

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 108 OF 2023

(Originating from the District Court of Chunya at Chunya, in Criminal Case No. 45 of 2022)

IBRAHIM MOHAMED.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 18/09/2023

Date of Judgement: 29/12/2023

NDUNGURU, J.

"Business went wrong" is a clause which can be used to tell the what happened in this case. On 28 day of March 2022, one **A.K** to hide her identity (henceforth, the complainant) agreed with IBRAHIM MOHAMED (the appellant) for what they called as short time sexual intercourse for payment of Tshs. 10,000/=. The agreement was furnished in a guest house called PILSON at Kasanga village within Chunya District and Mbeya Region. According to the complainant, at the beginning things went as per the agreement as that, having finished

normal sexual intercourse she dressed up while the appellant remained necked.

It was said that, things got changed and went wrong when the complainant wanted to leave the guest house room. It is when the appellant intercepted the complainant's legs, she fell down then the appellant undressed her pant and laid on her back then took his penis and inserted in her anus. That the appellant did the act while holding the complainant's mouth to prevent her from raise alarm. That, notwithstanding of being prevented to raise alarm, she managed to do so after feeling much pain and started bleeding for the tear she sustained in her anus. That the alarm she raised was responded by some Samaritans who immediately arrived at the scene and found the appellant sodomizing the complainant.

Thereafter, the appellant was arrested, taken to police station then arraigned to the District Court of Chunya (the trial Court) for the unnatural offence contrary to section 154 (1) (a) of the Penal Code Cap. 16 R.E 2019 (Now, 2022).

In the particulars of the offence, it was stated that on 28th day of March, 2022 at Kassanga Village within Chunya District in Mbeya Region the appellant did have carnal knowledge the complainant against the

order of nature. The appellant denied the charge, the case went to a full trial, at the end, the trial court was satisfied with the prosecution's evidence it thus convicted the appellant and sentenced him for thirty years imprisonment.

Dissatisfied, the appellant lodged the instant appeal raising five (5) grounds of appeal which in my reading they are premised on two complaints that; the prosecution did not prove the case to the required standard and that the defence evidence was not considered. On the 1st ground the complaints are that; the complainant's evidence was not corroborated, that there was no explanation to the delay to attend to hospital after the incidence, that other witnesses such as a good Samaritan, watchman of the guest house were not called and that the visitor's book was not tendered.

During the hearing of the appeal, the appellant appeared in person, unrepresented whereas Mr. Msemo, learned State Attorney appeared for the Republic.

When the appellant was invited to expound his grounds of appeal he just prayed for this court to consider his grounds of appeal and allow the appeal.

On his part, submitting in opposition of the appeal, Mr. Msemo dismissed the appellant's complaint that the prosecution did not prove the case at the required standard he argued that since in sexual offences the evidence of the victim is sufficient to warrant conviction, that PW1 in this case explained it all about what befallen her and that her testimony was corroborated by PW2 and PW3. Then that exhibit P1 proved that the victim was sodomized. Mr. Msemo thus, urged this court to dismiss the appeal.

When given opportunity to rejoin, the appellant reiterated that his grounds of appeal be found meritorious and the appeal be allowed.

I have considered the grounds of appeal, the submissions by the learned State Attorney and the record. In my view, the appellant's complaints can conveniently be resolved by submitting the evidence adduced by the parties at a fresh scrutiny. And in performing this noble duty, I will be guided by the well-known principle under section 110 of the Evidence Act, Cap. 6 R.E 2022; that he who alleges must prove. Moreso, the principle in criminal cases that a burden of proof lies upon the prosecution and it is beyond reasonable doubt. And it never shifts to the accused person. See the holding in **Pascal Yoya @Maganga vs**

Republic, Criminal Appeal No. 248 of 2017 Court of Appeal of Tanzania (Unreported).

In the instant matter, three witnesses testified on the prosecution side. PW1, the complainant said that she was sodomized by the appellant soon after they finished a normal sexual intercourse which they had agreed on. That she felt pain and bled in the anus for the tear that she sustained. In corroborating PW1's evidence, PW2 testified that he was called at PLISON guest house where in one of the rooms of the guest house he found the appellant under arrest and the complainant then he was told that the appellant has sodomized the complainant, therefore, he ordered the militia men to take the appellant to Chunya Police station. On top of that, PW3, medical doctor stated that he examined the complainant and found her anus with bruises and blood stain. PW3 formed the opinion that the complainant was forcefully penetrated with a blunt object like penis suggesting that she was sodomized.

