

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB-REGISTRY)

AT KIGOMA

DC. CRIMINAL APPEAL NO. 2337 OF 2024

ANDREA LIBERATUS APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the Judgment and decree of the District Court of Kibondo at Kibondo)

(M. M. Makonya, SRM)

Dated 11th day of December 2023

In

(Criminal Case No. 192 of 2023)

JUDGMENT

Date: 13/05 & 13/06/2024

NKWABI, J.:

The trial court was verily satisfied that the charge against the appellant was proved beyond reasonable doubt. It convicted him of unnatural offence which is committed contrary to section 154 (1) (a) and (2) of the Penal Code. The incident happened allegedly on 26th October 2023. It was committed against a boy aged 12 years. The appellant is aggrieved by both conviction and sentence hence this appeal in this Court.

The appellant, in bringing this appeal, is banking on a ground of appeal that the charge was not proved beyond reasonable doubt. That ground has two branches, one being evidence on identification was tenuous and

the testimony of the victim of the alleged offence was not credible. The respondent strenuously opposed the appeal.

This appeal was disposed of by way of oral submissions. Mr. Fortunatus Maricha, learned State attorney represented the respondent while the appellant had the services of Mr. Sadiki Aliko, learned counsel. I am heavily indebted to the learned advocates for both parties over their powerful submissions.

It was Mr. Aliko's contention, in submission in chief, that the three grounds of appeal refer to evidence as to the question whether the charge was proved beyond reasonable doubt. Mr. Aliko submitted that the case was not proved beyond reasonable doubt in the district court of Kibondo. The charge was about an unnatural offence contrary to section 154 (1) (a) & (2) of the Penal Code whereas to prove the offence, there ought to be proof of age of the victim and penetration of the anus of the victim by the appellant, he stressed. Mr. Aliko conceded that best evidence is that of the victim as per **Seleman Makumba v. Republic**.

Regarding the age of the victim, Mr. Aliko maintained that the age was not proved. He added that the witness (PW.3) was only informed about the

offence by the mother of the victim. It was also his argument that he did not mention or testify about the date of birth of the victim.

Concerning proof of penetration, Mr. Aliko argued that, first of all, as per **Makumba's** case, the evidence of PW.1 did not specifically state about it (had sexual intercourse against the order of nature). He explained that those words are too general and PW1 did not say the appellant did insert his penis into his anus. No other witness can prove penetration, underscored Mr. Aliko.

Mr. Aliko too criticised the identification, saying that the evidence of PW.1 merely stated that he was carnally known against the order of nature when the appellant was going to Nyamkokoma village. He added that the victim was with PW.2. but PW.2 did not tell if prior to the incident if they had known the appellant. He questioned how could they agree just like that to go with a stranger. Mr. Aliko stressed that they did not testify if they had ever seen the appellant prior to that day of the alleged incident.

Mr. Aliko did not end there he also attacked, even the way the appellant was arrested, saying it brings doubt on the identification of the appellant. He elaborated that they did not mention to the mother of the victim who

committed the offence. He also argued that it is stated that there was inspection in the dormitories of the college where the appellant studies and was identified. Then he was sent to police station Kibondo. That is according to PW.5 who said an identification parade was conducted. That the appellant was identified in the identification parade, but initial information is not clear. Further, stated Mr. Aliko, there was no saying as to the reasons for the identification of the appellant to have committed the offence.

Mr. Aliko stressed that the identification of the culprit was very crucial. Due legal process of the identification parade ought to have been observed. He pointed out that the P.G.O. No. 232 ought to have been observed whereby an Assistant Inspector or above ought to lead the identification parade. The parade was led by a police officer without the rank. The rights of the suspect such as to have a lawyer were not availed to him, added Mr. Aliko.

He finally concluded his submission in chief by stating that witnesses ought to have been credible and there should be positive identification. It is thus, he prayed the appeal be allowed and the conviction be quashed

and the appellant be set free because the charge was not proved beyond reasonable doubt.

In reply submission, Mr. Maricha conceded that the unnatural offence ought to have been proved penetration of the anus and that the age too ought to have been proved. He strongly advanced that all the ingredients of the offence were proved. He elaborated that one of them is penetration of the anus, which, according to him was proved by PW.1 at page 6 of the proceedings, the victim said that the accused took his penis and entered it into his anus. That proves penetration, insisted Mr. Maricha. He added that there was corroboration from the evidence of the medical doctor at page 11 and 13 and exhibit P. 1 and the evidence of PW.2 also corroborate the evidence of PW.1 and is the person who went to report the incident to PW.3 and he saw the offence being committed, elucidated Mr. Maricha.

