IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 53 OF 2022

(Original Criminal Case No. 8/2021 of the District Court of Njombe before Hon. M. Kayombo, SRM.)

JASTINI LUPEMBE HONGOLI ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

JUDGMENT

15th May & 31st July, 2023

I.C MUGETA, J:

The appellant was arraigned before the District Court of Njombe and charged with unnatural offence contrary to section 154(1) and (2) of the Penal Code [Cap. 16 R.E 2019]. The prosecution alleged that on 26th October 2018 at Uzunguni area within the district and region of Njombe, the appellant had carnal knowledge of the victim, a boy aged 11 years against the order of nature.

The facts leading to the arrest and arraignment of the appellant are that on 26th October 2018, the victim, a boy aged 11 years while on his way home met the appellant. The appellant allured him to a place nearby Ruhuji River and ordered him to undress and he inserted his penis into the victim's anus. The victim went home and narrated the incident to his

mother (PW3) who reported to the police station. On the same day, the victim was taken to the hospital and examined by Robert Kinyamagoha (PW4). The doctor found the victim's anus with a big wound and opined that, he was penetrated by a blunt object. The appellant was arrested on 25/12/2020, his cautioned statement was recorded by H. 7022 D/C Nicolaus where he admitted to have carnally known the victim against the order of nature.

In his defence, the appellant generally denied to have committed the offence.

Upon full trial, the appellant was found guilty and convicted to serve 30 years jail term. He has appealed to this court challenging both the conviction and sentence imposed on him on twelve grounds of appeal. However, the substance of the said grounds can be grouped in two major complaints, namely:-

1. *That the offence was not proved beyond reasonable doubts.*
2. *That the appellant was not properly identified at the crime scene.*

The appeal was argued by way of filing written submissions. The appellant was unrepresented whereas the respondent was represented by Hubert Ishengoma, learned State Attorney.

In supporting that the charge was not proved beyond reasonable doubts the appellant had the following complaints: **one,** that the charge was defective as it did not disclose the time the offence was committed. That, the place of commission of the offence in the charge sheet differs with that proved in court. According to the charge sheet the offence was committed at Uzunguni area. However, he argued, PW1 testified that the offence was committed at Ruhuji area whereas PW3 mentioned the crime scene as Ruhuji Power station Uzunguni area and msituni The charge sheet was also framed under a non-existing provision as the 1st page of the judgment showed that the appellant was charged under section 154(1) (a) & (20) of the Penal Code. In his view, the prosecution ought to have amended the charge under section 234(1) of the Criminal Procedure Act [Cap. 20 R.E 2022]. That, the omission to do so occasioned injustice to the appellant as he had the right to know the nature of the offence he was charged with. To cement his argument, he cited the case of **Emmanuel**

Kingamkono v. Republic, Criminal Appeal No. 494/2017, Court of Appeal – Mbeya (unreported).

Two, that the charge against him was not properly investigated. This is because he was arrested two years after the commission of the offence. In his views, this creates doubts as he lived in the same street with the family of the victim. That the prosecution did not give reasons for the delay in arresting him. He further complained that the police officer who investigated the case did not testify in court.

Three, that his cautioned statement was recorded out of time and was involuntarily made. He argued that the statement was recorded after the prescribed period of four hours as he was arrested on 25/12/2022 around 11:30pm and his statement recorded at 6:00pm to 1:10pm and the date the statement was taken was not mentioned. The statement did not reflect the questions the appellant was asked during the interview. He argued that the trial court erred in admitting it as was he was tortured, beaten and wounded. To support his argument, he cited the case of **Mashaka Abel Ezekiel v. Republic**, Criminal Appeal No. 297/2012, Court of Appeal (unreported).

Four, that the record has contradictory and unreliable testimonies of prosecution witnesses. Those covers the place and the state the victim met his mother and also the description of the crime scene. Another contradiction is on the time when the victim left home to escort his friend and the time he was medically examined by PW4.

Five, that ingredients of the charged offence were not proved. In his view, the prosecution did not prove that it was the appellant's penis that penetrated the victim's anus as no samples were taken

Six, that PW1's evidence was recorded contrary to section 127(2) of the Evidence Act [Cap. 6 R.E 2022]. The appellant submitted on this complaint that the record does not show that the court inquired into the victim's understanding of the nature of oath. To bolster his submission, he cited the case of **Ramson Peter Ondile v. Republic**, Criminal Appeal No. 84 of 2021, Court of Appeal – Dar es Salaam (unreported)

Eight, that there are irregularities in the trial court's proceedings. The appellant outlined the provisions and principles of law that were violated by the trial court. In his view, there was violation of section 210(3) of the CPA as the proceedings only show that the said section was complied with but in fact the evidence was not read over after being

recorded. Another violation according to the appellant is that preliminary hearing was not conducted which this renders the proceedings a nullity. To support his argument that failure to conduct preliminary hearing renders the proceedings a nullity, he cited the case of **MT 7479 Sgt. Benjamin Holela v. Republic** [1992] TLR 121.

Nine, that the appellant's defence was not considered. He argued that failure to consider the appellant's defence vitiates the conviction as it was held in **Maneno Rashid v. Republic**, Criminal Appeal No. 11/2021, High Court – Morogoro Registry (unreported).

On the 2nd ground, the appellant contended that he was not properly identified at the crime scene as PW1 did not disclose the amount of light that enabled him to identify him, the time spent under observation, the distance and whether he was familiar with the appellant before the incident. To support his contention, he cited the case of **Waziri Amani v. Republic** (1980) TLR 250 where the court laid down conditions for identification to be watertight.

The learned State Attorney resisted the appeal. On the complaint that the cautioned statement was improperly admitted he submitted that

an inquiry was done by the trial court which later was convinced that the cautioned statement was voluntarily made and admitted the document.

