THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 179 OF 2023

(Originating from the Court Resident Magistrates of Songwe at Vwawa, in Criminal Case No. 38 of 2022)

ISRAEL AMBELE MWAIPAJA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 06/03/2024
Date of Judgment: 30/05/2024

NDUNGURU, J.

Before the District Court of Songwe at Vwawa in Criminal Case No. 38 of 2022, the appellant, Israel Ambele Mwaipaja was charged then convicted of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap. 16 R.E 2022. It was alleged according to the particulars of the offence that on 16th October, 2022 at Saza area within Songwe District and Region the appellant had carnal knowledge of DPS (name concealed to protect her dignity) a girl aged thirteen (13) years against the order of nature.

The appellant denied the charge. The case went to a full trial. At the end, the trial court was satisfied by the evidence of the prosecution it thus convicted and sentenced him to serve 30 years in jail.

The prosecution evidence led to the conviction was marshalled through five witnesses and two exhibits that is PF3 (exhibit P1) and cautioned statement (exhibit P2). On the other side, the appellant fended himself and did not have a witness to call. In essence, the evidence by prosecution witnesses was that; PW1, the victim said that on the material date, she took some food to her grandfather's home. Unfortunately, he was absent at that time. That, when she was waiting for her grandfather, appeared the appellant who pulled her in the kitchen undressed his trouser and the victim's underpants then inserted him manhood into her anus.

The incidence was witnessed by PW2 who testified that, she is a neighbour to the victim's grandfather and she knew the victim and the appellant. That on the material date she was at her home surroundings, she saw the victim seating at her grandfather's home. She also saw the appellant going at the same place who then held the victim's hand and took her in the kitchen. That since she knew the victim to be not mentally okay, she suspected something fishy she thus, went near the

kitchen to see what was going on. Thereat, PW2 saw the legs of the appellant and heard some crying voices, she quickly called other neighbours who also came to witness the incident where they found the appellant sodomizing the victim. It is PW2 who apprehended the appellant while another woman among of the called neighbours raised alarm which made other people to gather at the scene of crime. Then the appellant was taken to the police station.

PW2 evidence get force from PW3, aunt and guardian of the victim, who told the trial court how she sent the victim to take some food to her grand father and how she was phone called and told about the happenings to her father and how the appellant was taken to Mkwajuni Police Station and given a PF3 for the victim.

Also, PW4 a medical doctor at Songwe District Hospital stated how he medically examined the victim and revealed that she was penetrated in the anus as the muscles were loose and there were bruises. PW4 also tendered PF3 which was admitted as exhibit P1. PW5 G1686 D/CPL Charles was the one who recorded cautioned statement of the appellant (exhibit P2) which was admitted without objection from the appellant. According to PW5, the appellant admitted in the cautioned statement to have committed the offence.

In his defence the appellant said that he was at scene of crime but he delayed to move away from the kitchen he was thus arrested by the neighbours on the allegation that he raped the victim. Also that he was then taken to the police and recorded his statement. That the victim was medically examined but not him.

As I have hinted before, the prosecution evidence was found to have proved the case to the hilt thus, the appellant convicted and sentence. Aggrieved, the appellant appealed to this court with four grounds that:

1. The trial Court Magistrate erred in law when convicted and sentenced the appellant without recording the question he asked the witnesses which is against the law.

2. That the trial Court Magistrate erred in law when convicted the appellant without examining the evidence adduce by PW1 and PW2.

3. That the trial Court Magistrate erred in law when convicted the appellant relying on PW2 evidence without considering that other people who PW2 alleged to have been called and apprehending the appellant at the scene of crime were not called to collaborate

her testimony as PW1 did not testify if PW2 saw the appellant committing the offence.

4. That the trial Court Magistrate did not consider his defence and the prosecution did not prove the case beyond reasonable doubt.

Owing to those grounds of appeal, the appellant prayed for this court to allow his appeal quash the conviction and set aside the sentence then release him from custody.

At the hearing of the appeal, the appellant appealed in person, unrepresented while the respondent Republic was represented by Ms. Prosista Paul, learned State Attorney. The appeal was orally argued.

When the appellant was invited to expound on his grounds of appeal, he prayed to adopt them and that they be considered.

On the other hand, Ms. Paul resisted the appeal and submitted on the 1st ground that, it does not hold water referring to pages 6 and 7 of the proceedings that the appellant did not cross examine PW1. That the appellant was given an opportunity to cross examine the witnesses but never did so. Thus, that the complaint is an afterthought.

That on the 2nd ground of appeal Ms. Paul submitted that the appellant did not explain how the trail magistrate failed to enquire on

the evidence of PW1 and PW2. She went on arguing that the evidence by PW1 and PW2 was analysed, assessed, evaluated and found to be credible. Further, that the evidence by those witnesses had never been shaken as the appellant did not cross-examine them. That failure to cross examine a witness on some facts cannot complain later on. Substantiated her argument with the case of **Nyerere Nyague vs Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012). Also, that the appellant was caught red handed sodomizing the victim.

On the 3rd ground, Ms. Paul argued that there is no specific number of witnesses required to prove certain fact as per section 143 of the Evidence Act, Cap. 6 R.E 2022 thus, that it is only credibility of witnesses that is required.

As to the 4th ground, Ms. Paul contended that the defence evidence by the appellant was considered but was weak to shake the prosecution evidence and that since the appellant was found red handed and cautioned statement was admitted without objection the case was proved at the required standard.

