THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA

(CORAM: HON. AUGUSTINE RWIZILE)

DC. CRIMINAL APPEAL NO. 000039771 OF 2023

SAIDI S/O ATHUMANI ..... COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF

VERSUS

REPUBLIC ..... RESPONDENT / DEFENDANT

JUDGMENT

Fly Notes

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Facts

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Ratio Decidendi

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2nd of July 2024

Hon. RWIZILE.:

The appellant, Said Athumani was arraigned at the District Court of Uvinza at Uvinza, in Kigoma Region on one count of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap. 16, R.E. 2022]. The offence against order of nature was alleged committed to a boy of 6 years. The trial court, after considering the evidence brought before it by the prosecution, was convinced that the charge was proved beyond reasonable doubt.

He was not only convicted as charged, but also was sentenced to life imprisonment. The appellant was not satisfied with both conviction and sentence, he has preferred this appeal on the grounds that;

1. *The trial court erred in law and fact for convicting the appellant without regarding that the prosecution did not prove the charge beyond reasonable doubt.*
2. *The trial magistrate erred in law and in procedure in convicting the appellant without showing under which law or provision of the law the appellant was convicted which is a procedural irregularity and therefore fatal; hence there is miscarriage of justice.*

3. *The trial magistrate erred in law and facts on convicting the appellant without considering that the DNA Examination Report (Exhibits P5) revealed that there was no relation or connection with the DNA results of the blood sample procured from the accused.*
4. *The honourable court erred in law and fact in convicting the appellant without considering the cardinal principle that the appellant cannot be convicted on the weakness of his/her defense save on the strength of the prosecution evidence adduced.*

The appellant was unrepresented when this case was set for hearing. The respondent, on the other hand was under the service of Ms Antia, State Attorney. The appellant did not have anything to argue but asked the defence attorney to state her case first.

Contesting the appeal, the learned state attorney argued that the charge was proved. She said the case was proved beyond reasonable doubt because there was penetration which is a key element in proving the charge. The learned attorney said, Pw1 proved the case as it is reflected on page 18 of the proceedings.

It was her argument that the victim's anus was penetrated. Pw6, she added, proved the victim's anus was with bruises which was due to penetration by a blunt object. The appellant according to her, admitted before Pw4. Exhibit P1, a caution statement, supports other procured evidence. She said, Pw1 told Pw2 immediately as he arrived at home about the incident.

On the second ground, it was argued that an irregularity that the law applied to convict him was not named, is curable under section 388 of the Criminal Procedure Act. In the view of the learned attorney, the charge sheet was properly drafted and has the provisions and the trial court referred it in its judgement which is contrary to section 154(2) of the Penal Code.

An argument on the 3rd ground was that the DNA results was given by Pw8, which proved there was a relationship between the sperms found in the victim's pants and the appellant's blood.

Arguing the fourth ground of appeal, she held the view that the evidence for the prosecution was enough to prove the case, as it did, and it is not true that the conviction based on the defence weakness. The trial court showed, she said, there was no doubt in the evidence of the prosecution case. She prayed therefore this appeal be dismissed.

The appellant on his part, stated that justice was not done. He said, it took too long from the date of arrest to when he was charged, and one year for the case to be heard. The evidence of Pw1, according to the appellant was that the offence was committed, he went home to report. He said, this was a 6-year-old child, which is impossible for him to do so. The evidence of the medical doctor said, he was received in the hospital on 14.10.2022 and examined on the next day, why did he not examine him on that day. He said, the bruises in the anus can be caused by hard faeces or a blunt object. It was therefore not proved the same was penetrated. Pw8 said, according to him, received the sample of blood and pair of shorts of a child and said they had no relationship.

Further, Pw10, in terms of evidence, he said, he took samples of two people not known if the samples taken were from the appellant. Pw5 said, he added, there was an oral admission at the police station, and it took at least one month to take him to court. Why did it take too long, he asked? This means, they waited him to heal wounds due to the beating. He prayed this appeal be allowed

In determining this appeal, the sole issue is as to whether the charge against the appellant was proved beyond reasonable doubt. As the first appellate court, I think, I have to re-evaluate the evidence in order to meet justices of this case. The prosecution had 11 witnesses. The story leading to the arrest of the accused is alleged to have begun after Pw1 reported the incident to Pw2 at home. Pw1, mentioned the appellant to have committed the offence against him. Pw2 informed Pw3 who, upon arriving at their home, she found Pw1 holding a boxer with sperms. The appellant was arrest by Pw2. Pw2 and Pw3 took the victim and the appellant to Pw4. Before Pw2, Pw3 and Pw4 it is alleged, the appellant admitted having committed that offence on 14th October 2022. Pw4 gave to Pw2 and Pw3 a letter and went to the police station where they handed the appellant. A PF-3 was issued by Pw5 to the victim who was taken for examination and treatment at the hospital. At the police station, before Pw5, the appellant is alleged to have admitted, the caution statement was recorded -exhibit P1. Pw1 was attended by Pw6 on 15th October 2022.

