THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL REVISION NO. 31 OF 2023

(Originating from the District Court of Kilosa in Criminal Case No. 232 of 2022)

HAMADI ATHUMAN ABDALLAH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Ruling date on: 31/07/2023

NGWEMBE, J:

In the exercise of powers conferred upon this court under section 372 (1) of **the Criminal Procedure Act, [Cap. 20 R.E 2022]**, this revision was preferred by the court *suo motu* for the purposes of satisfying itself as to the correctness, legality or propriety of the proceedings and orders of the trial court, following the complaints received from the inmate Hamad Athuman Abdallah (the applicant), when this court visited Wami Kuu prison, that his trial was unfair.

The background of this matter as per the trial court's records, before the District Court of Kilosa, the applicant was charged for two counts of unnatural offence contrary to sections **154 (1)(a) under the Penal Code [Cap 16 R.E 2022]** convicted and sentenced to serve 30 years imprisonment on each count, concurrently. It was alleged in the charge sheet that, on unknown date and time at Msowelo village within Kilosa district in Morogoro region, the applicant had carnal knowledge of

two children aged 10 and 13 years old against the order of nature. The applicant pleaded not guilty to both counts in the charge sheet.

In turn the prosecution lined up five witnesses including the two victims, Caroline Donzie Malamo, WP 4603 S/G Beth and Savaya Kilanzo as PW1, PW2, PW3, PW4 and PW5 respectively. PW1 testified that, she has a younger brother (PW2) and two sisters who together are living with their father. That their father used to do *'bad things'* to them; inserting his penis into her anus and that he did so to PW2. The offences against the victims were being committed at their home during night hours. PW1 said that she didn't report the matter anywhere because of fear until when she was at Dar es Salaam where she told one "Mama G" who took her for medical check-up. Further PW1 testified that, PW2 told her that their father was doing the act to him also.

PW2 briefly testified that, he is staying with his three sisters including PW1 at Msowelo and that their father used to *do bad things* to him. Carolin Donzie Malamo (PW3), the owner of Orphanage Centre under whose care the victims are currently placed, testified that, she received a call from teacher Ashura Madange informing her that there are children at Msowelo who are suspected of being sodomized by their father, she reported the matter to the Ward Executive Officer and the convict was called at the office with his three children. PW1 was at Dar es Salaam, she said that PW2 was not willing to cooperate, they called back PW1 from Dar es salaam who told them what happened. They went to a Social Welfare Officer who advised them to go to Dumila Police Station where both PW1 & PW2 admitted that they were being sodomized by the applicant. Police gave them PF3 for medical check up. Thereafter, PW3 took the victims into her Orphanage Centre.

WP 4603 S/G Beth PW4 a police officer testified that on 06/07/2023 while at Dumila police station, received PW3 and PW1. PW3

lodged a complaint that PW1 was sodomized by her father, on 10/7/2023 PW3 came again with PW2, having the same complaints as those in respect of PW1. PW4 interrogated them and prepared PF3 and took PW2 for medical examination, PW4 tendered those two PF3 forms, they were admitted and marked exhibit P1 and P2 respectively.

The last prosecution witness was Victor Savaya Kilanzo PW5, a medical doctor who testified to have examined the victims. In his opinion, PW1 was penetrated in her anus. The muscles were loose, exhibit P2 on remarks regarding PW2 indicated that the boy was being penetrated several times as the anus was open to a diameter of 2 centimetres that a finger would easily pass.

On the defence side, the applicant Hamad Athuman Abdalah testified as DW1. On affirmation he denied the allegations. Narrated that he was called to Ward Executive Officer and taken to Dumila Police Station where he was charged with the offences. Todasua Ndoisenga DW2 testified that she took PW1 to Dar es Salaam as a house keeper and she was physically fit, she said she knows nothing apart from that. DW3 testified also to know nothing regarding the allegations except that he knew PW1 went to Dar es Salaam. That was all from both sides.

The trial court in its determination referred to the principle that in sexual offences, the best witness is the victim as stated in **Selemani Makumba Vs. R, [2006] T.L.R 379, Anania Bukuku Vs. R, [2011] T.L.R. 33 [CA]** and **Diha Mtofari Vs. R, Criminal Appeal No. 249 of 2015.** The trial magistrate relied on the testimony of PW1 and PW2 (victims). I am very well aware of the rule, it has been in place for decades now.

However, application of that rule must go along with credibility and reliability test rule applying squarely to the victim whose evidence is under scrutiny. There must be a serious consideration of the victim's

truthfulness and credibility before the court can rely on the victim's evidence. This is what was stated in the case of **Mohamed Said Vs. R, Criminal Appeal No. 145 of 2017** and **Hamisi Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019.** The above is what section 127 of the **Evidence Act** provides, as will be later addressed.

In this case PW1 explained that she kept silent for fear of her father's reaction and that when she was at Dar es Salaam away from him, she opened up and told one "Mama G". That Mama G, the teacher was the one who basically initiated the criminal allegations. It is noted also that PW2 did not cooperate at first, but even the other children living in the same house with the victims were not called.

Under the circumstance, I am of the strong opinion that the said teacher Ashura Madange who informed PW3 about the incidents, Mama G who was informed by PW1 and who is said to have taken PW1 to hospital and the other children of the homestead were important witnesses. The prosecution would have assisted the court if it brought those witnesses before the court.

The prosecution must not forget that they have a very important role and duty to sufficiently establish and prove the offence to the standard required by law and the standard is proof beyond reasonable doubt. See the cases of **Hamisi Hassani Jumanne Vs. R, (Criminal Appeal No. 397 of 2021) [2023] TZCA 79, Skona Rolyan Munge & Others Vs. R, (Criminal Appeal 51 of 2020) [2022] TZCA 773 and Tumbark Halbathe Vs. R (1957) EA 355, Sunderje Vs. R (1971) HCD 316.** The accused does not bear any burden to prove his innocence, **Akwino Malata Vs. R, Criminal Appeal No. 438 of 2019** and **D.P.P Vs. Ngusa Keleja @ Mtangi & Another [2020] 2 T.L.R. 204 [CA]** are among the precedents. In the latter it was observed *inter alia* that: -

"An accused has no duty of proving his innocence, and in making a defence, an accused is merely required to raise a reasonable doubt. We must add here that even, the accused person can only be convicted on the strength of the prosecution case and not on the basis of weakness of his defence"

Taking into consideration their age being 13 years and 10 years respectively it is understandable that they were afraid because they were living only with their father at the farms area. But it is not known how teacher Ashura Madange suspected about the victims being sodomized by their father as initiated the process which took the applicant to justice, so to say.

The case being of sexual related offence, the law recognises the evidence of the victim alone would be sufficient to warrant conviction, but there must be a serious consideration of the victim's truthfulness and credibility before relying on his or her evidence, I pointed earlier. In the case of **Mohamed Said (supra)** it was held: -

"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with the rules of evidence in general, and s. 127 (7) of Cap 6 in particular, and that such compliance will lead to punish offenders only in deserving cases."

Likewise, in the case of **Juma Antoni Vs. R, (Criminal Appeal 571 of 2020) [2022] TZCA 250,** the Court of Appeal took the above precedent among others of its previous decisions and insisted that: -

"In the premises, although the best evidence of rape is that which comes from the victim, however, that is not a waiver on

the court assessing the credibility in order to satisfy itself that the witness is telling nothing but the truth"

According to the Medical Doctor, PW1 was penetrated unnatural way and exhibit P2 also suggests PW2 being penetrated several times at the anus. Such evidence corroborated the evidence of the victims that there was penetration. The prevailing question is who committed the offence against the two victims? The trial court made its finding that the applicant was the offender. I am hesitant to share the trial court's conclusion. My hesitation should not mean heightening the standard of proof or changing any rule. The law is clearly settled that corroboration is not necessary as pointed out earlier and provided under section 127 (6) of **The Evidence Act, Cap 6,** that: -

"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth."

However, a literal interpretation of the provision gives at least the following; *One* – the evidence of a victim may be relied upon and found conviction without corroboration, if it is the only available evidence. *Two* – before relying on that evidence to make conviction, the court must assess the credibility of the victim and be satisfied that the victim is telling nothing but the truth.

What satisfies the court that the victim witness is telling nothing but the truth, is not his promise that he will tell the truth and not lies. Even the oath or affirmation should not make the court sit back and relax about truthfulness of the victim. It is upon testing the witness' credibility through demeanour, coherence and consistence among other parameters, that the court can realise its satisfaction. That is what our courts have been holding decades now. Among many other precedents, there is that of **Oscar Lwela Vs R, (Criminal Appeal No. 49 of 2013) [2013] TZCA 476** where on credibility it was stated thus: -

> *"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two; when the testimony of that witness is considered in relation with the evidence of other witnesses,* ***including that of the accused person."***

It should be noted as above that consistence of the witness is never tested narrowly as the trial court seems to have done, but it is tested in the broad perspective, not only testing it against the prosecution witnesses, but also must be tested in relation to the defence witnesses. PW1 said that though for fear she did not disclose about the offence, but she disclosed to "Mama G" upon reaching to Dar es Salaam and that "Mama G" took her for medical checkup. Now, before the trial court and even before this court, it is not known particularly, who this Mama G is. But on the defence side there was a witness who took PW1 to Dar es Salaam for housekeeping. This is DW2, one Todasua Ndoisenga, who testified on oath that PW1 was physically fit. The logic would expect PW1 to disclose to this witness about the abuse she went

through at her father's home. This was the earliest opportunity having left the father's guardianship. The said Mama G would have disproved what DW2 stated about PW1's condition upon arriving to Dar es Salaam.

But in this case the trial court went wrong on three points; *First* – there was no ground to believe that the victims' evidence was the only available evidence. This is because the victims and other witnesses were heard mentioning other important witnesses, but those witnesses were not summoned; those other witnesses are children under the applicant's custody; the teacher who disclosed about the offences; and "Mama G" who was said to have been informed by PW1 and taken her to hospital.

Second – the credibility of the victim witnesses was not tested before believing that their evidence was reliable. *Third* – the trial court did not analyse the evidence properly.

This court has made an overall analysis of the evidence including coherence and consistence of the victims and finds that, their evidence was not coherent and thus unstable; how the four children were being sheltered in the house? How were they sleeping? How was it possible that all the incidents be committed in the same house during night hours by the same offender and each of the victim fail to notice the other victim's encounters? How did the other children failed to notice the perpetration? All these questions were to be cleared by the prosecution. Otherwise, they remain to be serious doubts against the prosecution case, which according to our established position of the law, doubts are resolved in accused favour. In the case of **Akwino Malata Vs. R, Criminal Appeal No. 438 of 2019,** where the prosecution evidence in respect of rape was questionable, the Court of Appeal Sitting at Iringa observed the unanswered questions and proceeded thus: -

"Therefore, the cumulative effect on these crucial matters, show that there are doubts on the prosecution case against

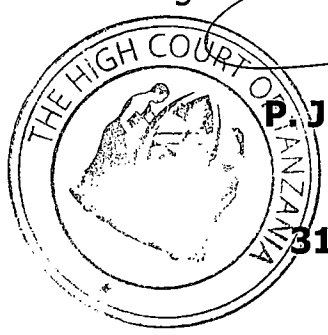
the appellant. It is trite law that whenever there is doubt on the prosecution case, the same should be resolved in favour of the accused...Consequently, since there is doubt on the prosecution case, we resolve the same in favour of the appellant. We therefore, find that the prosecution did not prove their case beyond reasonable doubt."

Likewise, this court finds the prosecution case was not well established. The doubts were serious as analysed herein and this court is confident that had the trial court considered those doubts, it would have ultimately found the offence not proved beyond reasonable doubt.

It is on the above basis this court hereby revise the trial court's finding. The offence was not proved beyond reasonable doubt, I therefore, proceed to quash the conviction and set aside the sentence meted by the trial court. The applicant be released forthwith, unless there is a lawful cause to hold him further.

Order accordingly.

DATED at Morogoro in chambers this 31st July 2023.



P. J. NGWEMBE

JUDGE

31/07/2023

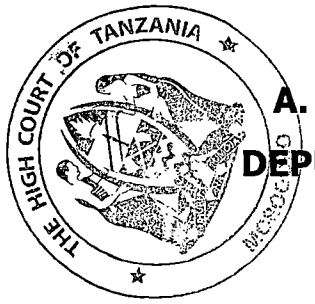
Court: Ruling delivered at Morogoro in Chambers this 31st day of July, 2023 in the presence of applicant and in the absence of Respondent/Republic.

A. W. Mmbando

DEPURTY REGISTRAR

31/07/2023

Right of appeal to the Court of Appeal explained.



A. W. Mmbando

DEPURTY REGISTRAR

31/07/2023