THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 41 OF 2023

(Arising from the decision of District Court of Kyela at Kyela in Criminal Case No. 86 of 2022)

LUSEKELO SEPHANIA KASANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 22/05/2023
Date of Judgment: 14/07/2023

NDUNGURU, J.

Before the District Court of Kyela at Kyela (herein referred to as the trial Court), the appellant, Lusekelo Sephania Kasanga was arraigned for the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code (Cap 16 R.E. 2019). It was alleged in the particulars of the offence that, on diverse dates from 05th day of July, 2022 to 08th day of July 2022 at Itope village within Kyela District in Mbeya Region, the

appellant unlawfully had carnal knowledge with a boy aged 18 years old who shall, for the purpose of hiding his identity, be referred to as "victim".

The appellant pleaded not guilty to the charge. Consequently, the trial was conducted whereby the prosecution called a total of three witnesses and relied on three exhibits namely; PF3 as exhibit "P1", cautioned statement of the accused person as exhibit "P2", and victim's statement as exhibit "P3" to prove its case. On the other hand, the appellant, was the only defence witness. Upon a full trial, he was found guilty, convicted and sentenced to serve thirty (30) years imprisonment.

Aggrieved by the conviction and sentence, the appellant has preferred the present appeal based on two grounds of appeal, namely;

1. That, trial Court erred in law and fact to convict and sentence the appellant in a case that was not proved to the required standard..
2. That, the trial Court erred in law and fact to admit the victim's statement without adhering to the procedure set down by the law.

When the appeal was placed before me for hearing, the appellant was represented by Ms. Nyasige Kajanja, learned advocate whereas Mr. Rajab Msemo assisted by Ms. Julieth Katabara, both learned State Attorney,

appeared for respondent/Republic. The appeal was disposed of by way of oral submission.

In supporting of the appeal, Ms. Kajanja opted to commence with the second ground of appeal. She contended that, the record of the trial Court is clear that the victim of the offence was not called to testify, the prosecution prayed the trial Court under section 34B of the Evidence Act (Cap 6 R.E. 2019) to tender the witness's statement recorded at police station because the victim is nowhere to be found.

She also stated that, the record shows that the appellant was served on the same date the witness's statement and the case was fixed for hearing on 12th day of December 2022. To buttress her argument, she referred this Court at page 44 of the trial Court's proceedings. Again, Ms. Kajanja submitted that, the appellant had no representation when served with the copy of the said statement, the Court did not address the appellant to file objection. She added that, there was no reasons given to the Court as to why the victim was not available either dead or being out of Court jurisdiction.

She continued to submit that, the record reveals that on 1st day of August 2022 the prosecutor prayed for the Court summons for five

witnesses the prayer was granted and the summons was issued on 12th day of December 2022 no summons was returned showing that the victim was not found. She referred this Court at page11 of the trial Court's proceedings to support her submission. Again, she contended that, there was no further request of Court summons to the said witness. She further contended that, section 34B (2) (a)-(f) was not adhered. She added that, the law requires that there must be steps taken to procure the witness.

Moreover, Ms. Kajanja submitted that, the record does not show the steps taken by the prosecution to trace the witness and reach into conclusion that the witness was nowhere to be found. She went on submitting that, the appellant was denied his right to cross examine the witness. To reinforce her submission, she cited the case of **Joseph Shabani Mohamed Bay & 3 others v Republic**, Criminal Appeal No. 399 of 2015, CAT (unreported)

As to the first ground of appeal, Ms. Kajanja argued that, the witnesses testified before the trial Court tendered the weak testimony thus failed to prove the case beyond reasonable doubt. That, medical officer (PW1) said in investigation no bruises, discharge or blood was revealed. She also submitted that, in the statement of the witness (Exhibit "P3") at

page 2, the victim did not state why he did not report it as in the next he date was taken to his home and then sedomized, this circumstances raised a great doubt. Again, she stated that the case against the appellant was not proved to the standard required. Finally, she prayed the Court that, the appellant's appeal be allowed.

In rebuttal, Mr. Msemo resisted the appeal. He supported the conviction and sentence of the trial Court. He went on to argue the second ground of appeal that, according to the proceedings it is true that the prosecutor prayed for the summons for witnesses, there is nowhere it is shown that one of the witnesses mentioned in those summons that the prosecution requested the victim. However, no provision of the law provides for the reasonability or effort used to procure the witness to attend in Court, the fact that the statement met all conditions stipulated under section 34B of the Evidence Act (supra) was enough.

He further stated that, the case of **Joseph Shabani Mohamed Bay & 3 others v Republic** (supra) cited by the counsel for the appellant is distinguishable. He contended thus that, the trial Court properly admitted the statement. In conclusion, he prayed the Court that, this ground of appeal be dismissed for being devoid of merit.

Responding to the first ground of appeal, Mr. Msemo contended that, it is settled principle that in sexual offence, the best evidence comes from the victim. He also stated that, in this case the attendance of the victim was not possible thus his statement was tendered in Court. To cement his argument, he cited the case of **Anord Mtuluva v Republic**, Criminal Appeal No. 511 of 2020, CAT (unreported) to the effect that, failure of the victim to appear to the Court, cannot render the case unproved.

