IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 01 of 2022

(C/F Criminal Case No. 159 of 2020 in District Court of Moshi at Moshi)

DPP ……..……..…… APPELLANT

VERSUS

ELIFURAHA PUSSEY NKUNGI…..…….. RESPONDENT

EX PARTE JUDGEMENT

Date of Last Order: 21.08.2023
Date of Judgment: 29.09.2023

MONGELLA, J.

The respondent was arraigned before the District Court of Moshi at Moshi for unnatural offence contrary to Section 154 (1) and (2) of the Penal Code Cap 16 R.E. 2002 read together with section 185 of the Law of the Child Act, 2009. The particulars of the offence are to the effect that: on 28.03.2020, at Rau Kariwa area within Moshi District and Kilimanjaro Region, the appellant did have carnal knowledge of a girl aged 11 years old (hereinafter to be referred as the victim or PW2) against order of nature.

The accused denied the charge against him and the case proceeded to trial. The prosecution mounted six witnesses being;

PW1, Dianess Emmanuel Shayo, the victim's mother; PW2, the victim; PW3, Teresia Nicholaus Urassa, paternal cousin of the appellant who lived with them; PW4, Frank Joel Mkenda; PW5, Victor Jeremiah Adolf, the medical doctor who examined PW2 and; PW6, F 4369 DSGT Lasangani, the investigator.

The case advanced by the prosecution through the above witnesses was to the effect that: on 28.03.2020 around 11:00hrs, the victim confronted the respondent, who worked as a shop keeper at her mother's shop requiring him to return back her watch. The respondent told her to get him tea and he would return the watch thereafter. The victim brought the tea from home and could not find the respondent in the shop. She called him and the respondent replied telling her that he was at the back yard. She thus took the tea to him at the backyard and requested for her watch. As per the victim's testimony, the respondent suddenly pulled her into his room where he stayed with one named Bingo. He locked the room, undressed the victim's skintight and underpants, laid her on the bed, and undressed himself. He then shut her mouth and thereafter inserted his penis into her anus. She felt pain and begged him to let her go. Eventually, he opened the door and let her go. The victim could not raise an alarm throughout the ordeal. The respondent gave her 1,000/- and she left.

PW3, noticing that PW2 was gone for a long time, went to the shop, but did not find her there. The shop was temporarily locked with a padlock. She went through the tenants' gate but saw no one

outside. She decided to sit on a chair in front of the shop. The victim then came from the tenants' gate. PW3 interrogated her and she disclosed that she was in Ally's and Michael's room. PW3, walked into Ally's and Michael's room and found the respondent seated on the coach. She asked him as to why he was there, but he did not respond. PW3 left and headed home with PW2.

Upon getting back home, PW3 interrogated PW2 on where she had gone and on where she had gotten the Tsh. 1,000/- she held on her hand. PW2 admitted to have been given the money by the respondent and she narrated the entire ordeal. PW3 went back to the shop to interrogate the respondent who denied to have committed the act. He however, started shivering and PW3 started hitting him with a wire she had on her hands. The respondent escaped.

While at work, at Kilimanjaro Hospital, PW1 received a call from Teresia, crying. Teresia told her that there was a problem at home and she hang up. She called her back and was told that PW2 had been raped. She went home whereby Teresia told her that PW2 was sodomized by the respondent when she brought him tea. She interrogated PW2 who narrated the ordeal to her. She examined her anus and went to Majengo police with her where their statements were recorded and they were given a PF3 to take to hospital. Then they were accompanied by a WP to go to Mawenzi Hospital. At the Hospital, PW5, examined PW2 around 16:36hrs and observed that PW2's vagina was intact while her anus had been

reddish and bruised at 9 inches, though the sphincter muscles were intact. The situation was probably due to the penetration being made slight. PW2 was also tested for HIV and STDs and given medication. PW5 finally filled the PF3, which the trial court admitted as Exhibit P1.

