IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 18 OF 2023

(C/F Criminal Case No. 50 of 2021 District Court of Mwanga at Mwanga)

MUSSA RIDHIWANI ALLY@ MKWAVI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of Last Order: 21.08.2023
Date of Judgment: 18.09.2023

MONGELLA, J.

The appellant was arraigned before the District Court of Mwanga at Mwanga (the trial court, hereinafter) for unnatural offence contrary to Section 154(1) (a) and (2) of the Penal Code, Cap 16 R.E. 2019. The particulars of the offence are to the effect that: on 16.12.2020 at or about 10:00hrs at Sango Village within Mwanga District, the appellant had carnal knowledge of one XY (name intentionally withheld and hereinafter to be referred as the victim), a boy aged 13 years, against the order of nature.

Following the appellant's denial of the charge, the case proceeded to trial. The prosecution called 6 witnesses being; PW1, Huruma Amani Mruki, the headmaster of Sungo Primary school;

PW2, Grace Msanga, the mother of the victim; PW3, the victim; PW4, Salutary Elong; PW5, WP 3229 D/SGT Fatuma, the investigator of the case; and PW6, Jacklin Mchomvu, the health teacher at Sungo Primary school.

The facts as depicted from the evidence presented by the prosecution explain that: on 16.12.2020 at about 10:00hrs the victim (PW3) was on his way heading to a river. On the way he met the appellant who told him to go to his home to watch television. The appellant took him to his room, undressed his shorts and underwear and inserted his penis into his anus. Thereafter they both dressed up and the appellant threatened to kill him if told anyone of the incident. From then on, the appellant continued to do the said act to the victim.

On 17.02.2021, while at school, a fellow student reported to PW1 that the victim smelt like feces. PW1 told the victim to go wash up in the toilet. He then told PW6, of the odour from the vicitm and told her to teach him how to clean up himself. PW6 questioned the victim, but he was afraid to tell her anything. However, the victim told one Teacher Abrahamu that "*Musa Mkwavi ananiingizia mdude wake kwenye eneo la haja kubwa*" meaning that the appellant usually inserts his penis into his anus. PW6 then informed PW1 of the issue. On 19.02.2021, the victim was interviewed in PW1's office before PW1, PW4 and PW6. Afterwards, PW3's father was called, but did not come to the school so PW2 was called instead.

PW4 informed PW2 of the incidence and advised her to report the matter to the police. The matter was reported at Msangani Police Post whereby the victim was interviewed. A PF3 was issued and they went to Kifura health Centre whereby the victim was examined by one Doctor Emmanuel Mwembeni who also filled the PF3. The PF3 was tendered by PW5 and admitted as Exhibit PE1.

After the court had found a prima facie case was established against the appellant, the appellant was given opportunity to present his defense. He gave his evidence as DW1 and did not call any witness. His defense was that: on 11.01.2021, he was convicted for stealing a television and sentenced to serve 7 months in prison. He was then released on 26.04.2021 and upon going home, he was told that he was charged for unnatural offence. He questioned why the incident was not reported at an earlier time. He also averred that there is contradiction in the evidence of PW6 and PW3 (the victim) on what grade the victim was when the said act was done to him. He also faulted the prosecution's failure to summon the doctor to tender the PF3.

Aggrieved by the conviction and sentence, the appellant preferred this appeal on the following grounds:

1. *That, the trial magistrate erred in law and facts to convict and sentence the appellant despite the prosecution's failure to prove its case beyond reasonable doubt.*

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2. *That, the trial magistrate erred in law and facts to convict and sentence the appellant by relying on insufficient evidence adduced by the prosecution.*

3. *The trial magistrate erred in both law and facts to convict and sentence the appellant relying on contradictory evidence adduced by the prosecution side.*

4. *That, the trial magistrate grossly erred in both law and facts for failure to consider the evidence adduced by the defense side.*

The appeal was argued by written submissions whereby the appellant was fended for himself while the respondent was represented by Mr. Ramadhani A. Kajembe, learned state attorney.

