**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**IN THE SUB-REGISTRY OF MWANZA**
**AT MWANZA**

**CRIMINAL APPEAL NO. 92 OF 2023**
*(Originating from Criminal Case No. 116 of 2022 from Ilemela District Court)*

**FRANCIS STEVEN @ MWANDENUKA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*18th September & 06 October, 2023.*

***Kilekamajenga, J.***

In the District Court of Ilemela, the appellant was arraigned for the offense of unnatural offense contrary to **section 154(1)(a) of the Penal Code, Cap. 16 RE 2019**. According to the charge, it is alleged that, on 11th July of 2022 at Ghana area within Ilemela District in Mwanza, the appellant had carnal knowledge with an adult male person against the call of nature. The appellant entered a plea of not guilty prompting the prosecution to prove the case to the required standard. During the trial, the victim (PW1) who was twenty six (26) years old testified that, on 10th July 2022, he contacted his friend called Eripidius and they agreed to meet at Ghana area. At the meeting point, the victim found Eripidius together with the appellant. The victim met the appellant for the first time. Thereafter, they went for drinking at Bucket Bar; it was already at mid night. At around, 2 am, the victim was already drunk and wanted to rest. The appellant requested the victim to go outside and negotiate with a tuk tuk (*Bajaji)*

driver; the victim came back and was requested by the appellant to finish the remaining drink. Thereafter, four of them took the tuk tuk towards the appellant's home where they spent the rest of the night. While in the house, Eripidius went to sleep; the appellant and the victim continued to pray games on TV. Finally, they went to bed, the victim slept in the midst of Eripidius and the appellant. The victim was later awakened by a severe pain in his anus. He touched his anal part found it smeared with oil. He pushed aware the bed sheet that he shared with the appellant; he was shocked to witness the appellant with pants (boxer) down. The victim realised that he was sodomised by the appellant as Eripidius was already in deep sleep. He complained to the appellant against the evil act; the appellant admitted to have carnally known the victim but consoled him and urged him not to raise an alarm as he used a condom. The appellant further promised the victim for money (*mdogo wangu usipige kelele nimefanya lakini nimetumia kondomu nitakupa hela*). Angered with the appellant's statement, the victim screamed but the appellant manhandled him. The fracas in the room invited the attention of a neighbour who broke the door. The victim still complained and was advised to report the incident to the street chairman who received the complaint; found a militiaman and took the victim back to the appellant's house. On the way, they met Eripidius leaving the appellant's house but they decided to go back to the appellant's house. In the presence of the street chairman, the appellant admitted to sodomise the victim. The street chairman called a taxi; the appellant, victim and Eripidius were taken

to Kirumba police station. The victim was given a PF3 form and instructed to go to Sekou Toure Regional Hospital for further examination.

PW2 was the medical doctor who examined the victim and found bruises on the victim's anus which was due to forceful penetration of a blunt object. PW2 filled-in the PF3 form which was tendered in court and admitted as exhibit P1. PW2 concluded that, the victim was carnally known against the order of nature. PW3 was the police officer with force number WP5994 from Kirumba police station and works in the criminal investigation department. On 12th July 2022, she was assigned to investigate the case concerning the offense of unnatural offense. In her investigation, PW3 visited the crime scene and she was informed about the fracas and the allegation of sodomy committed by the appellant to the victim. PW3 interrogated the appellant who admitted to have slept with the victim on one bed but denied to sodomise him. Also, somebody called Festo who witnessed the fracas told PW3 that, the appellant confessed before the Street Chairman to sodomise the victim.

During the defence, the appellant admitted to have slept with the victim in his room together with Eripidius. He denied to have sodomised the victim and further blamed the victim for framing the case against him. He knew the victim through Eripidius. On that day, they went to drink at Bucket Bar and returned at home at 5 am. He further admitted to remain behind playing games with the

victim while Eripidius went to bed. On that day, the victim complained to have been sodomised. He insisted that, the case was doctored against him though he paid Tshs. 150,000/= to the victim through Eripidius. DW2 heard the fracas at the appellant's home and witnessed the appellant with blood stains and there were broken bottles on the floor. He also heard the victim complaining about the illicit act. They advised the victim to report the incident to the police.