PW6 investigated on the case. He interrogated the respondent and interviewed the witnesses. He also drew the sketch map of the crime scene, which was admitted as exhibit P2. PW4 testified on the room which was allegedly shared by one, Ally and Michael in which the offence was allegedly committed. He averred that on the material day, at 08:00hrs, he went to their room to pick up his laptop and they told him to leave the keys at the shop where the respondent was the shopkeeper. He left around 08:00hrs and left the key there.

After closure of the prosecution case, the court found that a prima facie case had been established against the respondent. The respondent thus entered his defense whereby he testified as a sole witness (DW1). He denied knowing the victim nor having carnal knowledge of her against the order of nature.

He further claimed before the trial court that there were inconsistencies in the evidence adduced by PW1, PW2 and PW3 as to the place where the offence was committed. He said that the three told the court that the incidence occurred in the shop. He added that PW3 had also said that he saw him with the victim in

the bedroom whereby he lied. He tendered PW1's statement before the police which was admitted as Exhibit D1.

After considering the evidence of both parties, the trial court found the respondent not guilty of the offence charged and acquitted him accordingly. Aggrieved, the appellant has preferred this appeal on the following grounds:

1. *That, the Hon. Trial Magistrate erred in law and fact by faulting the prosecution case while the charge against the respondent had been proved beyond reasonable doubt.*

2. *The trial magistrate erred in law and fact by failing to comply with section 154 and 164(1) of the Evidence Act [Cap 6 R.E 2019] when the accused tendering exhibit D1. (sic)*

Since this matter was filed in this court, the respondent has never entered appearance despite being duly served through publication. Consequently, the hearing of the appeal proceeded *ex parte against* him. The appeal was argued by written submission whereby the respondent was represented by Mr. Ramadhani A. Kajembe, learned state attorney.

Arguing on the 1st ground, Mr. Kajembe averred that the prosecution was required to prove the elements that constitute unnatural offence under section 154 (1) and (2) of the Penal Code.

He mentioned the element being penetration of a male organ into the anus of the victim.

In showing that the case was proved, he contended that the best evidence is that of the victim thereby referring to the celebrated case of **Selemani Makumba vs. Republic** [2006] TLR 379. He said that, in respect thereof, it is upon the prosecution to lead the victim to give a clear narration of the events that led to the penetration which was done by PW2. He had a firm view that the victim (PW2) proved that penetration was done and PW5 corroborated her testimony whereby he stated that the anus of the victim had fresh bruises at 9 inches, the sphincter muscles were intact and that showed that a blunt object had penetrated her anus rarely.

Mr. Kajembe was of view that the trial magistrate failed to appreciate the evidence of PW2 and PW5 as well as Exhibit P1 which corroborated the medical examination conducted by PW5, instead, the trial magistrate only looked at the place where the event had taken place and concluded that there was contradiction on the place the event took place which went to the root of the case and also disregarded the testimony of PW2 because she was beaten and thus forced to mention the respondent. He argued that such facts were never raised during hearing, hence the trial magistrate acted on extraneous facts.

He refed the court to the testimony of PW2 at page 7, 9, and 10 of the typed proceedings whereby she told the court that the

respondent pulled her into his room where he stays with one, Ally and Juma (sic) and in cross examination, she maintained that the act was done inside the room. The same was also stated by PW3 and PW4 who were told by PW2 that the incident took place in Michael's room. That, PW6 stated that PW2 had showed her the room where she was sodomized thus, the testimony of the said witnesses did not contradict each other as the same clearly showed that the crime was committed inside the room of Ally and Michael and there was no evidence that PW2 was beaten or forced to mention the respondent.

Mr. Kajembe contended that it is settled principle of law that the court should not raise new issues while composing its judgment. That, it ought to be limited on matters which arose during the adjudication of the case or pleadings of the parties. That, issues not raised during trial should not be assumed as presented nor included in the judgement.

