IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 50 of 2023

(C/F Criminal Case No. 57 of 2023 in the District Court of Moshi at Moshi)

STEPHEN AUGUST MTUI…….…… APPELLANT

VERSUS

THE REPUBLIC……..RESPONDENT

JUDGEMENT

Date of Last Order: 30.10.2023
Date of Judgment: 06.12.2023

MONGELLA, J.

The appellant herein was arraigned before the District Court of Moshi at Moshi for unnatural offence under **section 154 (1) (a) and (2) of the Penal Code** [Cap 16 R.E 2022]. It was alleged that on 04.01.2023 at Marangu Kitowo Area within Moshi District in Kilimanjaro region, the appellant had carnal knowledge of a boy aged 16 years (the victim, hereinafter) against the order of nature.

To prove its case; the prosecution paraded five (5) witnesses: PW1 (the vicitm); PW2, Shufaa Farigi Ally; PW3, WP. 2133 S/Sgt Mariam; PW4; Cyprian Mchami and; PW5, Aldegunda John Mtuy. The prosecution's case was to the effect that:

On the material date of 04.01.2023, the victim went to a shoe shiner to fix his shoes. Upon arriving there, he did not find the shoe shiner. The appellant who was driving his motorcycle came from a butcher where he had gone to stamp meat and offered to help him call the shoe shiner at his house, so he followed him to his house as the appellant lives near the shoe shiner. While at his house, the appellant gave him the shoe shiner's number and he called him. The shoe shiner informed him that he was at the market purchasing shoe materials.

The victim returned the phone to the appellant who told him to enter his house. He deceived him into going into his room and locked the door. The appellant told him he loved him then touched his thighs and other parts of his body. He tried to shout, but the appellant covered his mouth. The appellant then removed his trousers and those of the victim, took him to his bed and inserted his male organ into his anus telling him to keep quiet and promising to give him the phone.

He then gave the victim the phone and T.shs. 5,000/- and warned him not to disclose what had happed otherwise the appellant will lose his job and the victim would lose his studies. After the act was done, the victim went to the shoe shiner, picked his shoes and went home. A few days later, the appellant called him again and sodomized him. The victim claimed to have been sodomised by the appellant at 4 diverse times.

After such incidents of being sodomized, the victim fell ill. PW5 gave him money to go to the dispensary for treatment whereby he was given medicine, but did not get better. The victim then called the appellant to inform him that he was sick and he gave him T.shs. 15,000/= with which he purchased more medicine. PW5, became suspicious on where the victim got the money. Upon questioning him, he confessed to have received from money from the appellant thrice and that he had sodomized him thrice. The victim also confessed that the appellant had given him lotion, perfume and powder. PW5 informed the victim's parents and the appellant accompanied by PW4 came to her seeking to settle the matter concerning him and the victim. Eventually, the victim was taken to his parents.

On 05.02.2023, PW3 was assigned to investigate this case. She interrogated witnesses and visited the crime scene. PW2 medically examined PW1's anus whereby he found the sphincter muscles loose though there were no bruises. In his examination, PW2 concluded that PW1's anus had been penetrated by a blunt object. He then filed the PF3 they had come with and tendered the same in court whereby it was admitted as exhibit P1. After the closure of prosecution's case, the trial court found the appellant with a case to answer.

The appellant gave his testimony as DW1 and called three (3) witnesses; DW2; Octavian Minja; DW3, Baraka Peter Temu and; DW4, Happiness Andrea Mtuy, his wife.

The appellant alleged that on the material day of 04.01.2023, he left home around morning hours and was back at 12 noon. At his home, he found his mother, the house boy, a visitor he had contacted (DW2) and his wife (DW4). While drinking tea, his helper and the victim arrived. The two had tea as well. The appellant then left and came back home at around 6pm. Three days later, he was called by PW5 who asked about the phone in possession of the victim. He replied he did not know about the said phone. He alleged that his salon workers informed him that they had given the phone to the victim and no proof was produced to prove otherwise. He then learnt of rumours about him. He testified further that none of the things given to the victim were his. He claimed that people were out to tarnish his image. He also challenged the victim's late reporting of the incident as the same allegedly took place on 04.01.2023, but was reported on 05.02.2023.

DW2, testified that on the material day he came to the appellant's house around 11 am, but did not find him. The appellant then arrived with his fellow at about 40 minutes later and they all had tea together. Later on, two young men arrived, had tea and left. He too left the house around 3 pm. That in few days later he learnt of the appellant's arrest.

