IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 36 OF 2023

(Originating from Criminal Case No. 73 of 2023 in the District Court of Maswa at Maswa)

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

CHARLES ZAKARIA .....1ST RESPONDENT

FATUMA MOHAMED ..... 2ND RESPONDENT

JUDGEMENT

25th July & 11th Sept 2023

F.H. MAHIMBALI, J

In what can be said into Swahili saying 'Mke wa Mtu sumu' is what can be said befell the victim in this saga one Daniel Ngasa who was suspected having extra marital affairs with the second respondent who is the wife of the first appellant as usual in secret modes. The husband – first respondent, then became aware of the said secret extra marital affairs.

On the material date, having seized his wife's cell phone and while together, personated himself as wife (Fatuma) and started fake chats with the victim - Daniel Ngasa where then the victim assuming chatting with

Fatuma, prepared himself for the said meeting as usual to go and pick her to an agreed place.

Where upon reaching there (inside the Fatuma's residence), he was then caught by the said husband – Charles Zakaria in the presence of the said Wife – Fatuma who then got sure that the said Daniel Ngasa was having an affair with his wife. He first seized his mobile phones and taken his money (100,000/=) while armed with a panga. In a further revenge, the husband then ordered him to undress, where he obeyed, where then he burnt his body by gas stove. As if that was not enough, he ornamented his erect penis by lubricating oil and sodomized the victim by inserting his erect penis into his anus. After all this, he was let go; where sometimes later, he reported the incidence at police and eventually the birth of this case.

The respondents herein were arraigned before the trial Court against the charge containing four counts; Armed robbery; Contrary to Section 287 of the Penal Code, Cap 16 R:E 2019, Malicious Damage to Property; Contrary to Section 326 (2) (a) of the Penal Code Cap 16 R:E 2019, third count was for 1st respondent which is Unnatural Offence; contrary to Section 154 (1)(a) of the Penal Code, and Conspiracy to damage reputation of a person; contrary to Section 386 (1)(b)& (2) of the Penal Code (supra).

During the hearing of this appeal, the appellant had legal services of Ms. Rehema Sakafu learned State Attorney while the respondents had legal service of Mr. Masige learned advocate.

Ms. Rehema abandoned third ground of appeal, she then proceeded to argue the rest grounds of appeal.

Ms. Rehema argued that as per evidence of the trial court's records, the prosecution established the charge beyond reasonable doubts as required by the law.

She fortified that according to page 12 -15 of the typed proceedings, PW1 testified how he was called by the respondents at their homeplace, how he was treated, how his phone was destroyed and how his money amounting to 100,000/= was taken by force by the respondents. PW1 also testified how the 1st respondent had carnally known him against order of his nature.

Ms. Rehema also submitted that, since in sexual offences the best evidence comes from the victim himself /herself, it is therefore undoubted that what the victim testified is truthful and reliable. She referred this Court to the case of **Bashiru Salum Subi versus Republic, Criminal Appeal No.379 of 2018 CAT** to the effect.

Ms. Rehema also added that, the evidence of PW1 was corroborated by PW5 (examining doctor), PW6 and exhibits P5 and caution statement of the 1st respondent.

Ms. Rehema further argued that PW5 testified well how the victim's anal muscles were relaxed as could no longer tighten when examined.

The 1st respondent clearly as freely admitted so before PW2 and PW3 that he went against the order of nature and harmed him through the use of panga and gas cooker. PW1 and PW2 as per proceedings of this case hold reliable evidence in which they must be relied upon. She cited the case of **DPP versus Orestus Mbawala @ Bonge, Criminal Appeal No.119 of 2019, CAT.**

Ms. Rehema also submitted that, what was testified by PW2 before the trial Court was truth as he was free agent. The 1st respondent's admission before PW2 in a full consideration, is nothing but truthful and reliable. She then prayed before this Court that the trial Court's judgement be reversed and the respondents be found guilty with the offences charged.