He further contended that even if there was a contradiction as to the place the offence took place, what the prosecution ought to have proved was penetration as it was a sexual offence. He again referred the case of **Selemani Makumba vs. Republic** (supra) arguing that in the said case, the court stated that the best evidence in rape comes from the victim himself or herself. In the premises, he had the stance that the trial court ought to have taken the evidence of the victim of paramount importance.

With regard to the 2nd ground, Mr. Kajembe averred that the trial court erred in accepting exhibit D1 contrary to section 154 and 164(1) of the Evidence Act. He contended that under section 154 a witness should be cross examined on particular areas in which one wished to contradict him, but the same was not done. That, the respondent did not challenge the witness on such areas. That, section 164 (1) of the Evidence Act provides for procedure for impeaching a witness on a document. He as well referred the case of **Lilian Jesus Fortes vs. Republic** Criminal Appeal No. 151 of 2018.

He thus challenged the trial court's decision for not adhering to the procedures laid down under the law and for not considering that the procedures were not followed by the respondent. He further contended that the trial court erred in holding that the respondent had the right to impeach the statement given by the police by tendering the same at defence hearing stage and not during cross examination of the maker of the statement (PW2). That, previous statements made by witnesses are supposed to be used against them in court and not to be used against other witnesses. In the premises, he prayed for this court to expunge exhibit DW1 from the record.

In conclusion, he prayed for the appeal to be allowed, the acquittal to be quashed and the respondent to be convicted and sentenced accordingly.

I have considered the appellant's grounds of appeal and the submissions by the learned state attorney, as well as, the record of the trial court. I shall start deliberating on the 2nd ground of appeal, however, before deliberating on the said ground of appeal, I find it pertinent to note that it came to my attention that at some point during trial, that is, on 03.08.2020, the presiding magistrate had been transferred to a different station and the case was reassigned to a different magistrate.

Upon the new trial magistrate addressing the respondent under section 214 of the Criminal Procedure Act, the respondent requested for PW1 and PW2 to be recalled as witnesses. The magistrate, granted his request. However, the trial magistrate labeled PW1 as the victim and PW2 as her mother while the two adduced their testimonies as PW2 and PW1 respectively. This was an error on the part of the magistrate as it is well known that upon recalling a witness, that witness's label does not change since he or she is not adducing evidence as a different witness. In the circumstances, I shall maintain the labels these two witnesses had during their prior examination.

On the 2nd ground of appeal, Mr. Kajembe faults the admission of the statement of PW1 as "exhibit D1" on the reason that it was done in contravention of **section 154 and 164(1) of the Evidence Act**. I will herein reproduce the same for ease of reference:

"***154.*** *A witness may be cross-examined on previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*

164.-*(1) The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him-*

(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(b) by proof that the witness has received or received the offer of a corrupt inducement to give his evidence;

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the complainant was of generally immoral character."

Upon observing the two provisions, I find that **section 154 of the Evidence Act**, addresses circumstances where an adverse party intends to challenge a witness on a statement given by him/her in

writing when cross examining the said witness. The provision allows an adverse party to call the witness' attention on part of the writing without the same being shown to the witness or proved. **Section 164 (1) of the Evidence Act** provides for ways in which a witness' credibility can be impeached. The most relevant provision in this case is **section 164 (1) (c)**. The admissibility of such statement as exhibit depends on whether the party cross examined the witness on the statement he or she made. If the witness was not cross examined first, the admission of the statement as an exhibit shall be considered incorrect. This was well elaborated by the Court of Appeal in the case of **Hatari Masharubu @ Babu Ayubu vs. Republic** (Criminal Appeal 590 of 2017) [2021] TZCA 41 TANZLII, whereby the Court reasoned:

> *"We are however, mindful of the fact that the thrust of the appellant's argument is that the evidence of PW2 at the trial is contradictory to her statement she recorded at the police which was tendered and admitted as exhibit D1 during the defence case. Nonetheless, as correctly stated by Ms. Banturaki, exhibit D1 was wrongly admitted in evidence and relied upon in determining the fate of the appellant.* ***We entirely agree that if the appellant wanted to cross-examine PW2 on the previous statement she made at police against her testimony at the trial, he would have done so when she testified in chief. If that was not possible, as it happened in this case, he would have requested the trial court to re summon PW2 who had already testified for cross examination****. As that course of action was not taken, the statement of PW2 could not be*

> *properly tendered and admitted into evidence under section 154 of the Evidence Act during the defence case as it was done in his case."*

As pointed earlier, the record shows that the respondent did request to have PW1 and PW2 recalled as witnesses as reflected on page 22 to 26 of the typed proceedings. The respondent cross examined the two witnesses on statements they made before the police. However, the respondent did not cause the witnesses tender the statements, which would have been admitted as "exhibit D1" during their cross examination. In my view, in the circumstances, the admission of the exhibit was erroneous as it was not tendered by the maker, addressee or custodian as required under the law. See: **D.P.P vs. Mirzan Pirbakhshi @ Haji & 3 Others**, Criminal Appeal No. 493 of 2016(CAT at DSM, unreported). The record also shows that the respondent prayed to tender the statements of one Dainess and Theresia. These were PW1, the victim's mother, and PW3, the victim's sister, respectively. However, it appears that only one statement was tendered and admitted as "exhibit D1" during defence evidence and it is not known to which witness between PW1 and PW3 does the exhibit belong. Exhibit D1 is therefore expunged from the record.

As to the 1st ground, the appellant claims that the case was proved beyond reasonable doubt. Mr. Kajembe faults the trial court on the basis that it introduced new facts which were not produced before it thus reaching its decision on extraneous matters. This argument

originates from the trial court's assertion that PW2 had stated that she was beaten by PW3 and so she was forced to mention the respondent as the assailant.

It should be noted that there was change of presiding magistrates before finalization of the case. The record shows that when the second magistrate took over the case, the accused prayed for PW1 and PW2 to be recalled to be examined afresh so that the Hon. Magistrate could understand their evidence well. In that respect, the evidence to be considered is the one taken after the witnesses were called. Their initial evidence is discarded.

The evidence of PW1, as seen at page 23 and 24 of the typed proceedings, does not support what Mr. Kajembe contends. It is clear on record that the victim stated to have been beaten by PW3 for her to speak the truth to her. The trial Magistrate therefore never invented any extraneous matters. For ease of reference, at page 23, the victim stated:

> " .. Later I told my sister I was from neighbour's house my sister started to beat me. Then I decided to tell truth. That Elifuraha inserted dudu lake to my anus. My sister started to beat Elifuraha who ran away." (sic)

From the above quotation, I reiterate my stance that Mr. Kajembe's argument that the trial court invented new facts is unsubstantiated. I wonder if the learned counsel took time to thoroughly read and

understand the evidence on record before coming up with such contention or if he did that intentionally to mislead the court. As clearly seen on the record, PW2 stated to have been beaten by PW3 so that she could tell the truth. In fact, she told the truth after receiving the beating from PW3.

Now, regarding whether the case was proved beyond reasonable doubt; under the law, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not to believe the said witness. The good reasons that can be considered include the fact that the witness had given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See: ***Goodluck Kyando vs. Republic*** [2006] TLR 363; ***Mathias Bundala vs. Republic***, Criminal Appeal No. 62 of 2004 (CAT, unreported); and ***Shaban Daudi vs. Republic***, Criminal Appeal No. 28 of 2001 (unreported).

It is also a settled legal position that the first appeal is in form of re-hearing therefore empowering the first appellate court to re-evaluate and re-consider the entire evidence on record and arrive at its own conclusion. This was decided by the Court of Appeal in a number of its decisions. See for instance, the case of ***Mkaima Mabagala vs. The Republic***, Criminal Appeal No. 267 of 2006, in which while reverting to the decision made in ***D. R. Pandya vs. Republic*** (1957) E.A. 336 and in ***Iddi Shaban @ Amasi vs. Republic***, Criminal Appeal No. 2006, the Court held:

> *"First appeal is in form of re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a crucial scrutiny and if warranted arrive at its own conclusion of fact."*

On the strength of the above decisions, I shall re-evaluate and re-examine the evidence on record. The witnesses I find material in this case are PW2, the victim, and PW3, the victim's sister who supposedly saw the victim coming from the room the offence had occurred. The law is trite that in rape cases, the best evidence comes from the victim. See: **Bashirfu Salum Sudi vs. The Republic**, (Criminal Appeal No. 379 of 2018) [2019] TZCA 531 TANZLII; **Emmanuel s/o Phabian vs. The Republic** (Criminal Appeal No. 259 of 2017) [2021] TZCA 133 TANZLII; and **Edward Nzabuga vs. The Republic**, Criminal Appeal No. 136 of 2008 (CAT at Mbeya, unreported).

It is however, also, the position of the law that the court should be careful not to take the victim's testimony wholesale. The court therefore is obliged to critically analyse the victim's testimony to ascertain its credibility, reliability and sufficiency to avoid punishing innocent persons. See: **Majaliwa Ihemo vs. The Republic** (Criminal Appeal No. 197 of 2020) [2021] TZCA 304 TANZLII; **Paschal Yoya @ Maganga vs. The Republic** (Criminal Appeal No. 248 of 2017) [2021] TZCA 36 TANZLII; and **Shabani Daudi vs. Republic**, Criminal Appeal No. 28 of 2000 (CAT, unreported).

Upon careful consideration of the evidence on record, I have noted contradictions between the key witnesses, which I find material. The victim, when recalled stated that the appellant took her to Bingo's room, sodomised her and gave her T.shs. 1,000/- to keep her quiet. She said that she felt pain and thereafter walked with difficulty. In re-examination, she stated that she never raised any alarm as there were no people in that area. That, she was beaten by her sister and had to tell her the truth about the appellant sodomising her.

On the other hand, PW3 stated that she saw the victim coming out of the gate from the tenant rooms. When she asked her as to where she came from, the victim told her that he came from Ally and Michael's room. That, she went home with the victim and asked her as to what happened and the victim told her that she was sodomised by the appellant.

The material contradiction I find from the evidence above first relates to the crime scene: while the victim stated that it was in Bingo's room, PW3 stated that the victim told her she was inside Ally and Michael's room. Second, PW3 and the victim during their testimony in chief, stated that the appellant covered her mouth during the act thereby connoting the reason she could not make any noise. However, during re-examination, the victim stated that she never raised any alarm as she knew there were no people outside there.

Apart from the contradictions, I also find the prosecution evidence implausible. PW5, the medical doctor, stated to have found the victim's anus reddish and with bruises at a length of 9 inches. Just by looking at a ruler, one can tell how long 9 inches are. However, though stated that it was because the act occurred rarely (sic), he stated that he found the sphincter muscles intact. This is also reflected in the PF3 tendered in evidence in court. As much as the evidence of PW5 is an expert opinion, the law is trite that the same does not bind the court. The court therefore is empowered to examine the evidence and come out with its own findings that may as well differ from the expert opinion. See: **Saidi Mwamwindi vs. Republic (1972) HCD 212**.

It should be recalled that the victim testified to have felt pains leading her into walking with difficulties and was taken to hospital within few hours after the alleged incident. Taking into account the medical report and testimony of PW5, one can agree that, in the circumstances, pains and difficulty in walking are obvious consequences. However, this fact was never stated by PW1, PW3, PW5 and PW6 who supposedly attended the victim immediately after the alleged rape incident. If it is true that she had bruises at 9 inches length in her anus, felt pains and walked with difficulties, all the witnesses who attended her immediately should have noted that important fact and testified on it. The fact that it was never mentioned by any of them raises doubts as to its credibility.

With the above observation, I find the prosecution failed to prove the charge to the hilt. In respect thereof, the appeal is found to lack merit and is dismissed.

Dated and delivered at Moshi on this 29th day of September, 2023.

X

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