IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 72 OF 2022

(Originating from the decision of the District Court of Mlele at Mlele in Criminal Case No. 101 of 2021)

JOHN KOMBA @MAGOTI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

30th November, 2023 & 27th February, 2024

MRISHA, J.

Before the trial court which is the District Court of Mlele at Mlele, the appellant **John Komba @Magoti** was charged, tried and convicted of an offence of Unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap 16 R.E. 2019 [Now R.E 2022] and upon hearing evidence from both parties, the said trial court sentenced him to serve a sentence of life imprisonment in respect of the abovenamed offence.

The evidence which led to his conviction and sentence was that on 15.11.2021 at Ikuba Village within Mlele District in Katavi Region, the

appellant approached the home of SIMUDA S/O KUSHESHA (PW2) and did have carnal knowledge of one BS (PW3), a boy aged five years (5) who is a son of PW2, against the order of nature.

The offence was committed by him when PW2 and his wife were absent. Upon arrival from his daily activities PW2 did not pay attention to his child's changes; it was until the following day around 2100 hours when PW2 noticed that his child was having a problem with his ureteral part as he was crying and complaining to have some pains when he went for a long call.

Upon examination of his child, PW2 noticed some unnormal bruises on the anus of BS; and when probed of what had happened to him, BS told his father that it was the appellant who had carnally known him beyond the order of nature. PW2 added that BS (PW3) described the appellant as the person who left his clothes at their home.

That upon gathering such information, PW2 quickly approached KIJA KIYUMBE (PW4) a hamlet leader and informed him about the incident. PW4 directed PW2 to find and arrest the appellant and PW2 complied to such direction, then PW4 directed the militiamen to bring BS (PW3) for him to identify the appellant. Upon arrival, PW3 picked the appellant from a group of his fellow fishermen, as the one who had carnally known him beyond the order of nature.

Also, according to the evidence of PW2 and PW4, upon being asked whether he is the one who committed such offence, the appellant confessed the offence and began to ask for forgiveness from PW4 claiming that he was drunk. Thereafter, PW4 directed the militiamen to convey the appellant to Usevya Police Post for further measures to be taken.

Another piece of evidence came from DERICK D. MAZIGE (PW1), a medical doctor who attended PW3 and his father who is PW2 on 17.11.2021. He testified before then court that PW3 was brought at his working place, Usevya Health Centre at around 1200 hours. That PW2 who had a PF3 complained to him that his son who is PW3 had been penetrated.

That upon diagnosing the PW3, PW1 observed that there were irregular bruises on the anus of PW3 though he did not see any fluid or sperms. However, he said that the patient was feeling some pains when touching his anus.

He added that the anus sphincter of PW3 was slightly disturbed. He concluded that PW3 had been penetrated by a blunt object. He opined that it was the penis which was used to penetrate PW3. Thereafter, he issued PW3 with some medicine and filled the PF3; the same was tendered and admitted before the trial court as Exhibit P1.

Again, there was the evidence of Hon. VULSTA KUNDY (PW5) who testified before the trial court as a Justice of Peace. According to him, the appellant was brought before him on 18.11.2021 by the police officer for him to record his Extra Judicial Statement.

After complying with all the guidelines for recording of the Extra Judicial Statement, he was satisfied that the appellant consented freely to make his statement before him, then he allowed him to do so while recording his Extra Judicial Statement.

According to PW5, the appellant confessed before him that actually he is the one who committed the offence of unnatural offence by having carnal knowledge of PW3 beyond the order of nature and that after recording the appellant's statement, he read over to him and the appellant acknowledged to him that indeed what he recorded from him was correct, then the appellant appended his signature on the Extra Judicial Statement. The same was tendered and admitted before the trial court as Exhibit P2.

It is also on record that upon being found with a prima facie case and informed of all his rights of defence, the appellant entered his defence by informing the trial court that on 17.11.2121 at night he was approached by a person whom he did not describe and after exchanging

some greetings, that person claimed that the appellant had gone to his home, but he denied to have gone to that person's home.

That thereafter, that man wanted to go with him to the hamlet leader who is PW4. He responded to that demand and upon arrival, the appellant denied all the allegations that were levelled against him. It is when he was matched to the Police Post where he made his statements.

