IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 73 OF 2023

(C/F Criminal Case No. 196 of 2022 in the District Court of Rombo at Mkuu)

VALENCE PANKLAS MTALES.. **APPELLANT**

VERSUS

REPUBLIC... **RESPONDENT**

JUDGEMENT

Date of Last Order: 20.05.2024
Date of Judgment: 10.06.2024

MONGELLA, J.

The appellant herein was arraigned in the district court of Rombo at Mkuu (henceforth, the trial court) for unnatural offence contrary to **Section 154 (1), (a), of the Penal Code** [Cap 16 R.E 2019].

The particulars of the offence as disclosed in the charge are to the effect that: on 13.09.2022, at about 23:00hrs at Masera-Chini village within Rombo district in Kilimanjaro region, the appellant had carnal knowledge of a 24 years old man (hereinafter, the victim or PW2), against the order of nature.

The appellant denied the charge levelled against him shouldering the prosecution with the duty to prove the case. The prosecution

called 8 witnesses to prove the case against him and tendered one exhibit.

The prosecution case, as gathered from the evidence it presented was that: on the material day of 13.09.2022, at around 23:00hrs, the victim who was testified to be mentally unfit, was heading home after purchasing a bottle of soda from one Peter James. In the said shop there were other people including the appellant and PW4. The appellant followed the victim. Upon reaching near the appellant's home, the appellant held the victim's neck, threatened to kill him and dragged him into his house. The appellant then undressed PW2's trouser and his own and forced him to bend down whereby he inserted his manhood into the victim's anus.

PW4, who headed home from Peter's shop, in about 10 minutes after the appellant, heard the victim groaning near the appellant's house. The appellant's house was roofless and had no concrete walls, but only sticks (*fito*) surrounding the house. PW4 peeped in and under the moonlight he saw the appellant unnaturally knowing the victim. He rushed to PW3, (the victim's brother) and called him to see what was transpiring. Upon his arrival at the crime scene, PW3 used a mobile phone torch to illuminate the appellant's home whereby he found the appellant committing the heinous act against the victim. He instructed PW4 to jump into the appellant's house to stop what was happening and he rushed home to call PW1 (his father). After getting his father, they went to PW5, the ten-cell leader and jointly marched to the crime scene.

PW1 and PW5 entered the appellant's house and took out both, the victim and the appellant. By then, a multitude had gathered at the appellant's house ready to attain justice against him. PW6, passing by the area witnessed the appellant and the victim both naked with only shirts on them. The appellant and PW2 were eventually taken to Ngoyani Police, then to Mkuu Police.

On 14.09.2022 at around 12:00hrs, the victim was medically examined by PW7 who found his anus loose, swollen and with bruises, he concluded he was penetrated by a blunt object. PW7 filled a PF3 in to that effect. PW8 was handed the file for investigation and the appellant was finally arraigned on 16.09.2022.

The trial court found the prosecution to have established a prima facie case against the appellant and invited him to defend himself. He gave his evidence as DW1 and had one witness, DW2, his father.

The appellant alleged that he was at home whereby he heard some noise and when he went out. Out there he found people and the victim who assaulted him while accusing him of raping the victim. He then questioned other details like the victim stating that he had penetrated him four times. DW2, testified that on the material day, he heard people yelling that the appellant should be murdered. He walked out and found many people seeking to kill the appellant, but he and PW5 tried calming them down. He further stated that the incident was planned against the appellant.

After observing the evidence of both parties, the trial court found the appellant guilty of the offence charged, convicted and sentenced him to serve 30 years imprisonment term and to pay compensation of TZS. 500,000/= to the victim.