Based on the above evidence, the appellant was convicted and consequently sentenced serve thirty (30) years in prison. Irked with the decision of the trial court, the appellant approached this Honourable Court for justice with two grounds that:

1. *That, the trial magistrate erred in law and in fact by his failure to evaluate the evidence adduced before him by the parties.*
2. *That, the trial court erred in law in holding that the offense of unnatural offense was proved against the appellant beyond reasonable doubt.*

When addressing the grounds of appeal, the learned advocate for the appellant, Mr. Deya Outa simultaneously argued the grounds of appeal. Mr. Outa was of the view that, this being one of the sexual offenses, according to the case of **Moses Charles v. R**, [1987] TLR 134, if the victim is an adult, the evidence need corroboration unless the court has warned itself on the danger of the evidence being fabricated. The counsel further argued that, the case is hinged on circumstantial evidence; no witness saw the appellant committing the offense.

Where the evidence is purely circumstantial, it must point towards the accused in exclusion of any other person. There should be no existing circumstances to weaken inference to the accused and such inference must be proved beyond reasonable doubt. He referred the court to the case of **Ally Bakari v. R**, [1992] TLR 10. In the evidence, the victim tried to convince the court that he was intoxicated after he went to negotiate with the tuk tuk driver. However, the evidence suggests that he was conscious because the victim played games with the appellant before going to bed. Furthermore, the victim was not sure about the person who sodomised him; the victim simply believed the appellant sodomised him. The mere allegation that the appellant was naked does not prove the offense.

Furthermore, the victim did not mention the source of light used to identify the appellant. Also, the presence of oil on the victim's anus was not observed by the medical doctor. The counsel further challenged the time taken by the victim to report to the hospital; there was an expiry of about six hours from the time of the alleged sodomy to the time he was examined by the medical doctor. Moreover, in this case, the trial court could have gone further to inquire why the victim was named a thief when the fracas arose. The counsel cemented the argument with the case of **Lauriano Mseya v. R**, [2009] TLR 250. The counsel insisted that, the case against the appellant was framed. The counsel further argued that, the evidence at hand presents two views. First, the fracas arose

after the victim was labelled a thief. Second, the victim did not know the person who sodomised him. He urged the court to interpret those two views in favour of the appellant. He fortified the argument with the case of **Olfam Mathias @ Mnora v. R**, [2012] TLR 304. The counsel stressed, the case was not proved beyond reasonable doubt. He implored the court to allow the appeal.

In reply, the learned State Attorney, Ms. Sophia Mgasa supported the conviction and sentence against the appellant as the case was proved beyond reasonable doubt. The evidence of PW1 pointed towards the appellant as the one who committed the offense even though three persons slept on one bed. Moreover, the appellant confessed to sodomise the victim. The evidence of PW1 was corroborated with the testimony of the medical doctor (PW2). The evidence of DW2 also confirmed that the victim was carnally known by the appellant. In the cases like the one at hand, the best evidence always comes from the victim. See, the case of **Seleman Makumba v. R** [2006] TLR 96. The victim's complaint about the incident did not suggest that he (victim) was sodomised by two persons. Also, the evidence at hand, does not suggest that the victim was intoxicated; the victim remained emphatic about the person who sodomised him. The counsel objected the allegation that the victim's words on the act had double interpretation. On the source of light, the evidence suggests that there was clear light as the victim and appellant prayed games on TV before going to bed. Therefore, there was electricity. As the victim and appellant shared one bed

sheet, there was no possibility of mistaken identity. Furthermore, the victim wore his clothes and the oil seems to have been rubbed from the anus. However, the medical doctor observed bruises on the victim's anus which is pertinent in proving the offense of unnatural offense. The victim, being an adult, could not have been sodomised by another person before presenting himself to the medical doctor. Even the allegation that, the victim was a thief does not feature in the evidence; this might have been an afterthought. Ms. Mgasa objected the allegation that the evidence had two views; she insisted, the case was proved beyond reasonable doubt.

