IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 144 OF 2022

[Arising from Criminal Case No. 02 of 2020 at the District Court of Arusha at Arusha]

GERALD S/O EFATA _____ **APPELLANT**

versus

REPUBLIC _____ **RESPONDENT**

JUDGMENT

10/07/2023 & 08/09/2023

BADE, J.

The appellant herein was arraigned at the District Court of Arusha at Arusha on the charge of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code (Cap 16, R.E 2019). After a full hearing, the trial Court found him guilty and sentenced him to life imprisonment.

Aggrieved by the aforesaid conviction and sentence, he lodged this appeal on the following grounds:

i. That, the trial court erred in law and in fact in convicting the appellant without proof of the offence against him beyond all reasonable doubt as required by the law.

ii. That, the trial magistrate erred both in law and in fact in convicting the appellant without proper evaluation of the evidence.

Before going to the merit of this appeal, we will briefly review the contextual background. It was the prosecution's case that on an unknown date in January 2021 at the Kimandolu area within the District and Region of Arusha, the appellant did have carnal knowledge against the order of nature with one "TJ" (the name withheld), for the purposes of concealing his identity, a boy of thirteen (13) years old. The charge was read over and explained to the accused person in his own words and entered the plea of not guilty to the charge.

During the hearing, the prosecution had a total of three witnesses while on the defense side, the accused person had two witnesses. Agness Daniel, (PW1) who is TJ's mother, her testimony was to the effect that on 18/02/2021 she returned home and found her son unhappy; she asked him what the matter was, and he replied that he had a stomach ache. That the next day there was some discharge coming from TJ's

anus, she checked him and found some liquid on his anus. She further testified that the next day TJ went to the toilet and had difficulty in easing himself, she checked on him and found a part of his flesh coming from his anus. She further testified that she asked him why his anus is coming out, and he replied that he was afraid the appellant will kill him. She asked him the same question again and he replied that the appellant undressed his pants and put his penis into his anus. She went to report to the police and then they went to the hospital.

On the other hand, TJ (PW2) testified that in January 2021 he went to the appellant's house to watch TV. After finishing watching TV around 17:00 hrs, he saw that the appellant closed the door, and held his hand forcibly while shutting his mouth. He undressed his pants and then undressed his own pants while still shutting his mouth using one hand. He stretched his legs and then puts his penis into his anus. TJ further testified that after he was done, he made him bend, then he put his penis into his anus again, twice, and then he pushes him onto the bed. He came on top of him and shut his mouth to the extent that he could not breathe. TJ further testified that the appellant stretched his legs again and put his penis into his anus twice.

After he was done, he told him to go away and threatened him that if he told his relatives or his mother, he would kill him and they would find him dead "migombani". He went home, finding it difficult to walk as he was in pain nor could he sit properly. It was also his testimony that, when he goes to the toilet, he could not ease himself well as piles were coming out of his anus, and he kept feeling like he needed to fart all the time, and when he does, some fluid was coming out of his anus. His mother discovered his problems after some time, about two days or so before he started falling sick when his mother realized that something was not well with him. At this time, he only told his mother that he had a stomach ache, for which she brought some medicine for him, until 18/02/2022 when she discovered that he was sodomized and reported the matter to the Police.

Dr. Elibariki Samson Kaluwa a Medical Doctor, testified as PW3, relating that on 21/02/2021 he attended a victim who was alleged to have been sodomized, a boy of 13 years old. That when he examined the victim, he found out that his sphincter muscles were loose, presenting with old and new bruises on the anus. That many bruises were on the twelve-o'clock area on the upper side of the anus. He further testified that there was a prolonged penetration of a blunt object which could be a finger or penis.

On the defense side, the appellant testified as DW1, his testimony was to the effect that the case was framed against him since TJ's mother has a conflict with their family and she once told his mother that she will show him and when they came to arrest him at his workplace, she told him that she will imprison him since his mother thinks she is beautiful.

Flora Efata (DW2) who is the appellant's mother testified that the appellant used to go to work in the morning and come back at 9 p.m. and he does not stay at home. They were told that he sodomized the victim on an unknown date of January 2021. After his arrest, TJ's mother came to her house and told her that she would imprison his son and if she failed, she would kill him.

