IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB- REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 87 OF 2022

(Originating from Mbulu District Court, Criminal Case No. 58 of 2021)

ISSACK DOMINISIAN .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th March & 24th May 2023

KAMUZORA, J.

The Appellant herein, is challenging the conviction and sentence of life imprisonment imposed by the District Court of Mbulu at Mbulu (the trial court) for unnatural offence. Three grounds were preferred by the Appellant in the petition of appeal as follows: -

1) *That, the trial Magistrate erred in law and fact for failure to scrutinize and evaluate evidence tendered before him consequently holding the Appellant criminally liable.*
2) *That, the trial magistrate erred in law and in fact when he failed to scrutinize the evidence as regards to the identification of the Appellant.*

3) *That, the trial magistrate erred in law and in fact for failure to inquire on unexplained delay to report the alleged crime to police from April 2016 to September 2019.*

Briefly, the facts leading to this appeal can be discerned from the record of the trial court. It was alleged that on unknown dates in April, 2016 at Imboru Area within Mbulu District in Manyara region, the Appellant did have carnal knowledge of a boy aged 8 years (the victim) against the order of nature. That, the victim used to go to the house of Safina John @ mama Careen to buy milk and the Appellant was a shamba boy in that house. That, in several occasions the Appellant was taking the victim to his room and did have canal knowledge of him against order of nature. That, the Appellant threatened to kill the victim if he discloses the ordeal to anyone. That, the victim's mother noticed the unusual defecating (stool discharge) from the victim and sent him to hospital for check-up and the Doctor informed her that the victim was sodomised. When interrogated, the victim mentioned the Appellant as the person responsible. The report was made to the police station and the Appellant as arrested and charged for unnatural offence. The trial court was satisfied with prosecution evidence hence convicted and sentenced the Appellant to serve life imprisonment and pay Tanzanian Shillings five million as compensation to the victim. Being aggrieved by

the trial court's decision the present appeal was preferred by the Appellant faulting the trial court decision on the above grounds.

When the matter was called for hearing, the Appellant was ably represented by Mrs. Kimale, learned advocate, whereas Ms. Riziki Mahanyu, learned State Attorney appeared for the Republic. Hearing of the appeal was conducted verbally.

Arguing in support of appeal, Mrs. Kimale submitted jointly for all the three grounds that there was no enough evidence to convict the Appellant for unnatural offence. That, before the trial court the Appellant was charged for the offence which was committed in 2016. That, there is no date or month to which the offence was committed. That, the evidence reveals that at time of the alleged incident the victim was 8 years old and did not know the name of the Appellant as he only mentioned him as Kakaa. That, the victim did not report to the parents what happened to him until 2019, three years later. That, by the time the report was made the Appellant was no longer working at the place the offence was alleged committed. That, the evidence by PW3 reveals that the Appellant worked at that house for three months only, although the Appellant denied to have worked for PW3. That, the witness did not tender any exhibit to show that the Appellant worked for him.

Pointing at page 11 of the trial court proceedings, Mrs Kimale argued that PW3 admitted that there were other young men working for her apart from the Appellant. That, for the period of three years no report was made on the incident and the victim was still living in the same place and he used to buy milk from the house of PW3. That, the circumstance under which the Appellant was charged for unnatural offence is doubtful because even identification of the Appellant was based on the mark, a tattoo on the left hand. She argued that many young men had tattoo and since there were many shamba boys at that house, it was expected that all young men who worked there could have lined up for identification parade. She insisted that there was no proper identification proving that the Appellant was responsible for the offence. Mrs. Kimale added that although it was alleged that the Appellant worked for PW3 on 2016 for only three months, no report was made over the incident on 2016 instead the report was made on 2019 thus creating doubt.

Ms. Kimale further submitted that, the doctor's evidence at page 15 of the proceedings reveals that the victim was examined and the doctor discovered that the incident occurred three months before the victim was sent to Selian Hospital for examination. That, when

examined, the victim was 12 years old meaning four years had passed from the date of the alleged incident. That, the Doctor's report does not show if the Appellant was responsible to what happened to the victim. She added that since the victim was a student and he was going to school, he used to meet other different people thus no one could have protected him from being abused by other people. It is the claim by the counsel for the Appellant that, this case was fabricated against the Appellant.

The Appellant's counsel also submitted that the sketch map that was used as exhibit was prepared in 2020 and no one explained if the environment was still the same for the whole period of 5 years. That, the victim also admitted that at the place he was living there were many young men and the victim also continued buying milk from the same house until 2017 and no report of the incident was made. She was of the view that if the incident occurred in 2016, it is doubtful as to how the victim suffered the problem in 2019 and not 2016 when the incident occurred.

Mrs. Kimale contended that the Appellant was convicted on circumstantial evidence as there is no direct evidence. That, the Appellant was convicted on account that he was identified by PW1 and

PW3. She was of the view that, identification was supposed to be water tight with series of events showing that the Appellant was responsible for the offence. In support of her submission the counsel referred this court to the case of **Andrea Vs. Republic**, 1971 HCD, 141 where it was held that the evidence based on identification from the complainant must be water tight to prove the case. Pointing at this case, she argued that there was no evidence that the Appellant was identified as there was no proper identification conducted and the incident itself was not reported on time.

