

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 104 OF 2022

(Original Criminal Case No. 48 of 2022 in the District Court of Sumbawanga at Sumbawanga)

HAMZA S/O ABDALLA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MWENEMPAZI, J:

The appellant was arraigned in the District Court of Sumbawanga District and charged for committing an Unnatural offence contrary to section 154(1)(a) and (2) of the Penal code, Cap. 16 R.E. 2019. In the trial court it was alleged that the accused person on the 11th day of June, 2022 at Utengule Area within Sumbawanga Municipality and Rukwa Region did have carnal knowledge with one 'XX' (name of the child intentionally to protect him) a child aged ten (10) years old against the order of nature. When the charge was read over to the accused person, he denied that he committed

the offence and also, he denied the facts which were read over and explained to him.

The case had to go for a full trial whereby the prosecution called three witnesses; namely, Mathew Steven, Scolastica Alfred Nyamo and the victim child "XX". PW1 tendered one exhibit, a PF3 he filled after examination of the boy. The defendant testified to defend himself. The summary of the prosecution evidence was as hereunder shown. I will commence with the victim child in order to have the flow of the story. PW3 the victim child testified that on the 11th June, 2022 was on the way at Utengule area, he met the accused who approached him and told him to have sex with him on the promise of giving him a toy car. The accused then dragged the victim into the bush made of long grasses undressed the victim and himself and then had a carnal knowledge of the victim against the order of nature. The child testified that he felt pain but he could not scream because the accused covered his mouth with his hands. The victim told the story to his friend, Ayoub who in turn told the victim's mother. The mother went and told the chairman of the street. The victim knew the accused and recognized him in the dock.

According to the victim's mother, one Scolastica Alfred Nyamo, PW2 on the 16th day of June, 2022 students of Utengule Primary School went to her home with the victim boy. They told her the story. The person who did that was Ayoub Kayahela. He told her that the accused person had sex with XX promising to buy him a toy car. It was sex against the order of nature. She took the children to the chairman who asked the kids and they told him the story. The chairman called the police, it would seem (according to the evidence by PW2) the chairman left with the children together to the residence of the ten cell leader. There, all the children accompanying the chairman including the victim XX confessed to have had sex with the accused against the order of nature in the bush. The accused person was called and admitted to know the children and also admitted to have had sex against the order of nature with the children but he pleaded to the chairman that things should not be taken far. They should end there. When the police came took the accused person and they (PW2 and PW1) also went to the police and later to the Sumbawanga Regional Referral Hospital after they had been issued with the PF3.

At the hospital the case was for investigation by PW1 one Mathew Steven, a Clinical Officer. He received a client on the morning of 17th June, 2022. It

was a boy named XX. He complained that he has been raped. He examined the boy and found that the anus was relaxed. It showed that a blunt object had been inserted more than once. He filled the PF3 and ordered for the child to come back after one month.

The trial court in the assessment of the evidence made the finding that the accused is guilty of the offence he is being charged with and convicted the accused with the Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap. 16 R.E. 2019. The accused was sentenced to life imprisonment in jail.

It is against the conviction and sentence the accused has file an appeal raising seven (7) grounds of appeal. The grounds of appeal can be summarized as follows: one, that the offence he was charged with was not proved beyond reasonable doubt. Two, that the trial court erred in law and fact to rely on the evidence adduced by PW1, the clinical officer who examined the victim without using scientific instruments. Three, that the trial court erred in law and fact to convict the appellant based on the contradictory evidence of PW1 and PW2 on the dates the offence was committed and the date of examination of the victim by the clinical officer.

Four, that the trial court erred in law and fact to convict the appellant relying on the evidence which missed the testimony of the investigator or any police officer. That shows the appellant was not cautioned. Five, that the court erred in law and fact in passing a sentence to the appellant while the appellant was not convicted. Section 235 of the Criminal Procedure Act, Cap. 20 R.E. 2022 was contravened. Six, the court erred in passing the sentence without previous record and mitigation factors as required by the law. Seven, that the trial court erred to sentence the appellant without considering the defence.

At the hearing the appellant fended for himself and the respondent was being served by Ms. Ashura Ally, learned State Attorney. The appellant was brief in his submission. He prayed for the court to consider the grounds of appeal and allow the appeal and that he be released from prison.

Ms. Ashura Ally, learned State Attorney commenced submitting on the appeal by stating that the Respondent is opposing the appeal, and opted to submit on the first ground of appeal which intimated to this court that in the course of his submission she will be touching other grounds of appeal.

The learned State Attorney submitted that the prosecution in the case against the accused person was required to prove the following elements. One, age of the victim. Two, that there was penetration and three, that it is the accused person who did the act, penetration.