Aggrieved by the conviction and sentence, the appellant filled the appeal at hand on the following grounds:

1. *That, the learned trial magistrate grossly erred both in law and fact in finding and holding that, the appellant was found flagrante delicto" unnaturally entering PW2, despite the evidence of PW3 and PW4 being highly suspicious.*

2. *That, the learned trial magistrate grossly erred both in law and fact in relying upon the evidence of PW2 to convict the appellant, but failed to take into consideration that, PW2 was a mental retarded person (as testified by almost all prosecution witnesses) Therefore, the trial court ought to have had conducted an examination on this particular witness to ascertain his competency to justify the reception of his evidence*. (sic)

3. *That, the learned trial Magistrate grossly erred both in law and fact holding that .PW3 and PW4 identified/recognized the appellant at the scene of the alleged crime while the circumstances and conditions at the scene were not conducive for proper and correct identification.* (sic)

4. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, PW2 (the victim) was a self-confessed liar and his evidence ought not to be believed, since he said that he went to Peter's shop to buy soda while PW4 who testified to be with PW2 at the said peter's shop said that, they were drinking Liquor (Banana beer) Therefore, Both PW2 and PW4 were under the influence of alcoholism to enable them know; understand and rightly grasp what happened.* (sic)

5. *That, the learned trial Magistrate grossly erred both in law and fact in relying upon weak, tenuous, contradictory, inconsistent, incredible, uncorroborated and wholly unreliable prosecution evidence as a basis of the Appellant's conviction.*

6. *That, the learned trial magistrate erred both in law and fact by being adamant that, the strong and well supported defense evidence of the appellant did not raise any reasonable doubt on the prosecution's case.*

7. *That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law.*

The appeal was contested by written submissions whereby the appellant was unrepresented while the respondent was represented by Mr. Henry Kasiano Daudi, learned state attorney.

The appellant generally submitted on the appeal. He argued that the trial court erred in convicting him as the conditions and circumstances at the crime scene were not conducive for proper, correct and unmistaken identification or recognition. He said that from the evidence of PW2, the incident took place at 23:00hrs which was night time and the possibilities of mistaken identity were not eliminated. Explaining further, he contended that PW2 never mentioned the intensity of light which enabled him to identify or recognize his assailant. Emphasizing that there ought to be detailed explanation on the source of light, he cited the case of **Isaya Samweli Mkeya @ Suma and Another vs. Republic** (Criminal Appeal No. 45 of 2023) [2024] TZHC 926 (18 March 2024) and **Waryoba Elias vs. Republic** (Criminal Appeal No.112 of 2020) [2023] TZCA 17314 (9 June 2023) TANZLII.

Still faulting the prosecution evidence on the question of identification, he further contended that there were discrepancies in the evidence of PW2, PW3 and PW4 with regard to his identification at the crime scene. He alleged that PW2 never stated the source of light. On the other hand, he said, PW3 testified to have used a phone torch light to illuminate the room and therein recognized the appellant. He added that PW4 stated that there was moonlight and the house had no roof, hence he could identify

and recognize him. In his view, there was a question on the source of light that enabled the three witnesses to identify the perpetrator.

The appellant further pointed out that PW1, the victim's father testified that the appellant was not of sound mind. He claimed this fact was not considered by the trial court even when PW4 cemented on such fact. That the trial court received the PW2's evidence without first ascertaining whether PW2 was mentally fit to testify. He alleged that this serves to show that PW2 was not mentally fit and thus could be easily fed information which he produced in court. He asked this court to disregard the evidence of PW2.

The appellant further faulted the trial court arguing that it never treated the evidence from prosecution witnesses with caution, particularly that of PW2 and PW4. He considered PW2 a self-confessed liar as he stated that he had gone to Peter's shop to buy soda, but PW4 testified to have been at Peter's shop drinking with him (the appellant) who had banana beer, and PW2 who was also having banana beer. In the circumstances, he considered PW2 to have lied to the court and pretended to be mentally fit and able to recall what transpired on the material day.

