IN THE HIGH COURT OF THE UITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

CRIMINAL APPEAL NO. 02 OF 2023

(Originating from Criminal Case No. 124 of 2021 of the Court of the Resident Magistrate of Tanga at Tanga)

MOHAMED HASHIMU @ ADAD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last order: 18/08/2023
Date of Judgment: 28/08/2023

MANYANDA, J.

The Appellant, Mohamed Hashimu @ Adad, is aggrieved by the judgment of the Court of the Resident Magistrate of Tanga, hereafter referred to as "the trial court" dated 29/11/2022 in Criminal Case No. 124 of 2021. In the trial court, the Appellant was tried and convicted with an offence of unnatural offence, contrary to section 154(1)(a) and (2) of the Penal Code, [Cap. 16 R. E. 2022] and sentenced to serve thirty (30) years imprisonment.

He has appealed to this Court armed with four grounds namely: -

1. *That the learned trial magistrate erred in law and facts by acting upon hearsay evidence of the prosecution witnesses;*
2. *That the learned trial magistrate erred in law and facts by acting upon unreliable, contradictory and doubtful evidence of PW2,*
3. *That the learned trial magistrate erred in law and facts by failing to notice that the medical evidence did not support the allegations of PW2; and*
4. *That, the prosecution case was not proved beyond reasonable doubts.*

Then, the Appellant engaged an Advocate who drafted and filed an amended petition of appeal, it bears six grounds of appeal namely: -

1. *That the trial magistrate erred in law and facts in convicting the accused person based on the improper identification of the accused person;*
2. *That the trial magistrate erred in law and facts in convicting the accused person based on contradictory oral and documentary evidence of PW5, a medical doctor;*
3. *That the trial magistrate erred in law and facts in convicting the accused person based on untrue evidence of PW2, the victim;*

4. *The trial magistrate erred in law and fact in convicting the accused person by adding evidence in her judgment which had never been given by any prosecution witness;*
5. *That the trial magistrate erred in law and facts by failure to evaluate properly the issue raised against evidence of both parties in her judgment resulting in convicting the appellant; and*
6. *That the trial magistrate erred in law and facts by convicting the Appellant herein while the prosecution failed to prove their case beyond reasonable doubts.*

Let me narrate the facts of this case albeit briefly. It was alleged in the particulars of offence that in the month of June 2021 at Donge – Kiboi area within the District and Region of Tanga, the Appellant had carnal knowledge against the order of nature to a boy of 11 years old whose name, in order to protect his identity is withheld, and he will, for that purpose, be referred to as "the victim" or simply "PW2". He denied the allegations.

The prosecution summoned a total of five (5) witnesses. PW1, a mother of the victim reported the incident after noticing that her son, PW2 had been ravished against the order of nature. She took him to

police where he got PF3, then to hospital where the victim was medically examined and found that he had some friction in the anal orifice though he didn't find spermatozoa since it was a fourth day from the incident day.

PW2, the victim, stated that on a day he did not recall was sodomized by the Appellant in an unfinished house and was threatened not to tell anyone or else would be killed by the Appellant. That the Appellant used to do the same several times.

On 28/06/2021 the victim is alleged to have coaxed his cousin PW3, a secondary school boy aged 13 years old, to have anal sexual inter course with him, however that move was curtailed by PW3's mother who noticed the two boys acting in an unusual manner. Seeing the situation PW3's mother told PW1, the mother of PW2. It was when PW1 interrogated PW2 who told his mother, PW1, all what happened to him and name the Appellant as a person who used to sodomize him.

PW5, a medical doctor examined PW2 and found the anal orifice sphincter muscles intact save for some friction thereat. PW4 was an investigator of the case.

In his defence, the Appellant denied all the allegations and contended that he had some misunderstanding with one of his fellow motorcyclists commonly known as 'boda boda' businessmen, who used PW1 to implicate him with a crime he didn't commit.

The trial court believed the prosecution's evidence and disbelieved the Appellant's story; hence it convicted him as charged and sentenced him to 30 years imprisonment. As stated above, the Appellant is appealing to this Court.

Hearing of the appeal, with leave of this Court, was conducted by way of written submissions. The parties filed their submissions in time. I will not reproduce their submissions, but I will be making reference to them in the judgment.

The Appellant's Counsel, Mr. Mohamed Kajembe, learned Advocate, argued grounds two, three and four separately, and combine grounds five and six; so, did the learned State Attorney, Rehema Amon Mgeni for the Respondent, I will also determine the grounds in the same sequence.

The compliant in the first ground is that the Appellant was not properly identification by the victim, therefore it was wrong for the trial magistrate to base its conviction on that weak evidence of identification. Mr. Kajembe fronted two arguments, one, that the victim did not mention the Appellant at the earliest opportunity as a person who did the evil act on him. Second, the victim named a person called "Moody" while the Appellant's names are Mohamed Hashimu @ Adad, that, these are two different persons.

Therefore, according to the Counsel, identity was not water tight. He relied on the authorities in the cases of **Hamis Selemani @ Mfarusi vs. Republic,** Criminal Appeal No. 90 of 2021 and **Marwa Wangiti Mwita and Another,** [2002] TLR 39.

The State Attorney maintained that the Appellant was adequately identified by PW2 who mentioned him at the earliest opportunity naming him as "Moody". The State Attorney argued further that PW1 knew the Appellant earlier, hence it was a matter of recognition which is more reliable. She cited the case of **Jumapili Msyete vs. Republic,** Criminal

Appeal No. 110 of 2014 (unreported) where it was held inter alia that recognition is more reliable that identification.

My perusal of the trial court proceedings shows that the said trial court raised two issues, the first was whether PW2 was carnally know against the order of nature and two whether it was the Appellant who carnally knew the victim (PW2). After finding the first issue in affirmative, the trial court went on answering the second issue in affirmative too. It stated at page 8 as follows: -

> *"The victim (PW1) identifies the same person who is subjecting (sic) him to anal intercourse ..... In all occasion (sic) happens (sic) during day time as well accused is a familiar person to him, so cannot mistaken to someone else."*

Earlier, in its judgment, the trial magistrate had said that PW2 identified his assailant as one Moody and it is through that name the Appellant was pursued, arrested, prosecuted and ultimately convicted and sentenced.

The question here is whether a person called "Moody" is the same as Mohamed Hashim @ Adad. The Counsel for the Appellant answered it in negative, the State Attorney did not say a word.

My perusal of the record reveals that the victim named his assailant as "Moody" and described him as a person who used to park his motorcycle near a grocery 'genge' where he used to go and buy various items including bananas. The victim knew his assailant by a name of "Moody" whom he knew by face prior to the incident day. It was that "Moody" who called him and led him into an unfinished house where he had carnal knowledge of him (victim) against the order of nature.

The Appellant was arrested pursuant to that naming and description by the victim. That, one, his name is Moddy, second, he does motorcycle business 'boda boda'. Third, he parks his motor cycle near the grocer 'genge' and, fourth, the Appellant was a neighbor of PW2.

I have gone through the defence, and found that basically the Appellant admitted all the facts used by the victim to identify him, that,

he does motorcycle business 'boda boda', he parks his motor cycle near the grocer 'genge' and he was a neighbour of PW2. Moreover, in cross examination, the Appellant admitted knowing both PW1 and PW2 and that he had no any grudges with them.

With these pieces of evidence, I am convinced that the Appellant was adequately identified by the victim. He did not only cross examine anything as regard to the name of "Moddy" but also on the facts that led to his identification. He clearly admitted in cross examination knowing each other with the victim and his mother PW1.

There being no grudges between them, I find that the victim is a reliable witness who adequately identified the Appellant. I may also add that the word Moddy is an acronym of the word Mohamed as commonly used in our society.

As regard to the issue of mentioning the Appellant by the victim, whether it was made at earlier opportunity or not, the same depends on the circumstances of each case. In this case, the victim mentioned the Appellant before PW4, WP 6573 D/Cpl Josephine. He did so after been assured of peace and security. He did so on the same day on which the

incident was discovered by PW3's mother and reported to PW1 later on to PW4. In my firm view this was well still within the early opportunity. Hence, I find the complaint in ground one as having no merits.

The main complaint in ground two is that PW5 gave contradictory evidence between his testimony in court and documentary evidence he gave in PF3. The Counsel for the Appellant stated that PW5 did not mention anywhere, neither in his oral testimony nor in the PF3 which he filled, showing that there was penetration. In his oral testimony PW5 said that he saw some frictions in the anal orifice which he opined that they were caused by fungal infection and that the anal orifice sphincter was intact. Also, that PW5 wrote a "dash" (....) in the PF3 at a place where he was required to fill showing whether there was penetration because he did not find signs of penetration.