Arguing his appeal, the appellant averred that the trial magistrate relied on contradictory evidence by the prosecution as the preliminary hearing shows that the offence was committed on 16.12.2020 at around 10:00 am while PW3 testified that the appellant had carnal knowledge of him against order of nature on 16.11.2020, hence proving that the case against him was fabricated and the prosecution failed to prove the charge against him beyond reasonable doubt.

He further averred that the court failed to draw adverse inference on PW3's failure to report the incidence as soon as possible as he alleged that the act was done to him on 16.11.2020 while the same was reported on 14.03.2021 by his parent. He cited the case of **Marwa Wangiti Mwita and Another vs. Republic** (Criminal Appeal No. 6 of 1995) [2000] TZCA 4, in which the Court addressed the importance to name the suspect at the earliest opportunity. He alleged that the failure of PW3 to name him at the earliest opportunity is evidence that the case against him was fabricated.

The appellant challenged the prosecution's failure to bring one Imani Mwambene who was the doctor that medically examined PW3. He averred that the act of PW5 tendering the PF3 and not the said Imani made PW5 to testify as a medical officer while he was not one. He contended that the failure of the prosecution to call the doctor who was a material witness entitles the court to draw an adverse inference that if called, the witness would have testified contrary to the party's interest. He fortified his argument with the decision in **Hemedi Said vs. Mohamed Mbilu** [1984] TLR 113 and **Aziz Abdallah vs. Republic** [1991] TLR 71.

He finally argued that the defence evidence was not considered, but did not explain on this issue. He prayed that the court allows his appeal, quash his conviction and set aside his sentence.

In reply, Mr. Kajemnbe consolidated the 1st 2nd and 3rd grounds of appeal. Submitting on the same, he argued that the offence was proved against the appellant. That, under section 154 (1) and (2) of the Penal Code, unnatural offence has two ingredients; **one**, penetration of male penis and **two**, against order of nature as stated in the case of **Nyamasheki Malima @ Mengi vs. Republic** (Criminal Appeal No. 177 of 2020) [2022] TZCA 326.

He further argued that the best evidence in sexual offences is that of the victim as there are hardly eye witnesses given that the acts are done in closed areas. He submitted that PW3 gave a clear narration of the event that led to the commission of the offence and from his testimony, it was proved that the appellant's penis penetrated PW3's anus and the same was corroborated by the PF3 (Exhibit PE1) which showed that the sphincter muscles of PW3 were torn due to anal intercourse.

As to the contradiction on the date the offence was committed, Mr. Kajembe was of the view that the same did not go to the root of the case as the appellant was not prejudiced nor did he suffer any injustice. He admitted that there was a variation of just a month between 16.12.2020 appearing on the charge and 16.11.2020 which was mentioned by PW3 in his testimony but the same was immaterial and had not occasioned miscarriage of justice. He had the stance that the anomaly is curable under **section 234 (3) of the Criminal Procedure Act**. He fortified his argument with the case of

Osward Mokiwa @ Sudi vs. Republic (Criminal Appeal 190 of 2014) [2019] TZCA 169 TANZLII.

Addressing the appellant's submission on failure of PW3 to name the appellant at the earliest stage and the failure of prosecution to call material witnesses, he averred that the same were new issues not raised in the memorandum of appeal and parties are bound by their pleadings. He supported his argument with the case of **Maria Amandus Kavishe vs. Noarah Waziri Mzeru and Another**, Civil Appeal No. 365 of 2019 [2023] TZCA 31 and that of **Bahari Oilfield Services FPZ Ltd. vs. Peter Wilson** (Civil Appeal No. 157 of 2020) [2021] TZCA 250 both from TANZLII. He thus prayed for the two issues not to be considered by this court.

On the 4th ground, that the defence witness was not considered; Mr. Kajembe addressed the failure of the prosecution to call the doctor who medically examined PW3 raised by the appellant in his defense. He contended that there was no legal requirement to call specific number of witnesses as stated under **section 143 of the Evidence Act.** That, what matters is the credibility of the said witnesses as held in **Christopher Marwa Mturu vs. Republic** (Criminal Appeal 561 of 2019) [2022] TZCA 652 TANZLII. He argued further that the prosecution was not obligated to call the doctor and in sexual offences the testimony of the doctor is not the only evidence to prove the offence. He further had the stance that, the defence evidence was considered as it is evident on page 7 of the judgment. He concluded praying for the court to find the appeal

without merit and uphold both the conviction and sentence by the trial court.