He added that both PW2 and PW4 were under the influence of alcohol and thus incapable of understanding what was transpiring. That, it was uncertain whether PW2 having consumed alcohol and being of challenged mental state could have been capable of

recognizing him as his ravisher. In his view, the evidence seemed to be a result of fabrications against the him in order achieve or attain an end only known to the prosecution's witnesses, particularly PW1, PW2, PW3 and PW4.

The appellant concluded his submission by praying for this court to find the prosecution to have failed to prove the case against the appellant beyond reasonable doubt. He also prayed for this court to find merit in his appeal, quash the conviction, set aside the sentence and set him at liberty.

The appeal was opposed. In reply Mr. Daudi argued collectively on the 1st and 3rd grounds. He contended that there was no speck of doubt in identification of the appellant at the crime scene. He argued so on the ground that the appellant was caught in flagrante delicto while penetrating the victim who was moaning in pain as testified by PW4. He said that PW3 supported PW4's testimony that they asked PW4 to jump into the appellant's house to stop them. Further, he said that PW3 and PW4 had no problem in identifying the appellant as they knew him for a long time as they were neighbours and there was moonlight reflecting at the scene. That the witnesses also used PW3's phone torch light. In support of his argument, he referred the court to the case **of Furaha Michael vs. The Republic,** Criminal Appeal No, 326 of 2010 CAT at Mwanza (unreported).

Addressing the 2nd ground, the Mr. Daudi argued that every person is competent to testify unless the court considered that he or she is incapable of understanding questions put to him or of giving rational answers to such questions. He referred to **Section 127(1) of the Evidence Act [Cap 6 R.E. 2022]** to that effect. He further contended that while it is undisputed that PW2 was not mentally well as testified by PW1, PW2, PW3, PW4, PW5 and PW6, still he was competent to testify in terms of **Section 127(5) of the Evidence Act**. He cemented the argument with the case of **Fadhili Makanga vs. Republic** (Criminal Appeal No. 458 of 2017 [2020] TZCA 270 TANZLII.

Mr. Daudi claimed further that the trial court asked PW2 a few questions on his particulars to which he positively responded. That, PW2 further expressed his competence while testifying leading the court to believe his evidence. In those bases, Mr. Daudi found the complaint that the victim was not of sound mind devoid of merit.

Replying to the 4th ground, Mr. Daudi remarked that it is settled principle that every witness is entitled to credence and must be believed and his testimony accepted unless the witness has given some improbable or implausible evidence or the evidence has been materially contradicted by other witnesses. In support of this position, he referred the case of **Goodluck Kyando vs. Republic T.L.R** [2006] 363.

He further argued that the prosecution was required to prove that the appellant had carnal knowledge of PW2 against order of

nature. Maintaining that the prosecution discharged its duty, he contended that PW2 testified that the appellant did the act to him. He had the stance that PW2's testimony was corroborated by that of PW3 and Pw4 who caught the appellant in flagrante delicto. In the circumstances, he found baseless the assertion that PW2 and PW3 were under the influence of alcohol thus incapable of understanding what had transpired. In addition, he disputed PW3 being under the influence of alcohol. Explaining further proof of the offence, he contended that PW1 and PW5 also found the appellant and PW2 naked at the crime scene and that it is for such reasons that the trial court believed the testimonies of PW2 and PW4.

As to the 5th ground, Mr. Daudi had the stance that the prosecution evidence was strong enough to convict the appellant. He held such stance on the ground that the witnesses were consistent, credible and their testimonies corroborated each other. He explained further that PW2 testified on how the appellant carnally knew him against order of nature and his testimony was corroborated with that of PW3 and PW4 who caught the appellant in flagrante delicto. That, PW3 then called PW1 and PW5 who together went to the crime scene and found the appellant and PW2 naked. PW2 was then taken to the hospital and examined by PW7. Mr. Daudi found no contradictions between prosecution witnesses rendering the trial court correct in relying on the prosecution evidence to convict the appellant.