He added that while there he was threatened by the police who told him that he will know how to make his statements. Later he was remanded in police lockup. On the following day he was taken to Inyonga Police Statement, then to the trial court.

It due to the above evidence, that the trial court found the appellant guilty of an offence of unnatural offence contrary to 154 (1) (a) and (2) of the Penal Code, Cap 16 R.E. 2019 [Now R.E 2022] henceforth the Penal Code, convicted, and sentenced him, as stated above. The appellant was not amused by such conviction and sentence. He therefore, decided to come to this court with a petition of appeal which contain the following grounds of grievance: -

1. That, the trial court erred at law to convict the appellant depending on the so-called evidence of the victim which was made available contrary to law.

2. That, the trial court erred in law to admit the extra judicial statement which was procured by deception.
3. That, the trial court erred at law to believe and work upon the confession said to have been made by the appellant before hamlet leader.
4. That, the trial court erred at law to convict the appellant by depending on the evidence of PW1-The medical doctor whose report did not exclude the possibility of the victim being penetrated by any other object apart from a penis.

When the appeal was called on for hearing, the appellant stood alone, unrepresented while the respondent Republic was represented by Ms. Atupele Makoga, learned State Attorney. The appellant just told the court that the petition of appeal which he filed with the court, contain grounds of appeal which was self-explanatory; so, he urged the court to consider them, allow his appeal and set him free.

On the other side, Ms. Atupele Makoga informed the court that she supports both the conviction and sentence imposed by the trial court against the said appeal. To support her position, she submitted in respect of the first ground of appeal that the victim of a sexual offence in the present appeal is a minor.

She clarified that when the offence was committed, he was five (5) years old and the trial court was required to follow the procedure prescribed under section 127 (2) of the Evidence Act, Cap 6 R.E. 2022 (the TEA) which among other things required the trial court to satisfy itself if a victim of a sexual offence who is of the tender age tells nothing, but the truth. On that legal requirement, the learned counsel submitted that the trial court complied with it, as it is shown at page 17 of the trial court typed proceedings.

She further submitted that the trial court complied with the procedure of recording evidence of a witness who requires an interpreter which is provided under section 211 (1) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA); hence, she submitted that the trial court was not at fault, as far as the above procedures are concerned.

That apart, the counsel for the respondent Republic submitted that it is a trite law that the best evidence in sexual offences come from the victim; she cited the case of **Seleman Makumba vs Republic** [1999] TLR 94 to support that proposition.

She went on submitted that looking at page 17 of the trial court typed proceedings, it is apparent that when testifying before the trial court the victim of the alleged sexual offence who is PW3 managed to identify the appellant as the person who had canal knowledge of him beyond the

order of nature and his evidence was corroborated by that of PW2, as it is shown at page 13 of the typed proceedings. Based on such reasons, the learned counsel submitted that the first ground of appeal lacks merit.

Turning to the second ground of appeal, it was her submission that the same too has no merit, rather it is an afterthought because the appellant consented to make his statement before the Justice of Peace who is PW5 and he was he did not cross examine that prosecution witness whether it is true that he confessed before him that he is the one who committed the offence with which he stood charged before the trial court.

According to the learned counsel, failure of the appellant to cross examine PW5 on the issue of deception is shown at page 23 of the typed proceedings. She added that even during defence hearing the appellant did not complain that his extra judicial statement was procured by deception. Hence, she prayed to the court to find that the second ground of appeal has no merit and dismiss it accordingly.

Submitting in respect of the third and fourth grounds of appeal which she proposed to address together, Ms. Atupele Makoga contended that the same are all afterthought because they corroborate the evidence of the victim. She added that the evidence of the victim can stand and

prove the offence without depending on the evidence of a doctor or a hamlet chairman and that the opinion of the medical expert cannot bind the court.

She added that even if other evidence will be expunged, still the remaining evidence is sufficient to prove the offence of unnatural offence the appellant was charged with before the trial court. Having submitted so, Ms. Atupele Makoga prayed that the appellant's appeal be dismissed for want of merit and the conviction together with the sentence meted out to the appellant be sustained.

I had enough time to peruse the entire proceedings of the trial court and the typed judgement which the appellant is now challenging. If that is not enough, I also had enough time to go through the oral submissions of both parties, the provisions of the law as well as the authorities cited by the counsel for the respondent Republic.