DW3, the appellant's fellow veterinary doctor, testified that on the material day, he went to the appellant's house for breakfast and found visitors. When drinking tea, two young men appeared and they too joined them. Afterwards, they all left. He said that he left

with the appellant and the visitors and later brought the appellant back home at around 4 pm.

DW4, the appellant's wife, testified that on the material date, his husband (the appellant) left for work in the morning. That, at around 11 am she received a visitor who came for the appellant. That, the said visitor waited for the appellant at her mother in law's home. The appellant then came home with DW3 around 12 noon and they had tea. Then the victim and their barber came to their home and they too had tea. The appellant and DW2 left and later the barber and PW1 also left. She also averred that she was surprised of the news regarding the appellant considering that on the material date she was around the entire day.

Upon observing the evidence of both parties, the trial court found the appellant guilty of unnatural offence, convicted and sentenced him to serve 30 years imprisonment term. Aggrieved, he has preferred this appeal on four grounds as hereunder:

1. *That Honourable Trial Magistrate erred in law and in fact for convicting the Appellant based on the case that was not proved beyond reasonable doubt.* (sic)

2. *That, the trial Magistrate erred in law and in fact for failure to evaluate evidence adduced by the defence, hence wrongly convicted and sentenced the Appellant.*

3. *That, Honourable Trial Magistrate erred in law and in fact for failure to take the evidence of the victim at wholesome as required by the established principles of the law.*

4. *That, the trial Magistrate erred in law and fact for failure to evaluate evidence of PW3 and exhibit P1 thus convict and sentenced the accused person wrongly.*

The appeal was argued orally whereby the appellant was represented by Mr. Emmanuel Anthony, learned advocate while the respondent was represented by Mr. Ramadhani Kajembe, learned state attorney.

In his submission in chief, Mr. Anthony collectively argued the 1st and 3rd grounds of appeal. He directed the court's attention to page 7 of the proceedings whereby the victim (PW1) disclosed that after being given the phone, he went to the shoe shiner whereby he picked up his shoes and went home. He contended that initially, the victim stated that he met the appellant at the shoe shiner, but the shoe shiner was absent. That, the victim as well testified that the appellant called the shoe shiner and informed them that there was a person waiting for him and thereafter the appellant took PW1 to his place and sodomized him. Mr. Anthony challenged the prosecution for failure to furnish the alleged shoe shiner as a witness.

He was of considered view that there was contradiction as to the dates of the offence whereby while the victim (PW1) averred that

the incident took place on 04.01.2023, the appellant denied the incident ever taking place. He further argued that the incident was reported a month later, that is, on 05.02.2023 and when PW1 was questioned as to why he reported the same late, he replied that when the act was done for fourth the time, he reported the same to a priest. However, PW1 did not disclose when he reported the same to the priest and the priest was never called to testify. He faulted the omission to call the shoe shiner and the priest contending that the omission warrants adverse inference being drawn against the prosecution. In support of his stance, he cited the case of **Charles s/o Kassim @ Kitobe vs. Republic** (Criminal Appeal 546 of 2021) [2022] TZCA 581 TANZLII.

Mr. Anthony further faulted the late reporting of the incident. That after the priest advised him to report the matter to his parents but he did not do so until he fell ill which was on 05.02.2023. He had the view that the late issuing of the report creates doubts as to his credibility and thus diminishing his credibility. He supported his stance with the case of **Pascal Yoya @ Mganga vs. Republic** (Criminal Appeal 248 of 2017) [2021] TZCA 36 TANZLII.

Arguing on the 2nd ground, Mr. Anthony alleged that the trial court failed to evaluate the evidence on record and thus reached a wrong decision. He averred that the appellant's defence was strong in the sense that he was at home on the material day and he was not alone, a fact that he supported with his 3 witnesses. He thus challenged the trial court for ignoring the principle established

in the case of **Paschal Yoya** (supra), in which the Court of Appeal gave directions on importance of evaluating evidence.

He had the stance that the appellant's case casted doubts on the prosecution's evidence arguing that, while the victim disclosed that the incident took place at 10 am, DW4 testified that she was at home the entire day and that DW3 was with the appellant. In the circumstances, Mr. Anthony prayed for this court to re-evaluate the evidence on record to see that the prosecution's evidence had doubts, hence set the appellant at liberty by quashing his conviction and sentence.