With regard to the 6th ground, the learned state attorney had the firm stance that the charge was proved beyond reasonable doubt against the appellant. He challenged the appellant for failure to raise any doubt in his defence against the prosecution case. He explained that the ingredients of unnatural offence are penetration of male organ into anus of the victim whereby however slight, it suffices to prove the offence. To buttress this point, he referred the case of **Leonard Raymond vs. Republic**, Criminal Appeal No, 211 of 2016.

Establishing that the ingredients of the offence were established, he argued that PW2 testified on the appellant's male organ penetrating his anus and his evidence was not shaken nor broken by the appellant. He argued further that even as the appellant cross examined PW2, he maintained his testimony on being penetrated. Arguing on the legal position regarding evidence of the victim in sexual offences cases, he contended that the best evidence in sexual offences is that of the victim, a position he supported with the case of **Selemani Makumba vs. Republic** [2006] T.L.R 379. Arguing further, he contended that PW7 further corroborated PW2's testimony on there being penetration. He added that PW3 and PW4 also found the appellant in flagrante delicto unnaturally knowing the victim. In his stance, the appellant failed to raise any doubt on the prosecution's evidence.

Mr. Daudi finalized his submission by praying for the appeal to be dismissed for lack of merit. The appellant opted to file no rejoinder.

Upon considering the grounds of appeal and the submissions of both parties, I find it apparent that the appellant is faulting both the conviction and sentence metered by the trial court. He alleges that the prosecution failed to discharge its burden of proving the case against him. His claims are that: he was not identified at the crime scene as the assailant; PW2 was not a competent witness to testify; PW2 and PW4 were not credible witnesses; and that there were contradictions in the prosecution witnesses' evidence.

It is well settled that the standard of proof in criminal cases is beyond reasonable doubt. This is well stated under **Section 2(a) of the Evidence Act**. Such fact has been the core principle in criminal trials and is emphasized daily. This burden is to be borne by the prosecution. However, such duty is two-fold, not only is the prosecution charged with the duty to prove that the offence was committed, but also that the accused was the one that committed the offence. This was well expounded in **Malik George Ngendakumana vs. Republic** (Criminal Appeal 353 of 2014) [2015] TZCA 295 TANZLII whereby the Court of Appeal stated:

> "The principal of law is that in criminal cases the duty of the prosecution is twofold. One, to prove that the offence was committed, and two, that the accused person is the one who committed it."

It was the appellant's claim that he was not properly identified at the crime scene as alleged by prosecution witnesses. On this claim, foremost I wish to note that, as displayed in the charge, the offence

was allegedly committed around 23:00hrs. This means it was already dark at the time. Such fact is in fact undisputed.

It is well settled that evidence on visual identification is rather the weakest form of evidence. As such, courts ought to take precaution in approaching this kind of evidence to avoid cases of mistaken identity. In this regard, courts have established several factors that ought to be taken into consideration by decision makers when dealing with such evidence. The first of such factors were provided by the Court of Appeal in **Waziri Amani vs. Republic** [1980] TLR 250 whereby the Court stated:

> "Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems dear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: **the time the witness had the accused under observation**; **the distance at which he observed him**; **the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene**; and further **whether the witness knew or had seen the accused before or not.** These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity."

In the matter at hand, it is not disputed that the appellant and PW2, PW1, PW3, PW4 and PW5 knew each other before. They all were neighbours to each other. This therefore was clearly a case of identification by recognition rather than visual identification. The categories of identification were better explained in **Jumapili Msyete vs. Republic** (Criminal Application 4 of 2017) [2018] TZCA 314 (12 December 2018) (TANZLII) whereby the Court stated:

> "For the purpose of analysis and the experience enriched from case law, cases of identification may be identified into three broad categories. Visual identification, identification by recognition, and voice identification. In visual identifications, usually, the victims would have seen the suspects for the first time. In recognition cases, the victims claim that they are familiar with or know the suspects. In the last category the victims would usually claim to be familiar with the voice of the suspect although they may or may not have seen him. It is akin to identification by recognition."

