possible that the act of sodomization was done during those time. **Sixth,** the trial court observed further that there was evidence that families of the respondents and the victim have been in quarrels over land boundaries before this incident.

The Director of Public Prosecutions was aggrieved with the decision. Therefore, the appeal was preferred on the following grounds, namely that;

1. The honourable court erred in law and fact by failing to evaluate, analyse and consider evidence of PW2 and PW3 thereby arriving at a wrong decision.
2. The honourable court erred in law and fact by acquitting the respondents by relying on the defence only and not giving reasons why it did not consider the evidence of prosecution, thereby arriving to wrong decision.

The prosecution case, so far as relevant was this. PW1 was Stanslaus Andrea Kipundu, a grandfather of the victim. On October, 2021 he observed some changes in the body of the victim as he was becoming fat and the breasts were growing big as a woman. He told the court that, on 9th October, 2021 while having dinner he observed the victim who used to go to the toilets frequently while holding a stick. Then, he inquired from him as to what was the problem. The victim told him that he was raped by the respondents and that he was threatened to be slaughtered if he dares to tell anyone about the incident. In the next morning, that was on 10th October, 2021 he reported the matter to

the police where he was given PF3. After the examination, it was revealed that the victim has been sodomized frequently prior to the current incident.

More or so, PW2 was the victim himself. He was eleven (11) years boy at the time of the commission of the offence. According to him, he knew both respondents as they were his neighbours. He knows the 2nd respondent as traditional healer whereby people come to his home during the night, day and in the evening for healing services. The victim recalled further that, at around 7:00 P.m. on unrevealed date he was called by the 2nd respondent at his home where he also met the 1st respondent. Together, they blind folded him with a piece of cloth and another piece of cloth was inserted in his month in order to avoid screaming noises. At that moment, the 2nd respondent inserted his penis in his anus while the 1st respondent was standing beside him. The victim narrated further that, after the incident the 2nd respondent gave him Tshs. 2000/= where he went back home. After wards, he went to wash at the toilet. Furthermore, he told his grandfather (PW1) that he had rushes in his anus where he was given jelly to apply. It was revealed further that, the victim could not attend school for two days.

On another day, he was called again by the 2nd respondent where he was told to take off her clothes. This time around, it was the 1st respondent turn where he sodomised the victim who also claimed to have been threatened by his assailant with a knife. The victim was then given a certain amount of money. He explained that, one evening when they were having dinner at home his grandfather became suspicious when he saw him going to toilet frequently. It was at that moment where he disclosed to him that the two respondents had sodomized him several times.

It may be mentioned that, PW3 was Michael Idah Ndunguru. He was a medical doctor who examined the victim (PW2) at Kigamboni Health Centred. The report revealed that the victim had a loose sphincter, presence of faeces, bruises and discharge in his anus showing that a blunt object was inserted in the anus. In his evidence, he concluded that, in view of the above it was clearly that the victim (PW2) was sodomized.

The defence side, DW1 and DW2 told the trial court that the case against them was fabricated one due to the existing quarrels between their parents and PW1 regarding land matters. According to them, the victim who lived with PW1 used to leave his grandfather's home and

stay outside home for three to four days. Likewise, DW3 contended that the victim was not sodomized. It was her testimonies that his grandfather (PW1) usually used to come at her home and complain about his grandson (PW2) that he does not sleep at home. According to her, there has been some mediations of the quarrels between the 2nd respondent and PW1. On the other hand, DW4 testified that they lived in squatter areas and that there are people at the house of the 2nd respondent every day due to his traditional healing activities. In that regard, such offence could not have happened without being noticed by neighbours. On his part, DW6- a chairman street affirmed that there has been quarrels between PW1 and the respondents' parents.

The appeal was argued by way of written submission. The appellant was represented by Ms. Nura Manja, learned State Attorney while the respondents were represented by Advocate Laurencia Mayila.

In the first ground of appeal, Ms. Nura contended that nowhere in the impugned judgment the trial magistrate evaluated and considered the prosecution evidence. It was her view that, this court has powers under Section 382 of the CPA to step into the shoes of the subordinate court and evaluate, analyse and consider and reverse the findings of the trial court.

In reply, the learned counsel Mr. Laurencia Mayila argued to the contrary. The counsel made reference to the evidence on records stating that all raises doubts as to the participation of the respondent in the commission of the offence charged. The learned counsel stressed the assessment of the evidence of PW1 where it was found funny for the victim becoming fat and develop breasts as a result of sodomy. It was his submission that, the fact that the victim did not sleep at home on several occasions and that his grandfather had been complained as such every day, such behaviour raises questions and a lot of doubts as to the involvement of the respondents.