Regarding the complaint that the charge was not proved, he submitted that in sexual offences the best evidence is that of the victim as held in **Godi Kasenegala v. Republic**, Criminal Appeal No. 10/2008, Court of Appeal – Iringa (unreported). In his view, the victim (PW1) was a credible witness as he testified clearly how the appellant inserted his penis in his anus. That his evidence is corroborated by his mother (PW3) to whom the victim first told of the incident. That PW4 also corroborated the victim's evidence as he proved that he was penetrated. The appellant in his cautioned statement also admitted to have sodomized the accused. He contended that all these proved the offence beyond reasonable doubt.

On identification of the appellant, he pointed out that the victim testified that there was bulb light which enabled him to identify the appellant. Moreover, the victim was familiar with the appellant, they spent much time together before the commission of the offence. Thus, there was no possibility of mistaken identification. All the requirements of visual identification were met as propounded in the cases of **Christopher Ally v. Republic**, Criminal Appeal No. 510 of 2017, Court of Appeal – Mbeya

(unreported) and **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014, Court of Appeal – Mbeya (unreported).

The learned SA urged this court to disregard the appellant's complaint that the charge was defective. This is because the non-existing provision was a typing error in the judgment. The variance of place of commission of offence in his view was a minor difference which is curable under section 388(1) of the CPA.

He argued further that the trial court properly analyzed and evaluated the evidence.

In rejoinder, the appellant essentially reiterated his submissions in chief.

In disposing the appeal, I will start with the issue whether the charge against the appellant was proved beyond reasonable doubt. In that regard I shall discuss two issues which are sufficient to dispose of this appeal. **Firstly**, is whether the appellant was properly identified. **Secondly**, is whether the evidence of the victim has any probative value.

On identification there is no dispute that the appellant was a stranger to the victim when they met and finally lured him to the place where he

Mgeta

sodomised him. Under the circumstances, the prosecution ought to lead evidence to ascertain that the victim properly identified the culprit because the appellant was arrested on 25/12/2020 while the incident to place on 26/10/2018. The sure way to guarantee unmistaken identity is to produce evidence on how early the victim named the suspect and described him in term of physical appearance, dress code and even special mark on the body which can distinguish the culprit from others.

The evidence of the victim is that he met the culprit at 19:00 hours and he identified him because there was a bulb. This means it was already dark but the victim does not state whose bulb produced the light as it is unusual to have bulb producing light on roads in places like Njombe. In court he described the culprit as a young boy of medium size with a light skin colour. However, the evidence on record does not show if he made this description to his mother (PW3) when they met immediately after the incident. The record is dead silent as to how and why the appellant was finally arrested almost two years later. In **Chacha Jeremiah Murimi and 3 Others v. Republic**, Criminal Appeal No.551 of 2015 it was held that the ability to name the suspect at the earliest possible opportunity assures the witnesses credibility and reliability (page 20). Besides failure to lead

evidence on how the appellant was connected with this case, no identification parade was conducted after arresting the appellant.

In its judgment the trial court held:

> *"... identified the accused who ... because of the electrical bulbs and there was light. Also they are living in the same street also he explained that the accused has no one figure".*

Indeed, the victim testified about the light and the bulb. He said there was light referring to time he met the culprit. However, he did not mention the source of that light. Regarding the bulb he was referring to either the places where they passed through to the scene of crime or where the incident took place. Whatever the case, the evidence is not clear because bulbs are installed and it is unlikely that the incident occurred at an open space. The victim was categorical that he was led into the bush. Therefore, presence of electrical bulb there is out of the equation.

The finding that the victim and the appellant live at the same street is erroneous. This is because the victim did not give evidence to this effect. It is his mother (PW3) who testified on this fact after hearing it from the victim. This is what she said:

"Then I asked him who did that he replied that there one youth who is living to the same street"

This evidence does not describe anything for the appellant's identification. It is hearsay evidence so to speak.

The finding of the trial court that the appellant has a missing fingure is supported by evidence. The victim, indeed, said so in his evidence and it is on record that the trial magistrate observed the missing figure and did put such finding on record. The problem with this evidence, however, is that such description was not stated by the victim to anybody until when he said it in court. Dock identification is relevant if it corroborates a previous identification.

For the foregoing shrtcomings, it cannot be said that the appellant was properly identified.

I move to the validity of the victim's evidence.

When the victim testified in court he was 13 years old, therefore, a child of tender age. His evidence was supposed to be recorded upon making a promise to speak the truth and not lies in terms of section 127(2) of the Evidence Act [Cap. 6 R.E 2022]. Alternatively, he would have been sworn upon satisfying the court that he understand the meaning and

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nature of oath. In this case the victim testified under oath but the record is silent on whether she passed the said test. Lack of such finding vitiates his evidence. I expunge it from the record for want of probative value.

Once the evidence of the victim is expunged from the record, the remaining incriminating evidence is that in the caution statement (exhibit P1). The caution statement was repudiated. A repudiated confession even though it ground a conviction, prudence demands that it ought to be corroborated which is lacking in this case.

For the foregoing, I hold that while I have no doubt that the victim was sodomised and got serious injuries as confirmed by the PF3 (exhibit P3) which was tendered by PW3, there are serious doubts as to whether it is the appellant who committed this offence. The trial court wrongly convicted him. Consequently, I quash the conviction and set aside the sentence. The appellant is to be released from custody unless otherwise lawfully held for another offence.

I.C. MUGETA

JUDGE

31/7/2023

Court: Judgment delivered in the presence of the appellant in person and Herbert Ishengoma, learned State Attorney for the respondent.

Sgd. I.C. MUGETA

JUDGE

31/07/2023