

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB REGISTRY)**

AT MWANZA

CRIMINAL APPEAL NO 6323 OF 2024

*(Arising from criminal case No. 88 of 2023 of the District court of Ilemela at Ilemela before Hon. P.P Kubaja
SRM Date 23rd day of Octoba, 2023)*

BETWEEN

ISMATH ABDALLAH (ISMAIL S/O ABDALLAH) APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

28TH & 28TH May, 2024

A. MATUMA, J.

On 09/05/2023 at around 22:40 hours, PW1 superintendent of police Kulwa Misogarya who was OC/CID of Ilemela District was on patrol with his fellow police officers at Villa Park Kirumba area near vijana club. They saw a crowd of women who were prostitutes making business of commercial sex.

They arrested such prostitutes and taken them to police. The appellant was among those prostitutes who was later discovered to be a man after he was ordered to take off the women dresses, hair wig and leg ornaments (vikuku).



The investigation revealed that the appellant had been allowing men to have his canal knowledge against the order of nature since way back in 2017 when he was a secondary school boy.

From such facts, the appellant was charged in the district court of Ilemela at Ilemela for unnatural offence contrary to Section 154 (1) (c) of the Penal Code, Cap.16 R.E 2022.

The prosecution brought three witnesses. Pw1 Surpa, PW2 WP 72460 D/CPL Frola who recorded the cautioned statement of the appellant and PW3 Samira Idd the medical Doctor who examined the appellant and established that he had evidence of anal penetration and HIV positive.

In his defense, the appellant conceded the crime and made an apology. He did not therefore challenge the prosecution evidence made against him.

The trial court became satisfied that the prosecution case was proved to the required standard and proceeded to convict him and sentenced him to serve a custodial term of thirty years.

The appellant became aggrieved against such conviction and sentence hence this appeal with a total of five grounds of appeal whose complaints are to the effect that;



- i. He was wrongly convicted and sentenced under the wrong name of Ismail Abdallah as against his name in the charge sheet Ismath Abdallah.
- ii. The prosecution failed to bring in court physical exhibits (the women dresses and ornaments) he is alleged to have been putting on as a woman.
- iii. Failure of the trial court to have ordered his mental examination made by the mental institute of Milembe.
- iv. Reliance on the cautioned statement which was not freely taken.
- v. Failure of the prosecution to bring in evidence the women (prostitutes) who were arrested together with the appellant as the witness to prove such allegation.

At the hearing of this appeal the appellant was present in person while the respondent was represented by Brenda Mayala learned State Attorney.

Arguing for his appeal the appellant submitted reiterating the grounds supra lamenting that he was convicted in the wrong name of Ismail Abdallah instead of his real name Ismath Abdallah and therefore serving the sentence of another person. He also lamented that since he was

alleged to have been arrested while dressing as a woman the alleged clothes and ornaments ought to have been brought in evidence as exhibit.

He again faulted the prosecution for failure to call the alleged prostitutes to confirm that they were arrested with him in such illegal business. About soundness of mind, the appellant admitted that he is sane but argued that at the time of trial he was very sick of warts (Bawasili) and HIV and therefore was not that much okay. About his cautioned statement the appellant admitted that he confessed at police but that was after torture and that is why even in court during his defense confessed the crime.

Responding against this appeal, the learned State Attorney argued that the appeal is devoid of any merits and submitted that the name Ismail was just a typing error in the title of the trial court judgement because all other documents including the charge sheet, the proceedings, the conviction order, the sentence and the committal warrant all cited him in his proper name Ismath Abdallah.

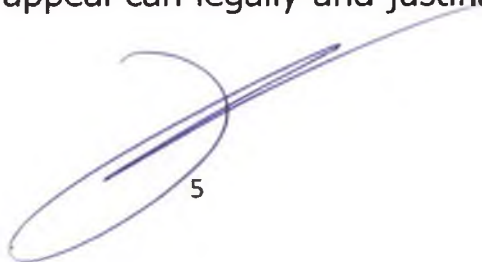
The learned State Attorney rejected the rest of complaints arguing that failure to call women prostitutes who were arrested together with the appellant was not fatal because under section 143 of the Evidence Act the prosecution is not obliged to bring a certain number of witnesses. The

witnesses brought discharged the burden of proof establishing the guilty of the appellant to the offence charged.

About the Cautioned statement the learned state attorney submitted that the appellant confessed before the police and his cautioned statement was tendered in evidence without objection. She cited the case of ***Nyerere Nyague versus The Republic, criminal Appeal no. 67 of 2010*** at page 8 whereas the Court of Appeal held that a confession is presumed to have been voluntarily made until it is objected and that the accused must object such a statement before it is admitted in evidence. On the allegations of failure to bring the dresses and leg ornaments, the learned state attorney argued that such exhibits could not negate the fact that the appellant was arrested with them nor they were relevant to the charged offence.

About the ground of insanity, the learned state attorney submitted that the appellant was of sound mind. He cross examined the witnesses and no any conduct in the proceedings suggested that he was not mentally okay.

Having heard the parties for and against this appeal as herein above reflected I find that this appeal can legally and justifiably be determined



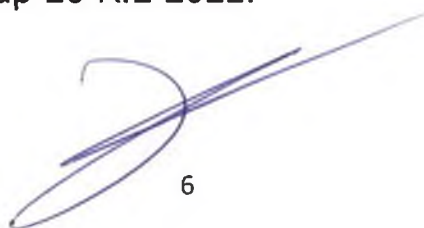
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by determining one issue on whether the prosecution case was proved beyond any reasonable doubts against the appellant.