In the rejoinder, Mr. Outa stressed that the words used by the victim do not suggest that he was sodomised by the appellant. He further insisted that, the victim could have been accompanied to the hospital. Also, the fracas arose after the alleged theft. In conclusion, the case was not proved beyond reasonable doubt.

In this case, the appellant advanced two grounds of appeal which are hinged on two major points; **first,** the failure by the trial court to evaluate the evidence; **second**, the offense against the appellant was not proved beyond reasonable doubt. When expounding the grounds of appeal, Mr. Outa was of the view that, the evidence at hand presents two views; that, the fracas arose after the victim was implicated in the theft and that the case was not proved. The appellant's



counsel urged the court to interpret the two views in favour of the appellant. Furthermore, in support of the grounds of appeal, Mr. Outa raised several issues which I wish to address them in this judgment. First, the appellant's counsel argued that, in this case, as the evidence of sexual offense was adduced by an adult, there was a need for such evidence to be corroborated to clear any possibility of being fabricated. In his view, the victim fabricated the evidence against the appellant. This allegation was, however, objected by the learned State Attorney. In this case, I have already considered the victim's evidence in connection with the offense. The victim met the appellant for the first time on 10th July 2022; the victim was introduced to the appellant by Eripidius. It is undisputed that, the appellant and Eripidius were friends for more than two years. The evidence further shows that, the victim arrived from Dar es salaam to Mwanza on 07th July 2022. While I am alive on the possibility fabrication of evidence; however, in this case, I find no reason to believe or question the veracity of the victim's testimony. The victim clearly narrated that they were drinking the whole night until at 5 am. They arrived at the appellant's home; while Eripidius went to bed first, the appellant and victim remained behind and played games before going to bed. While sleeping, the victim felt pain, he woke up and witnessed the appellant naked. In his own words, the appellant's pant was down. The victim further noticed the presence of oil on his anus. While he seemed discontented with the act, the appellant comforted him. The appellant was willing to give the victim some money as consideration. Moreover, in the



appellant's evidence, he admitted to have paid Tshs. 150,000/= to the victim through Eripidius. With this clear evidence against the appellant, I have cleared the doubt on whether the victim fabricated evidence against the appellant. In my belief and understanding, this was one of the demeaning incidents that an adult of sound mind could have fabricated. The act seemed to belittle both the appellant and the victim, no wonder the fracas pulled a considerable cloud of people.

Second, Mr. Outa argued that the case entirely depended on circumstantial evidence and therefore, all inferences in reference to the offense ought to point towards the appellant. I subscribe to the counsels view that circumstantial evidence should not suggest any other inference than the fact that the appellant committed the offense. There are several case laws on this legal point. For instance, in the case of **Lucia Anthony @ Bishengwe v. The Republic,** Criminal Appeal No. 96 of 2016, CAT at Mwanza (unreported), the Court of Appeal of Tanzania stated that:

i. *That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that he circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused non else (See* ***JUSTINE JULIUS AND***