The allegations raised by the appellant herein concern lack of sufficient light or rather lack of clarity on the source of light and intensity of light that aided the identification by recognition. The appellant claimed that PW4 testified to have caught the appellant and PW2 in flagrante delicto due to moonlight. At the same time, he claimed that PW3 alleged to have used a mobile phone torch to observe the appellant. Neither of these witnesses testified on the intensity of the light and it is questionable how both witnesses commission of the offence with diverse sources of light.

It is well settled that the source and intensity of light and the size of the area illuminated by such light are vital factors to be considered in both recognition and identification. This was established in **Waryoba Elias vs. Republic** (Criminal Appeal No.112 of 2020) [2023] TZCA 17314 TANZLII whereby the Court of Appeal stated:

> "It is trite that except where identification is by voice, in visual and recognition identification light, is a critical prerequisite. Accordingly, the Court has been resolute regarding its source and intensity stressing their proof beyond reasonable doubt that such light is bright enough to see and positively identify the assailant"

In **Issa s/o Mgara @ Shuka vs. Republic**, Criminal Appeal No. 37 of 2005 (unreported), the Court of Appeal clarified the essence behind clarification of source and intensity of light. It stated:

> "In is our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give sufficient details on the intensity of the light and the size of the area illuminated."

I have observed the testimonies of PW3 and PW4. It is evident that PW4 stated that he was able to identify the voice of PW2 who seemed to be groaning in pain and that thereafter he observed

the appellant's house. In his testimony, t it was with the aid of the moonlight that he was capable of recognizing the appellant and PW2 whereby both of them were lying down. He as well stated that he then went to call PW3. I will reproduce part of PW4's testimony to that effect:

> "I decided to leave; the path is nearby Valence's home, on my way I heard a mourning sound it was XY as I know him for a long time.; it was like he was beats; I decided to go nearby following the voice; Valencies house has no roof. There was moon light I saw two people naked Valence and XY sleeping on the floor I panicked and went to call XY brother Prosper, I told him to follow me to Valence's place and see, we went up to the house of Valence…" (sic)

PW3, the alleged victim's brother, stated that after being called by PW4, upon arriving at the appellant's home, he used his mobile phone to illuminate the area whereby he saw the appellant unnaturally entering PW2's anus. His exact words were:

> "I joined him to Valence's house, Valence house has no roof it is open that when it rains it goes inside; the walls has no were not bricked it is only 'fito' where one can see inside, I used my phone torch to light in as it was night and saw Valence unnaturally entering XY;" (sic)

Clearly, there were two distinct sources of light used to recognize the appellant and PW2. PW3 was aided by a mobile torch light and PW4 by the moonlight. However, the details on the intensity of the

light or the size that the light illuminated were never provided by the said witnesses.

However, in my considered view, the circumstances of the case raise no doubt that the appellant was properly identified at the crime scene. This is because, the appellant was caught in flagrante delicto by PW3 and PW4. Even after the incident, he never left the crime scene. PW4 jumped inside the unroofed, unbricked, stick (*fito*) walled house of the appellant to stop the heinous act. PW3 called PW1 and PW5 who upon arriving entered the appellant's house and took both the appellant and PW2 out of the house. The appellant and PW2 were still both naked after being pulled outside, a fact that was also witnessed by PW6 who was on his way at such night hours.

That same night, the appellant was arrested seemingly by the villagers and sent to Ngoyani police post whereby he was left at the station. PW2 was then taken to the hospital on 14.09.2022 in company of PW1, PW3 and PW4. Upon arriving at the hospital, he was examined by PW7.

