IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 14 OF 2022

(Originating from Criminal Case No. 22 of 2020 of the District Court of Rombo at Mkuu)

KOTIFRIDY EMMANUEL KIMARIO.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

28/10/2022 & 25/11/2022

SIMFUKWE, J.

The appellant Kotifridy Emmanuel Kimario was charged before the district court of Rombo with unnatural offence contrary to **section 154 (1)(a) (2) of the Penal Code, Cap 16 R.E 2019.** He was convicted and sentenced to a statutory sentence of life imprisonment.

It was alleged by the prosecution before the trial court that the incident took place on 27/11/2020 at about 18:00hrs at Urauri village within Rombo District in Kilimanjaro Region. That on the fateful day, the appellant is alleged to had carnal knowledge with one KJ (name withheld to hide identity) a boy of eight (8) years old against the order of nature.

The matter was reported at Tarakea Police station on 01/12/2020 where the victim was issued with a PF3 and taken to Tarakea Health Center. On the same date, the appellant was arrested and taken to Tarakea Police Station where he was interrogated.

In his defense before the trial court, the appellant denied to have committed the offence and alleged that on the material date he was at the farm. He complained that he was arrested without any arrest warrant nor village and sub village leaders.

The trial court found that the prosecution had proved its case beyond reasonable doubts.

After being aggrieved with the decision of the trial court, the appellant appealed before this court against both conviction and sentence on seven grounds of appeal. I paraphrase the grounds of appeal as follows:

1. *That, the learned trial Magistrate grossly erred both in law and fact in failing to note that the arrest of the appellant was a result of mistaken identity.*
2. *That, the learned trial Magistrate grossly erred in law and fact in failing to critically analyze and evaluate the entire evidence on record to an objective scrutiny. As a result, he ended up in using her own speculative ideas in convicting the appellant.*
3. *That, the trial Magistrate failed to note that there was high possibility that the case at hand was pure fabrication against the appellant as the parents of the victim did not take any action at the earliest possible opportunity nor take the victim for medical examination earlier.*

4. *That, the learned trial Magistrate grossly erred both in law and fact in failing to note that the act of the victim not disclosing the ordeal to anybody particularly his parents or teachers at the earliest possible opportunity cannot attract the confidence of her testimony before the court of law.*
5. *That, the learned trial Magistrate grossly erred in law and fact in relying upon exhibit P1 (the PF3) which was unprocedurally tendered and admitted in evidence as exhibit.*
6. *That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the appellant basing on weak, tenuous, contradictory, incredible and wholly unreliable prosecution evidence.*
7. *That, the learned trial Magistrate grossly erred in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubts against the appellant.*

The appeal was argued by way of written submissions. The appellant appeared in person while Ms Mary Lucas learned State Attorney opposed the appeal for the Respondent Republic.

From the outset, the appellant submitted inter alia that he was found guilty, convicted and sentenced to a harsh and capital sentence of life imprisonment basing on a defective and incurably charge sheet. He elaborated that the said charge sheet did not afford an opportunity to the appellant to comprehend the gravity and magnitude of the punishment facing him as there is no provision of punishment/sentence which was cited in the charge sheet. That, it is surprising and unknown where the trial Magistrate drew the sentence of life imprisonment inflicted upon the appellant. The appellant cemented his argument by citing the case of

Godfrey Simon and Another v. R, Criminal Appeal No. 296 of 2018 at page 8 where while dealing with similar situation, the Court of Appeal reasoned that failure/omission to cite the provision in the Penal Code which prescribes the sentence or the punishment, is a fatal omission as the appellant did not understand the nature and magnitude of the punishment ahead of him to enable him prepare the informed defence. He quoted what was stated by the Court that:

> *"It is thus settled law that, punishment/sentencing must be specified in the charge so as to enable an accused person to understand the nature of the charged offence and the requisite punishment. In the present case, the omission to state the punishment provision prejudiced the appellants who were not made aware of the serious implications of the offence charged, the gravity of the impending sentence and as such, they were unable to make an informed defence."*

The appellant insisted that with all due respect, guided by the above cited case law, that is what precisely happened in the case at hand. He prayed this court to amplify the findings in the case of **Godfrey Simon** (supra) in resolving the aforementioned omission.

On the second ground of appeal, the appellant asked that who told PW1 and PW3 that the suspect was at Paskali's farm. That, why did PW1 and PW3 not let the victim lead them to the locus in quo? He commented that the above questions leave many doubts as to whether the appellant herein who is an old man aged 64 years was indeed a real perpetrator of the charged offence.

On the issue of exhibit P1, the PF3, the appellant submitted that the said exhibit was not properly cleared for admission and it was not read out aloud before the court after being admitted. Therefore, the appellant's attention was not drawn to the contents of the said exhibit.

Regarding the issue of failure of the victim to name the culprit or disclose the ordeal against him at the earliest possible opportunity; the appellant stated that in this case the victim remained silent for quite a while without disclosing the alleged ordeal against him which cannot attract confidence of his testimony before the court of law. Furthermore, PW1 and the victim's father despite discovering the ordeal on 27/11/2020, they never took any action including reporting to the responsible authorities nor took the victim to hospital for medical check-up and treatment at the earliest possible opportunity. The appellant was of the opinion that the above noted weakness raise reasonable doubts on whether the said ordeal befell the alleged victim and connotes that there is high possibility that the offence was fabricated against him.

The appellant prayed this court to find merit in his appeal, allow it, quash the conviction, set aside the sentence and set him at liberty.

In her reply, Ms Mary Lucas learned State Attorney on the outset she stated that they support the conviction and sentence imposed to the appellant by the trial court. The learned State Attorney stated that they wish to reply the grounds of appeal in its generality by basing on one key point that the prosecution proved the case beyond reasonable doubts.

It was argued inter alia that the prosecution paraded five (5) witnesses and the trial court after hearing both sides, convicted the

appellant with the offence charged and sentenced him to serve life imprisonment.

Ms Mary submitted that it was alleged that the appellant did have sexual intercourse against the order of nature to a boy aged 8 years who is PW2 herein. In order to prove the offence charged the prosecution ought to show that there was anal penetration however slight as rightly provided under **section 130(4) of the Penal Code** (supra); and that the said penetration was done by the appellant. Ms Mary commented that in our case as shown at page 9-10 of the typed proceedings PW2 elaborated clearly how the appellant did sodomize him.

It was submitted further that it is a cardinal principle of law that the best evidence of rape or any sexual offence comes from the victim as it was held in the case of **Selemani Makumba v. R [2006] TLR 379.** The learned State Attorney said that the trial Magistrate believed that the victim was telling nothing but the truth and used his unsworn testimony to convict the appellant. That, evidence of penetration was corroborated by the testimony of PW4 a doctor who examined the victim and found him to be anally penetrated. PW2 identified the appellant to be the person who did such act to him and went to the place where the appellant works and pointed him. That, evidence of the victim was clear and consistent hence the contradictions alleged by the appellant regarding the place where the incidence took place are very minor. That, the said contradictions did not go to the root of the case as it was held in the case of **Eliah Bariki versus Republic, Criminal Appeal No. 321 of 2016** (unreported).

Ms Mary reiterated that, to prove the offence of rape or unnatural offence, penetration however slight is crucial. That, in our case the victim's evidence together with the testimony of the Doctor and the PF3 tendered before the court proves penetration. Therefore, basing on the above argument, it was submitted that the respondent does not support this appeal.

Having considered the grounds of appeal and submissions of both parties, ***the issue is whether this appeal has merit***.

In his submission, the appellant started with the issue of failure to cite the provision which prescribes the sentence for the offence of which he was charged. It may be noted that, the said issue was not stated in the grounds of appeal. It is trite law that parties are bound by their pleadings. Thus, I assume the issue of failure to cite the said provision as an afterthought and will not deal with it.

Regarding the place where the appellant was arrested, the appellant was of the view that the victim could have led them to the scene of crime and not at the place where he was found working. With respect, I find this issue as frivolous and unfounded as no suspect is expected to remain at the scene of crime throughout.

On the issue of failure to read out exhibit P1, I have gone through the proceedings of the trial court, at page 16 of the typed proceedings it was recorded as follows:

> ***"PW4****.....I pray to tender PF3 as exhibit for prosecution side.*
>
> ***Accused-*** *No objection*

Court- *PF3 is hereby admitted as exhibit for prosecution side and marked as exhibit P1*

Pros- *I pray PW4 to read the contents of exhibit P1*

Court- *Prayer granted."*

From the above quoted part of the proceedings of the trial court, it obvious that exhibit P1 was read over after being cleared for admission. Thus, the allegation of the appellant that the exhibit was not read over in court is misconceived.

Concerning the issue of failure of the victim to name the culprit or disclose the ordeal against him at the earliest possible opportunity; it is on record that after the parents of the victim had known the ordeal, they never took the victim to hospital until when they found the appellant. The appellant was of the opinion that the above noted weakness raise reasonable doubts on whether the said ordeal befell the alleged victim and connotes that there is high possibility that the offence was fabricated against the him. The learned State Attorney did not address this issue. She submitted generally that penetration was proved and that the victim identified the appellant as the person who sodomized him. We have plethora of authorities in respect of the importance of reporting the incident as early as possible having in mind stigma and cultural barriers.

In the case of **AHMED SAID V.R, Criminal Appeal No. 291 of 2015** (Unreported) at page 14, the Court of Appeal held that:

"...Much as we are aware of the timidness, taboo or stigma that may be an associated cause for the late or non -reporting to a person of confidence of an act of

sexual violence by a victim, nothing in the record points to that direction; on a failure to name a suspect at the earliest possible opportunity, this Court in the unreported ***Criminal Appeal No. 06 of 1995 Wangiti Mansa Mwita and Others V. The Republic,*** *the Court made the following observation:*

> *'The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as an unexplained delay or complete failure to do so should put a prudent Court into inquiry.'*

In our view the statement of principles equally be falls on a witness *in the shoes of Yusra who withheld the details of the sexual occurrence for quite a while. To further complicate her non-disclosure and as was correctly formulated by the learned senior state attorneys, Yusra was a self-confused liar."*

In this case, it is unbelievable that parents did not take their sodomized son for treatment for almost five days waiting to arrest the perpetrator. The matter was not even reported at the police station from 27/11/2020 when the ordeal was revealed until on 01/12/2020 when it was reported at the police station and the victim was taken to the Health Center. I concur with the appellant that it is doubtful whether the victim was sodomized despite the medical report on exhibit P1.

In criminal cases, the burden of proof lies on the prosecution which have the onus of proving the offence charged beyond reasonable

doubts. The accused's duty is to raise reasonable doubts on part of prosecution. The case of **Maruzuku Hamis v. R [1997] TLR 1** is relevant. However, when the burden shifts to the accused person, the standard of proof is on balance of probabilities as it was held in the case of **Said Hemed v. R [1987] TLR 117**

In this case, I am satisfied that on the strength of the 3rd and 4th grounds of appeal, on balance of probabilities, the appellant has managed to raise reasonable doubts on part of prosecution.

It is for that reason that I find this appeal has merit. The conviction meted against the appellant is quashed and sentence set aside. The appellant should be set free immediately, unless he is held responsible for other lawful reasons. Appeal allowed.

Dated at Moshi this 25th day of November 2022.

S.H.Simfukwe

Judge