In the second ground of appeal, Ms. Nura contended that decision of the trial court relied on the defence evidence particularly on account of bad behaviour of PW2 (victim) while forgetting status of maturity of the victim. It was the learned state Attorney view that there is no law that allows to punish the victim who was sodomized despite his notorious and troublesome behaviours. The learned State Attorney distinguished the cited case of **Mohamed Said, Versus the Republic**, Criminal appeal No. 145 of 2017 (Unreported) stating that, in this case, the victim had moved in with a man and had quit school for that and further that the evidence of bad moral behaviour was adduced before

the court by her own family members unlike in the present case where no proof of the victim to have allowed anyone to sodomize him prior the incident. Further submission on the part of the republic was that the witnesses gave direct evidence as per Section 61 and 62 of the Evidence Act, Cap. 6 R.E 2022. According to her, PW1, PW2 and PW3 were telling nothing but the truth that after the incident PW2 (Victim) told his grandparents what had befallen him and mentioned the respondents as the one who sodomized him.

In addition to that, the learned counsel argued that the victim (PW2) gave an account of what has transpired at the scene of crime and the same story was repeated before the trial court and his testimony was never shaken anyhow by the defence. The learned State Attorney cited the case of **Selemani Mkumba Versus The Republic [2006] TLR 380** when it was stated that the best evidence in sexually offences comes from a victim. It was also stated that, there was evidence of PW3 who found out that the victim had a loose sphincter muscle, hence he was penetrated. The State Attorney cited the case of **Goodluck Kiyando Versus Republic** [2006] TLR 363 where it was held that every witness is entitled to credence and must be believed and his testimony accepted unless there are agent reason for not believing it.

In conclusive remarks, the learned State Attorney was of the considered view that the case was proved beyond reasonable doubt. She added that, in the case of **Magendo Paul and another Versus Republic** [1993] TLR 218 cited with approve in the case of **Miller v. Minister of Pensions** [1947] 2 ALL ER the court held that;

> ***"The law would fail to protect the community if it admitted fanciful probabilities or possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility, in his favour which can be dismissed with a sentence, of course it is possible but not in the least probable, then the case is proved beyond reasonable doubt."***

In rejoinder, the learned counsel for the respondents rebutted the claim by the learned State Attorney stating that the trial court relied both in the defence and prosecution evidence. He also contended that, the case against the respondents was not proved beyond reasonable doubt.

In an attempt to show some patch marks on the prosecution case, the learned counsel submitted further that the prosecution did not call the victim's friends called Shaffi and Mariam to corroborate on what they saw on that particular day because the victim claimed that they were present and saw him being called by the 2nd respondent. According to

him, the victim did not know how much he was sodomized by the respondents, hence, his evidence was incredible. The counsel supported his submission by citing the case of **Azizi Abdallah Versus Republic** [1991] TLR 72 where it was held that the prosecution is under duty to call those witnesses who, from their connection with the transactional question, are able to testify material facts; if such witnesses are within reach but are not called without sufficient reason being shown the court may draw and adverse inference to the prosecution. On an effort to discredit the evidence of PW3, the counsel contended that the examination of the victim does not confirm if the act was done on the same day and it does not tell that the victim was sodomized by a certain person. He was of the view that, since the prosecution did not dispute that the victim used to go a place called Makinda and that he disappeared from home and his grandfather did not bother to look after him, it is does not tell whether the respondents were the one who did the act of sodomy.

In advancing further argument, the counsel stated that the victim was a boy of 11 years old and he used to go places where he was not supposed to and he was beaten by his grandfather for going into such places and when he was so sodomized for the first time he could not

report to the guardian and that he used to go to beach for sometimes; it is the counsel view that under such circumstances he might have been sodomised by other people whom he chose to conceal their identity.

After a careful analysis of the available records and submissions as disclosed by the evidence adduced in the case came to the conclusion that the testimony of PW1 and PW2 who were examined by the prosecution to prove the occurrence could not safely accepted and acted upon. This is a case of unnatural offence allegedly committed against the victim, an eleven-year boy. When questioned by his grandfather about the unnatural offence the victim told him that it was the respondents who had sodomized him.

It is a well-settled principle of law that, in criminal cases, the burden of proof lies upon the prosecution and it is beyond reasonable doubt. That was also the position in the case of **Pascal Yoya @Maganga Versus the Republic**, Criminal Appeal No. 248 Of 2017(Unreported), where it was held that: -

> ***''It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused***

only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence".

Likewise, in the case of **Mohamed Haruna @ Mtupeni & Another v. Republic,** Criminal Appeal No. 25 of 2007 (unreported) the court had held that: -

*"... **It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."***

Similarly, in **Mwita and Others Versus Republic** [1977] TLR 54 the court when hearing a criminal appeal had emphasized that: -

"The appellants' duty was not to prove that their defense was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."