The appeal was opposed by the respondent. In reply to the 1st ground, Mr. Kajembe reasoned that while the appellant claimed that he was not at the crime scene on the material day, his defence evidence shows that the was present. He substantiated his assertion by analysing the testimonies of the defence witnesses. He said that DW2 testified that he was there since 11hrs; DW4 said that she was not present immediately after preparing tea for the appellant; and the appellant himself stated that he went home at 12hrs at noon. Mr. Kajembe further contended that, in cross examination, the victim stated that the act was committed at 10hrs, but the appellant failed to cross examine him on the material time. In the premises he reverted to the established legal principle that failure to cross examine on a particular matter shows acceptance of the facts alleged. To that effect, he cited the case of **Nyerere Nyague vs. Republic** (Criminal Appeal No. 67 of 2010) [2012] TZCA 103

TANZLII. He further held the view that since these facts were raised at the appellate stage, the same were an afterthought.

Mr. Kajembe supported the trial court's findings in the sense that the trial court found the victim (PW1) a credible witness and trusted what the victim stated despite warning itself on taking the evidence of the victim in wholesale as held in **Mohamed Said vs. Republic** (Criminal Appeal 145 of 2017) [2019] TZCA 252 TANZLII.

Mr. Kajembe challenged Mr. Anthony's argument that the court should draw an adverse inference against the prosecution for failure to furnish the alleged shoe shiner. He held the view that the presence of the shoe shiner as witness was immaterial. That, the said shoe shiner was absent and the appellant appeared and offered to help him find the shoe shiner and afterwards took the victim to his home, inside his bedroom. Referring to the victim's testimony, he contended that the victim testified that when he entered the house, the appellant locked the doors with keys and sodomized him. He found the victim's evidence not being shaken thereby showing that the shoe shiner was an immaterial witness.

Further, citing **section 143 of the Evidence Act** [CAP 6 R.E 2022], he averred that the prosecution is not compelled to furnish a certain number of witnesses as what matters is the quality of the evidence and credibility of the witnesses, which he considered to be vivid in the case at hand. He supported his argument with the case of

Christopher Marwa Mturu vs. Republic (Criminal Appeal 561 of 2019) [2022] TZCA 652 TANZLII.

As to PW1's failure to report the incident on time, he admitted that the same can cause the court to draw an adverse inference. However, he contended that this rule has exception in the sense that there needs to be reasonable explanation for the delay and where it is given, the court is supposed to do away with the principle settled. He cemented his contention with the case of **Wilfred Andisai Mmari vs. Republic** (Criminal Appeal No. 164 of 2020) [2023] TZCA 17666 TANZLII. Referring to the victim's testimony, he argued that PW1 disclosed that he was warned not to say anything and thus in the judgement, the trial court found there was explanation offered as to his omission to report the matter early. He thus prayed for the court to find this argument without merit.

Addressing the 2nd ground, he denied the assertion that the trial court failed to consider the defence evidence as a whole. He alleged that the trial court did warn itself on relying on the victim's evidence in isolation of the rest of the prosecution witnesses thereby complying with the principle established in the case of **Ndikumana vs Republic**, Criminal Appeal No. 276 of 2009 (unreported).

Mr. Kajembe further maintained that the prosecution proved its case as it proved there was penetration into the victim's anus as settled in the case of **Onesmo Laurent @ Salikoki vs. Republic** (Criminal Appeal 458 of 2018) [2022] TZCA 594 TANZLII. That, the

prosecution also proved the age of the victim to be 16 years through the testimony of PW1, PW3 and PW5. He contended that the testimony of these witnesses was never disputed.

With regard to Mr. Anthony's argument that the priest was not called, he maintained the same argument as with regard to calling of the shoe shiner. He contended that the witnesses furnished by the prosecution were enough to prove the case. He prayed for this court to find the appeal without merit and uphold the conviction and sentence.

Rejoining, Mr. Anthony prayed for this court to take note that Mr. Kajembe conceded to the question of evaluation of the defence evidence. He averred that the evidence of the defence shows that the appellant was not on the crime scene on the material day and that there is no evidence from defence showing that the appellant sodomized the victim. He insisted that although **section 143 of the Evidence Act** and the case of **Christopher Marwa** (supra) provide that the prosecution is not compelled to furnish a particular number of witnesses, still it is their duty to prove the case beyond reasonable doubt.

He added that at the preliminary hearing the appellant denied committing the offence at the material time of 10am rendering the shoe shiner a material witness. He further averred that the Priest was a material witness to prove if PW1 had reported the matter to him earlier or not. That, if PW1 had been threatened he should not have

said that he once told the priest of the incident. He insisted that there was no evidence connecting the appellant to the offence. In conclusion he prayed for the appeal to be allowed and the appellant set at liberty.