Regarding the age aspect, it was the stand view of Mr. Maricha that was proved through PW.3 the parent of the victim of the offence as could be seen in page 8 of the proceedings. The victim was an underage, stated Mr. Maricha and referred me to the case of **John Ngonda v.**

Republic, Criminal Appeal No. 45 of 2020, CAT at page 16 and 17. He insisted that they proved the age of the victim.

On the aspect of identification, which is vital, Mr. Maricha contended that there was no identification parade conducted. That as revealed in the testimony of PW.1 at page 6 where he said he used to know the appellant and as he used to go to fetch water at the college so used to meet the appellant there. Mr. Maricha pointed out that the appellant admitted that residents do go to fetch water at the college.

About credibility, Mr. Maricha referred me to the case of **Shaban Daudi v. Republic**, Criminal Appeal No. 28 of 2021, CAT and stated that credibility can be deduced by looking at the evidence of other witnesses. The evidence of PW.1 is corroborated by the evidence of PW.2 and there is coherence. The defence of the appellant mentions about going to Myamkoma village on the material day. In the premises, the victim, stressed Mr. Maricha, is credible as per **Makumba's** case.

Mr. Maricha too was of a firm view that the process that was used to identify the appellant was the use of photograph and they were photographed in class. Then, the victim went to identify the appellant. He

noted that cross-examination done by the appellant was only based on how many times the appellant and seen for the first time and secondly after the incident where the appellant went away. So, the rest of the evidence was not disputed. He finally prayed that this Court upholds the conviction and sentence against the appellant.

In rejoinder submission Mr. Aliko reiterated his earlier submissions in chief that penetration was not proved. Regarding age, he insisted that PW.3, PW.3 did not prove age. PW.3 did not say when the victim was born, stressed Mr. Aliko.

Mr. Aliko also stressed that regarding identification, the judgment of the trial magistrate talks about identification parade. He asked me to see even the evidence of PW.5. Else the respondent ought to have appealed about it, Mr. Aliko stated his stance.

Concerning credibility of the witnesses, it was his contention that other witnesses indicate there was identification parade, so there is no coherence, the cited case assists the appellant and not the prosecution. He finally insisted that the case was not proved beyond reasonable doubt.

I have closely considered the arguments advanced by the counsel of both parties and I am of the firm view that the appeal is merited on the following grounds. The first ground that the prosecution witnesses especially the material ones who witnessed the offence being committed contradicted themselves on material particulars. While PW.1, the victim of the offence claimed to have not raised an alarm due to the threats made by the appellant to him, PW.2 who claimed to have witnessed the offence being committed said that PW.1 screamed (raised an alarm).

There is also contradiction as to whether the victim and PW.2 were acquainted to the appellant. There is a suggestion that the acquaintance was due to fetching water at the same place. But that is negated by the testimony of PW.1 who said it was the first time to see him at FDC. This glaring contradiction should go to benefit the appellant. Moreso when there was no any identification parade conducted. The circumstances of the case required identification parade to be conducted in accordance with the law as state in **Hassan Juma Kanenyera & Others v. Republic** [1992] T.L.R. 100 (CAT) at p 105- 106

"Again, the advocates for the appellants pointed out that after the identification parade appellants 1, 2, 3, and 5 registered their complaints that PW4 had known them

before. Sarkar's Law of Evidence 13th Ed, p. 99 was cited as authority that an identification parade is useless if the persons put on the parade to be identified are known to the person who is to make the identification.

I accept the question posed by Mr. Aliko that how could the victim and his colleague agree to accompany the appellant while they were not acquainted to him? Further, while another witness said about an identification parade having been conducted, the victim of the offence and his friend did not say anything about the identification parade. That being the position it is very dangerous to uphold the conviction and sentence.

The culmination of the above discussion, I allow the appeal and proceed to quash the conviction and set aside the sentence imposed upon the appellant. I order for his immediate release from prison unless he is held therein for other lawful cause(s).

It is so ordered.

DATED at **KIGOMA** this 13th day of June, 2024.




J. F. NKWABI
JUDGE