IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 318 OF 2016

(Originating from Morogoro District Court, Criminal Case No. 246/2014)

IBRAHIM YUSUPH KAMUGISHA---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

LUVANDA, J.

The appellant above named lodged an appeal challenging the decision of the District Court at Morogoro on ground that; Inspector Ndanda whom it is alleged the offence was first reported to him was not summoned; a cautioned statement "Exhibit P1" it is contents were not read over before the court; PW6 did not tender his preliminary findings on examining the victim; the trial court did not evaluate contradictions an evidence

of PW1, PW2, PW3 and PW4; evidence of PW1 and PW7 contradict; PW1 did not disclose the intensity of light; the prosecution failed to prove charge beyond reasonable doubt.

At a trial court, the appellant stand charged for an offence of unnatural offence contrary to section *154 (1) (a) Cap. 16 R.E 2002*. It was a prosecution case that on 22/10/2014 at about 1:00 hrs at Morogoro Remand Prison in cell No. 29, the victim (PW1) while asleep, felt something hot entering his anus, he awake, found his trouser removed up to the knees and sperms on his anus, managed to catch appellant penis which was wet (liquidity). The victim screamed, where their fellow inmate PW2 and PW3 awake and found the appellant penis which was wet with liquidity. That the appellant alleged to have ejaculated while masturbating where semen pull out and landed into victim' anus. But he (appellant) later bewailed apology and solicited the victim to condone. The victim was examined and found to have sustained bruises outside his anus which had blood. At defence the appellant denied committing offence, also that the victim was not sodomized as PW7 did not see any sperm or fluid in his (victim) anus. That it was not easy for him to commit sodomy, as there is a prisoner warden (DW2) whom they sleep together. DW2 stated that the leader of cell did not report to him (DW2)

rather reported to other prison warden. In view of this evidence the trial court find that the prosecution had proved a charge, hence convicted and sentenced the appellant to thirty years imprisonment.

At the hearing of appeal the appellant had nothing to submit. Responding to the appellants ground of appeal, Mr. Kissima learned State Attorney submitted that not every witness can be summoned to testify as the prosecution sort out witnesses who will enable them to prove a charge. As such there was no need to summon the alleged Insp. Ndanda. Regarding a second ground that a cautioned statement (Exhibit PE1) was not read to the accused, the learned State Attorney supported this ground that the same was not read over during a trial. As such asked the court to expunge it, citing **MOHAMED HILAY, CR. APPEAL NO. 331/2012 CAT** at Dodoma that, the court expunged a cautioned statement that was not read over in court. With reference to a third ground, he submitted that PW6 and 7 are medical doctors, while PW6 is a medical doctor at prison, PW7 is a medical doctor in civilian or normal hospitals. That PW6 examined the victim and advised him to be taken to another doctor for further examination. That PW7 examined the victim and filled a PF3, which was tendered in court. That what was

stated by PW5 does not differ with PW7. That PW1 explained well how he managed to identify the appellant, he caught appellant's penis which was wet, as they slept together and there was electrical light. That the evidence of PW1 was corroborated by PW2 (leader of a cell at prison), PW6 and 7 (medical doctors), including PW3 and 4, who in their totality together with Exhibit P2, had proved a charge beyond reasonable doubt. As such asked for the appeal to be dismissed.

In this matter PW1 nabbed the appellant penis who was sodomizing PW1 while was fast asleep. Their fellow inmates to wit PW2 and PW3, examined both the victim and the appellant, where they saw spermatozoa on PW1 anal and the appellant penis was wet smeared with liquidity. However, the appellant immediate defence that he was masturbating, was dismissed by his fellow inmate, on explanation that everyone had its mattress as such it was impossible for semen to pullout and land into victim's anal. Again the victim (PW1) trouser was seen undressed below knees. PW6 (Prison Medical Doctor) examined the victim and confirmed he sustained bruises on his anus with spermatozoa seen. PW7 (Medical Doctor at Morogoro Government Hospital) examined the victim and found bruised outside the anus with blood, but did not see spermatozoa, but she discovered that a

blunt object had entered his anus. As such the grounds by the appellant that the alleged Insp. Ndanda was not summoned or else that PW6 did not tender his preliminary findings are untenable. As the alleged Insp. Ndanda was just informed on the occurrence of the incidence as such his testimony was of no value. Again PW6 explained well that he referred the victim to police to obtain a PF3 for further examination. In other words when the victim was taken to PW6 the later did not have PF3, meaning that he did not prepare any report for tendering in court. Secondly, it was wise for medical examination to be conducted by a neutral independent party, instead of all witnesses to be either appellant's fellow inmate or prison warden alone. Fairness, justice and common sense dictate a course taken by PW6, which is proper and healthy. As such PW6 cannot be condemned for not filing or tendering medical report. Regarding a complain that PW1, 2 and 3 tendered contradictory evidence, I have not seen any. All three were firm and testified on consistence account of facts. Equally there was no contradiction between the testimony of PW1 and PW7 as the later testified on what she observed. Regarding a ground that PW1 did not disclose the intensity of light at a scene does not hold water, as PW1 nabbed the appellant penis and there was electricity light

into a cell, as such this ground is without substance. With reference to the ground that contents of a cautioned statement (Exhibit PE1) were not read over before the court, the same has merits. As submitted by the learned State Attorney, after admitting the same in evidence, the court ought to read over or cause it to be read over before the court. Noncompliance is fatal and the effects to such document is liable to be expunged from the court proceedings or records *(See Mohamed Hilay (supra)*. But still there is ample evidence to implicate the appellant with the charge leveled to him, as demonstrated above.

In passing, I have noted that the trial Magistrate had purported to conduct re-examination to PW1 and DW1 which was wrong. As re-examination is normally conducted subsequent to cross examination and the same is done by the party who called a particular witness (see *section 146(3) Cap. 6 R.E. 2002)*. PW1, DW1 were not a court witnesses as such the court went astray to attempt to re-examine them. As such this defeated the order and direction of examination of witness as provided for under *section 147(1) Cap. 6 R.E 2002*. What the learned trial Magistrate was supposed to do was just to put or ask questions to witness and not to conduct re-*examination (see section 176(1) Cap. 6 (supra)*.

However in view of a nature of a questions asked, I find that it was not fatal to the proceedings.

In the premises, the appellant appeal is without substance. The trial court findings and sentence are upheld.

Appeal dismissed.

E. B. Luvanda

JUDGE

27/06/2018