In his defence, the appellant denied everything, he denied to know the alleged guest house. He also distanced his knowledge of the complainant and denied to have any sexual agreement with her.

Having keenly looked at the evidence of both parties and the entire proceedings, I formed the opinion that notwithstanding of the appellant's denial, there were some facts which the prosecution did not need to prove since they were admitted by the appellant during preliminary hearing. The record is clear that the fact about the agreement between the appellant and the complainant to have sexual intercourse, the raising of alarm by the complainant and the whole story concerning PLISON guest house were not at issue. Those facts to be denied by the appellant during defence was nothing but an afterthought. This is because, facts admitted or agreed on during preliminary hearing need no evidence to prove. Under the circumstances, the prosecution's task was to prove if the victim was sodomized and if the appellant was a perpetrator.

At the outset, I concur with the learned State Attorney that in sexual offences like the one at hand the best evidence is that of the victim of offence if the same is believed to be true and a witness is credible. And only that may warrant to conviction of the accused person without being corroborated. This is in accordance with section 127 (6) of the Evidence Act and the decision in a number of cases like the **Selemani Makumba v Republic** [2006] TLR 379. **Edward Nzabuga**

v. Republic, Criminal Appeal No. 136 of 2008, Court of Appeal of Tanzania at Mbeya (unreported).

Nonetheless, I am aware of the exception on the general rule of the best evidence. It is that the victim's evidence cannot be taken whole sale, as the same must pass the truthfulness and credibility test as held by the Court of Appeal in the case of **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported).

In this case I have keenly observed PW1's evidence, she said that they agreed with the appellant for one night. Then she said that after they finished the intercourse, she wore her closes and wanted to leave the room is when the appellant intercepted her legs and fell down. I have many questions to ask myself from the evidence of the complainant. I asked myself if the agreement was for one night how it happened the complainant dressed so as to leave. And why the appellant waited until the complainant dressed and want to leave then decide to intercept her. Why the appellant if was in mind with the intention of sodomizing the appellant did not do so when they were in the course of the so called normal sexual intercourse. All these questions make me to find the complainant evidence untrustworthy and incredible.

Also, I have considered the appellant's complaint that there was no explanation why it took two days that is from 28/03/2022 when the offence was alleged to be committed to 30/03/2022 for the complainant to go to the hospital. According to the appellant, the delay raised a probability for the complainant to have met with other men on 29/03/2022. Indeed, it was stated by the prosecution side that the incident occurred on 28/03/2022 whereas the PF3 that is exhibit P1 shows that it was filled on 30/03/2022. It is also true that no explanation to the delay which creates doubt on its viability.

The appellant also complained that some witnesses such as the good Samaritan and a watchman of the guest house were not called. I am abreast of the law that in proving certain fact there is not a quantity of witness needed but the quality of evidence adduced. That is the spirit of Section 143 of the Evidence Act. Also, the holding in the case of **Yohanes Msigwa v R** [1990] TLR 148.

In this case the allegation that a good Samaritan arrived to the scene of crime found the appellant on top of the complainant sodomizing her, such witness was crucial. This is due to the principle that failure to call material witnesses who are within reach but are not called without sufficient reasons being shown by the prosecution court

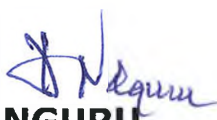
can draw adverse inference. see **Aziz Abdallah vs R** [1991] TLR 71; **Pascal Sele vs R**. Criminal Appeal No. 57 of 2017 (Unreported) and **Omari Hussein alias Ludanga and Another vs R**, Criminal Appeal No. 547 of 2017.

In the circumstances, failure to call such material witness without reasons about any difficult to procure his/her availability raises doubt to the prosecution case.

In the result I find the prosecution evidence did not prove the charge beyond reasonable doubt that the complainant was sodomized and the appellant was the perpetrator. In the event, I allow the appeal, quash the judgment and set aside the sentence meted to the appellant. I order the appellant be released from prison unless he is held therein for another lawful cause.

It is so ordered.




D.B. NDUNGURU,
JUDGE
29/12/2023