On the side of the Respondents Mr. Masige submitted that, from the charge, it is alleged that the respondents committed the offence on 11/2/2022, however, in his considered view, the appellant's evidence was

too weak, contradictory and legally incorrect to warrant conviction against the respondents. The prosecution evidence was full of doubts which essentially benefited the respondents.

Mr. Masige further submitted that, it was alleged that the offence was committed on 11/02/2022 but there is evidence that the incidence was reported at police station on 14/2/2022. PW1 in his testimony said that, when he went to the home place of the respondents, he had ridden his motor cycle. After all the events against him he did not report the matter anywhere but on 14 /02/2022.

Mr. Masige referred the case of **Wangati Mwita and Another versus Republic, (2000) TLR 43.**

As per PW1's testimony that he was unconscious after the commission of the offences, but he had been able to tell his colleague (PW2) on the same date. He further contended that PW2 when testifying his evidence averred that the story of torture and sodomy of the Victim, he did not get it from PW1 but from a street news and after lapse of three days.

Therefore, the evidence of PW1 was contradictory by itself with that of PW2 on the existence of the alleged offences. Thus, PW2's evidence is not corroborative to PW1's evidence.

With the evidence of PW3 allegedly to be corroborated with the testimony of PW1 is hard to the facts of the case. Mr Masige submitted that PW3 in his testimony said that 1st respondent confessed before him. At page 22 of the typed proceedings of the trial Cout, PW3 denied knowing the Victim. Therefore, that caution statements of the 1st respondent did not corroborate the PW1's evidence.

He further added that the said caution statement was repudiated, nowhere in the said cautioned statements the respondents seem to have admitted as alleged.

It is trite law that, where the cautioned statements are repudiated, courts are supposed to find evidence corroborating the repudiated cautioned statements. He referred the case of **Dotto @Lukubaniga versus Republic (2016) TLS 388.**

Mr Masige also added that, apart from notable contradiction, the prosecution alleged that what PW1 testified is corroborated by the testimony of PW5.

During the trial, PW1 testified that he went to hospital on 14/2/2022, but the PW5 testified that he examined PW1 on 15 /2/2022. Therefore, there is contradiction between the evidence of PW1 and evidence of PW5. Therefore, there is no credible prosecution witness can

be relied upon on the instance that based on the strength of lapse of time after the commission of the offences and subsequent reporting. The medical reports cannot and in fact did not suggest the sodomy act as contended. He referred the case of **Daudi Antony Mzuka versus Republic, Criminal Appeal No.297 of 2021 CAT** to the effect.

Mr. Masige also averred that, PW1's evidence is not reliable if what alleged done was actually done. For failure of PW1 to report timely the incidence, testified that he fell unconscious, was a new information and is an afterthought. If the assertion is true, then PW1 would have reacted by taking him to hospital. To fortify the same, he cited the case of **Issa Juma Idrissa And Another versus Republic (2020) TLR 366 .**

Mr Masige concluded that, PW1's evidence was not a truthful and reliable witness in the circumstances of the given facts. And therefore the prosecution's evidence did not establish the charge against the respondents as required by the law.

However, Mr. Masige argued that, if all alleged that on all what happened, the victim was also recording the whole event at the scene of crime, and the three phones were recovered. When all the said cell phones were taken for scrutiny at Forensic Bureau. The returned CD was admitted as exhibit P8. The forensic report established that among the names in

the said cell phones was Nestory Makoye and not Daniel Ngassa or his wife. There was no testimony /witness from forensic Bureu to establish the findings neither the said CD was played.

Mr. Masige submitted that, the inconsistence transpired affect the root of the case. He referred the case of **Emmanuel Kabelele versus Republic, Criminal Appeal No.536 of 2017**,failure to call material witnesses in a proof of the case render the prosecution's case weaken. Similarly, failure to play the alleged CD, reasonably shakes the prosecution's case. He referred the **case of Awadhi Gaitan @Mbowe versus Republic, Criminal Appeal No.288 of 2017.**

Based on his submission Mr Masige, contended that the respondents did not commit the alleged offences and the 1st Respondent was not at scene.