The Counsel for the Appellant was of the view that PW5 did not prove penetration which is an essential ingredient of the offence of carnal knowledge per the cases of **Masumbuko Zakarika John vs. Republic,** Criminal Appeal No. 66 of 2022 and **Yohana Charles vs. Republic,** Criminal Appeal No. 5 of 2022.

On her part, the State Attorney maintained that penetration was proved through PW1, PW2, PW3, PW4 and PW5. That the PF3 was just supplementing to the oral testimonies.

I agree with the State Attorney, in this case, the evidence of penetration comes from PW2, the victim. In his testimony PW5 did not state clearly whether there was penetration. In his oral testimony, at page 34 of the proceedings, he said the following: -

> *"They informed me that he was sodomized, as per their information, it was four days had passed. He had clean clothes, but as of checking that anus I could see there was bruises and (sic) outside I checked inside the anus there was intact, but I checked inside further I could see there was some friction in his anus that has (sic) caused that bruises and he was in pain as I put my finger to check anal way, the child complained to be in tingling 'muwaso' so I thought it was fungal infection".*

As rightly submitted by the Counsel for the Appellant, PW5 did not fill anything showing penetration in PF3, he wrote a dash in the blank space he where he was supposed to write his findings about existence or otherwise of penetration. It means the testimony of PW5 in both

aspects, oral and documentary, is not contradictory but consistent to the effect that he didn't medically establish penetration. Ground two has no merits.

Ground three questions PW2 testimony as being untrue. The trial court warned itself upon believing on truthfulness of PW2's testimony after referring to the case of **Mohamed Said vs. Republic,** Criminal. Appeal No. 145 of 2017 (unreported) where the Court of Appeal stated that: -

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

Then the trial court went on believing the testimony of PW2 as nothing but truth due to his clear unhesitant evidence explaining how he was penetrated. The State Attorney supports the trial court's findings.

My perusal of the evidence on record reveals that PW2 gave a very detail on how he was cornered by the Appellant threatened and forced to go into the unfinished house and subsequently carnally known against

the order of the nature, on the first day and the subsequent dates. In short, he explained that the Appellant lubricated his erectile male member with his saliva and penetrated it into the anal orifice of the victim, he rubbed it in and out until he discharged some sticky fluid, which he touched and found it inside his anus. Medical examination was conducted fourth (4) days later, hence likelihood of finding bruises or spermatozoa was minimal due to long elapse to time and cleaning by the victim.

However as per the case law in **Selemani Makumba vs. Republic**, [2006] TLR 379, it was made clear that in criminal proceedings involving sexual offences, the best evidence comes from the victim, the medical evidence just corroborates that of the victim. The Court of Appeal of Tanzania succinctly stated as follows: -

> *"A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ. True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. In the case under consideration the*

victim, Ayes, said the appellant inserted his male organ into her female organ. That was penetration and since there was no consent, then, there was rape."

I understand the position of law in the case of **Masumbuko Zakaria John** (Supra) and **Yohana Charles** (supra) that penetration is an essential element in carnal knowledge offences. I am also aware of the principle of law in **Mohamed Said's case (supra)** that evidence of a victim of sexual offence must pass the test of truthfulness before been acted upon.

In this case PW2 testified the truth; he withstood a lengthy cross examination and managed to maintain consistence in his testimony. Moreover, his testimony is coherent with those of PW1, PW3 and PW4. There was no sensible cross examination to shake PW2 credible testimony. This court finds that his testimony was nothing but truth account of what happened to him. He was carnally known against the order of nature by a person he mention, who is the Appellant. I concur with the trial court's findings on credibility of PW5 testimony as being reliable, as it was best placed in assessing the same. Ground three has no merit.

In ground four, the complaint is about trial court adding evidence not adduced by the parties. The added evidence which is said to have been added is the time at which the offence is alleged to have been committed, it is mentioned by the trial court to be "day time." It is the view of the Counsel for the Appellant that none of the prosecution witnesses mentioned the time of commission of the offence to be day time.

The State Attorney opposed this ground submitting that the trial court was right in finding that it was day time because the evidence at pages 14, 15 and 16 of the proceedings vividly show that the acts were committed during day time.