I have considered grounds of appeal and the rival submissions of both parties. I have as well thoroughly gone through the trial court record. Noting that the 4th ground of appeal was abandoned, I will herein resolve the 1st, 2nd, and 3rd grounds collectively under one main issue as to whether the prosecution proved the charge against the appellant beyond reasonable doubt. In the course of doing that, I shall re-evaluate the evidence of both parties, considering that this is a duty charged on the 1st appellate court.

It can be briefly stated that the appellant faults the trial court's conviction and sentence for relying on the prosecution case which was not proved beyond reasonable doubt. The main basis of his claim is that the prosecution failed to call material witnesses, being the alleged shoe shiner, whom the appellant alleged to have talked to through the appellant's phone and passed to collect his shoes on his way back from the appellant's house; and the priest, whom the appellant claims to have reported the matter to before it was known by his guardian (aunt).

At this juncture, I wish first to start with the defence evidence. Generally, it was the defence case that the appellant never committed the offence charged. In essence, the defence staged

evidence showing that the surrounding environment would not permit the appellant to commit the alleged offence at his home. DW4, his wife testified that on the alleged date of commission of the offence, that is, on 04.01.2023, the appellant left home early morning and came back at 12 noon for breakfast, with his friend, DW3, then they left together and came back at 6pm. She alleged to have been at home the whole day and in that respect, the offence would not have been committed in the house. The appellant also alleged to have gone back to his home at 12 noon as usual to have his tea. From the rest of the defence witnesses, that is, DW2 and DW3, it appears that they were with the appellant on the material day having the breakfast together. While DW2 stated the time to be 11am, DW3 did not state the exact time. On the other hand, the victim, claimed to have been in the appellant's house on 04.01.2023 at around 10am whereby the alleged offence occurred for the first time.

Further, the law is settled that every witness is entitled to credence unless there are cogent reasons not to believe the witness. These could be such as where there are contradictions or inconsistencies in the witness' testimony. The way the prosecution witnesses are to be believed is the same way the defence witnesses are to be believed. See: ***Daniel Malogo Makasi & 2 Others vs. The Republic*** (Consolidated Criminal Appeals No. 346 of 2020) [2022[TZCA 230 TANZLII. In that respect I shall scrutinize the appellant's evidence.

As stated earlier, his evidence was geared towards showing that the appellant was not at home at the material time alleged by the victim and that when he came back home, he was surrounded by a number of people rendering it impossible to commit the offence he stood charged with. He claimed to have gone back home at 12 noon whereby he found his mother, the house boy, a visitor and his wife. That, they had tea together and left thereafter till evening. DW2 stated that he arrived at the appellant's house at 11 am whereby he found the appellant's mother and had to wait for the appellant for 40 minutes. DW3 testified to have gone to the appellant's house with the appellant. He however, did not state the time they arrived at the appellant's house, though he said that they found the visitors there. Supposedly, the said visitor is DW3 who also testified into the appellant arriving with DW3. DW4, who is his wife, testified that he received the appellant's visitor (supposedly DW2) at 11am and the appellant arrived at 12 noon in the company of Baraka (DW3).

In scrutinizing the defence evidence as above, I find the time of commission of the offence being of essence in this matter. It should be noted that in his testimony, the victim specifically stated that the offence was committed against him at around 10am whereby the appellant took the victim to his house and did the act to him. All defence witnesses asserted that the appellant arrived at his home at 12 noon. DW4, to be specific, testified that the appellant left the house in the morning and came back at 12 noon for tea. She claimed to have prepared the tea for him and his guests. Since, the

victim alleged the offence to have been committed at 10am, I find DW4's evidence being relevant in establishing that the appellant was not at home at the alleged time of 10am. This is because she claimed to have been at home the whole day of the alleged incident. So, her evidence would eliminate the possibility of an assumption that the appellant was at home at 10am then left and came back again at 12 noon.

However, I find material contradictions regarding the presence of DW4 at the appellant's home on the date of the alleged offence. While the appellant mentioned DW4, his mother, his visitor (DW3) and his house boy to have been present at his house, DW3 never mentioned to have found DW4 at the appellant's house. He specifically stated to have found the appellant's mother at the house and that it was the appellant's mother who gave him tea to drink. DW3's statement also negates DW4's statement that she received DW3 and told him to wait for the appellant, who was not at home by the time he arrived, that is, at 11hours.

