IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB - REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 86 OF 2022

(Originating from Criminal case No. 93 of 2021 of the District Court of Nyamagana at Mwanza)

RAMADHANI JUMA @SAMUNGA----------APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

Last Order: 16.12.2022
Judgment: 20.02.2023

M.MNYUKWA, J.

The appellant, **RAMADHANI JUMA @SAMUNGA** was charged and arraigned before the District Court of Nyamagana at Mwanza for the offence of Unnatural Offence c/s 154(1)(a) of the Penal Code Cap. 16 RE: 2019 (now RE: 2022). It was alleged that, on the 14th Jully, 2021 at Igogo Mungushi area within Nyamagana District at Mwanza region the appellant **RAMADHANI JUMA @SAMUNGA** did have carnal knowledge with a young boy aged fifteen (15) years against the order of nature who, for

purposes of concealing her identity will be referred to, in this judgment, as the victim.

The story went that, on 14 July 2021, the victim who is a boy aged 15, came to Mwanza all along from Muleba with the intention to search for a job. At around 21 hrs he disembarked from the bus stand at Nyegezi and walk to town and on the way, he met with the accused whom he knew him before as PW1 once resides in Mwanza. After the exchange of the greetings the accused asked the boy for his purpose of walking to town that night and PW1 explained that he was looking for a job. It was alleged that, the appellant offered a job to the victim and he took him to his residence, offered him food and a place to sleep. At around 23 hrs after the boy had taken shower and slept, he alleged that the accused ordered him to undress and sodomised him and the boy managed to escape and ask for help. That, the street chairman and other people managed to arrest the accused who was walking following the victim and they inspected his house, recovered the clothes of the victim and sent the accused to the police station who was then charged and arraigned before Nyamagana district court.

The accused pleaded not guilty to the charge and the prosecution paraded a total of 5 witnesses and the accused defended himself on oath.

In his defence, the appellant categorically denied having committed the offence. He claimed that, the case was framed and fabricated against him. After the trial the accused was equally convicted and sentenced to life imprisonment and ordered to pay the victim a compensation at a tune of Tshs. 2,000,000/=. Dissatisfied, the accused has lodged the present appeal before this court appealing against the conviction and the sentence on both counts as follows: -

1. *THAT, no penetration was proved and no DNA test was conducted.*
2. *THAT, the lower court relied upon un favourable identification circumstances.*
3. *THAT, prosecution side failed to summon a material witness from where the appellant was living, as he does not go against S. 143 of TEA (Cap 6, RE:2019) but according to the circumstances of the case there was needs of summoning.*
4. *THAT, the lower court failed to consider my strong defence I fended myself.*
5. *THAT, the evidence of PW1 was not corroborated with other evidence.*
6. *THAT, I do not pen off without saying that this alleged offence was not proved beyond all reasonable doubts.*

When the appeal was called for hearing, the appellant appeared in person, unrepresented and Ms. Sabina Chonghoghwe represented the respondent, the Republic and she supported the conviction and sentence.

The respondent was the first to submit and on the first ground of appeal that no penetration was proved and no DNA test was conducted, Ms Sabina avers that, as other sexual offences require proof of penetration, the same was proved in the trial court. Referring on page 14 of the trial court proceedings, she insisted that when the victim was testified before the court he stated what happened. Referring to the principle in the case of **Seleman Makumba vs Republic** 2006 TLR 379, she stated that, the best evidence in sexual offence cases comes from the victim. She went on that, what is required in proof of an unnatural offence is the fact that the victim was penetrated and DNA is not a legal requirement. She, therefore, insisted that the ground is baseless.

On the second ground that the lower court relied upon unfavourable identification circumstances, Ms. Sabisa insisted that, the ground is baseless. Referring to page 12 of the trial court's proceedings, she stated that, the victim testified how he knew the appellant before the incident and also on page 15 of the trial court's proceedings when cross-examined,

the victim testified to have met with the appellant the evidence which was not disputed as also appears on page 41. Supporting her arguments, she refers this court to the case of **Kennedy Ivan vs Republic**, Criminal Appeal No. 178 of 2007 where the Court of Appeal in discussing the principles of identification as stated in **Waziri Amani** case, they stated that, the criteria are not exhaustive, and that in identification each case is determined on its on circumstances. She prays this ground to be dismissed.

On the third ground of appeal that the prosecution side failed to summon a material witness from where the appellant was living, Ms. Sabina avers that it is clear under section 143 of the Evidence Act Cap 6 RE: 2019 that there is no specific number of witnesses to prove the case, the court trusted and believed the evidence of the victim who once reported to the street chairman as shown on page 21 of the trial court's proceedings. Insisting, she referred to the case of **Goodluck Kyando vs Republic** 2006 TLR 363 that every witness is entitled with credence and must be believed. Therefore, she prays this ground to be dismissed for want of merit.

On the 4th ground that the lower court failed to consider his strong defence when he fended himself, Ms sabina insisted that, records of the trial court show that the appellant's defence was considered and therefore insisted that the ground lacks merit.

On the 5th ground of appeal, that the evidence of PW1 lacks corroboration to support a conviction, it was her submission that, the evidence of the victim (PW1) was enough to prove the case without corroboration. Referring to page 17 of the trial court judgment, the trial magistrate remarked that the evidence of PW1 was consistent and therefore sufficient to prove the case against the appellant. She insisted that, though PW1 evidence proved the case, his evidence was also corroborated by the evidence of PW2 and PW3. He, therefore, prays this ground to be dismissed.

On the 6th ground that the prosecution did not prove the case to the standard required, Ms Sabina insisted that the case was proved beyond reasonable doubt and the evidence of PW1 as it appears on pages 13 and 14 of the trial court's proceedings, it was proved that the appellant penetrated the victim. She, therefore, prays this appeal to be dismissed.

Submitting in support of his grounds of appeal, the appellant prays this court to adopt his grounds of appeal and form part of his submissions. he added that, his sexual organs does not operate after he was involved in an accident and he was not tested. He, therefore, prays this court to allow his appeal.

After the submissions from both parties, I now proceed to determine this appeal where the appellant is appealing his innocence fronting six grounds of appeal.

As it is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden to prove the case beyond a reasonable doubt and the accused only needs to raise some reasonable doubt on the prosecution evidence. In **Mohamed Haruna @ Mtupeni & Another** Criminal Appeal No. 25 of 2007 the Court stated that: -

> *"Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*

See the cases of **Woolmington v. Director of Public Prosecutions** [1935] AC 462; and **Nyabohe Nyagwisi Nyagwisi vs Republic** Criminal Appeal 243 of 2020, **Vitalis Joseph vs Republic** Criminal Appeal No. 384 of 2021.

Based on the grounds of appeal by the appellant which claims that the prosecution case was not proved to the hilt, I therefore, placed with a legal duty to determine whether the prosecution case was proved beyond a reasonable doubt.

On the first ground of the appeal, the appellant claims that penetration was not proved. The prosecution insisted that there was proof of penetration by the victim. As stated in **Leonard Raymond Appellant vs Republic,** Criminal Appeal No. 211 Of 2016, the court of Appeal insisted that: -

> *"For a charge of unnatural offence to succeed, the prosecution has to prove that the appellant penetrated his male organ in the anus of the victim and such penetration however slight, is sufficient to constitute the sexual intercourse necessary for the offence".*

(See also **Daniel Nguru & Others v. Republic**, Criminal Appeal No. 178 of 2004 and **Omari Kijuu v. Republic,** Criminal Appeal No. 39 of 2005 (both unreported).

In the case at hand the victim testified that the appellant penetrated his anus using his penis when he was offered a place to sleep by the appellant. The victim narrated all the incidents before and after the act and the way the appellant was arrested and managed to recover his clothes, and recovery of exhibits which were sent together with the appellant to the police station as proof of the act committed by the appellant. I am alive with the principle referred by the prosecution as stated in the case of **Seleman Makumba vs Republic** 2006 TLR 379, where the Court of Appeal stated that, the best evidence in sexual offence cases comes from the victim but before I solely relied on the principle the following doubts raised by the appellant has to be seem cleared.

First, going to the records, the appellant does not dispute knowing PW1 or even taking him to his house and offering him food and a place to sleep rather he denied to have known the victim against the order of nature. He claims that from when he was arrested, the police could not have incriminating evidence against him as he stayed in the police lock-up for almost a month, a factor which were not denied by the prosecution. Going to the records, the appellant was arrested on 21.06.2021 the day the commission of the alleged offence but he was first arraigned on 12.

08.2021. this raised doubt on the part of the prosecution case in the following aspects.

As it is the principle of the law as stated the evidence of the victim is sufficient to convict the accused if the court do believe that to be true as stated in **Habibu M Tilla vs Republic,** Criminal Appeal No. 416 Of 2018, where the court of appeal stated that:-

> *"It is now trite position that in a sexual offence case, the only independent evidence of a victim of the offence, including a child of tender age, may be sufficient to prove penetration notwithstanding that such evidence is not corroborated".*

See also the case of **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015. Based on the circumstance of this case, it requires other evidence to corroborate the evidence of PW1. The prosecution evidence stated that while PW2 and PW3 entered the house of the appellant with PW1 the victim who was able to recover his clothes, they also seized a handkerchief which the accused used to clean up, and the machete which was used to threaten the victim which was handled over to the police but they appear nowhere on the part of the prosecution evidence that was tendered before the court.

Again, PW1 was sent to the hospital after the alleged offence. I am alive with the principle in **Ally Mohamed Muya vs Republic**, Criminal Appeal No. 02 of 2008 the court of Appeal stated that:-

> *"it is true that PF3 (Exhibit Pl) would have supported the commission of the offence but rape is not proved by medical evidence alone some other evidence may prove it..."*

In this case at hand, the evidence of a medical doctor who examined the victim of rather the PF3 would be vitally important to extinguish doubts raised by the appellant on the commission of the alleged offence. Neither the Doctor who examined the victim nor the PF3 which is featured in prosecution evidence appeared to form part of the court records.

In the offence at hand, it must be proved that the victim was penetrated for the offence to stand. In regard to the evidence adduced by the prosecution failed to meet the criterion under section 3(2)(a) of the Evidence Act Cap. RE: 2019, and the appellant's doubts raised could not be cleared.

Based on the above findings, it suffices to hold that the trial court's conviction against the appellant was not proved beyond reasonable doubt and occasioned failure of justice on the part of the appellant. The first ground of appeal, suffice to dispose of this appeal for the reason that

failure to prove penetration no other element can be determined to cure the cause.

In the premises, I refrain from determining the rest of the grounds of appeal, the same will not save useful purpose now. Under the circumstances, I allow the appeal. I quash the conviction and set aside the sentence. I order the immediate release of the appellant from prison unless he is lawfully held. Order accordingly.

It is so ordered.

M.MNYUKWA

JUDGE

20/02/2023

The right of appeal is explained to the parties.

M.MNYUKWA

JUDGE

20/02/2023

Court: Judgement delivered on 20th February 2023 in the presence of the appellant in person.

M.MNYUKWA

JUDGE

20/02/2023