I have keenly considered the grounds of appeal, the submissions of both parties, and thoroughly gone through the trial court record. In my deliberation, I shall jointly address the 1st, 2nd and 3rd grounds of appeal and address the 4th ground, separately.

On the consolidated grounds, the appellant addressed the variance in dates between the charge and the evidence of PW3; PW3's failure to report the matter at an earlier stage and; the failure of the prosecution to call the doctor as a witness. He asked the court to draw adverse inference on the prosecution's failure to call the doctor and PW3's failure to report the incidence at an earlier stage.

It is evident on the record of the trial court that there was a variance between the testimony of PW3 and the charge regarding the date the offence was committed. The charge and preliminary hearing disclose the offence being committed on 16.12.2022. This date is also mentioned by PW5 who investigated the incidence. However, PW3, the victim, testified that the offence took place on 16.11.2023.

In my view, the variance in the dates can be fatal depending on the facts of each case. In the matter at hand, I do not find the variance being fatal to the extent of vitiating the conviction. As argued by Mr. Kajembe, the appellant was not in any way

prejudiced with the variance in dates as the variance has not in any way negated the commission of the offence against the victim. I agree with Mr. Kajembe that the inconsistency is cured under **section 234 (3) of the Criminal Procedure Act**. In **Said Majaliwa vs. Republic** (Criminal Appeal 2 of 2020) [2021] TZCA 276 TANZLII, the Court of Appeal addressed a similar situation whereby the date of commission of the offence depicted on the charge and that testified by the victim were different. The Court observed:

> *"In this case, as already hinted above, it is without question that the charge sheet indicates that the offence was committed on 27/8/2019 while PW2 testified that the offence was committed on 23/3/2019 … **we think that the variance in dates was curable under section 234 (3) of the CPA** and, therefore, the 1st appellate court cannot be faulted in its finding. Hence, this ground also lacks merit, we dismiss it."*

See also; **Seleman Rajabu vs. Republic** (Criminal Appeal 149 of 2013) [2014] TZCA 277; **Damian Ruhele vs. Republic** (Criminal Appeal 501 of 2007) [2012] TZCA 160; **Issa Ramadhani vs. Republic** (Criminal Appeal 409 of 2015) [2016] TZCA 326 and; **Nkanga Daudi Nkanga vs. Republic** (Criminal Appeal 316 of 2013) [2014] TZCA 213, all from TANZLII. Considering the reasoning from these cases, this issue is thus found without merit.

Before I move on to the other two issues, I wish to address the contention by Mr. Kajembe whereby he faulted the submissions of the appellant on the said issues, who also sought for this court to draw an adverse inference against the prosecution on the ground that the appellant raised new issues. I disagree with his assertion because while the issues may not have been reflected as grounds of appeal, the appellant did challenge the whole of prosecution evidence and since these were matters of evidence, they fall within the scope of his grounds of appeal. I shall therefore address the issues advanced by the appellant in challenging the prosecution evidence.

On the incident being reported to the police at a later date after PW3 had reported the same, it is well reflected on record that the incidence allegedly happened on 16.11.2020 or 16.12.2020 however the same was only discovered on 17.02.2021 and reported sometime around 14.03.2021. While the failure to report an offence at an earlier stage could render the investigation of the same harder, the same does not hold any legal consequences as long as all procedures for investigation are followed. This argument is thus without merit.

On the failure of the appellant to name the suspect at the earliest point. It is true that the law is settled to the effect that naming the suspect at the earliest possible opportunity is an important assurance of the reliability of the witness. Likewise, failure to mention the suspect at the earliest possible opportunity may put the

credibility of the witness in question. See: **Marwa Wangiti Mwita & Another** *(supra)*; **Bakari Abdallah Masudi vs. Republic**, Criminal Appeal No. 126 of 2017 (CAT at Mtwara, unreported); and **Jaribu Abdallah vs. Republic** [2003] TLR 271. In my considered view however, each case has to be considered taking into account its own peculiar circumstances. In these cited decisions, it was not ruled that the failure to name the suspect at the earliest possible opportunity is an automatic discredit of the witness's credibility. The court therefore has to consider the circumstances of the case, particularly where an explanation has been offered by the victim for his/her delay in naming the accused at the earliest opportunity.