It is undisputed fact that the parties herein have parted ways on the grounds of appeal raised by the appellant to challenge the decision of the trial court. In the circumstance, the issue for determination is whether the present appeal has merit.

In the first ground, the appellant has complained that the trial court erred at law to convict him depending on the so-called evidence of the

victim which was made available contrary to law. In opposing that ground, the counsel for the respondent Republic has tried her level best to show that the trial court complied with all the necessary procedure of recording the evidence of a victim of sexual offence who is of tender age and who is not conversant with the language of the court.

On my part, I have gone through page 17 of the typed proceedings referred to me by the learned counsel only to satisfy myself whether the trial court complied with the procedure before recording the evidence of PW3 whom it is not disputed between the parties herein that was of tender age when the alleged sexual offence was committed. The maxim les Ipsa loquitur applies here because the relevant reads as follows: -

*"**Court**: A child is 6 years old, as such he is asked to promise before the court to say the truth and only the truth.*

Sgd

RM

21/03/2022"

The above quoted part of the typed proceedings clearly depicts that the trial court complied with the procedure of recording the evidence of a victim of sexual offence whose age is under eighteen (18) years old, as stipulated under section 127 (2) of the TEA.

Again, I have observed that in the course of adducing his evidence before the trial court, the said victim (PW3) properly identified the appellant as the person who had carnal knowledge of him on the material day at his parents' home. This is shown at page 17 of the typed proceedings where PW3 was recorded to have testified that,

> *"I know this person (accused). I saw this person at our home, he penetrated me (Alinitomba Nyuma). My mother was at home. This person came at home I told my mother on what he did to me. My mother went to fetch water when he penetrated."*

It is apparent from the above expert that PW3 told the trial court what exactly the appellant had done to him on the day in question, but when defending himself before the trial court, the appellant did not call his fellow fishermen whom he claimed to have been with at the fishing place on 15.11.2021 when the alleged sexual offence was committed.

The evidence of PW3 was corroborated by the evidence of PW2, his father who told the court that according to the interview he had done with PW3, he noted that the offence was committed on 15.11.2021, the same day the appellant had paid visit to him home and later on left behind his clothes at his home.

The case of **Suleman Makumba vs Republic** (supra) cited by the counsel for the respondent Republic to support her argument regarding

the evidence of PW3, applies to the circumstance of the present appeal. It is my settled view that the evidence of PW3 is the best as he had managed to identify the appellant and went on to implicate him as the one who had canal knowledge of him, and no one else.

Both PW2 and PW3 had no previous grudges with the appellant and they used to know him very well as he used to pay visit to their home. In the circumstances, it could not be possible for them to fix him with such serious criminal allegations, if it is not him who committed the offence with which he stood charged before the trial court.

It is due to the above reasons, that I am inclined to find that the first ground of appeal raised by the appellant through his petition of appeal has no merit, as rightly argued by the counsel for the respondent Republic. The same is hereby dismissed accordingly.

In the second ground, the appellant has faulted the trial court for admitting the extra judicial statement which according to him was procured by deception. The counsel for the respondent Republic has tried his level best to show that such ground is an afterthought and therefore, lacks merit.

Although, the appellant has not gone far by expounding his complaint, I have taken the view that he was not satisfied with the manner in which

that important documentary evidence was admitted. Perhaps, this might be caused by his state of being a layman. However, I have found that his complaint has no merit. I will clarify why I have said so.

The typed proceedings of the trial court, particularly at page 24, tells it that when PW5 prayed to tender the alleged extra judicial statement of the appellant as an exhibit, the appellant raised an objection in the following words: -

> *"I object, I was taken by two police officers who tortured me at police post"*

After such objection, the prosecutor responded as follows: -

> "***Prosecution***: *The objection by accused is not merited, PW. 5 clarified before the court that he abided to all procedures before recording the confession, including voluntariness of accused to give his statements"*

Then, after such response, the learned trial magistrate ruled out as follows: -

> "***Court:*** *As correctly submitted by prosecution side, the objection by accused is not material, the witness being a judicial officer/Justice of peace abided to all the procedures before recording the confession of which accused did not*

object. As such, confession/extra judicial statement is admitted as exhibit P.2"

With all due respect to the appellant, it is my settled view that his complaint could have merit had it been raised before the trial court and the police offices whom he has alleged to have tortured him. The records of the trial court depicts that the appellant raised such complaint before the trial court in absence of those police officers, but in presence of a Justice of Peace (PW5) who as the Hon. Trial magistrate observed, complied with all the procedures of recording the Extra Judicial Statement which intel alia require a Justice of Peace to ask the suspect if he want to make his confession before him/her on his free will and the appellant confirmed to him that he so wished to make his statement before him.