Lastly, Mr Masige submitted that, the chain of custody was not observed for an offence of destruction of properties as the alleged exhibit was not put into process as alleged.

Where the charge alleges PW1 phone was TECNO POP 2, the victim alleged to be TECNO PAVOUR 3.

Mr. Masige concluded that from the established facts above, the trial Court was properly justified in its findings and therefore its verdict be upheld by this Court.

In rejoinder, Ms. Rehema reiterated what she submitted in chief. She added that the prosecution case was proved beyond reasonable doubts and the respondents ought to be convicted.

On the delay to report the incidence at police, for sure it was inhuman act and a degrading one. Thus, that delay of reporting does not suggest that the victim was not humiliated, but in the circumstances of the case, he was justified to do so.

Ms. Rehema admitted that there is a difference of reporting dates to hospital, and there is difference of description phones. However, Ms Rehema argued that the discrepancies are minor and thus do not affect the root of the case. To fortify her argument, she referred the case of **Ali Mwinyi Mkuu @ Babu Saya versus Republic, Criminal Appeal No.499 of 2017.**

Ms. Rehema resisted the argument raised by the Respondents' counsel that the 1st respondent was not at scene. She argued that the argument is afterthought and ought not to be relied.

Having heard both parties, I have now to determine the appeal and the issue to be considered is whether this appeal has been brought with sufficient cause.

However as argued by both parties, this appeal is centred on the evidence transpired before the trial Court.

I have done my thorough findings based on the trial Court's records, and the submission of the parties and herein are my observations.

The respondents were charged with four counts; Armed robbery, malicious damage of property, conspiracy to damage reputation of the victim and against the 1st respondent, unnatural offence.

Now, in determining this appeal it will be prudent and important to look for the ingredients of the offences alleged to be committed in relation to evidence before the trial Court.

It is on records that the respondents were charged with armed robbery. The ingredients of the offence of armed robbery were stated in the case of **Fikiri Joseph Pantaleo @Ustadhi v. R, Criminal Appeal No. 323 of 2015** (unreported) in which it was stated:

" I agree with Ms Mdegela the learned State Attorney over her doubts whether the element of stealing in the offence of armed

robbery was proved at all. For purposes of Instant appeal, the main elements constituting offence of armed robbery section 287A are first stealing. The second element is using firearm to threaten in order to facilitate the stealing ..."

Subsequently in **Yosiala Nicolaus Marwa and Others v. Republic, Criminal Appeal No. 193 of 2016** (unreported) the Court of Appeal held that:

"...an Important element of the offence of armed robbery is indeed the use of force against victim for the purposes of stealing or retaining the property after stealing the same."

Being guided by the above authorities, I will respond to the question whether the above ingredients of armed robbery were proved in the present case. To prove the above ingredients the prosecution paraded six (6) witnesses and tendered 15 exhibits.

In the present appeal, the respondents contended that the prosecution had weak evidence to prove the offence. They alleged that there was no proof of alleged stealing and commission of the offence, there was no exhibits of money alleged to be stolen from the victim (asportation).

However, it was averred that on the incidence the caution statements of the respondents were repudiated and nowhere respondents

confessed to have stolen monies from the victim therefore the offence was not proved.

From the trial court records, it is true that the respondents were arraigned amongst others with the offence of armed robbery, whereby it is alleged that during evening hours, the respondents stole Tshs 100,000/= from the PW1 and the respondents used intimidation and weapons to procure the same.

However, in course of reading the evidences enclosed and the principle enshrined in the law, I have found none of evidence incriminating the respondents with the offence of armed robbery. PW6 testified that, she was among the police officers who searched the respondents' home place and wrote exhibit P6. P6 did not contain the item of the alleged stolen money. **See Fikiri Joseph Pantaleo case (supra).**

Meanwhile, there is no evidence to prove as to whether the offence was really committed. The PW1 alleged that the offence was committed during evening hours, PW2, Pw3, PW4 and PW6 testified hearsay evidence as they delivered story narrated by the PW1 or heard from other persons. It should be noted that hearsay evidence is not admissible see Section 62 of the Evidence Act Cap 6 RE 2022.