She also referred the case of **John Donald Mkondola Vs the Republic,** TLR, 2017, 114 where it was held that, principle on circumstantial evidence is that the evidence must be water tight. That, in the present case, the trial court was supposed to satisfy itself if the circumstance of the case was satisfactory that the offence was committed by the Appellant and no anyone else could have committed the offence for the whole period until when the Appellant was arrested.

The Appellant's counsel concluded with a prayer for this court to allow the appeal by quashing the trial court judgment and setting aside the sentence passed against the Appellant.

Responding to the grounds of appeal, Ms. Riziki supported the conviction and sentence imposed against the Appellant by the trial court. She submitted that the evidence of PW1 is clear that he was being sodomised by the Appellant since 2016. That, the victim used to go at the house of PW3 to buy milk that PW3 had employed the Appellant among other young men who were taking care of the cows. That, the Appellant used to take the victim to his room and victim was able to describe the colour and environment inside that room. That, such fact was supported by PW3 who is the owner of the house and the employer of the Appellant. That, the victim testified that he was threatened by the Appellant who told him that he will kill him. That, the Appellant committed the act several times as the Appellant used to go there to buy milk.

Responding to the appeal and especially to the argument that there were many young men at the house of PW3, Ms. Riziki submitted that PW3 explained that the Appellant was the one who was directly responsible for selling milk. That, it is true that the victim did not mention the Appellant's name as he knew him as Kakaa and he identified him in court. That, even PW3 testified that they used to call

the Appellant as Kakaa and the victim mentioned that the Appellant had tattoo on his hand.

On the argument that the incident was not reported immediately, Ms. Riziki conceded that the time passed before the incident was reported. She however submitted that the evidence of PW2 who is the victim's mother is clear that she discovered the problem after the child started to experience unusual excreting (stool discharge). She sent him to Mbulu Hospital and they told her that he was not sick but the problem continued. That, she sent the victim to Selian Hospital for examination and it is when she was informed that the victim was being sodomised and that was 2019. That, she reported the matter to the police station and when the victim was asked as to the person who was sodomising him, he mentioned Kakaa who is the Appellant here in court.

She added that, during cross examination, the Appellant mentioned that there were other young men but the Appellant was the one who sodomised him and he had a tattoo on his hand. Ms. Riziki was of the view that identification was clear because from the beginning, the victim mentioned the Appellant. That, since he sodomised him several times, he could not have made mistake in identifying him. That, the victim also mentioned that he did not inform his parents as the Appellant

threatened him and warned him not to say anything and the victim did not reveal anything until his mother discovered. Ms. Riziki insisted that, sexual offence is done at zero distance thus, easy to identify the culprit. She faulted the argument that the offence could have been committed by anyone else as suggested by the counsel for the Appellant.

Regarding the argument that the sketch map was prepared in 2020, she submitted that even in the absence of sketch map the victim's evidence was clear and was supported by PW3 who is the owner of the house to where the offence was committed. In her view, there was no need for identification parade as the victim knew the Appellant. She insisted that the evidence was water tight as the victim identified the Appellant and the place the offence was committed. That, such evidence was enough to convict the Appellant. Reference was made to the case of **Seleman Makumba Vs. Republic**. TLR 2006, where it was held that true evidence in sexual offence comes from the victim of the offence and can be enough for convict. That, the doctor (PW4) also confirmed that the victim was sodomised. The learned State Attorney prayed for the appeal to be dismissed on account that the prosecution side proved their case beyond reasonable doubt.

In a brief rejoinder the counsel for the Appellant reiterated what she submitted in chief and added that, the doctor's report reveal that the victim was penetrated by the blunt object but the same does not suggest that only the penis could have penetrated him. That, the delay in reporting the incident brings doubt and identification of the house and properties in the room is not enough to prove the case as the victim could be couched to say so. That, the victim continued to buy milk at the same house even after the Appellant has quitted job thus, it was a good time to report the matter because the person threatening him was no longer there. She further added that the evidence by PW2 does not show as to when the victim was sent to Mbulu Hospital except the time the victim was sent to Selian, that is, 2019. That, it cannot be concluded that the incident occurred in 2016 and the victim suffered the consequence in 2019. The Appellant's counsel prayed this court to allow the appeal.

I have clearly considered trial court record, grounds of appeal and submissions by the parties for and against the appeal. The grounds of appeal are centred on assessment of evidence by the trial court which entails the second scrutiny of evidence in record to see whether the case before the trial court was proved beyond reasonable doubt to warrant

conviction of the Appellant. The scrutiny intends to respond on the arguable issues based on; **proof of penetration, time in reporting the incident, identification of the culprit** and **proof of case on the required standards in criminal cases.**

Starting with proof of penetration, there is evidence from the victim and his mother that the victim suffered abnormal discharge of stool. This triggered the mother to take action by sending the victim to two different hospitals. There is no evidence regarding the first hospital at Mbulu but there is evidence that the victim was sent to Lutheran Medical Centre (Selian Hospital) and was examined by PW4. The evidence by PW4 and the PF3 reveals that the victim was penetrated in his anus as he has loose sphincter muscles, scar in the anus and his rectum shifted from its normal position. The victim was operated to restore the organs to their positions. In his evidence, the doctor concluded that the victim was penetrated by a blunt object and the PF3 reveal that the scar was for a period of three years back. With that evidence, this court is satisfied that the prosecution evidence proved that the victim was penetrated.

Having concluded so, the subsequent issue is who is responsible for penetrating the victim. This take me to the determination of

argument based on time spent before reporting the incident, identification of the culprit and proof of case on the required standards in criminal cases.

Starting with time for reporting, there is no doubt that the incident was reported at the police station after more than three years. As per the charge sheet, evidence by PW1, PW2, and PW5 the offence was committed in April 2016 but the incident was reported at the police station in September 2019. The reasons put forward was that, the Appellant threatened the victim not to reveal the ordeal to anyone.

I agree that sometimes, threat to a child of tender age may lead non-disclosure of the offence. This is so where the circumstance of the case reveal that the victim suffered direct threat and he is still living or is in contact with the person who threatened him thus, could not say anything for his safety. In other words, the threat must in the face of it, be direct making the victim uneasy to reveal ordeal against him.

In this case, the victim was not living with the person who threatened him. The evidence of PW1, PW2 and PW3 reveal that the Appellant was living at the house of PW3 and the victim used to go there just to buy milk. The victim had a chance to report the ordeal at home but did not. He withheld the information concerning the offence

for more than 3 years without mentioning the offence and or naming the offender on account of threat. Assuming that he was afraid that may be the Appellant will attack him if sent again to buy milk, the evidence by PW3 reveal that the Appellant worked for her for three months only in 2016. The victim was still going to that house to buy milk even after the Appellant left. Since he was the one serving milk, it means that the victim was aware that the Appellant no longer worked there. There is no explanation as to why he did not tell his mother of the ordeal. Apart from that, the victim had a chance to tell his mother or doctor when he was sent for the first time at Mbulu Hospital. In the case of **Wangiti Mansa Mwita and others Vs. The Republic,** Criminal Appeal No. 6 of 1995 CAT (Unreported) which was cited with approval in the case of **Peter Abel Kirumi Vs. The Republic,** Criminal Appeal No. 25 of 2016 CAT at Arusha (Unreported) it was held that the ability of a witness to name a suspect at the earliest opportunity is an assurance of his reliability. It was further held that in the same way, an unexplained delay or complete failure to do so should put a prudent court to inquiry.

In considering the above finding and the circumstance of this case, I agree with the argument by the counsel for the Appellant that the circumstances under which the offence was delayed in being reported

creates doubt and therefore need other collaborating evidence to prove that the Appellant was responsible for the offence. This takes me to the scrutiny of evidence leading to identification of the Appellant as responsible for the offence.

The evidence by the victim reveal that he identified the Appellant for having a tattoo on his left hand. That was confirmed by other witnesses and the court. It was argued by the counsel for the Appellant that the Appellant is not the only young man with a tattoo. There is no evidence clarifying a tattoo on the Appellant's hand that could be differentiated from any other tattoo. Similarly, there is no explanation if no any other young man had a tattoo in that area. It must be noted that, despite the Appellant's denial, the prosecution evidence reveal that the Appellant lived in the house of PW3 for three months in 2016. However, before and after his discharge from work there were other young men who worked for PW3. The contention by prosecution side that they used to call him Kakaa and the victim mentioned Kakaa in itself does not lead to a conclusion that only the Appellant could be referred as Kakaa. That is the name which most of children call young men who are elder than them as they see them as brothers.

The evidence reveal that the victim saw the Appellant for the last time in 2016 when he was 8 years old but the Appellant was arrested in 2019 on account that the victim mentioned him as Kakaa who had a tattoo. The Appellant was then arrested and the victim identified him in court as the person who sodomised him. In my view, the age of the Appellant and the time spent before reporting the incident could lead mistake in identification. I therefore agree with the suggestion by the Appellant's counsel that there was a need for identification parade to avoid mistake in identification of the real culprit. What was done was just a dock identification which in law does not eliminate the danger of committing mistake in identification.

On the argument as to whether the offence was proved beyond reasonable doubt, it is my conclusion that the offence was not proved beyond reasonable doubt. Although the Appellant had no sound defence, the law imposes the duty to prove criminal offence to the prosecution side. The above two doubts on identification and delay in reporting the offence makes this court to conclude that the offence was not proved on the required standards in criminal cases. In other words, the prosecution evidence was not water tight to warrant the conviction of the Appellant by the trial court.

In the final analysis, the appeal is of merit and it is hereby allowed. The trial court's judgment, conviction, sentence and order arising therefrom are hereby quashed and set aside. The Appellant be released immediately from prison unless lawfully held for any other valid cause.

DATED at **ARUSHA** this 24th day of May 2023.

D.C. KAMUZORA

JUDGE