In terms of exhibits, two exhibits were at issue, the pants with sperms, exhibit P6, and blood sample taken from accused of DNA test. It is alleged, the exhibits were given to Pw9, the exhibits keeper. Pants were given to Pw9 by Pw3 while blood sample was from Pw7 after receiving the same from Pw10 who collected it. They were all given to Pw7 who took them to Chief Government Chemist Laboratory Authority. Unfortunately, Pw7 arrived at late hours. Under his protection, he kept the exhibits in his bag till the next day when he submitted them to the Chief Government Chemist at the lake zone Mwanza and were taken to Dar es salaam for analysis. From Dar es salaam, the results were given to Pw11 who took them back to Uvinza police station. The same was given to Pw9 again who kept them until they were brought to court. Exhibit P5 is a DNA examination report. It unveiled that the DNA found in the blood sample taken from the appellant, is the same as the DNA found on the pants of the victim.

On his side the appellant denied the offence. He relates the age of the victim to his age and then stated that, if indeed he could penetrate the victim's anus, he could not manage to walk. He further denied any admission of the offence before any prosecution witness. He submitted that exhibit P5, a DNA examination report is not reliable because it had been proved before, that such laboratories do not have accurate results as they had once shown. The appellant further said that Pw10 took blood samples from two suspects and may have confused between the two. On confession, he argued that the same was taken by force, he was threatened and beaten. He added, even the victims' age, was not proved.

Having heard the submissions and gave a brief account of the evidence at the trial, it is clear to me that evidence relied by the trial court to convict the appellant is a DNA report and confessional statements before Pw2, Pw3 and Pw4.

To start with, the DNA sample was taken by Pw10. Collection of samples for DNA is governed by the Human DNA Regulation Act, 2009, which requires such samples to be taken by a sampling officer, who in terms of

section 14(2) and (4) should not only be a police officer, or a medical practitioner, but also should observe the sampling guidelines stipulated in the regulations made under the Act. I have no doubt, in taking samples Pw10 complied with the guidelines. But, taking samples for DNA from a person suspected of committing a criminal offence has to comply with mandatory provisions of section 30 of the Act. For easy of reference, the section provides; -

30(1) Where the sample for Human DNA is collected for criminal investigation, the sampling officer shall inform the person from whom the sample for Human DNA is to be taken-

(a) that the authorization by the requesting authority has been obtained.

(b) the reasons for taking the sample for Human DNA;

(c) the procedure to be used to collect; and

(d) that the genetic information to be extracted from that sample for Human DNA may be used as evidence for or against that person.

There is no evidence that Pw10 complied with the law when taking samples from the appellant. I think therefore, the sample taken that led to examination and analysis and therefore exhibit P5 a report was against the law. In terms of section 169(4) of the Criminal procedure Act, it was not fair to admit the same into evidence. It is therefore excluded. This, therefore, sufficiently disposes of the 3rd ground of appeal. It is with merit.

The caution statement is exhibit P1. This was recorded by Pw5, a police officer on 14th October 2022. The law provides for the caution statement to be taken within four hours in terms of section 50(1)(a) of the Criminal Procedure Act. It is from the records that a statement was taken from 2200hrs to 2240hrs. It should be noted that when tendered by Pw5, there was no objection. When a caution statement is not contested by the accused when tendered, it means, its truth is admitted. The appellant's silence on the caution statement at the time it was tendered proves to me that it was reflecting the truth. It was not proper therefore to raise doubt on its content at some later stage. It is trite that, ***one*** a confession statement will be presumed to have been voluntarily made until objection to it is made by the defence on the reason that, either it was not voluntarily made or not made at all as held in the case of **SELEMANI HASSANI v R** Criminal Appeal No. 364 of 2008 (unreported). ***Two***, if an accused intends to object to the admissibility of a confessional statement he is obliged to do so before it is admitted, and not during cross examination or when making his defence, the case of **JUMA KAULULE v R,** Criminal Appeal No. 281 of 2006 (unreported) made it so clear. ***Three***, in the absence of any objection to the admission of the statement when the prosecution sought to have it admitted, the trial court cannot hold a trial within trial or inquiry to test its voluntariness which is best practice and procedure obtaining in this jurisdiction. ***Four***, if objection is made at the right time, the trial court has the duty to stay the trial and conduct an inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted into evidence. This point was the position in the case of **TWAHA ALLY AND 5 OTHERS v R**, Criminal Appeal No. 78 of 2004 (unreported).***Five***, even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each

case in terms of the case of **TUWAMOI v UGANDA**, [1969] E.A 696. ***Six***, in terms of the case of **PAULO MADUKA AND 4 OTHERS v R**, Criminal Appeal No. 110 of 2007 (unreported) everything being equal the best evidence in a criminal trial is a voluntary confession from the accused. ***Seven***, the appellant having failed to object to the admissibility of the caution statement, he is estopped from objecting it at any stage late. It is because the court had not time to vet it in order to see if it complied with the law. But further, it is clear to me that the statement was made voluntarily and complied with the law.