I may I also add that had the circumstances being different, the Hon. Trial Magistrate would have been under legal obligation to stop hearing of the main case an conduct an inquiry in order to ascertain whether the said extra judicial statement was made voluntarily by the appellant, but that is not the case with the present case because it is not indicated anywhere in the trial court typed proceedings that the appellant was tortured or forced to make his confession before PW5, a Justice of Peace and worse still he neither mentioned the names of those two police

officers whom he alleged to have tortured him before conveying him to the Justice of Peace, nor did he tell the said Justice of Peace about those allegations. With the foregoing reasons, I am of the settled view that the second ground of appeal by the appellant has no legs to stand. Hence, I dismiss it for want of merit.

This takes me to ground three of the appellant's petition of appeal. In there, the appellant has complained that the trial court erred at law to believe and work upon the confession said to have been made by him before the hamlet leader. The counsel for the respondent Republic has argued that this ground is an afterthought before the evidence of PW4 and corroborated that of PW3.

Having gone through the evidence of PW4, it has come to my mind that the evidence of that prosecution witness was strong as it criminates the appellant that he confessed before PW4 to have carnal knowledge of PW3 and asked for forgiveness from the father of PW3 who is PW2.

That evidence was corroborated by that of PW2 who told the trial court that the appellant confessed to him to have committed the offence he was charged with before the trial court and he apologized for that. I have also observed that there was no any previous history of conflicts between the appellant and those two-prosecution witness to the extent

of making them unbelieved on what they had testified against the appellant.

Also, during defence hearing, the appellant did not deny those witnesses' evidence which implicated him with regard to the commission of that offence. Owing to those reasons, I am unable to find merit in the third ground of appeal.

Lastly, through his fourth ground of appeal, the appellant has submitted that the trial court erred at law to convict him by depending on the evidence of PW1, the medical doctor whose report did not exclude the possibility of the victim being penetrated by any other blunt object apart from a penis.

The above submission clearly indicates that the appellant has no qualm about the fact that the victim of the sexual offence in the present case, was actually penetrated on the day in question which was 15.11.2021. His problem is on the outcome of the medical examination conducted by PW1.

He has tried to challenge PW1 who opined that the blunt object which penetrated the private part of PW3 could be a penis. I agree with PW1 that scientifically, it could be difficult for him to come up with a conclusive finding that it was the penis which was used to penetrate into

the private part of PW3. However, due to the prevailing circumstances observed by him during medical examination, the said witness opined that it was a penis and no other blunt object which was used to penetrate the private part of PW3.

Basically, this issue need not detain this court much. It is on record that the evidence of the victim who is PW3 reveals that it was penis of the appellant which was used to penetrate into his anus. That evidence was well corroborated by PW2 and PW4 and during defence hearing the appellant did not dispute that he used his penis to penetrate the private part of PW3.

I wonder what the appellant was complaining about; if it was not him who did that, then he could use that opportunity to tell the trial court that what was testified against him by PW2, PW3 and PW4 was nothing, but false, instead of not talking anything about such crucial evidence.

Again, under normal circumstances, PW1 being a medical doctor could not be in a position to tell exactly what had befallen PW3 on the day in question and be able to tell the trial court whether it was a penis or another blunt object which was used to penetrate into the private part of PW3. The reason is obvious that he was not at the crime scene; what he did was just to use his expertism after diagnosing the patient who was brought to him in just few days after the occurrence of the said

incident of sexual offence. Therefore, owing to the above reasons, I also find that the fifth ground of appeal by the appellant is without merit.

The above being said and done; I am of the settled view that the present appeal has no merit. Consequently, I dismiss it accordingly and proceed to upheld the decision of the trial court.

It is so ordered.

A.A. MRISHA
JUDGE
27.02.2024

DATED at **SUMBAWANGA** this 27th day of February,2024.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

A.A. MRISHA
JUDGE
27.02.2024