I have gone through the testimony of PW2 as recorded in the typed proceedings at pages 14, 15 and 16. With dew to the Counsel for the Appellant, I agree with the State Attorney, although it was not directly mentioned by PW2, circumstances of the case imply that the offence was committed during day time. I say so because PW2 was clear in his testimony that all the three incidents in which he sodomized happened during day time for the following grounds. On day one, PW2 was sent to buy banana and on the way to the grocery (genge), met the

Appellant who forcibly led him to an unfinished building and had carnal knowledge against the order of nature. PW2 narrated how the penetration was effected. Had it was dark he could have not seen all those details he gave. On day two PW2 said was again sent to go to the same grocery, he again signaled by the Appellant to enter into the same building he tried to resist but was threatened by signaled to be slaughtered. In fear he obeyed, and he ended up being sodomized by the same Appellant. So was on day three.

With all these pieces of testimonies one would ask who could dare send PW2 to buy bananas at a grocery at night and in all those three days? The answer is no. Moreover, the Appellant did not cross examine on these incriminating pieces of evidence.

In my firm view, with due respect to the Counsel for the Appellant, I agree with the State Attorney, as did the trial court that although the witnesses did not specifically mention the "day time", it can be implied from the evidence that the incidents took place during day time as explained above. The trial magistrate did not add any untestified evidence. This ground fails.

As regard to grounds five and six, the complaint generally is on failure by the prosecution to prove the case beyond all reasonable doubts.

The Counsel for the Appellant argued that the two issues raised by the trial magistrate were not answered by the prosecution evidence affirmatively. That, the trial magistrate gave generalized observation that penetration was proved and that it was the Appellant who carnally knew the victim. On her side the State Attorney maintained that the trial magistrate adequately analyzed the evidence and correctly found that penetration was proved. She reiterated her reliance on the authority in the case of **Selemani Makumba (supra)**

As I have stated above the trial magistrate analyzed the evidence of both sides and found that the Appellant was implicated by the evidence.

The Counsel for Appellant condemns the trial magistrate as having not analyzed the evidence. He made reference to the Preliminary Hearing. My perusal of the record did not show me any memorandum of undisputed matter in the preliminary hearing.

In fact, the preliminary hearing was casually conducted in violation of both the provisions of Section 192 of the Criminal Procedure Act, [Cap. 20 R. E. 2022] and the Accelerated Disposal of Cases Rules, GN No. 192 of 1988 which require orality of the facts. That, the facts prepared by the prosecuting officer must be read out aloud in court to the accused and recorded by the court from which a memorandum of undisputed matters is drawn. Then, the said memorandum of undisputed matters must be read to the accused and if it is unqualified by the accused, it must be signed by both the accused and if represented, his advocate, the prosecuting officer and the presiding magistrate. See the cases of **MT7479 SGT Benjamini Holela vs. Republic** [1999] TLR 121, **Natheniel Alphonce Mapunda and Another vs. Republic** [2006] TLR 397, **Pagi Msemakweli vs. Republic** [1997] TLR 331, **Efraim Lutumbi vs. Republic,** Criminal Appeal No. 30 of 1996.

This was not done; therefore, it is a misconception to rely on the preliminary hearing proceedings.

I have taken pain to read the whole of the trial court judgment, I am satisfied that it dealt with the two raised issues in a style it used. As rightly submitted by the State Attorney, each magistrate or judge has his or her own style of composing a judgment, what is important is that it must conform with the requirements provided for under section 312 of the Criminal Procedure Act, that is, it must have summarized facts, point(s) for determination, the decision and reasons for the decision. From the above analysis, I am satisfied that the grounds five and six of appeal are non-meritorious.

In the upshot, for reasons stated above, I find the appeal is barren of fruits; the same is hereby dismissed in its entirety.

Moreover, I have found that the sentence of 30 years imprisonment meted to the Appellant by the trial court is unlawful. A lawful sentence to a person convicted with the offence of unnatural offence of a child person under the age of 18 years is life imprisonment. This is per the provisions of section 154(2) of the Penal Code following amendments effected to it by the Law of the Child, [Cap 13 R. E. 2019]. In the circumstances I do hereby invoke the revisionary powers bestowed unto this Court under section 373(1)(a) of the Criminal

Procedure Act and revise the said unlawful sentence which I do hereby quash and set it aside.

In lieu therefore I impose the lawful sentence of imprisonment for life provided by the provisions of section 154(2) of the Penal Code. The appellant will serve a sentence of life imprisonment commencing from the date he was convicted by the trial court, that is, on 29/11/2022. Order accordingly.

Right of appeal to the Court of Appeal of Tanzania dully explained to the parties.

Dated at Tanga this 28 day of August, 2023

F.K. MANYANDA

JUDGE