In this case, the victim's mother testified as PW2. She testified that the victim boy's age is ten (10) years old. The counsel for the respondent submitted that according to the case of **Makanje Kamola vs. The Republic**, *Criminal Appeal No. 30 of 2018, Court of Appeal of Tanzania at Mwanza*, the proper persons to prove age of the victim are the victim himself, relative, parents, doctor or birth certificate of the victim.

The counsel for the respondent submitted that another element to be proved is penetration. In this case, it is sodomy or carnal knowledge against the order of nature. Here the witness was PW1, the clinical officer who examined the victim on the 17th June, 2022. He testified that he examined the victim boy and found that his anal sphincter was relaxed and confirmed that he has been penetrated more than once by a blunt object. He filled the result in the PF3 which was tendered as Exhibit P1.

The counsel submitted further that the victim testified as PW3 and in his testimony, he accounted how the whole event happened. At page 14 he showed how he was approached by the appellant who promised to buy him a toy car. Then took the victim into the bush and had sex against the order of nature with him. The victim told his friends who spilt the beans to the victim's mother and the victim confirmed to her. The counsel cited the case of ***Seleman Makumba vs. The Republic, [2006] T.L.R. 379*** for the argument that it was held that the victim is the best witness in sexual offences. She therefore submitted that the prosecution managed to prove that the victim was sodomized.

The appellant has argued that the judgment was made relying on the testimony of the clinical officer who did not use scientific instruments. She submitted referring to page 9 that it is clear the examination was done scientifically.

The counsel submitted further that the fact that the appellant was taken to the police late is immaterial as that is not the element to be proved in order to show that the victim was sodomized. Also not tendering a caution

statement is immaterial and at page 12 of the proceedings it is clear the appellant was convicted before being sentenced.

The complaint that there was no hearing for sentencing is unfounded as the record at page 12-14 shows the sentence was meted following hearing. The respondent's counsel submitted that the appellant's defence was also considered at page 8 before convicting the appellant. She concluded that the prosecution proved the case against the appellant beyond reasonable doubt and prayed that the appeal be dismissed and conviction and sentence be upheld.

The appellant had nothing to add in rejoinder except for the reiteration of what he had stated in his submission in chief.

I have read the record of the trial tribunal and also heard the submission by the parties in the appeal. The question to be resolved is whether the appeal has merit and that it should therefore be allowed. To answer the question, this court being the first appellate court is empowered to revisit the evidence and assess the same to come at its own findings while being cautious that it has not seen the witnesses while testifying.

In this case the appellant was charged for the unnatural offence contrary to section 153(1)(a) and (2) of the Penal Code, Cap. 16 R.E. 2019. In order for the offence to be proved under the cited provisions of law, the prosecution must prove that the perpetrator has penetrated his penis into the anus of the victim, and the age of the victim must be below the age of must under eighteen years old and the person doing that must be the accused person charged in court. The victim here was positive in his testimony that the accused, the appellant, approached him while on the way at Utengule and had carnal knowledge of him on the promise that he will give or buy him a toy car. The victim could not scream as the accused placed his hands on the victim's mouth to cover it, then the victim narrated the story to his friend Ayubu who in turn told the victim's mother. The victim then retold the story to his mother and the chairman.

Though it is on the level of hearsay, the appellant admitted before the chairman and begged that the story should not go further. The stories were confirmed by the clinical officer, PW1 who examined the boy. In the case of

Seleman Makumba vs. The Republic, [2006] T.L.R. 379 it was held that:

*"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.**"*

The evidence in this case is clear the offence was committed by the appellant and he even begged to keep the story a secret. It would be doubtful in absence of the testimony of the victim. However, the testimony has confirmed what otherwise would seem doubtful and confirmed by PW2 and PW1. With the evidence looked as a whole, prosecution as well as defence testimony, it is clear the prosecution proved the case against the appellant.

As to the complaint on sentencing levelled through grounds 5, 6 and 7; the counsel for the respondent has submitted showing that there was conviction before sentencing was heard and pronounced. The appellant's complaint is ungrounded and prayed that the same be dismissed. It is clear at page 13

and 14 of the judgment, the trial magistrate pronounced a sentence after he had considered the aggravating and mitigating factors. After all, the wording of section 154(2) of the Penal Code, Cap. 16 R. E. 2019 it is clear, where the victim is under the age of eighteen years, the offender shall be sentenced to life imprisonment in jail. That was done.

For the reasons and explanations herein above, I find the appeal by the appellant to be devoid of merit. The same is dismissed and conviction and sentence are upheld.

It is ordered accordingly.

Dated and signed at Sumbawanga this 25th day of September, 2023



T. M. MWENEMPAZI

JUDGE

Judgement delivered in judges chamber in the presence of the appellant and Mr. Jerinus Mzanila State Attorney, for the Respondent this 25th day of September, 2023.


T. M. MWENEMPAZI

JUDGE

25/09/2023

Right of appeal explained.




T. M. MWENEMPAZI

JUDGE

25/09/2023