Further, on cross examination, DW4 changed her statement and said that it was the appellant who told him about the dates and the PF3. She also stated that she resides at Masama Hai where she works and usually comes home (to the appellant's house) on Fridays. That, the appellant resides at his home with his mother, but in separate houses. She admitted that 04.01.2023 was a working day. I took the trouble to consult the calendar for the year 2023 and found that 04.01.2023, the date of commission of offence, was in

fact on Wednesday, the day DW4 stated to be residing in Masama Hai for work. The testimony of DW4 on cross examination proves DW3's assertion that she was not around when he arrived at the appellant's house and that he was received by the appellant's mother. To this point, I find DW4 an untruthful witness. The evidence of DW2 and DW3 does not in any way prove that the appellant was not at his house on 04.01.2023 at 10am, the time the victim alleged to have been sodomised by the appellant.

To this juncture, I wish to examine the testimony of the victim. It is trite law that the best evidence in sexual offence comes from the victim so long as the court finds the evidence credible. This is in consideration of the fact that it is the victim who knows better than anyone else of the ordeal he/she went through. See: **Manyinyi Gabriel @ Gerisa vs. Republic** (Criminal Appeal No. 594 of 2017) [2021] TZCA 742 TANZLII; and **Mbarouk Deogratius vs. Republic** (Criminal Appeal No. 279 of 2019) [2020] TZCA 1896 TANZLII.

The victim explained in details on what happened. He explained how the appellant took him to his house and unnaturally carnally known him. He explained how the appellant gave him presents, including money and how it all came in the open. That, he fell sick and was taken to hospital whereby her aunt/guardian realized that he was having money and items which she questioned him as to where he obtained them. The victim then decided to tell the truth. Though the prosecution charged only one incident of 04.01.2023, it appears, from the victim's testimony, that the two were already in

a relationship as the victim used to go to the appellant's house where he would be sodomised and given money and presents. He stated that the appellant had sodomised him four times. I have as well observed the cross examination of the victim by the appellant and found that he remained firm with his testimony. His testimony was not shaken at all. I, in fact, find the victim's testimony being credible. There is nothing to put his credibility in question.

While arguing, the appellant's counsel, Mr. Anthony, faulted the prosecution's case for failure to call the shoe shiner and the priest and for failure of the victim to report the incident at earlier time. On this, I am at one with Mr. Kajembe that the law does not compel the prosecution to furnish a specific number of witnesses to prove a fact. This position is settled under **section 143 of the Evidence Act** which states:

> "**143**. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."

Non-calling of a witness can only be fatal if the witness is material. As argued by Mr. Kajembe, in unnatural offences, what is required to be proved is penetration against the order of nature. PW2, the medical doctor who examined the victim, testified that the victim was penetrated by a blunt object about two weeks ago. He found no bruises, but loose sphincter muscles. It was the victim who mentioned the appellant as the one responsible for his condition. I

have already ruled that the testimony of the victim was credible. With such finding, I am of the view that the said shoe shiner and priest were not material witness to render the prosecution evidence insufficient to prove the case beyond reasonable doubt for not calling them. The said witnesses were not eye witnesses to the commission of the offence.

With regard to the failure of the victim to mention the appellant at the earliest possible opportunity, I am of the view that each case has to be decided in accordance with its own peculiar circumstances. The law treats mentioning of the suspect at an earliest possible opportunity or unexplained delay as creating assurance or not on the witnesses' credibility. See: **Marwa Wangiti Mwita and Another vs. Republic** [2002] TLR 39). As such, where there is an explanation as to the delay, the court is to weigh the same and if convinced rule in favour of the victim.

In the matter at hand, the victim explained that the appellant warned him not to tell anyone as he shall lose his job and the victim shall lose his studies too. However, considering further the testimony of the victim which indicates that the two had gotten into a relationship whereby he used to go to the appellant's house for the acts, I am of the considered view that it was not possible for the victim to tell anyone in the circumstances. The victim appears to have accepted the relationship only to be uncovered by the sickness. However, where the offence is an unnatural offence and much more involving a child below 18 years, consent becomes

immaterial. In that respect, I find no merit in the appellant's counsel's contention.

Before penning down, I have noted that the trial court sentenced the appellant for 30 years imprisonment term. However, he was charged under **section 154 (1) (a) and (2) of the Penal Code**, which provides for a life imprisonment sentence where the offence involves a child below 18 years of age. For ease of reference, the provision states:

> "s. 154 (1) Any person who-
> (a)has carnal knowledge of any person against the order of nature;
>
> (2) **Where the offence under sub section (1) is committed to a child under the age of 18 years the offender shall be sentenced to life imprisonment**.

In the premises, the sentence against the appellant is hereby enhanced to life imprisonment in accordance with **section 154 (2) of the Penal Code, Cap 16 R.E. 2022**. For lack of merit, the appellant's appeal is hereby dismissed in its entirety.

Dated and delivered at Moshi on this 06th day of December, 2023.

X

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