IN THE HIGH COURT OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 79 OF 2023

(Originating from the District Court of Iringa at Iringa

in Criminal Case No. 43 of 2023)

ARON KIWALE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

04th & 27th March 2024

LALTAIKA, J.

The Appellant herein **ARON KIWALE** was arraigned in the District Court of Iringa at Iringa charged with one count of **Unnatural Offence** under Section 154(1)(a) and (2) of the Penal Code Cap 16 RE 2022. The allegation was that on **the 2nd day of March 2023 at Mgama village** within the District and Region of Iringa he had carnal knowledge, against the order of nature, **of a four-year-old boy** (name concealed.)

When the charge was read over and explained to the appellant (then accused) he denied wrongdoing. This necessitated the conducting of a full trial. To prove the allegation, the prosecution paraded a total oof four (4) witnesses (whom I will later refer simply as PWs) and tendered one

documentary exhibits. Halfway through, the trial court made a finding that the appellant had a *prima fascie* case to answer. The defence **case had three witnesses in total**, the appellant inclusive.

Having been convinced that the prosecution had left no stone unturned in proving the allegation, the learned trial magistrate convicted the appellant as charged. She proceeded to sentence him to serve a thirty years' imprisonment term. Dissatisfied with this decision, the appellant has appealed to this court by way of a petition of appeal containing the following grounds:

1. *That the trial Magistrate erred in law and fact to convict the appellant relying on repudiated retracted cautioned statement that was recorded illegally.*
2. *That the prosecution side failed to prove the case beyond reasonable doubt.*
3. *That the sentence imposed by the trial court was manifestly excessive regard being to the circumstances in which the offence was committed.*
4. *That the trial Judgment was not a n Judgement at all simply because it contained procedural illegalities.*

When the appeal was called for hearing on the 14th of March 2024, the appellant had no legal representation hence **fended for himself**. The respondent Republic, on the other hand, appeared through **Mr. Nashon Simon, learned State Attorney** (SA). The next part of this judgement is on submissions by both parties.

The appellant, who appeared confident and well prepared did not opt for the chance to merely chip in for a rejoinder. He indicated that he was going to argue only the second and fourth grounds. I must admit that although the language of the court was Kiswahili, the appellant used specialised legal terminologies as if he had been in court corridors before.

Arguing in support of the second ground, the appellant averred that a myriad of inconsistencies led to the prosecution's inability to prove the case beyond reasonable doubt. Drawing attention to purported inconsistencies, the appellant cited page 9 of the record. He averred that the victim's mother (PW1) purportedly recounted observing blood and whitish fluid emanating from the victim's anus, a claim that was contradicted by the medic (PW4), who adamantly asserted the absence of semen or blood. This apparent contrast, the Appellant reasoned, watered down coherence of the prosecution's narrative.

Moreover, the appellant alleged that there were discrepancies between PW1 and PW2's respective accounts. Specifically, PW1's assertion regarding the victim's whereabouts and the purported events leading up to the alleged incident sharply contrasted with PW2's rendition of the events. Such glaring

disparities, the appellant argued, eroded confidence in the prosecution's case, casting doubt upon its credibility.

With even more forceful arguments, the appellant cast a doubt upon the assertion of penetration in the victim's anus, probing the veracity of PW1's claims regarding bruising and discoloration. The appellant underscored the ambiguity surrounding the real cause of the purported injuries, positing alternative explanations such as sickness, accidental trauma, or contact with blunt objects. The Appellant emphasized that such unsubstantiated assertion lacked substantive evidentiary support.

Turning his focus to procedural irregularities, the appellant highlighted the prosecution's failure to summon a potentially pivotal witness named Abiud, whose testimony could have shed crucial light on the circumstances surrounding the incident. Moreover, the appellant meticulously dissected the testimony of PW2, the victim, exposing purported inconsistencies and lacunae in his narrative. He argued that PW2 failed to provide essential details, including the location and timing of the alleged incident, as well as the absence of any mention of threats or coercion—a crucial element in establishing culpability.

Moving on to the fourth ground, the Appellant made a rather scathing attack of the impugned judgment. He claimed that it was not a court judgment at all for, among other things, its failure to afford due consideration to his defence, particularly his assertion of the alleged fabrication of the case by his brother. The appellant complained bitterly that this constituted a glaring miscarriage of justice underscoring the profound inadequacies in the adjudicative process.

Taking up the podium, Mr. Simon announced boldly that he objected the entire appeal and that he would address the 2nd and 4th grounds raised by the appellant.

Regarding **the second ground**, the learned State Attorney argued that the case was indeed proved beyond reasonable doubt as required by Section 3(2) of the Evidence Act Cap 6 RE 2022, which mandates the prosecution to establish the case beyond reasonable doubt. In a composed and thoughtful mood, Mr. Simon argued that since the appellant was charged with Unnatural Offence, the prosecution needed to prove the victim's age, penetration against the order of nature, and the identity of the perpetrator.

The learned State Attorney contended that all three elements were established. In this case, Mr. Simon reasoned, the victim's mother (PW1) testified to the victim's age. He referred this court to the case of **FRANK KINAMBO v. DPP** Crim Appeal No 47 of 2019 to emphasize that the age of the victim could be proved by various means, including the victim's parent or medical practitioner.

Regarding penetration, Mr. Simon argued that sexual offenses often occur in secrecy, with the victim and perpetrator as the primary witnesses. He cited Section 127(6) of the Evidence Act, which allows conviction based on the victim's evidence alone if the court deems the witness credible. Having elaborated his point using several cases that recognize the evidence of a victim of sexual offences as the best evidence, Mr. Simon decided to go beyond the confines of our jurisdiction. Taking a trip to the Philippines, he referenced the case of **PEOPLE OF PHILIPPINES v. BENJAMIN A. ELMANOOR/G.R** NO 234951 where the trial court found the victim's testimony credible, as noted in the judgment. He claimed that such a foreign precedent was cited with approval by our Apex court in **MOHAMED SAID v. REPUBLIC** Criminal Appeal No 145 of 2017.

Mr. Simon countered the appellant's claims of contradictions and failure to summon a witness, stating that the witness in question was not crucial as he did not witness the incident. He argued that the victim did mention the appellant at the earliest stage, contradicting the appellant's assertion.

Moving on to the fourth ground, Mr. Simon strongly defended the impugned judgement. Further, he refuted the appellant's claim that his defence was not considered. He pointed out specific references in the judgment where the trial Magistrate, allegedly, addressed the defence. In conclusion, Mr. Simon asserted that the grounds of appeal lacked merit, urging the court to dismiss them and uphold the trial court's decision.

I have dispassionately considered the rival submissions and carefully examine the records. My role as the first appellate court is akin to rehearing. That means, it is incumbent upon me to reevaluate the evidence adduced in the trial court and if necessary, come up with a different conclusion. See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014

The appeal is centred around allegations of unnatural offence. I will carefully examine the Offence alleged to have been committed, the witness

testimonies, evidence presented and relevant principles of the law emanating therefrom.

In using OWEP tool, a judge or magistrate must ensure that the offence alleged to have been committed does exist in the statute books in the first place, if yes whether the same is correctly cited in the charge sheet or information and if the answer is also in the affirmative whether procedural amendments if any have any bearing on the substantive law. This is to ensure that an accused is charged with an existing offence akin to the maxim that no offence without law.

In the matter at hand, the Appellant was charged with one count of Unnatural Offence. The offence is clearly provided in our laws particularly under Section 154(1)(a) and (2) of the Penal Code Cap 16 RE 2022 as earlier on cited. I have taken the liberty to scrutinize the records and found no fault in the citation of the offence and the subsequent description in the charge sheet.

I made an equally closer scrutiny of the testimonies of the prosecution witnesses. It goes without saying that although in sexual offences, as argued by Mr. Simon, the victim is the best witness, only a parent knows the pain of coming home to find one's child unable to sit because he had been

sodomized. I read the evidence of the victim's mother with some level of empathy. It appears to me that the victim and his mother made it difficult for anyone present in the court to slumber. With that, I move to the grounds of appeal that are, in my opinion, centred on evidence. As usual the verdict will draw from legal principles.

The appellant chose to argue only two grounds namely the 2nd and the 4th. The second ground is rather a general complaint that the prosecution case was not proved beyond reasonable doubt. Specifically, the appellant focused on pointing out purported inconsistencies. He forcefully argued that there were inconsistencies between testimonies of the 1st and 4th on what they reported.