In the present appeal, the grandfather (PW1) took the victim to the hospital for examination in the second day of 10th October, 2021. The evidence of PW3 and the examination report (PF3) revealed that a blunt objected was inserted in his anus being an indication that the victim was sodomized. According to the victim, he was sodomized by both respondents at the 2nd respondent's home, and in the process, he was blind folded, put a piece of cloth in his month to silence him and

that after the incident he went back home. Subsequently thereof, the victim went straight back home to the toilet where he washed his private parts. This young boy never complained to his grandparents about such brutal and heinous act that was allegedly done to him by the two respondents. As shown in his evidence, after he was sodomised in the first instance, he never disclosed it because he was threatened to be slaughtered by the 1st respondent. However, it represents unexplained scenario as to how after he was threatened to be slaughtered by the 2nd respondent, he managed to back to the home of the 2nd respondent on another day and accepted again to be sodomised by the 1st respondent. As it was revealed by the victim. This time around he was threatened with a knife by the 1st respondent. All those kinds of threats imposed by the respondents to the victim would have made the victim susceptible to disclose the same to his grandparents. In addition to that, it is also questionable as to why the victim decided to remain silence until he was questioned and threatened to be punished by his grandfather (PW1).

Apart from that, the victim contended that he could not remember how many times he was sodomised. He only mentioned two incidents done to him by respondents. The medical doctor (PW3) stated that the victim was sodomised several times as his sphincter was loose and there were bruises. PW1 testified that, when the victim was asked about the incident he refused to disclose until P1 hold up the stick against him. In the case of **Mohamed Said Rais Versus Republic,** Criminal Appeal No. 167 of 2020) (unreported) the Court of Appeal when dealing with case of rape, had this to say: -

> ***"There is no explanation either why she could keep quiet from such a fateful event after she had been freed by the assailants without asking for help from the people nearby the house with a view to apprehending the culprits immediately thereafter. In our view, had the trial court directed its mind to these lingering doubts, it should not have entered a verdict of guilt".***

In the presence of such unanswered questions by the prosecution, it raises doubts and the same can be easily seen that such longstanding quarrels between the grand parent of the victim (PW1) with the parents of respondents suggest that the respondents were incriminated of such quarrels.

In view of the above, there was every reason for the trial court to doubt credibility of evidence of both PW (1) and (PW2). This is because; **one,** it was not clear at what time the threat posed to the victim to be slaughter by the 2nd if he dared to tell anyone ended, to the extent that the victim saw it feet and prudent to go back again at the same place and be sodomised again by the 1st respondent. This piece of evidence that he did not disclose the incident at first instance because of the threat posed by 2nd respondent does not seems to make any sense because of his U-turn, back to the home of the 2nd respondent. **Two,** If the medical doctor (PW3) found out that the victim was sodomised several times, who else might have done that because the victim only mentioned two incidences; that of 9th and 10th October, 2021 by the 1st and 2nd respondent. It should be noted further that, the medical report does not tell whose penis penetrated in the anus of the victim **Three**, since the victim was seen by his friends Mariam and Shaffi when he was called by the 2nd respondent to his home to commit such unnatural offence, it would be not wise to act on the evidence of PW2 in the absence of any independent corroboration of the testimony of the alleged individuals. **Four**, PW1 was only giving hearsay and incredible evidence whose credibility is also questionable. This is because it was not explained how the incident of sodomy for two days made the victim

to grow breast like that of women. **Five,** there was also uncontroverted evidence that, despite of his age, the victim used to sleep outside his grandparents' home and stay for three to four days. This piece of evidence was also relied by the trial court which had opportunity to see, hear and examine the victim in the box, yet he was not impressed by his evidence in consideration of explained notorious behaviours of the victim. The High court decision in **Republic Versus Elizabeth Michael Kimemeta@Lulu,** Criminal Sessions Case No. 125 Of 2012, Rumanyika, J. as he then was, had observed that actions of the child is important to be considered particularly where it is inconsistence with his or her innocence. **Six,** there was also evidence that the 2nd respondent was a traditional healer or doctor and according to the evidence available his home used to be visited by many people at all times i.e., during the morning, day and in the evening hours. This piece of evidence was not controverted in any way. In consideration of all these, it was important for the prosecution to reveal as to how was it possible such illegal acts be done in such conditions without being noticed by visiting people around and the neighbours, so to say. This was an important factor to be considered because some of the neighbours including the Street Chairman testified that the respondents did not commit any act of sodomy against the victim. These neighbours seem to suggest that the

case was all about the existing land quarrels between parent of the respondents and PW1.

In view of the above, I reject the theory put forward by the prosecution that the trial court did not evaluate and analyse the evidence adduced before it. That being said, the trial court was right to ignore such pieces of evidence adduced by the prosecution.

In the upshot, the appeal is dismissed in its entirety. The conviction and sentence of the trial court is upheld.

Order accordingly.

H. R. MWANGA

JUDGE

28/06/2023

COURT: Judgment delivered in Chambers this 28th day of June, 2023 in the presence of Advocate Anita Katema for the Appellant and Mr. Emanuel Maleko, learned Senior State Attorney for the respondent.

H. R. MWANGA

JUDGE

28/06/202