Starting with the name of the appellant, it is true that he was charged by the name of Ismath Abdallah. That is clearly seen in the charge sheet itself and the trial court proceedings. But the trial court judgment cited him as Ismail Abdallah. The question is whether such error of citation of the appellant's name occasioned any failure of justice.

It is my firm findings that the error did not occasion any failure of justice. This is because, as rightly argued by the learned state attorney the charge sheet cited the proper name of the appellant Ismath Abdallah, the proceedings were conducted throughout in his proper name Ismath Abdallah, the conviction and sentence at page 8 of the trial court judgment and even the warrant of commitment to prison were all made and or entered against him in his proper name Ismath Abdallah.

Therefore, the citing of his name in the judgment as Ismail Abdallah was a mere typing error as rightly observed by the learned state attorney M/S Brenda Mayala. Such typing error did not occasion any failure of justice on the part of the appellant and thus curable under section 388 of the Criminal Procedure Act Cap 20 R.E 2022.



The appellant ought to have moved the trial court to make correction of his name in the trial court judgement but he did not do so taking the error as advantage to him. I think the appellant was wrong because by doing so he is not likely to benefit from such error because he was committed to prison under the name of Ismath Abdallah and not Ismail Abdallah. Therefore, even if this appeal is allowed in the name of Ismail Abdallah he will continue to be held in custody because for him to be released, the release order must cite him by the name he was committed for.

I therefore dismiss this complaint and under section 388 of the CPA (supra) order that the trial court judgement was entered against the appellant Ismath Abdallah and not Ismail Abdallah. For that purpose this judgement will site his proper name under which the conviction was entered and for the purpose of record the wrong name improperly cited shall be in bracket.

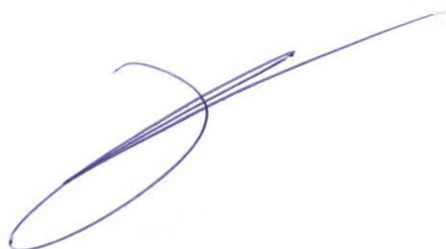
The rest of the complaints as I have said earlier can be answered by determining only one issue on ***whether the prosecution case was proved beyond any reasonable doubts against the appellant.***

The accused was charged for unnatural offence contrary to section 154 (1) (c) of the Penal Code for permitting male persons to have carnal knowledge of him against the order of nature.

The prosecution evidence of PW1 was to the effect that the appellant was arrested in a gang of women prostitutes who were conducting business of commercial sex. From such gang, it is when the appellant was detected to be a man who had dressed and decorated himself as a woman. On being interrogated he admitted to have been in such business since 2017.

The evidence of PW1 is corroborated by that of PW2 who recorded the cautioned statement of the appellant and tendered it in evidence as exhibit P1 without any objection. In the said statement the appellant confessed the crime and explained in detail on how he makes such illegal business. Just to quote part of the statement, the appellant explained;

"Huwa najiuzwa sehemu mbalimbali kwenye mabaa. Pia huwa najipanga pale uwanja wa CCM Kirumba.... Ni wanaume tofauti ambao wanakuja kupata huduma. Huwa wanadhani mimi ni mwanamke kwa kuwa nakuwa nimevaa gauni. Nikipata mwanaume napandisha gauni na kuinama namwambia kuwa nataka kufirwa sitaki mbele ili asijue kama ni mwanaume. Kwa hiyo nikimtegeshea mkundu akimaliza tunaachana bila kujua kama ni mwanaume."



This thorough explanation of the crime by the appellant is further corroborated by the evidence of PW3 Dr. Samira Idd whose findings after examination of the appellant's anal parts established that the anus had genital warts whose causative is either law body immunity or involvement in unnatural sexual intercourse. She also made it clear that the appellant informed her that he used to have carnal knowledge against the order of nature.

On top of all these facts and evidence, the appellant in his defence made a single paragraph defence evidence which was just a confession of the crime. That was his evidence under affirmation in the defence witness dock. He testified:

"Your honor, what I can only say to this court is, it is true that I have been involving in carnal knowledge against the order of nature. As of now what I can tell this court, I have repented it. I have learnt a lot during my stay at the remand prison so I ask for an apology"

With this statement in defence the question that the cautioned statement was involuntarily procured cannot arise. The appellant ought to have objected its admissibility as rightly submitted by the learned state

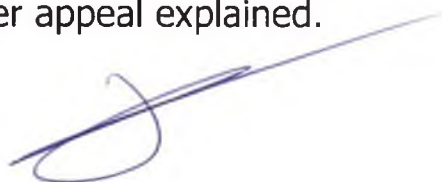
attorney and the authority of Nyerere Nyague's case. The complaint is an afterthought and accordingly dismissed.

The evidence as a whole as reflected above including the defence evidence proved beyond reasonable doubts that the appellant committed the crime of unnatural offence as he stood charged.

A bout complaint that the appellant ought to have been mentally examined, I find no merits in this complaint. The same is brought as an afterthought. It was not raised during trial and no conduct was even detected by the trial court that would have suggested the need to have the appellant's mental status examined. Even on this appeal the appellant pleaded that he is sane. He only stated that during trial he was sick but did not explain how was his mental status disturbed. I agree with the learned state attorney that the appellant cross examined the prosecution witnesses which suggested that he was mentally fit during trial.

I therefore dismiss this appeal in its entirety serve with a slight correction of the appellant's name to read Ismath Abdallah instead of Ismail Abdallah. Right of further appeal explained.

It is so ordered.





A. Matuma

Judge

28/05/2024

Court: Judgment delivered in the presence of the appellant in person and in the presence of Brenda Mayala learned State Attorney.



A. Matuma

Judge

28/05/2024