On the other hand, Irene Oscar (DW3) testified that it was said that the crime was committed at their house in the sitting room. From January to February 2021 she was at home all the time as she was recuperating from injuries that she had previously suffered. While it is said that the crime was committed in the living room of their house, she and the children were sleeping in the living room and the appellant who is her young brother would sleep in his brother's room. She further testified that it was not true that the appellant committed the alleged offence, she was home until he was arrested at his workplace. Moreover, she

alleges that TJ's mother had a conflict with her own mother, and She once said she was going to fix their mother or them. On the date when the accused was arrested, she said that if the court would not incarcerate him, then she would kill him.

This appeal was argued by way of oral submissions, the prosecution was represented by Mr. Mbagwa, learned state attorney, and the appellant was represented. By Mr. John Mseu, learned advocate. The counsel for the appellant submitted both grounds of appeal jointly. He argues that there was no direct evidence connecting the Appellant to the alleged offense with which he was charged maintaining that the evidence of PW1 was hearsay. Elaborating further, he explained that the testimony was only related to her from the information that PW1 received from PW2, the victim. He referred this Court to pages 8-13 of the trial court proceedings. It is the appellant counsel's contention that PW1 could neither ascertain when exactly the incident happened nor did she witness it. PW2 testified that the incident happened in January 2021 on pages 14-17 of the trial court proceedings when she went to watch TV at his house. She testified that they were just the two of them in the house. In his view, PW2 was not credible since while he said the incident happened in January, he reported the incident on 18/02/2021.

Moreover, the counsel for the appellant submitted that PW3 the doctor who prepared the medical examination report dated 21/02/2021, the report did not show that it was about him. It only stated the condition of PW2, the victim, but there was no evidence connecting the report to the appellant. He referred to this court on pages 24-25 of the trial court proceedings. That the evidence was not enough to convict him. To support his position, he cited the case of **Maliki George Ngendakumana vs R, Criminal Appeal No. 353 of 2014** page 6 where the Court of Appeal stated that:

> *"The principal of law is that in criminal cases the duty of the prosecution is twofold. One, to prove that the offence was committed, and two, that the accused person is the one who committed it".*

Counsel for the appellant further contended that exhibit P2 showed that the victim was known against the order of nature, but the report did not show who knew him as such. That he was not medically examined to establish if he had been involved in the incident regarding PW2 other than the fact that the victim himself made a claim that he was sodomized by him. There is not any other evidence on record to show that it is he who committed the alleged offence. He further contended

that neither was the specific day or date that the incident happened, it was only referred to as January. That there was no evidence to show that he was at the place of the incident on that particular date, and neither was there any item that was found with him that would connect him with the victim of the offence. He added that the trial court did not do a proper evaluation of the evidence making his conviction unlawful.

The appellant's counsel insisted that the fact that a victim alleged that the incident occurred in January 2021 and kept quiet until February 18, 2021, without notifying anybody at all makes her not credible and raises doubts, bearing in mind that PW2 and the appellant were neighbors. Counsel for the appellant further contended that the trial magistrate did not consider the testimony of the mother of the victim and appellant's own mother which caused the victim to be persuaded to lie and make up stories against him, with the aim of framing him up. He referred this Court to page 27 of the trial court proceedings.

Also, he alludes to the fact that there is no evidence showing who apprehended him, neither was there any police officer who testified that they apprehended the appellant nor was there any evidence by the investigator. He insisted that had the trial magistrate analyzed properly

the evidence before it, he would not have convicted the appellant as the evidence had so many doubts to stand a conviction.

In opposing the appeal, Mr. Mbagwa contended that the prosecution was able to prove its case. It is his contention that in offences relating to rape and sodomy the best evidence is that of the victim, PW2 as a victim explained the incident properly and had pointed the appellant as the perpetrator. He explained the incident that had happened during the day, and they were actually neighbors. To cement his position, he cited the case of **Selemani Makumba vs R, (2006) TLR 379** where the court stated the principle that in sexual offences, the best evidence is that of the victim. That PW2 was a child of a tender age, and thus his evidence was enough to convict the appellant under section 127 (6) of the Tanzania Evidence Act. He insisted that the prosecution case was proved beyond a reasonable doubt.

Mr. Mbagwa further argues that variation in the particulars of the dates of the incident is not strong enough to float the prosecution's case. That the victim who was 13 years old could remember the month as January but could not remember the date and that was a human error, particularly since the victim was a child. He added that so long as he could remember and point out the appellant it was enough to hold a

conviction of the appellant. To buttress his position, he cited the case of **Goodluck Kyando vs R, (2006) TLR 367** where it is stated that all witnesses are entitled to credence, and their testimony be accepted unless there are cogent reasons for not believing the witness. That the evidence of PW2 was the principal evidence that the court used to convict the appellant.

Moreover, the learned state attorney submitted that the issue of lapse of time between reporting the incident and the actual happening of the incident was due to the fact that the victim could not report any earlier since the appellant had threatened to kill him if he told on him and the person who made him tell was his mother after interrogating him. In his view, there was a good reason for the victim not to report on the incident as soon as it happened.

On the issue of there not being a police officer who apprehended the appellant, he argues that this ground is baseless because the evidence on the apprehension of the appellant is not feasible in the case against the appellant. To support his position, he cited section 143 of the Tanzania Evidence Act Cap 6 RE 2919 which does not require any particular number of witnesses to be called to prove a fact in existence. He added that the absence of such a witness was not contributing

anything to the matter at hand. He insists that the testimony of PW2 was corroborated by that of PW1 who was the mother and that of PW3 the doctor.

On the allegation that the report which was tendered did not show who committed the offence, he argues that it is normal that the doctor's report will not point out who committed the offence. The fact that there is no evidence saying the victim was sodomized, rather that she was unnaturally known. That, even if there was no doctor's report, the victim's evidence is believed by the court, and that should be enough to convict the appellant of the offence charged.

Regarding the allegations of there being family grudges, he retorted that the trial court records did not confirm the existence of this fact. While the appellant alleged that the victim's mother told the appellant's mother that she would kill the appellant; when cross-examined on this matter on whether he ever reported this matter to the police, he denied having done that, and there was no further evidence to stand this testimony. He concludes that this is an afterthought and could not sway away the facts as they happened.

Last but not least, on the allegation that the trial magistrate did not evaluate evidence, he disagreed with the appellant insisting that the trial

magistrate analyze the evidence, pointed out the issues to be determined after the factual analysis, as well as the reasoning for her said conviction. That the decision was in fact a reasoned judgment complying with section 312 of the Criminal Procedure Act Cap 20 RE 2019, which describes the content of a judgment including there being points for determination, decision, and reasons thereof.

In rejoinder, the appellant's counsel reiterated his submission in chief adding that while he realizes that PW2's evidence is the best evidence, he took issue with his credibility, since he took time to report the incident. He further argues that **Selemani Makumba's case (supra)** is distinguishable as it had different circumstances; as such it does not support Mr. Mbagwa's contention.

The appellant's counsel further argues that in disagreement a child of tender age's evidence is enough to hold a conviction. In his view, the victim's evidence did not meet the criteria put forth by section 127 (6) of the Tanzania Evidence Act, Cap 6 RE 2019. He contends that PW1 and PW2 not knowing the dates when the incident happened shows that they had not been sure of the evidence put forth as there was a considerable time-lapse from when the incident happened. The fact that PW2 is said to recognize the appellant is purely based on the fact that

they were neighbors, strenuously arguing that it is not necessarily based on the point that it is the appellant who did this offence. In his view, the case of **Goodluck Kyando (supra)** is also distinguishable because, under the case at hand, there was a cogent reason for the court to disbelieve PW2. He further alleges that PW2 did not testify that she was in fact threatened to be killed, and thus the court should not accord any weight to such evidence. On the other hand, the fact that the apprehension of the appellant had not been testified upon prejudiced the appellant, and the issue of family dispute is not an afterthought. In finalizing his submission, he prayed for this appeal to be allowed.

Having gone through the lower court records and the rival submission by the parties, the task before me is to determine, **one,** whether there was proper evaluation of evidence and **two** whether the prosecution proved the case against the appellant beyond a reasonable doubt.

On the first issue, it is argued by the appellant's counsel that the trial magistrate did not properly evaluate the evidence, especially by not considering his allegation that there was a family dispute between his own mother and the victim's mother. Going through the trial court record, I did find out that the trial magistrate evaluated the evidence

before it properly and in detail. She also considered the evidence of the defense side, rejecting the allegation of grudges based on the family conflict as the same has not been reported anywhere. In my view, the trial magistrate was right in rejecting the allegation that there was a family conflict between the appellant's mother and the victim's mother. It is on record that DW2 who is the appellant's mother while being examined in chief, did not testify to the fact that she had any conflict with the victim's mother before the incident. The allegation by DW2 in her testimony that the victim's mother told the appellant that she would imprison her son or if she failed, she would kill him, if indeed that conversation happened, then according to the testimony of DW3, it happened after the arrest of the appellant, and in my view, this cannot be referred as a pre-existing conflict pointing to holding grudges, but rather an outburst of an angry mother after she knew that her son was sodomized by the appellant. Having said so the allegation that the trial magistrate did not evaluate this piece of evidence properly is baseless.

Now deliberating the second issue on the allegation that the prosecution failed to prove the case against the appellant beyond reasonable doubt.

In the case of **Hassan Singa @ Ng'ombe vs The Republic,** Criminal Appeal No. 57 of 2022 CAT at Dar es salaam, it was held that:

"It *is an elementary position of law that in Criminal cases, the burden to prove the allegation beyond reasonable doubts is on the prosecution".*

It is the appellant counsel's contention that there was not enough evidence to support the appellant's conviction, as there is no direct evidence that links him to the crime due to the fact that the whole of the prosecution's evidence is hearsay and there was no evidence on who apprehended him; and that the prosecution did not call an investigator of the case. I find this allegation unmerited as the evidence of the victim was corroborated with the evidence PW3, a medical doctor who testified that after performing a medical examination of the victim he found out that his sphincter muscles were loose, he had old and new bruises on the anus and there was a penetration of a long time by a blunt object such as a penis or a finger.

On the allegation that the evidence of PW1 was hearsay, with due respect to the appellant's counsel, I think the very nature of evidence in sexual offenses is hearsay, that is why on numerous times, the court has held that the best evidence in sexual offenses comes from the victim of the offense. In the case of **Hamis Halfan Dauda vs The Republic,**

Criminal Appeal No. 231 of 2009 the Court of Appeal sitting in Dar es Salaam held:

> *"We are alive however to the settled position of the law that, the best evidence in sexual offences comes from the victim".*

It is on the record that the victim explained in detail and clearly how the appellant sodomized him. This shows that he was credible. The Court of Appeal in the case of **Wambura Kiginga vs Republic,** Criminal Appeal No. 301 of 2018, [2022] TZCA 283 in the circumstances where the appellant complained that he could not have raped the victim from January to October 2016 as per the charge sheet without such child reporting to anybody, contending that the case against him was cooked up and that the witness is not credible held while dismissing this ground of complaint:

> ".... with the issue of credibility of witnesses with emphasis of that of PW1, the victim. To do that we will be guided by three principles which are now deep-rooted in our courts such that it has since become part and parcel of our jurisprudence.
>
> **One**, that the best court for assessing credibility is the trial court and that this Court can rarely interfere with concurrent findings of two lower courts on an issue of credibility. The rationale is that the

second appellate court does not have the advantage that the trial court enjoys, that of seeing, hearing, and assessing the demeanor of witnesses. On this principle see this Court's decision in **Seif Mohamed E. L. Abadan vs R**, Criminal Appeal No. 320 of 2009; **Aloyce Maridadi vs R,** Criminal Appeal No. 208 of 2016 and **Ayubu Andimile @ Mwakipesile vs R,** Criminal Appeal No. 503 of 2017 (all unreported), among many other decisions.

Two, the other principle relevant to us is that, in sexual offences the best evidence is that of the victim, see **Selemani Makumba vs R,** [2006] T.L.R. 379 in line with section 127(6) of the Evidence Act and;

Three that every witness is entitled to credence and belief to his evidence unless there are good and cogent reasons to hold otherwise.