Indeed, the victim's mother (PW1) recounted observing blood and whitish fluid emanating from the victim's anus but the medic (PW4), mentioned that she found no semen or blood. Should I consider that a contradiction going to the root of the matter? The answer is to the negative. In the case of **MOHAMED SAID MATULA v. R.** [1995] TLR 22 on p. 48 it was held:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and resolve*

whether the inconsistencies and contradictions are only minor, or they go to the root of the matter. Normal discrepancies in evidence are those which are due to normal errors of observation, memory, lapse of time, mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be."

I have gone through the oral testimony of both PW1 and PW2 as well as the documentary exhibit in question namely PF3. The medical practitioner provides clearly that having examined the victim's anus there was proof of penetration. I make a finding that the alleged contradiction is not only minor but also does not go to the root of the matter. This is because, neither blood nor seminal discharge are an ingredient of the offence of rape. See the case of **ALFRED TEDO v. REPUBLIC [2001] TLR 126** where this Court (Kaji, J. as he then was) stated clearly that absence of spermatozoa in the victims' private parts did not vitiates the merits of the prosecution's case.

As argued by Mr. Simon, the prosecution needed to prove three elements of the offence namely: age of the victim, penetration against the order of nature and identity of the perpetrator. There has been no dispute

on the age of the victim. Penetration was proved even without blood and seminal discharge as already stated.

Let me add that with regards to the perpetrator, one can see clearly through the meticulously recorded proceedings that the victim and the appellant enjoyed a close relationship. The victim referred to him as **"Baba Mdogo Aron."** It is unfortunate that many if not most child sexual abuse cases especially those on sodomy against young boys involve very close relatives. I dismiss the second ground of appeal for luck of any merit.

On the fourth ground, the appellant claimed that the trial court's judgment was not a court judgment at all. He pointed out alleged shortfalls almost like a trained lawyer. This prompted me to take yet another look at the impugned judgment. I read and reread it through. I must admit that it is one of the best I have read recently. The learned trial magistrate, in my opinion, discharged her duties judiciously and made sound interpretation of the law. For avoidance of any doubts, I will move to the specific complaint raised by the appellant.

The appellant complained bitterly that the learned trial Magistrate did not consider the defence evidence. Mr. Simon, while responding to this complaint, drew my attention to page 3 and 7 of the impugned judgment.

Indeed, the learned trial Magistrate considered the defence evidence and balanced it with that of the prosecution and was convinced, as I do, that the case was proved beyond reasonable doubt.

It is unfortunate that the appellant thinks blaming a family conflict between him and his brother over maize is sufficient to exonerate him from this gross sexual abuse against a four-year-old boy. Painting an imaginary picture in one's mind before, during and after the alleged incidence closes all possibilities for consideration of such a lame excuse. I will explain.

Before the incident, the poor boy was, irrespective of whatever conflict was allegedly going on between his father and the appellant, he was, like most children are, naively close and obedient to his uncle "Baba Mdogo Aron." He agreed to stop playing so he could be sent to the nearby shop, not knowing that it was a mere trick devised by his so-called Baba Mdogo to get him.

The testimony on what transpired during the incident is consistent with what could be observed after the incident. The young boy was barely able to sit after the deplorable act of sodomy. There is no doubt that the future of the young boy will not be the same again. The attempt of the Appellant and his family

Our criminal justice requires that the prosecution case is proved beyond reasonable doubt. This duty rests on the prosecution. See **WOODMINTON V. DPP** [1935] AC 462. The term proof beyond reasonable doubt has not been defined in statutes. In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 the CAT held that

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

I entertain no doubt whatsoever that the watertight evidence adduced in the trial court is strongly against the appellant. The requirement for proof beyond reasonable doubt has, in mind therefore, in my reasoned opinion, I should probably add albeit in passing that the fact that the appellant is an uncle *baba mdogo* to the victim and not a stranger, is very sad indeed. It adds to the growing tendency, in our country, of child sexual abuse committed by close family relatives. It is akin to the Kiswahili saying **Kikulacho kinguoni mwako!** [You are most likely hurt by what is closest to you]. If care is not taken, to reverse the situation, the culture of brotherliness and hospitality **"undugu na ukarimu"** may be hampered.

Said and done, I dismiss the appeal in its entirety.

E.I. LALTAIKA
JUDGE
27.03.2024

Court

Judgement delivered this 27th day of March 2023 in the presence of Ms. Rehema Ndege, State Attorney for the Respondent and the Appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
27.03.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
27.03.2024