Further, prosecution evidence relied upon cautioned statements of the respondents which are exhibits P10 and P 15, on the incidence that, the respondents admitted to have committed the offence against the victim.

Looking at Exhibits P10 and P15, I have found the same were improperly recorded and thus has legal encumbrances.

Exhibits P10 and P15 have no certification clause as required by the law. And therefore, cannot be relied upon as they are bad in law. I found them to be not in compliance with sections **57 (4)(e) and section 58 (6) (a) (b) of the Criminal Procedure Cap 20 RE 2022,** which provides for requirements of certification by the accused. The said cautioned statement was not certified by the accused person as required by the law and thus it is fatal to rely on such evidence.

In the case of **Juma Omary versus Republic, Criminal Appeal No 568 of 2020 (CAT),** the Court of Appeal held that certification has a purpose of authenticating the truth of what the police had recorded and therefore, failure to do so or doing so under non-existent law, would render the same as if no certification was made at all.

In the case of **Mereji Lugori versus Republic, Criminal Appeal No 273 of 2011 (CAT),** it was held that

" Failure to comply with section 57(3) of the CPA had the effect of affecting a fair trial of the appellant since the authenticity of the appellant's cautioned statement remains uncertain, and subsequently expunged the appellant's cautioned statement from the record"

Having observed the same, I also proceed to expunge exhibits P10 and P15 from Court records. Having expunged them, the prosecution evidence remains with the evidence of assertion that the respondents used panga and intimidated the victim and in facts they tortured the victim.

Upon looking at exhibit P11, which is certificate of seizure of the alleged weapons used by the respondents in torturing and intimidating the victim and ultimately stolen his money. Such Exhibit P11 purported to filled by the OCS, who is PW4.

When looking at testimony of PW4 testified that, he received information about the commission of the offence and thus other police officers went to respondents' homeplace and conducted search and arrested the respondents.

" on 15/02/2022... I was at my working place whereby police officers did bring a suspect namely Charles Zacharia. He came with his wife,..... he was inspected and found with three phones .....I filed as I did sign it"

From the extract of evidence, PW4 told nothing about the alleged weapons whom he signed exhibit P11. And thus, he admitted that during the arrest and search he was not present instead there was other police officers.

It is my formed view that, exhibit P11 is not reliable and the search conducted to the respondents' home place was illegal as the police officers conducted without search order as required by the law. See Section 38(1) of the criminal Procedure Act Cap 20 R: E 2022. However, I found PW4 testifying hearsay evidence and therefore exhibits P11 is also expunged from trial court records.

Therefore, in the absence of weapons, and reliable witnesses to prove intimidation, asportation of money and threaten of the victim, I must conclude that the offence of armed robbery was not proved.

With the offence of malicious damage to property, I have gone through the trial court's records and these are my findings thereto.

PW1, testified that when he was at respondents' home place, the 1st respondent ordered the PW1 to remove everything which he had. He removed his mobile phone TECNO POP 2 PLUS valued at Tshs 200,000/= The 1st respondent destroyed the victim's phone by throwing it down and destroyed it by using panga and iron bar.

PW6, testified that PW1 came with a destroyed mobile phone make TECNO POP 2 PLUS, whereby PW6 took it and filed a seizure note which exhibit P6.

In my considered view exhibit P7 which is the alleged destroyed phone, was not procedurally seized. In the absence of chain custody of the property seized then such exhibits lack reliability to prove its origin. PW6 after had seized Exhibit P7, she was the supposed to fille chain of custody.

The rationale of chain custody when comes to exhibits was explained in the case of **Chacha Jeremiah Murimi and 3 Others versus Republic, Criminal Appeal No.551 of 2015,** where the court held that chain of custody when comes to exhibits is very important to prove origin and custody of the exhibits up to the time such exhibits are taken to Court. The aim is to prove that such exhibit was not tempered anyhow.