The above notwithstanding, still, there is need to see if the statement was corroboration. Corroboration here is important and it may come from evidence of the prosecution or defence. There is evidence that the appellant also confessed to Pw2, Pw3 and Pw4. I take the confession before Pw2 and Pw3 not from independent witnesses. It is because Pw2 arrested the appellant and Pw3 is his wife. Upon his arrest, the appellant was taken to their home. They can be taken as witnesses with own interest to serve, they were central to the arrest and the victim is their child. But Pw4, a leader of the local government, received the appellant held by Pw2. They went to the office and upon interrogating the appellant admitted having committed the offence. He is therefore an independent witness and is a fit person to receive a confession.

Pw1 a six-year boy testified. I have revisited the manner in which his evidence was recorded by the trial court. Being a boy of tender age, taking his evidence has to comply with section 127(2) of the Evidence Act. All what is required of child of tender age, before giving evidence, has to promise to tell the truth to the court and not to tell any lies. The manner in which this should be done was sufficiently stated by the Court of Appeal in the case of **GODFREY WILSON v R**, Criminal, Appeal No.168 of 2018 on page 13 to 14.

The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:

1. The age of the child.

2. The religion which the child professes and whether he/she understands the nature of oath.

3. Whether or not the child promises to tell the truth and not to tell lies.

The trial court although, it obtained a promise to tell the truth form Pw1, he was subjected to intense examination in the form of *voir dire* which is against the law. All in all, I have no doubt that Pw1 sufficiently told the trial court what was necessary; for instance, identifying the appellant properly and what he exactly did to him. Pw6 a medical doctor tendered a PF-3. It is exhibit P4. According to his evidence, Pw1 was found with bruises in his anus. This proved he was sodomized. The defence was that it is not possible for the victim of the stature of Pw1 to be penetrated by the appellant and yet manage to walk. What proves penetration is not the amount of damage caused in the anus. Penetration in such like cases, is proved by bruise if any and it does not matter if it was so deep or slight. It is clear to me that the caution statement was corroborated by Pw4 as well. Pw1, Pw2 and Pw3 gave evidence that is consistent with the rest of the evidence.

This leads me the 4th ground of appeal. The trial court in evaluating the evidence, relied on the weakness of the defence case without analyzing with sufficiency that the prosecution proved its case. I agree with the defence that it was not proper to do so. But it is not true in my view that there is no sufficient evidence from the prosecution case to prove the charge. I have shown before how the DNA analysis and examination report contradicted the law and so was excluded. I have also shown that there was other evidence that was relied upon by the trial court to found conviction. This was based on the confession statement exhibit P1 and that it was corroborated by Pw4 and Pw1. Further the evidence of Pw2 and Pw3 materially shows how Pw1 was attended by Pw6. Pw6 as well shown how Pw1 was penetrated in his anus and the presence of bruises caused by the blunt object. To me, this is sufficient to prove that even though the trial court took too much time to analyze the weakness of the defence case, still that does not mean, there was not prosecution evidence proving the case. I find no merit in the 4th ground of appeal.

The second ground should not detain me any longer. It is true the trial court did not state the provision of the law where the conviction was founded. In other words, the appellant complains that the trial court convicted him without citation of the law that empowered him to convict. This irregularity does not affect the trial. It is therefore curable as submitted by Antia State attorney under section 388 of the Criminal Procedure Act. I find no merit in this ground as well.

Last, it is the first ground. When dealing with ground three and four I shown that prosecution proved its case beyond reasonable doubt. I do not find it plausible to recapitulate what I have said before. Before, I pen off, it is clear that the prosecution did not deal with proving the age of the victim. This was important in this case because of the sentence imposed. Unlike in statutory rape, where consent is not needed, but the offence charged is not statutory rape. It is having carnal knowledge of person against the order of nature. It does not matter if done to a male person or a female age notwithstanding.

For the foregoing reasons, it is clear to me that this appeal has no merit. It is dismissed. But when dismissing the appeal, I hold that the sentence imposed was not proper since the age of the victim was not proved as I have shown before. Therefore, I set aside the sentence of life imprisonment and substitute for it, 30 years imprisonment.

Dated at **KIGOMA ZONE** this 2nd of July 2024.

AUGUSTINE RWIZILE

JUDGE OF THE HIGH COURT