IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZNAIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

CRIMINAL APPEAL NO. 202403192000007391

(Arising from Criminal Case No.55 of 2023 from Busega District Court at Busega)

JMM (Pseudo name) .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

24th & 30th April 2024

F.H. MAHIMBALI, J

The wonders in this world cannot be easily explained. Perhaps suggest an ancient saying: kuishi kwingi ni kuona mengi. The appellant in this case who is a male person aged 24 yrs had hired a room in a guest house at Nyamikoma village – Busega District and then took his man (a boy of 17 yrs old) where in, he permitted him to have a carnal knowledge against the order of his nature. When arrested together with that boy, whereas as the appellant herein (proper name withheld) was arraigned before the trial Court for the offence of permitting carnal knowledge against the order of his nature C/S 154 (1) (c) of the Penal Code Cap 16 RE 2022, his fellow (BN) was also charged for an offence

of unnatural offence against the appellant c/s 154(1) (a) of the Penal Code, Cap 16 R.E 2022. In essence, it was alleged that on 25/9/2023 at night hours at Nyamikoma Village within Busega District in Simiyu region, the appellant having hired a room in one guest house, permitted one (BN) a male person aged 17 years old to have carnal knowledge against the order of his nature. The trial court after a full consideration of evidence on records convicted both the appellant and the said BN for the offences charged and sentenced him to serve 30 years imprisonment as it ordered conditional discharge to the said BN – a minor male person. So in essence, this is a case in which both: the person committing unnatural offence and another who consents unnatural offence being committed against his order of nature are jointly charged and convicted.

Aggrieved with such decision, the appellant has approached this Court armed with six grounds of appeal which can be paraphrased into five grounds namely:

1. That the trial magistrate erred in law and fact to convict the appellant by relying exhibit P3 (certificate of seizure) in the absence of search order which is contrary to section 38 of the CPA.

2. That the trial magistrate erred in convicting the appellant basing on exhibit P1 and P7 (cautioned statements of the accused persons.
3. That the important witnesses of the case were not summoned to establish the case.
4. That there was no corroborating evidence to the cautioned statements.
5. That the prosecution side failed to establish the alleged offence beyond all reasonable doubts.

During the hearing of this appeal, the appellant appeared in person and unrepresented while the respondent/republic had legal representation of Mr. Katandukila Kadata learned State Attorney.

Arguing for the grounds of appeal, the appellant prayed for this Court to adopt them and form part of his submission. He thus, prayed for the appeal to be allowed.

On the side of the respondent, Mr. Kadata resisted this appeal. Mr. Kadata further contended that, with the first ground of appeal, holds no water as per circumstances of this case section 38 of CPA could not suitably apply. The circumstances as provided under section 38 of the CPA, apply in a different situation from the case at hand. He convinced

that search warrant or search order as per section 38 of the CPA, is only needed by police where a police officer has a prior criminal information of the availability of anything used in the commission of the offence. In the current case, the appellant was arrested while in possession of a counter book which was then seized by PW1 (police officer) and the certificate of seizure was then filled and was witnessed by the witnesses including the appellant himself. Thus, PW1 when arresting the appellant had no prior knowledge of the commission of the offence by the appellant which then needed a grant of order for the said certificate of seizure. Thus, the legal requirement under section 38 of the CPA has been watered down by these facts.

On the second and third grounds of appeal, Mr. Kadata fortified that the same is devoid of merits, should not be accorded any legal weight. The cautioned statements of both accused persons were admitted in a full compliance with the law. Also, both statements, were not denied by the accused persons during admissibility. Worse, there were neither objections nor cross examination of the alleged facts by the respective witnesses. Mr. Kadata banked his argument by refereeing this Court to the case of **Shomary Mohamed Mkwama, V. Rep,** Criminal Appeal 606 of 2021, at Page 18: that failure to cross examine an alleged fact, is deemed as admission. Also, section 33(2) of the CPA as

preferred by the appellant in his grounds of appeal, this section is completely not applicable in recording cautioned statements. The argument of duress/influence in procuring the alleged confession is to be considered as a mere after thought by the appellant as he did not say so at the trial Court.

With the fourth ground of appeal, Mr. Kadata submitted that the same is devoid of any merit. PW2 having no any interest with the said case, PW2 was by himself an independent witness. Likewise, PW3 of this case, had come to testify on oral confession of the appellant. He being uninterested person, he is not prevented from testifying. In consideration of the fact that all the ingredients of offence were established thus, conviction and sentence were properly meted out by the trial court. see section 143 of the Law of Evidence Act on the irrelevance of quantum of witnesses in a proof of a particular fact.

On the fifth ground, Mr. Kadata averred that the same not to be accorded any weight as the cautioned statement of the 1st accused was corroborated by the testimony of PW2 and PW3. The same were cemented by the testimony of DW1 and DW2 as both corroborated each other. Apart from this, there was oral confession before PW1 and PW2. Thus, it is not true that there was no any corroboration.

On the sixth ground of appeal, Mr. Kadata fortified that the same is weak point, as the said charges were established beyond reasonable doubt. In proof of this case, the prosecution was supposed to establish two things: Whether the appellant permitted his anus being known carnally and that there was penetration. In the medical examination of the appellant (page 20 of the typed proceedings), the appellant admitted before PW3 that he was truly known carnally. In his medical findings, PW3 established the said appellant was known carnally - by allowing his anus being known carnally. In his medical examination, PW3 established that the appellant's anus had stool wastes' remains and that the anus' sphincters were not tight as ought to be. As if this was not enough, PW3 also stated that when he interrogated the appellant as to why he encountered some bruises in his anus, the appellant stated to him that his fellow accused (first accused) had a bigger penis. And when he examined the first accused, he established so that he was blessed with a bigger penis by size and that even DW1 had also admitted before PW3 that he knew carnally the appellant and thus provided him with PEP for HIV protection. The testimony of PW2 also stated that the appellant is a guy person (known carnally against the order of his nature) and that DW1 was his lover and he permitted him to know him sexually on 25th September 2023. He referred this Court to the case

of **Geofrey Sichizya v. DPP**, Criminal Appeal No. 176 of 2017 at page 10, that oral confession made before or in presence of a reliable witness, be they civilian or not, may be sufficient by itself to found conviction against the suspect. As the appellant was a free agent, then reliance is made to the said confessions as are trustable. Further more, the appellant was found with a counter book containing details of all persons who they knew him carnally. Amongst them, was the first accused in this case (exhibit P2) which the same was not disputed by the appellant.

Mr. Kadata further added that, the admitted cautioned statements (P1&P7) likewise, were not disputed their admissions. With this evidence, it is beyond doubt that the appellant did commit the said charged offence as correctly convicted and sentenced. Mr. Kadata prayed for the appeal to be dismissed for want of merit. Conviction and sentence meted out by the trial court be upheld.

In rejoinder, the appellant disputed all that said by the respondent's counsel. The appellant denied to have committed the offence charged. He also bosted that he is a strong man, he can erect and also contemplated that in essence how can a strong man allow his body being known carnally while there are a lot of women in street.

He further contended that with due respect to the Republic, as per evidence in record, this case is fabricated against him. He then pressed for the appeal to be allowed.

Having heard both parties on merit, I have now to determine this appeal and the issue for consideration is whether this appeal has been brought with sufficient cause.

From the evidence on record, it is obvious that none of the prosecution witnesses witnessed the crime being committed. The only incriminating evidence against the accused is circumstantial evidence.

The appellant had complained on procedural irregularity of conducting search and arrest without warrant. He contended that he was arrested and searched without an order as required under section 38 of CPA and thus Exhibit P3 was erroneously admitted. The facts which were disputed by the Respondent's counsel.

I have dispassionately scanned the trial court's records, I must admit that there is unknown circumstances for the certificate of seizure filled by PW1 on the following account;

The PW2 - guest attendant alleged that on course of owing money, the appellant came and was arrested and upon interrogation by

Sungungu he confessed to have permitted to be known carnally by one BN against his order of nature. Thereafter, the convicts were taken to Nassa police station and PW2 went to police station and signed certificate of seizure. Then later on police came to the guest house and took a copy of register book which handled to them.

The PW1 alleged that he did not arrest the appellant but was arrested by civilian people and sent to police station where he met with them together with exhibits. He only filled certificate of seizure after had been supplied with those exhibits.

PW1 " *This is a book I secured from 2nd accused, ... i did fill certificate of seizure. It was secured by me in the presence of the Guest attendant, the certificate was signed by 2nd accused and the Guest attendant namely Marry. It was secured at police station, it was brought by those who arrested accused person ....*"

PW2 " *Thereafter they were taken at Nassa police station. Also, I went at the police station. I did sign certificate of seizure. Police officer came and took a copy of guest register book, it was the one who gave them that copy*"

From the extract above, reveals that the manner the certificate of seizure was procured, it is not clear as portrayed by PW1 that he only

admitted such exhibits at police station and so there was no requirement of search order. PW1 and PW2 were not in corroboration on certificates of seizure and on which exhibits seized. Exhibit P3 mentions the seized items; *"Daftar/ Counter book A4 aina ya Professor, $quire exercise book/daftari, Kalamu Moja ya aina ya Freedom Roll Away"*

PW2 recognizes the guest register book that was the only one which was surrendered to PW1 when he went to the guest house attended by PW2. The other items remain unexplained as to how were seized, by whom and where.

Notably, with the absence of such proof and explanations to the alleged exhibits, it is however plainly true that the purported search was conducted without any warrant as mandated under the provisions of section 38 of the Criminal Procedure Act upon which exhibit P3 supra was drafted.

The learned state attorney contended that there was no need of search order as the exhibits were surrendered to the police by civilian, but to the contrary his argument is not in supportive in any way as the evidence on records does not provide so. In whichever way, the search was thus illegal because search in the instance matter was not that of

emergency. It was a prepared search which required the search order dully issued by the police officer in charge of the police station.

However, in the case of **Chacha Jeremiah Mrimi vs Republic, Criminal Appeal No.551 of 2015,** it was also held that, certificate of seizure should also include the time at when was recorded. Exhibits P2 and P3 have no time as to when and where were they recorded.

I now move to the question of cautioned statement of the appellant. The appellant had complained that the trial court convicted him basing on cautioned statement which was recorded without adhering to section 33(2) of the CPA. The contention which was objected by the State Attorney.

It is true that the cautioned statement of the appellant was tendered without objection by him. It is however the law that admissibility of the cautioned statement is one thing but the weight of such admitted evidence is another thing. In the case of **Ndalahwa Shilanga and Another versus The Republic, Criminal Appeal no. 247 of 2008,** the cautioned statement of the accused was admitted without objection like instant case. The Court of Appeal however held that irrespective that there was no objection to admissibility of the statement, the same must be treated with circumspection regard being

on the peculiar circumstances of the case. In current case, the cautioned statements of both accused persons were admitted in a full compliance with the law. Also, both statements, were not denied by the accused persons during admissibility. Worse, there were neither objections nor cross examination of the alleged facts by the respective witnesses. I agree with Mr. Kidata that as per the case of **Shomary Mohamed Mkwama, V. Rep,** Criminal Appeal 606 of 2021, at Page 18: that failure to cross examine an alleged fact, is deemed as admission. Also, section 33(2) of the CPA as preferred by the appellant in his grounds of appeal, this section is completely not applicable in recording cautioned statements. The argument of duress/influence in procuring the alleged confession is to be considered as a mere after thought by the appellant as he did not say so at the trial Court. Both statements having properly recorded, cannot now be denied their worthiness.

However, placing reliance on the value of oral confession made before the guest attendant (PW2) and the examining doctor (PW3) by both DW1 and DW2, I have no any scintilla of doubt on placing reliance on it. By the way everything being equal, in a criminal trial a voluntary confession from the accused himself is the best evidence - S**ee Paulo Maduka and 4 others v R Criminal Appeal No. 110 of 2007 (unreported).** Further more, the appellant was found with a counter

book containing details of all persons who they knew him carnally. Amongst them, was the first accused in this case (exhibit P2) which the same was not disputed by the appellant.

Moreover, there was a complaint on the issue of corroboration of evidence and failure to call material witness. As correctly argued by Mr. Kadata that, there is no number of witnesses required to proof the case. see section 143 of The Evidence Act. Therefore, the alleged material witnesses may be deemed to be important to the appellant perception but not important in prosecution side or even the court. Therefore, this ground is misplaced and should not detain me much.

With regard to the complaint that the prosecution case was not proved beyond reasonable doubts. On this point, it is a trite law that, prosecution bears the burden to establish and prove the offence beyond reasonable doubt. Section 3 (2)(a) of The Evidence Act.

Likewise, section 110 of The Evidence Act, also provides in a clear manner as quoted hereunder: Section 110 (1)

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When

a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

These sections received breath by the Court of Appeal in the case of **Anthony Kinanila Enock Anthony Vs. R,** Criminal Appeal No. 83 Of 2021 when it held:

"As to the standard of proof which we shall also have the opportunity to consider in the instant case, the prosecution has the duty to prove ail the ingredients of the offence beyond reasonable doubt and here, one should not waste time trying to invent a new wheel as that is exactly what was stated by the House of Lords in England way back in 1935 in ***Wooimington Vs. DPP*** *[1935] AC 462 from where our present general principles of criminal law and procedure emanate"*

Now, in the case at hand Mr. Kadata correctly argued that the prosecution was supposed to establish two things: Whether the appellant permitted his anus being known carnally and that there was penetration.

Mr. Kadata also averred that in the medical examination of the appellant (page 20), the appellant admitted before PW3 that he was

truly known carnally. In his medical findings, PW3 established the said appellant was known carnally - by allowing his anus being known carnally. He referred this Court to the case of **Geofrey Sichizya v. DPP** (supra) that oral confession made before or in presence of a reliable witness, be they civilian or not, may be sufficient by itself to found conviction against the suspect.

Now, based on the argument by Mr. Kadata clearly provides that the conviction against the appellant was due to both cautioned statement where the appellant confessed to have committed the alleged offence and also oral confession and medical examination made to PW3.

Now, based on the trial court records, I am inclined to conclude that, unnatural offence was proved as required by the law.

However, it is the principle of the law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent reasons for not believing the witness as per the case ***of: Goodluck Kyando Vs R (2006) TLR 363.***

According to ***Mathias Bundala Versus Republic, Criminal appeal No 62 of 2004*** and ***Aloyce Maridadi Versus Republic, criminal Appeal No.208 of 2016*** (both unreported), good reasons for

not believing a witness includes where the witness gives improbable or implausible evidence or where the evidence of the witnesses materially contradicts the evidence of another or of other witnesses. There is none in record.

With all these observations, conviction and sentence meted against the appellant are hereby upheld and affirmed. I find this appeal to have been brought without sufficient cause, and consequently it is dismiss in its entirety.

Right to further appeal is hereby explained to the aggrieved party.

DATED at SHINYANGA this 30th day of April 2024.

F.H. MAHIMBALI

JUDGE