In my view, the prosecution evidence was watertight in relation to what transpired on the material day. The sequence of events eliminates any ounce of doubt on mistaken identity. The appellant was thus seen by PW4 and PW3 while committing the offence against PW2. He was arrested while still at the crime scene whereby he was surrounded by villagers and leaders like PW5 and eventually

taken to Ngoyani police post, then to Mkuu police station and finally arraigned in court. The chain of events was so closely held together such that there exists no doubt that the appellant was indeed the one caught at the crime scene. Therefore, in my view, while identification details lacked to some extent, the appellant was still well identified in the circumstances.

Moving on to the inconsistencies pointed out by the appellant. The appellant alleged that PW2 deceived the court concerning him purchasing a soda at Peter's shop on the fateful day. He as well claimed that what PW4 testified regarding PW2 taking banana beer on the material day along with PW4 himself was true. Indeed, the record reflect that PW2 stated that he came from Peter's Shop to get a soda but PW4 stated he was having banana beer. Obviously, this was a contradiction.

However, I find such contradiction quite minor and not going to the root of the case. While it appears that PW2 lied about what he consumed at Peters shop, still his lie to that effect could not possibly invalidate his evidence on the appellant grabbing him by the neck and dragging him to his house and had carnal knowledge of him against the order of nature. I find the assertion that PW2 and or PW4 were drunk being immaterial in the circumstances since the appellant was found in flagrante delicto penetrating PW2 against order of nature.

The appellant further challenged PW2's evidence averring that he was mentally unfit thus, his evidence ought not to have been considered. Foremost, as pointed out by Mr. Daudi, the Evidence Act provides that any person is competent to testify unless he or she is incapable of understanding questions put to him/her. This is well found under **Section 127(1) of the Evidence Act** which states:

> "Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."

Specifically, a person of unsound mind is competent to testify as provided under **Section 127(4) of the Evidence Act** which states:

> "A person of unsound mind shall, unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them, be competent to testify."

Elaborating on **Section 127(4) of the Evidence Act** the Court of Appeal in **Fadhili Makanga vs. Republic** (Criminal Appeal 458 of 2017) [2020] TZCA 270 (3 April 2020) stated:

> "… this provision clearly highlights the fact that unsoundness of mind shall not by itself invalidate the competency of the witness to testify in court. To that effect, meaning that where there is a witness of unsound mind, the court must satisfy itself that the witness is prevented by his/her condition from

> understanding the questions put to him and giving rational answers."

In **Fadhili Makanga** (supra), the Court held that the trial court was duty bound to determine whether a witness of unsound mind was capable of understanding the questions put to her and giving rational answers. The Court found such omission fatal and incurable whereby it stated:

> "Taking all these factors into consideration, failure to determine whether PW5 alleged to be of unsound mind, was capable of understanding the questions put to her and give rational answers and therefore competent to testify and put the finding on record was fatal and an incurable defect. Since this discredited the victim's evidence, its evidential value cannot stand on its own to prove the case against the appellant."

In the matter at hand, there is nowhere in the proceedings of the trial court reflected that the trial magistrate determined that PW2 was competent to testify despite such fact being stated by PW1, PW3, PW4 and PW5. However, in her Judgement at page 5, she noted that the appellant was able to testify on what transpired despite the allegations that he was mentally unfit. I wish to reproduce what the court stated as hereunder:

> "The defence evidence always has a duty to create doubt to the prosecution case however with our case the accused hasn't succeeded to do so, his statement that KK was mentally unfit and he was supposed to be taken hospital carries no water due to the competence he showed before court

> when he was adducing his evidence, there was no way one can say that he was not mentally fit while he managed to state all as happened on the material day, even though even his father and other prosecution witnesses said the same but his evidence was believed by this court…"

In my view, though the trial court, in its judgment, appears to have deliberated on the competence of the victim (PW2) to testify, determination of such competence ought to have been done before recording his testimony and reflected in the proceedings. Since, PW1 had mentioned, when testifying, that the victim was mentally unfit, the Hon. trial Magistrate, in my view, was informed of his state of mind prior to recording his testimony and thus ought to have ascertained whether PW2 was fit to testify or not. As such, I am of the conclusion that the evidence of PW2 was un-procedurally recorded resulting into diminished evidential value. The same is hereby discarded.