Another upshot, is contradiction of different versions by two witnesses, PW1 and PW6. PW1 testified that he reported the incidence at Maswa police station on 14 /2/2022 and is where he tendered the Exhibit P7 to PW6.

Prior PW1 stated that when he was at respondents' home place, he was ordered to remove everything of which he obeyed. PW6 alluded that, PW1 reported the matter at police station on 15/2/2022, he went with his phone which was destroyed and PW6 received it and recorded Exhibit P6 which is certificate of seizure.

In the case of **Chacha Jeremiah Mrimi (supra),** it was also held that, certificate of seizure should also include the time when was it recorded. Exhibit P6 has no time and it was made by a person without authority. see section 38 (1) of the Criminal Procedure Act (supra).

As observed herein above, in the absence of chain custody, different versions of reporting the incidence to police station by PW1 And PW6, and irregular procedures undertaken, there is no sufficient evidence to prove the offence of malicious damage of the property.

However, it is confusing, whether PW1 left all his properties to the respondents' home place as he alleged or later, he was given some of the properties.

Furthermore, in the course of perusing the trial court's records, I discovered that the respondents were charged under wrong provision of the law. The charge against the respondents' specifically to offence of

malicious damage to property was coached under section 326(2(a) of the Penal Code Cap 16 Re 2019. Such section provides that;

> *326 (2) Where the property in question is a dwelling house or a vessel, and the injury is caused by the explosion of any explosive substance, and if- (a) any person is in the dwelling house or vessel;... the offender is liable to imprisonment for life.*

In my view the intention was to charge the respondents with the offence of malicious damage to property as particulars of the offence suggest. Then the proper section was supposed to be 326 (1) of the Penal Code (supra). Therefore, the charge against the respondents was defective so speaking. Lastly the evidence mentions the 1st respondent. Nowhere the 2nd respondent is mentioned involving in destroying the alleged phone. Then how the 2nd respondent was charged with that offence.

I must therefore conclude that, the offence of malicious damage to property was not proved as required by the law.

Regarding to the third count which is unnatural offence, alleged to be committed by the 1st respondent.

I have gone through the findings and the trial court's records, and my response to the effect are as follows;

It was submitted by the appellant's counsel that, the 1st respondent after had humiliated the victim, he applied oil to the victim buttock and his anus and then he went against his order of nature. He also averred that the incidence was proved by the PW1 the victim himself and PW5 the medical doctor who examined the victim.

Ms Rehema also added that in sexual offences always the best evidence comes from the victim himself /herself. The preposition which was opposed by the respondents' counsel.

It is trite law that, any person who have carnal knowledge against the order of nature commits the offence and is punishable under the law. See section 154 (1)(a) of the Penal Code.

In the case at hand, the PW1 alleged to have been sodomized by the 1st respondent. He reported the matter to police station and later he was treated, similarly evidence was adduced by PW5 but in different version.

My reasons pursuant to the alleged offence, is the manner of the commission of the offence, reporting time of the offence and discrepancies of dates of receiving treatment.

PW1, alleged that, the acts were done on 11/2/2022 at the respondents' home place. He reported the matter to police station on 14/2/2022, and he went to hospital on 15/2/2022.

PW4, PW6 verified that, the PW1 reported the matter at police station on 15/2/2022 and he was availed with PF3 where he went and get treatment.

Exhibit P5 which is medical report, bears different dates; the date of 15/2/2022 and 17/2/2022, and such exhibit was signed by PW5 medical doctor on 17/2/2022. But according to PW5 testified to have examined the PW1 on 15/2/2022 and he filled up Exhibit P5 on that day.

As enshrined herein, my settled view is that, the offence of being sodomized sometimes needs proof of medical expert. Despite the fact that in sexual offences the best evidence comes form the victim, but the same is best complimented where there is medical evidence to prove the same. Therefore, corroboration of other independent evidence is sometimes of paramount importance where the act involves an adult and there is dispute on its act. In essence I am aware that a proof of a sexual act/offence is not reliant on medical report, because the thrust of penis of the doer is only known by the victim. All in all, a proof of any criminal

act as it is on other facts, is a question of proof. It being a criminal offence, it needed proof beyond reasonable doubt.

Now, based on the trial court's records, I am inclined to conclude that, unnatural offence was not proved as required by the law. The prosecution evidence was not certain at what exactly dates was the victim treated. PW5 who is a medical doctor testified to have treated the Pw1 on 15/2/2022, while exhibits P5 provides other dates for examination of the victim which is 17/2/2022. This brings doubts to a testimony of PW5 and Exhibit P5 and thus cannot be relied.

The disappearances of dates by witnesses and exhibits, and delay to report the serious offence like this are not minor issue as it touches to the root of the case and therefore cannot be ignored. **See the case of: Adolf Chacha versus Republic, Criminal Appeal No.106 of 2022.**

However, it is the principle of the law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent reasons for not believing the witness as per the case ***of: Goodluck Kyando Vs R (2006) TLR 363.***

According to ***Mathias Bundala Versus Republic, Criminal appeal No 62 of 2004*** and ***Aloyce Maridadi Versus Republic, criminal Appeal No.208 of 2016*** (both unreported), good reasons for

not believing a witness includes where the witness gives improbable or implausible evidence or where the evidence of the witnesses materially contradicts the evidence of another or of other witnesses

With the offence of conspiracy to damage reputation of a person, I have noted the following;

As alluded earlier that, then acts by the respondents aimed to damage the reputation of the victim. The respondents humiliated and tortured the victim to the extent of inhumanity. And so, the acts were degrading to a human being.

The argument which was opposed on the facts that there was no evidence of the commission of the alleged offence.

PW1 testified that he was tortured and sodomized, and all that done were degrading and inhumanity acts. PW2, PW3, PW4, PW4, PW5 and PW6 testified hearsay evidence as they only narrated what happened by being told by a victim and other people. In other words, there is no direct evidence to prove the offence.

However, PW1 alleged that when all evil acts were done, the PW1 was recording. But in turn the CD (exhibit P 9) which was alleged to be records of the alleged acts and tendered before the trial Court did not

play. This was the only evidence to prove the degrading acts purported to be done by the respondents.

Meanwhile, it was alleged that PW1 and PW2 were chatting each other, and thus PW1 went to 2nd respondent to take her to town but when reached there the 1st respondent rocked the door and started to humiliate him.

In the course of analysis, I find none of printing of sms between the two, which could ultimately prove the conspiracy of the commission of the offence by the respondents, as alleged by PW1 that the source was sms received from the 2nd respondent who instructed him to go and pick her and when reached there he encountered such humiliation.

However, I have noted that exhibit P1 which is certificate of seizure of phones which used in exchange of sms between the 2nd respondent and PW1 and that used in recording was irregular admitted. There was no search order as required under Section 38 (1) of The Criminal Procedures Act (supra). As alluded when arguing issue No.1, that PW4 confessed to have found the respondents while is at his working station. He was informed about the presence of the respondents and the alleged commission of the offence by his subordinate staff. And therefore he did not went to scene of event. But exhibit P1 appears to be signed by PW4

who was not present to the scene and so was done contrary to the law, the same cannot be relied upon.

In my conclusive view, there is no proof of evidence in regards to commission of the offence of conspiracy to damage reputation of the victim. Though it is true that someone's wife is not a good stuff to trade with, if the victim's story and complaint is truthful, but for lack of concrete evidence, it remains a price of the stuff he chose.

With all these observations, I must conclude that this appeal has been brought without sufficient cause and consequently is hereby dismissed.

Right to further appeal is explained.

It so ordered.

DATED at SHINYANGA this 11th day of September, 2023.

F.H. MAHIMBALI
JUDGE