On the other hand, it was also the appellant's contention that the prosecution's evidence had a lot of doubts incidental to the fact that one, the victim took so long to report the incident; two, the medical report did not implicate the appellant other than detailing the condition of the victim, and thus failing the test of connecting the appellant to the committed offence as the said report did not state who knew the victim

against the order of nature; three, the appellant was not medically examined to establish if he had been involved in the commission of the said offence against the victim; four, there was no specific date of the commission of the offence, it is only speculatively stated that the offence was committed in January; and lastly there was no item that was found which connects him with the alleged crime committed.

Regarding the first allegation, going through the prosecution's evidence at page 15 of the trial court typed proceedings, PW2 who is the victim testified that after the appellant sodomized him, he threatened him that if he disclosed the incident to his relatives or his mother, he would kill him, they will find his dead body "migombani". If the appellant threatened to kill the victim, I think it is a justified reason for the victim to keep silent for such long, bearing in mind that he was a child of tender age. In the case of **Ally Mussa @ Katambo vs Republic,** Criminal Appeal No. 505 of 2021 The Court of Appeal sitting in Mtwara where, upon satisfying his sexual desire, the appellant threatened to kill the victim if he revealed the ordeal, the court reasoned:

> *"..... that threat could be the reason the victim reported him late in July, 2018".*

So, the delay by the victim to report the incident until his mother discovers it is quite justifiable. In any case, it is a misconception to maintain that victims of sex offences such as this one should report rape or sexual offences immediately, and those who delay the disclosure might be falsely recalling sexual offences against them. The truth of the matter is that an incidence such as this one is first and foremost a traumatic event on the victim, be it an adult or a child. On the other hand, offenders will often use coercive control and a grooming process where they manipulate the victim into thinking that there will be negative consequences if they disclose the abuse (PW2 here testifies that the appellant threatened to kill him and that they will find his body "Migombani"); and sometimes to even make the victim think they are responsible for it or have consented to the abuse, and thus feeling a sense of shame. I am thus not convinced that the late reporting of the incident is casting doubt on the prosecution's case by making the first-hand account of the victim of the offence less credible.

Coming to the allegation that the medical report did not indicate the appellant as the perpetrator of the crime, or mention who exactly knew the victim against the order of nature, with due respect to the appellant's counsel, the medical report serves the purpose of reporting

the condition of the victim as was presented to the clinical observation and examining, it does not make a finding, on its own, or record who is the perpetrator of the crime. This contention is without any merit.

Similarly, I find without merit the allegation that there was no medical examination done on the appellant to establish if he committed the crime since there is no such legal requirement that the perpetrator of the sexual offence crime should undergo a medical examination to establish whether he committed the crime or not. In my view, I assume that typically, the counsel for the appellant is pushing for forensic medical evidence to prove that rape or sexual offence took place knowing very well they will not find any because the incident occurred some time ago. In my considered view, even if there was put in evidence some forensic report, which could have been taken off the scene of the crime immediately after the happening of the sexual offence, it would have only shown that some sexual activity took place, without necessarily proving the vital factor in determining whether there was the commission of a crime - that the act took place, done to a minor or a non consenting adult.

Turning to the contention that there was no specific date pinpointed for the commission of this crime and that it was only stated that the offence was committed in January, this argument is also without any basis, failure by the prosecution to mention with specificity the date of the commission of the sexual offence is not fatal if the victim remembers the details of the offence as it happened to him including the month on which crime was committed against him.

The counsel for the appellant also alleges that they did not find the appellant with any item which connected him to the crime, this is a baseless argument as according to the nature of the offence that the appellant was facing, the only item that can be used to commit the said crime is his penis used in a certain way, and the evidence needed in sexual offences solely rely on a first-hand account of the incidence by the victim.

Having said so this appeal is dismissed for lack of merit.

It is so ordered.

DATED at **ARUSHA** on the **08** of **September 2023**.

A.Z. BADE
JUDGE
08/09/2023

Judgment Delivered in chambers on **08 September, 2023** before counsel for the Applicants; and Respondents appearing in person. The Right of Appeal is explained.

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
08/09/2023