THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 40 OF 2021

(Originating from Ruangwa District Court at Ruangwa in Criminal Case No. 42 of 2020)

SAIDI SHAIBU MWIGAMBO .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

5th & 28th June 2023

LALTAIKA, J.

The appellant herein **SAIDI SHAIBU MWIGAMBO** was arraigned in the District Court of Ruangwa at Ruangwa charged with offence of Unnatural Offence c/s 154(1)(a) and (2) of the Penal Code Cap 16 RE 2022. When the charge was read over to the appellant, then accused, he pleaded not guilty. The trial court proceeded to conduct a full trial. Having satisfied himself that the prosecution has proved the case to the required standard, the learned trial Magistrate convicted the appellant as charged and sentenced him **to life imprisonment.**

Aggrieved, the appellant has appealed to this court on 6 grounds. Later on, he filed additional grounds of appeal containing four grounds. I choose not to reproduce the grounds.

When the appeal was called on for hearing on **the 5th day of June 2023**, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, entered appearance through Mr. Justus Zegge, learned State Attorney. The appellant, not being learned in law, prayed that his written statement of appeal be considered and reserved his right to rejoinder. That paved the way for Mr. Zegge, learned State Attorney.

Upon taking the podium, Mr. Zegge declared that the respondent was in support of both conviction and sentence. He then proceeded to counter the grounds of appeal in seriatim. Appreciably, the learned State Attorney started by highlighting the complaint of the appellant in each of the grounds making it rather unnecessary to reproduce them here.

Mr. Zegge stated **that the first ground of appeal** was that the learned magistrate had erred in not finding that no one witnessed the alleged offence . He argued that this ground was baseless, referring to section **143 of the Evidence Act Cap 6 RE 2022**, which states that no particular number of witnesses is required for proof of any fact. According to Mr. Zegge, the prosecution was justified in presenting seven witnesses, believing they could prove the offence.

He referred to the case of **WILLIAM NTUMBI v. DPP** Crim App 320 of 2019 CAT, Mbeya p. 12, where it was stated that the court could rely on the

evidence of a single witness if that witness could be trusted to provide all the surrounding circumstances of how the offence occurred.

Regarding the specific case at hand, which involved a sexual offence , Mr. Zegge emphasized that the victim was the most important witness in establishing the offence . He supported the court's decision to consider the evidence of the victim, as the offence was committed against her. Consequently, he requested that the ground be dismissed.

Mr. Zegge clarified the second ground of appeal, stating that the the prosecution had failed to consider the individuals who had committed the offence in Dar es Salaam and that PW6 (the sixth prosecution witness) had not proven the occurrence. He objected to this ground, citing the case of **YOHANIS MSIGWA V. R. [1990] TLR 14.** According to Mr. Zegge, the court stated that it was the prosecution's responsibility to decide which witnesses to present and which evidence to submit. He further explained that the prosecution chose witnesses who were available and did not see the need to call upon other witnesses. Mr. Zegge concluded by requesting that the ground be dismissed.

Moving on to the third ground of appeal, which he argued in conjunction with the first additional ground, Mr. Zegge clarified that the appellant's complaint is that PW1 was not subjected to the *vore dire* test before giving testimony. Referring to **section 127(2) of the Evidence Act,** he stated that a witness below the age of 14 can take an oath or affirm if the court is satisfied that they are capable of telling the truth.

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Regarding the sixth ground where the appellant claimed that the offence was not proved beyond reasonable doubt, Mr. Zegge cited the case of **MAGENDO PAUL AND ANOTHER V. R [1993] TLR 219**, where the court stated that the evidence of the prosecution must be stronger against the accused for the case to be proved beyond reasonable doubt. He argued that PW6 was able to prove the offence by demonstrating the victim's injury and requested that this ground be dismissed.

Moving on to the second additional ground where the appellant asserted that there was no proof of the victim's age and that PW4 and PW5 could not prove it, Mr. Zegge referred to the case of **WILLIAM NTUMBI V. DPP** (supra) p. 11, where the court stated that statements of parents or guardians can be used to prove the age of a victim. He mentioned that PW6, a medical personnel, proved that the victim was 14 years old at the time of the incident and requested that this ground be dismissed.

On the seventh ground argued alongside the fourth in the additional grounds whereby the appellant complained that the magistrate did not consider his age, Mr. Zegge cited **section 192 of the Criminal Procedure Act Cap 20 RE 2019**, which allows the court to read out facts to the accused person and for the accused person to dispute them. He argued that the appellant had the chance to object but did not do so. He requested that these grounds be dismissed as well.

On the eighth grounds where the appellant claimed that PW7 could not tender a cautioned statement, and no reason was given, Mr. Zegge mentioned that on page 25 of the proceedings, PW7 offered a cautioned

statement but the appellant refused it. He stated that this ground had no merit and should be dismissed. In conclusion, Mr. Zegge prayed that the entire appeal be dismissed as unmeritorious.

The appellant, on his part, when invited to add a word or two if he had any, insisted that the District Court did not act justly, highlighting that all three accused were charged with the same offence , but only the first accused was set free. The appellant argued that the victim did not recognize him, and the witnesses' evidence was hearsay, provided by the head teacher. The appellant claimed innocence and requested the court to closely examine the lower court's judgment.

The appellant pointed out that all seven witnesses were named by the head teacher and their testimony was based on hearsay. He further stated that the victim was disciplined by the head teacher after it was discovered that the victim had been subjected to sodomy. As a result, the victim decided to implicate several individuals, leading to the arrest of three of them. The appellant vehemently denied committing the offence . He prayed that this court acquits him.

I have dispassionately considered the grounds of appeal, response by the learned State Attorney for the respondent, additional account by the appellant and, more importantly, the lower court's records. I am therefore in the position to determine whether the appeal is meritorious. My analysis will start with the lower court records, which I find quite intriguing.

It appears, from what can be gleaned from the trial court's records, that a fourteen-year-old boy (back in 2015) who was living in Dar-es-Salaam moved to Mnacho Village in Ruangwa District. Details are not provided on when exactly the movement took place and what the reason was. Upon arrival in Mnacho, the lad joined the local Primary School. It appears also that while the appellant was in class and their teacher one Halid Ally Omari (who would later testify as PW4) was teaching a lesson on morality, it was alleged that the boy was a good example of victims of unnatural offence.

Mwalimu Omari took the allegation seriously and summoned the victim in his office. Upon interrogation, he allegedly confessed that he had been carnally known against the order of nature, several times. The boy allegedly went further and mentioned three individuals including the appellant who was 19 years old by then. The appellant and two others were arrested. They were arraigned in the District Court of Ruangwa. On finalization of the trial, the learned Magistrate acquitted the first accused. The appellant who was second accused was sentenced to life imprisonment whereas the third accused who was bellow 18 years of age was sentenced to corporal punishment of six sticks (strokes).

Needless to say, the appellant is strongly dissatisfied with both conviction and sentence of life imprisonment. This is his second attempt to seek this court's intervention. His first appeal was dismissed for having been filed out of the prescribed time. As a result of that dismissal, the appellant took to his heels to the Highest Court of the land namely the Court of Appeal of Tanzania protesting such dismissal as denial of his right of appeal and disregard to his constrained position as a prisoner that led to the delay in appealing on time.

To cut the long story short, the Apex Court on the 23rd day of March 2023 ruled in favor of the appellant. The Court ordered the "hearing and determination of the appellant's appeal...before another Judge." As alluded to above, such hearing took place on earlier this month, the 5th of June 2023 to be exact.

As the first appellate court, this court is entitled to reevaluation of the evidence adduced in the trial court and may come up with its own findings in the event that upon such reevaluation, it is satisfied that there are mis-directions or non-directions on the evidence. See **DIRECTOR OF PUBLIC PROSECUTIONS V. JAFFARI MFAUME KAWAWA** [1981] TLR 149, **SALUM MHANDO V. REPUBLIC** [1993] T.L.R. 170 AND **MUSSA MWAIKUNDA V. THE REPUBLIC** [2006] T.L.R. 387.

The offence of unnatural offences is provided under section 154(1) and (2) of the Penal Code Cap.16 R.E. 2022. For easy of reference and understanding below is the said section which reads:-

> "154.-(1) Any person who-
> (a) has carnal knowledge of any person against the order of nature; or
> (b) has carnal knowledge of an animal; or
> (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.
> (2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."

The Court of Appeal in the case of **AMRAN HUSSEIN VS R (CRIMINAL APPEAL NO.13 OF 2019)[2019]TZCA** 136 (22 April 2021) stated as follows on the ingredient of the offence of unnatural offence.

> *"To commit the offence under section 154 ...a person must have; one, carnal knowledge of another person against the order of nature or, two, carnal knowledge of an animal and, or three, permit a male person to have carnal knowledge of him or her against the order of nature."*

Needless to say, that the offence of unnatural offence is a sexual offence. Like rape, the prosecution must prove penile penetration into the anus. The evidence of penetration in the matter at hand raises a huge cloud of doubts on who among the three accused persons, the current appellant inclusive committed the offence that was proved by the medical test conducted. If the victim has been engaging in sexual intercourse against the order of nature "several times" and with "several people" in Dar es Salaam and in Ruangwa, mentioning all the three individuals was a technical error that should have been spotted by the prosecution much earlier. Undoubtedly, the alleged must have been done by the three suspects (and more other people) one person at a time.

It appears also that the learned trial magistrate took the testimony of the victim as gospel truth. There is no doubt that in sexual offences, the evidence of the victim is the best evidence. See **SELEMANI MAKUMBA V. REPUBLIC** [2006] T.L.R. 379. Nevertheless, the court should still check on credibility of the witness in question. In the case of in the case of **NELSON ONYANGO VS REPUBLIC**, Criminal Appeal No.49 of 2017 (unreported) the Court of Appeal stated that:-

"In considering the victim's evidence as the best evidence then the victim's testimony must be credible, convincing and consistent with human nature and normal course of things."

In the final analysis when the prosecution tendered evidence to prove that the victim had been carnally known, and that evidence was only one, the learned magistrate should not have failed to see that logically, only one of the three accused persons in his court could be convicted and ultimately sentenced. There was no "gang" activity or even "common intention" to commit the unnatural offence against the victim, in the same time and place.

Premised on the above, I am fortified that the offence of unnatural offence was not proved beyond reasonable doubt as required by law. Consequently, I allow the appeal. I quash the conviction and set aside the sentence of life imprisonment. Further, I order that the appellant **SAIDI SHAIBU MWIGAMBO** be released from prison forthwith unless he is being held for any other lawful cause.

It is so ordered.

E.I. LALTAIKA
JUDGE
28.06.2023

THE HIGH COURT OF TANZANIA

Court

Judgement delivered this 28th day of June 2023 in the presence of Mr. Justus Zegge, learned State Attorney and the appellant.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
28.06.2023

Court

Right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
28.06.2023