In the matter at hand, the victim (PW3) stated firmly during cross examination that the appellant threatened his life if he told the elders about the incident. There is therefore an explanation as to the delay in mentioning the appellant immediately after commission of the offence. Further, I disagree with the appellant that the same was not at all done. As clearly stated by PW1, PW4 and PW6, the victim named the appellant when he reported the matter to them after gathering courage to do so. Mentioning the appellant's name before these witnesses eased the investigation process. The claim is therefore found to lack merit.

On failure of prosecution to call the doctor who examined the victim, it is well settled and provided under **Section 143 of the Evidence Act** that no specific number of witnesses is required to prove the case. What matters is the credibility of the witnesses

presented by a party. See, **Christopher Marwa Mturu vs. Republic** (supra) and **Yohanis Msigwa vs. Republic** [1990] TLR 148.

To this point, two issues are to be addressed: **one**, whether PW5 was a competent witness to tender the PF3; and **two**, whether the procedures pertaining tendering of the evidence were followed.
As to who is competent witness to tender a document, the Court of Appeal elaborated the same in the case of **DPP vs. Mirzai Pirbakhshi@ Hadji and 3 Others,** Criminal Appeal No. 493 of 2016 (CAT, unreported), that:

> *"A possessor or a custodian or actual owner or alike are legally capable of tendering the intended exhibits in question provided he has knowledge of the thing in question."*

See also; **Director of Public Prosecutions vs. Kristina d/o Biskasevskaja** (Criminal Appeal No. 65 of 2018) [2023] TZCA 17434 and; **Juma Idd @ Dude vs. Republic** (Criminal Appeal 558 of 2020) [2022] TZCA 236 TANZLII.

In the matter at hand, therefore, PW5, being the investigator of the case and custodian of the PF3 was thus a competent witness to tender the document. However, despite the fact that the appellant did not object to the admission of the PF3, the trial magistrate had the duty to inform him of his right to require the person who made the report to be summoned. This mandatory requirement is well

stated under **section 240 (3) of the Criminal Procedure Act**, which provides:

> *"Where a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross- examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."*

In **Athumani Rashidi vs. Republic** (Criminal Appeal 110 of 2012) [2012] TZCA 143 TANZLII, the Court of Appeal dealt with a similar circumstance whereby it reasoned that:

> *"The record is plainly clear that the medical examination report (Exhibit PI) tendered by PW1 was not objected by the appellant. That notwithstanding, in terms of section 240 (3) of the Criminal Procedure Act the mandatory requirement that the appellant must be informed of his right to have the medical officer from Newala Hospital who examined PW1 summoned for cross- examination was not complied with. With this serious irregularity committed by the trial court, the medical examination report (Exhibit PI) ought to be expunged from the record, as we hereby proceed to do."*

In light of the above excerpt, I hereby expunge the PF3 from the record. Having done that, the underlying question is thus whether

in the absence of the PF3, the case was proved against the appellant beyond reasonable doubt.

The best and most reliable evidence in sexual offences is that of the victim of the sexual offence. In the matter at hand, the evidence of PW3 is considered to be the best evidence. See: **Selemani Makumba vs. Republic** (2006) TLR 386; **Alfeo Valentino vs. Republic**, Criminal Appeal, No. 92 of 2006 (CAT, unreported) and **Shimirimana Isaya and Another vs. Republic**, Criminal Appeal, No. 459 of 2002 (CAT, unreported).

The law is also settled to the effect that every witness is entitled to credence and to have his/her evidence believed by the court, unless there are cogent reasons not to believe the witness such as where there are contradictions or inconsistencies in the witness' testimony. See: **Goodluck Kyando vs. The Republic**, Criminal Appeal No. 118 of 2003 (CAT, unreported). PW3 in his testimony firmly narrated the entire ordeal of the first day the appellant carnal knew him against the order of nature. He as well stated how the said act was repeatedly done to him by the appellant from then on and how the same was discovered leading him to speak the truth. PW3 was firm in his testimony even during cross examination. I therefore do not find any reasons to fault the credibility of his testimony.