Mr. Msemo then faulted the appellant's counsel submissions about the absence of bruises and discharge to be not necessarily required in proving the offence but the requirement is to prove penetration however slight. In conclusion, he prayed for this Court to dismiss the appeal.

In rejoinder, Ms. Kajanja briefly submitted that, though the best evidence in sexual offences comes from the victim in this case it is as good as no evidence from the victim since it was not established by the State Attorney the steps taken to procure his attendance. And that the alleged cautioned statement of the appellant could not be sufficient evidence to base the conviction because it was repudiated.

I have anxiously examined and considered the rival submissions made by the counsel for the parties and the record, I find that the determination

of this appeal centers on two areas; first, whether the tendering of the victim's statement complied with the legal requirements and second, is whether the charge against the appellant was proved to the required standard.

Starting with first issue, it must be noted that, the victim in this appeal was a boy aged 18 years old but he did not testify before the trial Court. As correctly argued by Mr. Msemo, this is not the first time that a Court has convicted an accused person without the testimony of the victim of the crime. In a number of cases, it has been the position of this Court and Court of Appeal that conviction can be sustained independent of the evidence of the victim. See the cases of **Adam Shango v The Republic**, Criminal Appeal No. 149 of 2020, CAT and **Fuku Lusamila v The Republic**, Criminal Appeal No. 12 of 2014, CAT (both unreported) just mentioning a few.

In one hand, Mr. Msemo submitted that, victim's statement met all conditions stipulated under section 34B of the Evidence Act (supra) whereas Ms. Kajanja opposed such argument. The offence the appellant was facing was a grave one the proof of which needed cogent evidence. The victim was a crucial witness in the case. He did not give evidence. The

provisions of section 34B has six sub-sections. A written statement by any person who can be called to testify is admissible in terms of section 34B (2) of the Evidence Act. Six conditions for admissibility of such a statement are stated therein in paragraph (a) to (f). Briefly the conditions are: -

(a) The maker of the statement cannot be procured without delay,

(b) The statement is signed by the maker,

(c) The statement contains a declaration that the same is true and is liable to be prosecuted if found untrue,

(d) A copy of it is served to each of the parties to the proceedings before the hearing,

(e) If none of the parties, within ten days from the service with the copy of the statement, serves a notice on the party proposing or objecting to the statement being tendered in evidence, and

(f) Where the statement is made by a person who cannot read it, it is read to him before he signs and is accompanied by a

declaration by the person who read it to the effect that it was so read.

In the case of **Shilinde Bulaya v The Republic**, Criminal Appeal No. 185 of 2013, CAT (unreported) the Court of Appeal insisted that all the above conditions laid down in all paragraphs, that is from (a) to (f) of sub-section (2) of section 34B of the Evidence Act are cumulative and must all be met for witness statement to be admissible under section 34B (1) and (2) of the Evidence Act.

I have endeavored to peruse the Court record to see if the Court satisfied itself that the above stated conditions were met before the statement of the victim was tendered and admitted as an exhibit.

As indicated above, it is the prosecutor who told the trial Court the victim could not be procured. Efforts made to trace his where about were not disclosed to the Court so that it could be satisfied that section 34B (2) of the Evidence Act could be employed to tender the victim's statement (Exhibit P3). A plausible evidence ought to have been led to establish that the victim could not be procured. See the case of **Twaha Ali & 5 others v Republic**, Criminal Appeal No. 78 of 2004, CAT (unreported). Besides that, the record does not show, if the trial Court notified the appellant that he

had the right to bring the objection against the victim's statement being tendered in evidence taking into account that the appellant was, unrepresented. In the premises, it is my considered view that the victim's statement did not meet all of the required conditions as listed above. Exhibit P3 was, therefore, improperly received and admitted as exhibit. In thus expunge it from the record.

Coming to the second issue of whether charge against the appellant was proved to the required standard. Having expunged exhibit P3 from the record the remaining evidence in record is the testimony from PW1, PW2, PW3 and exhibit P2 (cautioned statement of the accused person). In his testimony PW1 said that, he did physical examination of the anus and there were no any bruises or any discharge or blood, but his fingers swiftly penetrated into the anus suggesting that it was not tight. In absence of exhibit P3, this piece of evidence cannot connect the appellant with the offence though it may raise a suspicion that, the appellant might have committed the offence.

Even the testimony adduced by PW2 and PW3 is not cogent evidence on which the appellant's conviction could be based, the said evidence remains as mere hearsay which is incapable being relied upon to establish

whether the same is true or not. In relation to exhibit P2, it is my finding that, it was unsafe to rely on it as it was retracted and it is not corroborated. See the case of **Bombo Tomola v Republic** (1980) TLR 254 and **Hemed Abdallah v Republic** (1995) TLR 172.

In fine, I allow this appeal in its entirety. The appellant's conviction for unnatural offence and sentence of thirty (30) years imprisonment imposed on him is hereby quashed and set aside. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

It is so ordered.

D.B. NDUNGURU

JUDGE

14/07/2023