***OTHERS VS. REPUBLIC***, *Criminal Appeal No. 155 of 2005 (unreported).*

ii. *That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See,* ***SIMON MSOKE VS. REPUBLIC, (1958) EA 715A*** *and* ***JOHN MAGULA NDONDO VS. REPUBLIC,*** *Criminal Appeal No. 18 of 2004 (unreported)].*

iii. *That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected [see* ***SAMSON DANIEL VS. REPUBLIC, (1934) E.A.C.A 154].***

iv. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See* ***SHABAN MPUNZU @ ELISHA MPUNZU VS. REPUBLIC,*** *Criminal Appeal No. 132 of 2002 (unreported).*

v. *That the circumstantial evidence under consideration must be that of surrounding circumstances which, by undersigned coincidence is capable of roving a proposition with the accuracy of mathematics. (See* ***JULIUS JUSTINE AND OTHERS VS. REPUBLIC*** *(Supra).*

vi. *That the facts from which an inference adverse to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See* ***ALLY BAKARI VS. REPUBLIC (1992) TLR, 10*** *and* ***ANETH KAPAZYA VS. REPUBLIC,*** *Criminal Appeal No. 69 of 2012 (unreported).*

However, the case at hand did not entirely depend on circumstantial evidence because the victim was an eye witness to the incident. Contrary to the appellant's view, in my view, the victim did not only simply believe that the appellant sodomised him but also witnessed the appellant naked immediately after the incident. Furthermore, the appellant confessed to have sodomised the victim. I find the allegation levelled by the appellant's counsel that the victim was not sure of the person who sodomised him to have no merit.

Mr. Outa further questioned the source of light that enabled the victim to identify the appellant. However, the evidence does not leave any doubt that there was electricity in the house. This fact is evident as the appellant and victim played games on TV before going to bed. Furthermore, they arrived at home at around 5 am; they played games before going to bed. Again, it seems there was a lapse of some minutes before the incident occurred. In my view, it was early in the morning with clear light to see what happened in the room. I find no merit in the allegation that there was no light to identify the culprit.

Third, the appellant's counsel queried the victim's evidence as the alleged oil on the anus was not observed by the medical doctor. This argument was resisted by the learned State Attorney as the victim had to put on his garments before going to the police for a PF3 form and finally going to the hospital for medical



examination. The victim could not have walked naked to the police station and the hospital for the mere reason of protecting the oil. Again, the doctor's role was to examine whether the victim was sodomised something which he did. The medical doctor was not looking for the presence of oil which, in my view, irrelevant in proving this offense.

Similarly, the appellant's counsel doubted the victim's evidence as there was a lapse of six hours from the alleged act to the examination of the victim. In my view, this was still a reasonable time considering the circumstances of the case. When the incident occurred, there was a fracas which attracted the community around. As the door was closed, a neighbour who heard the noises broke the door and the victim came out. Sometimes later, the victim was advised to report the matter to the street chairman something which he did. PW3 confirmed that, the incident was reported to the street chairman who also heard the confession from the appellant about the alleged offense. Later, the victim was advised to report the matter to Kirumba Police Station where he secured a PF3 form before going to the hospital. Of course, the victim's case was vital but, I am reluctant whether it was treated as an emergency case at the hospital. The victim was finally received at 11 am and examined at the availability of a medical doctor. The appellant's counsel further argued that, the victim might have done something to his anus before going to the hospital. In my view, this allegation is



not backed up with any evidence. I find Mr. Outa's arguments to be devoid of merit.

Finally, the appellant's counsel assailed the trial court for failing to inquire as to the reason why the victim was named a thief when the incident arose. However, if at all, the victim was a thief, such fact is missing in the appellant's evidence. On his side, the victim explained how he was christened as a thief after being discontent with the act. I understand, a person is only convicted based on the stronger evidence from the prosecution's witness. Nonetheless, the appellant also had an obligation to enlighten the court if there was any contrary evidence. In this case, I find the prosecution proved the case beyond reasonable doubt and the defence failed to shed doubt on the prosecution's case. I hereby dismiss the appeal and uphold the decision of the trial court. Order accordingly.

**DATED** at **Mwanza** this 06th day of October 2023.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**06/10/2023**



**Court:**

Judgment delivered this 06th October 2023 in the presence of the appellant and his counsel, the learned advocate, Mr. Deya Outa and in the presence of the learned State Attorney, Mr. Adam Murusuri. Right of Appeal explained.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**06/10/2023**