The variance on dates between the charge and other witnesses as opposed to PW3's evidence was immaterial as ruled already

hereinabove, and in further consideration of the continuation of the acts against him.

Further, PW3's evidence especially on the effect the act did to him was corroborated by that of PW1 who, on 17.02.2023 discovered an odd odour emitted by PW3 and had PW6 follow up on the matter. The follow up led to discovery that PW3 had been carnally known against order of nature. This led to PW1, PW4 and PW6 interviewing PW3 who mentioned the appellant as the person who did such act to him. Thereafter PW2 was informed whereby she went to the school to follow up on the matter. She then reported the matter to Msangeni Police post and took the victim to Kifura Dispensary for medical examination. PW2, testified that the doctor informed her that her son's anal sphincter muscles had loosened which was why feces came out uncontrollably. That, PW3 was further referred to Mawenzi Hospital for further treatment. This further proved the ordeal PW3 encountered as result of the said act being done to him.

The appellant's defense was unable to raise reasonable doubts on the prosecution's case. He simply denied to have done the offence and challenged the evidence of the prosecution in various aspects, which in my view have not raised any reasonable doubt on the prosecution evidence to vitiate the trial court's decision.

Finally, on the 4th ground in which the appellant claims that his defense case was not considered. The appellant however, did not elaborate on this ground as to why he reasoned so. However, upon

observing the trial court's judgment, I agree with Mr. Kajembe that the defense case was well considered by the trial magistrate in pages 7 and 8 in which she addressed the concerns raised by the appellant pertaining the evidence of the prosecution.

However, as the first appellate court, this court is obliged to re-evaluate and re-consider the defence evidence. See: **Prince Charles Junior vs. Republic**, Criminal Appeal No. 250 of 2014 (CAT at Mbeya, unreported). The appellant's defence mainly challenged the prosecution evidence for contradicting on the date of commission of the offence; on delay in prosecuting him; and on failure to have to medical doctor summoned to testify. All these issues have been addressed in detail hereinabove, in this judgement as they formed subject of the grounds of appeal. I therefore find no relevance in re-deliberating on the same. This ground therefore also fails.

Before penning down, I wish to observe that it has come to my attention, considering the record, that when the appellant was arraigned on 31.03.2021, he was 18 years old, his age was not challenged at any time. This means at the time he committed the offence he was 18 years old, an age which required the trial magistrate to exercise leniency in his sentence as required under **Section 160 B of the Penal Code** which states:

> *"For promotion and protection of the right of the child, nothing in chapter XV of this Code shall prevent the court from exercising-*
>
> *(a) reversionary powers to satisfy that, cruel sentences are not imposed to persons of or below the age of eighteen years; or*
>
> *(b) discretionary powers in imposing sentences to persons of or below the age of eighteen years."*

The failure of the trial magistrate to comply with the said requirement caused the appellant to suffer injustice. The Court of Appeal addressing a similar issue in ***Zuberi Mohamed @ Mkapa vs. Republic*** (Criminal Appeal No. 563 of 2020) [2022] TZCA 248 TANZLII, stated:

> *We agree with the counsel for both sides that in terms of the above provision, since the appellant was of the age of 18 years at the time of commission of the offence, upon conviction he was supposed to be sentenced to corporal punishment, but that was not the case. Failure to observe the dictates of the law in our considered view, occasioned miscarriage of justice on the part the appellant as he was sentenced to more than what he deserved.*

In the light of the above holding, I find that the sentence imposed by the trial court was contrary to the requirement of the law. Considering the time the appellant spent in custody, I hereby exercise my revisionary powers and set aside the life imprisonment sentence imposed. I order the immediate release of the appellant,

unless held for some other lawful cause. Apart from the revised sentence, the appeal stands dismissed for lack of merit.

Dated and delivered at Moshi, in chambers, on this 18th day of September, 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA