IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 72 OF 2023

(Originated from Criminal Case No. 04 of 2023 in the Resident Magistrate Court of Katavi at Mpanda)

MAJID KHALID SELEMAN @ALSALIMI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

3rd & 19th January, 2024

MRISHA, J.

Initially, **Majid Khalid Seleman @ Alsalimi**, the appellant, was charged before the Resident Magistrate Court of Katavi at Mpanda (the trial court) with two counts of the same nature to wit: Unnatural Offences contrary to section 154(1(a) and (2) of the Penal Code, Cap 16 R.E. 2022 henceforth the Penal Code, hereinafter referred to as the first and second counts respectively.

The particulars of the charge sheet in respect of the above two counts, were that on diverse dates between 1st August, 2022 and 31st August, 2022 at Madukani area within Mpanda District Katavi Region, the appellant had carnal knowledge of BB (PW1), a young boy aged 15 years. The appellant pleaded not guilty to the offence charged whereafter the prosecution called a total of three (3) witnesses to prove the case against him beyond reasonable doubts.

As per the trial court records, after a full trial; the appellant was acquitted on the first count for want of proof, save for the second count of which the trial court found to have been proved against him beyond any reasonable doubts and consequently convicted him, as charged. In the end, he was awarded a sentence of thirty (30) years imprisonment, the decision which the said appellant was not amused with. Hence, the present appeal.

A petition of appeal filed with the court, is predicated into seven grounds of appeal which can conveniently be mentioned hereunder:

1. That, the trial Court grossly (sic) fell in error for failure to consider and appreciate that an act of delaying to name the accused by PW1

as his assailant in absence of any justifiable cause(sic) introduced a great doubt in the prosecution case.

2. That, the trial Court (sic) felt into an error for convicting the accused on second count despite its finding that the evidence of DW1, DW2 and DW3 managed to introduce doubt in the prosecution case.
3. That, the trial Court erred in law and fact to convict the appellant on second count by finding that DW2's evidence corroborated PW1's evidence.
4. That, the trial Court erred in law and fact by convicting the appellant by relying on PW1's evidence which was not credible, truthful and reliable.
5. That, the trial Court erred in law and fact for failure to appreciate that failure to call key and material witnesses (Philipo, Rashidi and Rozi) by prosecution created doubt in the prosecution case.
6. That, the trial Court erred in law and fact by convicting the appellant relying on exhibit PE1(PF3) as a proof of penetration of the accused person's male sexual organ into the victim's anus.
7. That, the trial Court erred in law and fact for failure to evaluate evidence properly hence reached into a wrong decision.

Akaro, both learned State Attorneys, represented the respondent Republic When he was given a chance to address the court in respect of the said grounds of appeal, the appellant's counsel submitted by praying to merge grounds 2, 3, 6 and 7 of the appeal and argue them together. The learned advocate started to address ground arguing that failure of PW1 to mention accused person to his parent, school teachers or police raised some reasonable doubts on the prosecution's case. It is alleged by the prosecution Republic that the charged offence was committed on 1st August, 2022 and 30th August, 2022 but the offence was reported at the Police Station on 15th April, 2023 which is more than six months since the date the appellant was alleged to have committed such offence.

However, the learned advocate contended that failure to mention the accused or suspect on time without justifiable cause, it dents the credibility of the witness. He added that the prosecution Republic did not produce any evidence to justify why PW1 failed to mention the appellant at the first instance. To buttress the above position, the appellant's counsel cited the case of **DPP vs Juma Chuwa Abdallah and another**, Criminal Appeal No. 85 of 2018 CAT Zanzibar (unreported) at page 14.

In addition, he argued that the evidence of PW3 reveals that PW1 reported the incident after being interrogated by his father six months after the incident. Then, he compared the case of **DPP vs Juma Abdallah's case** (supra) with the present appeal and argued that in **DPP v Abdallah's case the victims** were children of 8 and 9 years old younger than the victim in the present appeal, but the Court of Appeal decided in favour of the appellant and held inter alia that:

> *"The victims' delay in reporting the incidents in this appeal until they were quizzed by the school administration dented their credibility and reliability of their evidence to prove the charged offences."*

Again, he argued that PW1 did not assert the reasons why he did not mention the appellant in the course of testifying before the trial court; also, when he was cross examined, PW1 replied that he was threatened by the appellant as it is shown at page 11 of the trial proceedings and that he was told not to tell anybody; in swahili language mean that, *"alisema nisimwambie mtu yeyote kuhusu hii kitu iwe siri yako na mimi".* According to the learned advocate, those words do not amount to a threat to him. To cement his proposition cited the case of **Nyerere Nyague vs Republic**, Criminal Appeal No. 67 of 2010 CAT Arusha(unreported).

In regard to the fourth ground in the petition of appeal, the learned advocate submitted that the best quality of evidence and its reliability depends on the credibility of the witness adducing it. In assessing the credibility of the witness, it is it is the monopoly of the trial court when it comes to demeanor of such witness.

He further argued that this court has mandate to assess the credibility of witness by considering coherence of the evidence of one witness against the other including evidence of accused person. He referred the case of **Raphael Ideje @Mwanahapa vs DPP**, Criminal Appeal No. 230 of 2019 CAT Mbeya(unreported). He contended that PW1 was not a credible and truthful witness because in his testimony PW1 testified that the offence was committed on August, 2022 and when cross examined, PW1 responded that he was taken to hospital one week after had carnal knowledge with the appellant. The credibility of PW1 was shaken and it was never clarified by PW1 during re-examination. The court cannot rely on it to ground conviction; it needs corroboration. He relied on the case of **DPP vs Juma Chuwa Abdallah and others** (supra) to cement his position.

To add more, he submitted that PW1 met the appellant by communicating with him via mobile phone, but in his testimony PW1 did not mention number used to communicate with him, while the appellant denied to communicate with PW1 and the doubt was not cleared by the prosecution.

On the fifth ground, the counsel for the appellant contended that, since the evidence of PW1 was not credible and reliable, then the prosecution side was supposed to call Philipo, Rashid and Rose as a material witness to corroborate the evidence of PW1. In his testimony PW1 affirmed that he went to school, met Philipo and told him he took the appellant's number; Philipo communicate with the appellant and PW1 went to the house of the appellant.

Again, PW1 revealed that he went to appellant's house and found Rashid, but immediately thereafter Rashid left his home place. PW1 testified further that, he went to the market with Rose in Shamwe village, at the market, the appellant called him and given Tshs 1000/=; PW1 gave Rose Tshs 500/= the said person was not called by the prosecution and no reasons were presented. Mr. Kulwa, conclude by submit that failure to call material witnesses in this case weaken the prosecution case, henceforth the fifth

ground of appeal has the prosecution side and the same appeal be allowed.

On the second, third, sixth and seventh grounds which the learned advocate proposed to merge and argue together, then he argued that the findings of the trial court that the evidence of DW2 corroborates the evidence of PW1 is misconceive. The evidence of DW2 introduced doubt, how does corroborate the evidence of PW1. He referred to the evidence of DW1, DW2 and DW3 which according to him, shakes the credibility of PW1's testimony. He added that the evidence of PW2, a medical doctor shows that he conducted medical examination on 15th April, 2023 and outcome of such medical report "P1" revealed there was penetration on the part of the victim which was caused by a blunt object immersed into his private parts on several times less than three months; that the incident happened in three months back.

He further submitted that in the charge sheet it is shown that the offence was committed on 1st August, 2022 and 30th August, 2022. He finally concluded that due to the grounds of appeal he had previously addressed and the above-mentioned reasons, it is shown that the prosecution side failed to prove the case on the required standard under section 3(2)(a) of

the Criminal Procedure Act. Hence, he prayed to the court to allow the appeal, quash conviction and set aside sentence.

In reply, Mr. Akaro supported the appeal on two grounds, namely ground one and ground four of the petition of appeal. He claimed that the trial court grossly felt in error for failure to consider and appreciate that an act of delaying to name the appellant by PW1 has is assailant is absence of any justifiable cause introduced a great doubt in the prosecution case. He vehemently submitted that, it is a position of the law that where the victim fails to mention the accused to his or her mother, to the police station or to any other person without a reasonable justification; that necessitates the trial court to have conducted an inquiry. To support his stance, cited the case of **Seleman Hassani vs Republic**, Criminal Appeal No. 203 of 2021 at page 17.

He further pointed out that the victim was not threatened by the appellant; he referred the court to page 9 of the trial proceedings, and submitted that PW1 was warned by the appellant not to tell anybody; when he was cross examined, PW1 replied by using the words *"alisema nisimwambie mtu yeyeote kuhusu hii kitu"*. That word does not amount to a threat, according to him.

The learned State Attorney vehemently submits that, PW1 testified that the appellant resides at Kawajense, whereas the appellant in his defence, testified he resides at Madukani. According to him, it is two different area and no evidence shows the mentioned areas are closed, that led PW1 worried to mention the appellant on time. Then, he argued that the evidence of PW1 is not credible and led to the prosecution failed to prove the case beyond reasonable doubt.

I have carefully examined the evidence on record and considered the rival submissions of the parties in the light of the grounds of appeal. I will now be in a position to confront the grounds for determination as they appear in the filed Petition of appeal. Nonetheless, the respondent Republic supported the appeal. I will start my determination of the rival matters in appeal by addressing the first ground.

At the outset, I wish to highlight one underlying feature of the offence for which the appellant was charged. According to the charge sheet, the appellant was charged under section 154(1)(a) and (2) of the Penal Code Cap 16 R.E. 2022. The relevant section under which the appellant is charged with, provides:

"154(1) Any person who: -

(a) has carnal knowledge of any person against the order of nature,

or

(b) N/A

(C) N/A

Commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."

On the above-mentioned provisions, the law prohibits the very act of carnal knowledge against the order of nature. The person who is convicted with the offence of carnal knowledge against the order of nature is liable to thirty years or life imprisonment where the victim is under the age of eighteen years (18) old.

The law in our country has established that the best evidence in sexual offence comes from the victim himself/herself as it is provided under

section 127(6) of the Law of Evidence Act, Cap 6 R.E. 2022 which provides that:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of child of tender years or as the case may be, the victim of sexual offence on its own the prosecution side, notwithstanding that such evidence is not corroborated, proceed to convict, it for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth..."*

There are abundant of cases of the Court of Appeal in which the evidence of victim on sexual offence was discussed; *See* **Seleman Makumba vs Republic**, [2006] TLR 384 and **Shomary Mohamed Mkwama vs Republic**, Criminal Appeal No. 606 of 2021.

Based on the principle under section 127(6) of the Evidence Act and case laws decided by the Court regarding the evidence of a victim of sexual

offences, I shall consider such principle when dealing with the present appeal. I will start deal with ground one where PW1 failure to report the incident promptly. At first, it is common ground that PW1 did not disclose his difficulty as early as possible. He only came out and revealed it on 15th May, 2022 after he was interrogated by his father. The delay was for about six months after the incident happened.

The learned counsel pointed out that delay of mention/name assailant severely dented the victim credibility and reliability of his evidence and relied on **DPP vs Juma Chuwa Abdallah** (supra). Be that as it may, Mr. Akaro, learned State Attorney admitted PW1 delayed to mention the assailant without justifiable reasons. In the same vein, he admitted that PW1 was not threatened by the appellant and even the words used by the appellant do not amount to a threat, he was just wanted to promise not to tell anybody.

At first, I acknowledge that in **DPP vs Juma Chuwa Abdallah**(supra), the Court of Appeal held that unexplained delay to name a suspect should bring the credibility of a witness to question:

"It is glaring from that it took nine months to report the fateful incident and arraign the respondents. The prosecution did not provide evidence explaining the cause of delay to report to either the victims' parents or elders or any member of the community or school. It is settled that delayed reporting dents the credibility of evidence of victims."

Again, in **Marwa Wangiti Mwita and Another vs Republic** (supra) the Court of Appeal underscored that,

"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry the victims delay in reporting the incidents in this appeal until they were quizzed by the school administration dented their credibility and reliability of their evidence to prove the charged offence."

Having reviewed the evidence on record and submission of both parties, in the instant, PW1 named the appellant after been interrogated by his father, it was six months after the incident happened; no justifiable

reasons were made by the prosecution evidence, as to why PW1 delayed to name his assailant. It is contrary to the principle underlined in **Marwa Wangiti & another vs Republic** [2002] TLR 39 that a delay in reporting a crime should put a prudent court to inquiry.

In our case, victim report the incident after being interrogated by his father; the records is silent as to why failed to disclose that informant until he was interviewed, and no explanation was provided by the prosecution during examination of witness. This leaves a lot to be desired for this court to give weight on the evidence of victim.

In the same vein, the court will consider will consider the situation differently where there is a threat made by the appellant to the victim. According to the trial court records, it is not in dispute that the victim was a young boy of fifteen years, in reply during cross examination, he revealed that the appellant just told him not to tell anybody, by his word PW1 testified that "*alisema nisimwambie mtu yeyote kuhusu hii kitu, iwe siri yako na mimi*". At his age, he must not have been frightened with the said words made by the appellant would retaliate by mentioned the assailant to his parents or to the school or any relatives, but he decided to remain silent for more than six months.

In my opinion, those words do not amount to a threat; thus, a delay to mention the appellant as earliest as possible dented the credibility and reliability of the evidence of PW1 to prove the charged offence.

Besides, the delay in reporting the incident was of about six months which, in my view is unreasonably longer. In the premises, I am persuaded to go along with both learned counsel that the delay complained of was irrational and unjustifiable.

On the complaint that PW1's evidence was not credible, truthful and reliable, the trial was error to believe and consider his evidence. It is well established principle that it is trial court which is better place to see and asses the witness credibility and demeanor as opposed to the appellate court, like this court, which solely depend on what is contended in the record. This position stated in the case of **Ali Abdallah Rajab v Sada Abdallah Rajab & others** [1994] TLR 132 where it was held that:

> *"Where the decision of a case is wholly based on the credibility of the witnesses, then it is the trial court which is better placed to assess their credibility than an appellate court, where merely reads the transcript of the records."*

Regarding the binding nature of the trial court's finding on credibility and reliability of the witnesses, the position is well articulated in **Omari Ahmed vs Republic** [1983] TLR 52 where it was held that:

> *"The trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility."*

Again, I entirely agree with the learned counsel that the best quality of evidence and its reliability depends on the credibility of the of the evidence adduced by the witness. In assessing the credibility of the witness, it is it is the monopoly of the trial court when it comes to demeanor of such witness. From the above position of the law and taking into account the prevailing circumstance of the present case, I am constrained to interfere with the trial court's finding on credibility of PW1.

This is because one, PW1's delay to name the assailant who committed the offence as earliest as possible, and he failed to gives justifiable reasons of delay; hence, PW1's evidence is not credible and cannot be relied on conviction. *See*: **Marwa Wangiti and Another vs Republic** (supra). In

Isaya John vs Republic, Criminal Appeal No. 167 of 2018 (unreported) in which the Court of Appeal gave full credence to an eight-year-old victim of sexual offence who had reported the suspect at the earliest opportunity.

And two, PW1 elucidated that he communicated with the appellant via mobile phone, he never mentioned the appellant's number nor mention his number used to communicate with the appellant; this left a lot of questions which were not answered. PW1 received the mobile number of the appellant from Philipo, who was given the said number to appellant, he confirmed to call the appellant on August, 2022, for easy of reference I quote:

> *"I communicated with the accused using mobile phone it was August, 2022."*

From the above quotation, PW1 was in a position to mention the number of the appellant or the number he used to communicate with the appellant, but despite of having a chance to do so, he did not mention to those concerned. Therefore, on the above-mentioned reasons, I am inclined to find that PW1 was not a credible witness; his evidence is not reliable and

the trial court was not entitled to convict the appellant under such circumstances.

Regarding the complaint that the evidence of PW1 was not reliable as the prosecution side was supposed to call Philipo, Rashid and Rose as material witnesses for clarification, it is important to refer section 143 of the Evidence Act, [Cap 6 R.E. 2022], which states that no particular number of witnesses is required in order to prove a fact. The application of that rule is subject to the position of the law on the duty of a party to bring on witnesses whose appearance for testimony is significant and that failure to do so attract and adverse inference.

The court would only draw and adverse inference on the prosecution case only in situation where the prosecution fails to summon as a witness a person who is well versed with the necessary information connected to the commission of the offence and whose presence can be procured without assigning good reasons. I also add, that the above would be the case only where no other witness(es) have given identical evidence on the matter.

The Court of Appeal lucidly elaborated the above position in the case of **Azizi Abdallah vs Republic** [1991] TLR 71 at page 71.

"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with transaction in question are able to testify material facts. ***If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to prosecution.*** *" [Emphasis mine]*

Again, the case of **Mashaka Mbezi vs Republic**, Criminal Appeal No.162 of 2017 (unreported) where it held that:

"An adverse inference may be drawn against the prosecution when a key but available witness is not called for testimony on an important aspect of the case."

I should stress that from the above positions, the following is discernible: - One, that PW1 meet Philipo at school, he informed PW1 about the appellant want to go to his house; two, PW1 went to appellant house at 2000hours and found Rashid an vacated the place and three, that PW1 went to his friend Rose thereafter they went to market met appellant, he was given Tshs 1000/= by the appellant and he gave Rose Tshs 500/=.

Despite the fact that PW1 mentioned them in his testimony, it is settled view my view the said mentioned persons were still material witnesses in this case. Hence, their evidence ought to have been recorded by the trial court in order to corroborate and give weight to the evidence of victim. However, it appears that the prosecution failed to summon those persons material witnesses who are well possessed with the necessary information connected to the commission of the offence and whose presence can be procured without assigning good reasons.

Therefore, I would not hesitate to draw an adverse inference against the prosecution side on their omission to call key important witnesses whose evidence had connection with the case the appellant was charged with. Since, the persons called Philipo, Rashid and Rose were not summoned and no justifiable reasons were given, that indicates that PW1 was not a credible witness; hence, his evidence is not reliable.

For what has been stated and done above, it is my view that dealing with the rest of the grounds, is of no essence but academic exercise which I am not prepared to indulge in today. Consequently, I proceed to allow the appeal, quash the conviction and set aside sentence passed thereto. I now

order for the appellant's immediate release from the prison custody if he is not otherwise being lawfully held.

Order accordingly.

A.A. MRISHA
JUDGE
19.01.2024

DATED at **SUMBAWANGA** this 19th day of January, 2024.

THE HIGH COURT OF TANZANIA

A.A. MRISHA
JUDGE
19.01.2024