I have considered the grounds of appeal as contained the petition of appeal and the submission in opposing the appeal. The major issue for determination is whether the appeal has merits.

Starting with the first ground of appeal the appellant is complaining that the trial Magistrate did not record his questions he asked to the witnesses the fact which has been forcefully resisted by Ms. Paul that the appellant never cross-examined any witness. I think, this complaint should not detain me. It is on the proceedings that on the cross examination, was just indicated as NILL, meaning that the appellant did not ask any question to the witnesses. The appellant's complaint is like impeaching court proceedings which it trite law that, Court record is a serious document; it should not be lightly impeached, there is always a presumption that a Court record accurately represents what happened; see **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 and **Exim Bank (Tanzania) Limited vs Johan Harald Christer Abrahmsson,** Civil Reference NO. 11 of 2018 Court of Appeal of Tanzania at, Dar es Salaam (unreported).

In this matter, there is no any reasonable ground established by the appellant to find out that what is on the record did not take place in the trial court. As the result I concur with Ms. Paul for the respondent

that the appellant complaint is an afterthought as he never cross-examined the witnesses. The ground of appeal is thus dismissed.

On the 2nd ground of appeal, as Ms. Paul did not grasp the complaint contained in this ground, I have also encountered the same difficulty. However, this being the first appellate court and the appeal is considered in the manner like re-hearing of the case. Then his complaint in this ground together with grounds 3 and 4 will be accommodated in the process of re-evaluating the entire evidence adduced by the parties before the trial court. The issue to be determined at this juncture therefore, is whether prosecution proved the charge against the appellant beyond reasonable doubt.

In resolving this issue, I am holding the principle in my mind that, he who alleges must prove set under section 110 of the Evidence Act. Moreso, the principle in criminal cases that a burden of proof lies upon the prosecution and it is beyond reasonable doubt. And it never shifts to the accused person. See the holding in **Pascal Yoya @Maganga vs Republic,** Criminal Appeal No. 248 of 2017 Court of Appeal of Tanzania (Unreported).

Furthermore, in sexual offence cases like the one at hand, it is that the best evidence comes from the victim. This is in accordance with

section 127 (6) of the Evidence Act and the decisions in a number of cases including the case of **Selemani Makumba v Republic** [2006] TLR 379. **Edward Nzabuga v. Republic**, Criminal Appeal 6 No. 136 of 2008, Court of Appeal of Tanzania at Mbeya (unreported).

In this case, having gone through the victim's evidence, I find she did not give detailed evidence on what befallen her. In my view, it might be for the reason that she is not a person of sound mind. This is according to the testimony by PW2 and PW3 that, the victim (PW1) is not mentally okay. Nevertheless, I find the victim explained how she took some food to her grandfather whom she found absent as she was waiting for him, the appellant came and took her in the kitchen undressed her and put off his trouser then inserted his penis in her anus.

From the victim's evidence though in brief, there is evidence by PW2 who told the trial court on all what she saw happening on the incident date. In effect, according to PW2, the appellant was caught red-handed. PW2 said that he saw the appellant holding the victim into the kitchen. That after having suspected something fishy regarding the mental status of the victim she approached the kitchen where she heard some crying noises and saw the appellant's legs. That she quickly called

other neighbours (though their names not mentioned) who came and together with PW2 found the appellant sodomizing the victim. This PW2's evidence has never been contradicted. The appellant in his defence said that he delayed to move from the kitchen. This defence evidence supports PW1 and PW2 evidence that the incident took place in the kitchen. Also, the appellant's evidence supported the prosecution evidence that he was apprehended by the people at the scene.

It was the appellant's complaint that PW2's evidence was not supported by other referred neighbours. Nonetheless, the law is clear that in proving certain fact there is not a quantity of witness needed but the quality of evidence adduced. That is the spirit of section 143 of the Evidence Act. Also, the holding in the case of **Yohanes Msigwa v R** [1990] TLR 148.

In considered view, the PW2's evidence of finding the appellant red-handed sodomizing the victim. Also, the evidence by PW4, a medical doctor at Songwe District Hospital who medically examined the victim and tendered exhibit P1 (PF3) which revealed that the victim was penetrated in the anus as the muscles were loose and there were bruises. Addition to that, was the evidence by PW5 and the tendered exhibit P2 (that is the cautioned statement) in which the appellant

admitted to have sodomized the victim. In the absence of any tangible defence evidence to cast doubt all that evidence adduced by the prosecution witnesses I am constrained to concur with Ms. Paul for the respondent/Republic that the charge against the appellant was proved to the hilt.

Before I pen down, I find it pertinent to look at the sentence of 30 years imprisonment meted out to the appellant in this case. According to the charge sheet, the appellant was charged under section 154 (1) (a) and (2) of the Penal Code, Cap. 16 which provides, specifically (2) that:

> *"(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.****"*

It was in the particulars of the charge that the victim was a girl aged 13 years old. This means that after the appellant being found guilty and convicted of the offence, the trial court was obliged to sentence him the mandatory sentence of life imprisonment.

It follows therefore that, since this Court has upheld the conviction of the appellant it has to enhance the sentence by virtual of section 373 (1) (a) of the Criminal Procedures Act, Cap. 20 R.E 2022.

In the end, I find the entire appeal lacking in merits, therefore, dismiss it. Also, I vary the sentence of 30 years meted out to the appellant and substitute it with life imprisonment.

Ordered accordingly,

D.B. NDUNGURU

JUDGE

30/05/2024