THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 30 OF 2023

(Originating from Mtwara District Court at Mtwara in Criminal Case No. 69 of 2022)

SALUM BAKARI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

19th & 31st July 2023

LALTAIKA, J.

The appellant herein **SALUM BAKARI** was arraigned in the District Court of Mtwara at Mtwara charged with the offence of Unnatural Offence c/s 154(1) (a) and Section 2 of the Penal Code Cap 16 RE 2022. It was alleged that on 27/8/2022 at Ligula Area in Mtwara, the appellant had unnatural carnal knowledge with one FJZ [name withheld to protect his privacy and dignity], a male youth aged 16, against the order of nature.

When the charge was read over and explained to the appellant, then accused, he pleaded not guilty. On completion of a full trial, the learned trial Magistrate was convinced that the prosecution had left no stone unturned in proving their case. The trial court convicted the appellant as charged and proceeded to sentence him to life imprisonment.

Needless to say, that the appellant is strongly dissatisfied with the decision of the lower court. He has appealed to this court by way of a petition of appeal containing six grounds of appeal. The grounds are reproduced bellow for ease of reference:

1. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellant based on a defective charge*
2. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellant while the age of the victim was not proved.*
3. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellant without scrutinizing the credibility and reliability of PW1 since the victim failed to identify the appellant on the earliest moment.*
4. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellant based on the evidence of PW4 (doctor) and his exhibit P1.*
5. *That the Magistrate erred in law and fact by convicting and sentencing the appellant when he complied with (sic) section 127(2) of the Evidence Act to the victim.*
6. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellant while the case was not proved beyond reasonable doubt.*

When the appeal was called on for hearing on the **19th day of July 2023**, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, enjoyed skillful services **of Ms. Atuganile Nsajigwa**, learned State Attorney.

The appellant requested that his written grounds of appeal be considered and proposed that the leaned State Attorney proceeds with her counterarguments in response thereof. The appellant, however, reserved his right to a rejoinder in case the need arose.

Taking the floor, Ms. Nsajigwa announced boldly that the respondent fully supported the lower court's decision. She proceeded to respond to the grounds of appeal as summarized in the next paragraphs.

Ms. Nsajigwa explained that **on the first ground**, the appellant was faulting the trial court for acting on a defective charge. According to the appellant's petition, the learned State Attorney reasoned, it seemed that he had failed to grasp the position of the law on the contents of a charge sheet. Ms. Nsajigwa went on to explain that the appellant had quoted section **54(1)(a) and jumped to 54(4) where the age mentioned was 10 years**. Ms. Nsajigwa stated the correct section as 154(1)(a), clarifying that it meant the charge had no defect. It had complied with section 132 of the Criminal Procedure Act Cap 20 RE 2022 (herein after CPA). Referring to the case of **ISIDORI PATRICE v. REPUBLIC** Crim App 224 of 2007 CAT, Arusha, Ms. Nsajigwa mentioned that the court had stated that

> *"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

She expressed the opinion that the ground had no merit and should be dismissed.

Moving on to **the second ground**, the complaint was about the lack of proof of the age of the victim. The charge sheet had mentioned that the victim was 16 years old, and the medical doctor PW4 had also mentioned the same. Referring to the case of **GEORGE CLAUD KASANDA v. DPP** Crim Appeal No 376 of 2017 CAT, Mbeya, Ms. Nsajigwa explained that the court had stated,

> *"Where the court identifies possible sources of proof of the age of the victim of a sexual offence, proof of age may come from either the victim, her relatives, parents, medical practitioner, or by producing a birth certificate." (See pp 10-11)*

She noted that PW4 had tendered a PF3, which was admitted as exhibit P1 and was read out loud to the appellant, who had no objection to its admissibility. Consequently, she concluded that the ground had no merit and should be dismissed.

Ms. Nsajigwa mentioned **that on the third ground**, the appellant's complaint was about the victim's failure to mention the appellant at the earliest moment. She explained further that the appellant had relied on the cases of **MARWA WANGITI MWITA and Another v. REPUBLIC** [2002]TLR 39 and JARIBU ABDALLAH v. REPUBLIC [2003] TLR 271.

The learned State Attorney pointed out that on page 9 and 10 of the typed proceedings, the victim had indeed identified the appellant at the earliest stage. During cross-examination, the victim had clearly responded and described how he knew the appellant and could distinguish him from others. Ms. Nsajigwa referenced Section **127(6) of the Evidence Act,** which provides that independent evidence from a child of tender age and a

victim of a sexual offence is significant, and corroboration becomes immaterial if the court trusts the victim to be truthful.

Ms. Nsajigwa further stated that since the victim was found with PW2, he explained how he left the appellant's house in the morning and revealed that the appellant had sodomized him multiple times, threatening harm if he reported it. Referring to the case of **GOODLUCK KYANDO v. REPUBLIC** [2006]TLR 363-367, she quoted the Court stating,

> *"It is trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing in a witness."*

Similarly, she cited the landmark case of **SELEMANI MAKUMBA v. REPUBLIC** [2006] TLR 379, where the court emphasized that "the best evidence in proving sexual offences is that of the victim."

Ms. Nsajigwa contended that the victim's evidence **was credible and remained unshaken**, and it was corroborated by the medical evidence of PW4. She referred to the case of **SHABANI DAUDI v. R.** Crim App. No 28 of 2000, where two ways of determining the credibility of a witness were discussed. She prayed that this ground be dismissed for lack of merit.

Regarding **the fourth ground,** Ms. Nsajigwa informer the Court that the complaint was about alleged flaws in PW4's evidence, particularly in the physical examination of the victim's anus and the specific object used for penetration. Referring to page 17 of the proceedings, she quoted PW4's response, stating that he found the victim had been sodomized, or

"something which had a blunt edge has passed through his anus." She prayed that this ground be dismissed.

Moving on **to the fifth ground**, Ms. Nsajigwa addressed, at some considerable length and detail, the appellant's complaint about noncompliance with Section 127(2) of the Evidence Act, which requires a child of tender age to promise the court to tell the truth.

The learned State Attorney pointed out that on page 7 of the trial court proceedings, the victim had promised to tell the truth and not lie. She argued that the complaint of non-affirmation was untrue, as the trial magistrate had conducted a *voire dire* test and affirmed that the victim had indeed affirmed as required by law. She cited **Section 198(1) and prayed for the dismissal of this** ground as well.

On the last ground, Ms. Nsajigwa addressed the complaint about proof of the case beyond reasonable doubt. The learned State Attorney expressed confidence that the case had been proved as required. She went on to provide the details that PW1 had explained the entire event, PW2 had witnessed the victim coming out of the appellant's house, PW3 Zuhura Salum, the chair of the Mtaa, had seen the victim come out of the appellant's house and had taken him to the hospital for examination, and PW4 Amos Berege had examined the victim and provided evidence of penetration against the order of nature, tendering exhibit P1 in court. She firmly believed that the prosecution had proved the case beyond reasonable doubt, and thus, she prayed that the appeal be dismissed in its entirety and the trial court's judgment be upheld.

The appellant, on his part, stated that the case had been cooked up by PW2, whose name was Hamisi Masudi Kavanda, a watchman at Dangote. The appellant questioned how PW2 could have seen him as he usually returned in the evening and was not present at the time of the alleged incident. According to the appellant, PW2 met him and the victim in the backyard of their house and asked to meet the victim while instructing the appellant to continue with his daily activities.

The appellant explained that they lived in the same place with PW2 and suggested that PW2 might have suspected him of having an affair with his wife. He questioned why PW2, being a Mgambo, did not arrest him if he truly believed that he committed a crime.

The appellant countered PW2's claim that he had forcefully engaged in a sexual act with the young man. He also mentioned that the chair of Mtaa had asserted that he and the victim were in a relationship. Moreover, the doctor claimed that the victim had bruises in his anus. The appellant argued that the victim was stronger, and therefore, it was impossible for him to have raped him. The appellant expressed surprise that the Village Executive Officer (VEO) never appeared in court. He also stated that he was arrested at Shangani, while the incident was said to have taken place at a different place.

I have dispassionately considered the grounds of appeal and the response by the learned State Attorney. I have also carefully examined the lower court records and I am inclined to decide on the merit of the appeal. My analysis and subsequent verdict will center on the 6th ground of appeal

namely proof of the case beyond reasonable doubt. In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC [1993] TLR** 219 the Court of Appeal of Tanzania held that

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

Unfortunately, proof beyond reasonable doubt is not synonymous to mechanically ticking the boxes on the various elements of a given offence. Some more in-depth reflection, evaluation of the witnesses as to their credibility and more importantly analysis of the evidence presented, are what the means of clearing doubts in criminal cases. I must point out that the learned trial magistrate allowed himself to accept many assumptions that needed a more critical examination deserving a criminal court. I will explain.

There first of such assumptions is whether the neighbour's act of calling the *mgambo* and *mtaa* leaders was based on the best of intentions. This is because, one cannot conclude that there were sexual acts performed simply by seeing two men walk out of a room. Even if the victim later ended up testifying against the appellant, his evidence should not have been taken as gospel truth. The circumstances that led the PW2 (the neighbour) to imagine the worst leave a lot to be desired. The situation would have been different if the victim was the one who directly reported the vice to any of the other witnesses. In the case of **SAID BAKARI V. REPUBLIC, CRIMINAL APPEAL NO. 422 OF 2013** (unreported), the Court of Appeal of Tanzania stated:

> *"In determining a case centered on circumstantial evidence, the proper approach by a trial court is to critically consider and weigh all circumstances established by the evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances."*

Secondly, I think the learned magistrate needed to remind himself that it takes two to tangle. The sixteen-year-old who testified that he had carnal knowledge against the order of nature "several times" with the appellant was equally in contravention of the law. I am not aware of any immunity to engage in criminal acts simply because one acts as a prosecution witness. If such practice is allowed, many young people will be used to incriminate innocent individuals and remain assured that they will not be criminalized. The mere fact that he was allowed to testify against the appellant under an artificial protection makes it rather difficult to ascertain his credibility.

I should probably add that such young offenders should not always be trusted. Even if medical examination proves that they have been penetrated against, the evidence should still be put into critical scrutiny to ensure that the medical proof is not used against an otherwise innocent person while the perpetrator, the real person responsible for such penetration continues to live with the young offender hiding under the pretext of victimhood. That is why the Court of Appeal in the case of **NATHANIEL ALPHONCE MAPUNDA AND BENJAMIN MAPUNDA v. R. [2006] TLR 395** stated:

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her testimony should pass the test of truthfulness."*

In this case, the trial court took the evidence of the victim as gospel truth. In the upshot, I allow the appeal. I quash conviction and set aside the sentence of the lower court. I order that **SALUM BAKARI** be released out of prison forthwith unless he is being held for any other lawful cause(s).

It is so ordered.

E.I. LALTAIKA
JUDGE
31/7/2023

Court

Judgement delivered under my hand and the seal of this Court this 31st day of July 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
31/7/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
31/7/2023