At this point, the crucial question is whether after discarding the victim's evidence there remains other pieces of evidence to hold the appellant's conviction. It is on record that there were other eye witnesses to the commission of the offence. PW4 testified to have heard and identified the victim's voice as he groaned in pain. He went close to the appellant's house and saw the appellant penetrating the victim unnaturally. PW4 called PW3 who came and also witnessed the heinous act. PW3 called PW1 and later went to call PW5, a ten-cell leader, at his home. PW1 and PW5 came into the appellant's house and they found both, the appellant and the

victim naked and took both of them outside the house. PW6, who was passing by the appellant's house on the fateful day, also found the appellant and the victim naked while outside the appellant's house. There were also other villagers at the scene, outside the appellant's house who then took the appellant to the police post.

PW7 medically examined PW2 on 14.09.2022 and filled the PF3. In his examination, he observed that the victim's anus was open, bruised, swelled up and concluded that a blunt object had penetrated his anus. His testimony went as hereunder quoted:

> "On 14/09/2022 at 12hrs I was in my Office Huruma Hospital there came a young man escorted with this father and Police his name was XY; with unnatural entering claims, he was nervous and dirty. I took him for examination, I took his history, and went on checking his anus it was open not normal bruised and swelling around my examination discovered that something, round and blunt entered the area from outside."

It is trite law that every witness is entitled to credence unless the testimony given is so inconsistent, contradictory, or implausible. See: **Efeso Wasita vs. The Republic** (Criminal Appeal No. 408 of 2020) [2023] TZCA 42 (22nd February 2023). The important thing to note is that all events in the charged offence were so connected to the extent that there was no room of fabrication or tempering with the evidence. The appellant was caught at the crime scene after being eye witnesses as observed hereinabove.

On the other hand, I find the appellant's defence did not raise any doubt on the prosecution's case. The work of the defence evidence is to plant reasonable doubts in the prosecution case. The appellant herein merely addressed the court on his arrest whereby he alleged that he was at home, heard some noise and when he went out, he found people and PW2 who assaulted him while accusing him of raping the victim. He further questioned other details like the victim stating that he had penetrated him four times. Nothing tangible was raised to refute the prosecution evidence, particularly those of the eye witnesses. In this appeal he challenged the eye witnesses on the ground that their testimony was suspicious. However, he failed to show how the said testimony was suspicious.

The other witness he furnished in support of his case (DW2), had nothing much to say other than that, on the material day, he heard people yelling that the appellant should be murdered. That, he walked out and found many people seeking to kill the appellant, but he and PW5 tried to calm them down. He further stated that they planned the incident as the appellant had sold his bed to the victim and that the victim used to come to his home to talk with the appellant.

Just like the trial court, I also find this line of defence not raising any doubt on the prosecution's case which remained consistent at all times. The parties never altered their statements at any time and their testimonies corroborated each other. There was not only direct evidence but also circumstantial evidence gathered from

the fact that the victim and the appellant were also found naked by other persons like PW1, PW5 and PW6. The evidence sufficed to prove the unnatural penetration to the victim by the appellant. Such penetration is the key ingredient of unnatural offence as well stated in **Joel s/o Ngailo vs. Republic** (Criminal Appeal 344 of 2017) [2019] TZCA 314 (29 August 2019) whereby the Court of Appeal stated:

> "Penetration, however slight into the anus, with or without consent; is an essential ingredient of unnatural offence under section 154 (1) (a) of the Penal Code. Proof of penetration is the main ingredient that makes this offence complete."

In the upshot, in consideration of my observation as hereinabove, I find no reason to quash the conviction and sentence passed by the trial court against the appellant. The appeal is thus found without merit and dismissed.

Dated and delivered at Moshi on this 10th day of June, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA