IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 136 OF 2021

(Arising from the District Court of Bunda at Bunda in Criminal Case No. 20 of 2021)

MARWA DANIEL @ OMARY DANIEL @ OMI ..... **APPELLANT**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

25.04.2022 & 05.05.2022

Mtulya, J.:

The **District Court of Bunda at Bunda** (the district court) in **Criminal Case No. 20 of 2021** (the case) on 6th September 2021 had convicted Mr. Marwa Daniel @ Omary Daniel @ Omi (the appellant) for the crime of unnatural offence contrary to section 154 (1) (a) & (2) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code) and ordered the appellant to serve life imprisonment as per section 154 (2) of the Code.

The decision aggrieved the appellant and approached this court complaining on six (6) issues, which in brief shows the following complaints: first, the district court did not conduct *voire dire* test as per section 127 (1) & (2) of the Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act); second, PF3 (exhibit P.1) was tendered by Heveson William (PW3) who did not prepare it; third, evidence of PW3 is fabricated as he works at Bunda DDH while the victim was examined at

Bugando Hospital; fourth, the evidence of aunt (PW2) is hearsay and evidence of PW3 did not prove sodomy; fifth, the evidence of prosecution is full of doubt as the claimed offence occurred on 26th October 2020 and reported on 30th October 2020; and finally the district court did not consider defence evidences.

The appeal was scheduled for hearing on 25th April 2022 through teleconference attached in Bunda Prison and offices of the Director of Public Prosecutions, Musoma in Mara Region and the appellants, who had no legal representation, briefly explained his complaints as follows: first, the learned magistrate in the case recorded evidence at his own procedure without abiding with the provisions of section 127 (2) of the Evidence Act as he did not conduct *voire dire* test. In second and third grounds, the appellant submitted that PW3 registered exhibit P.1, but the exhibit does not support the allegation as did not show any bruises or penetration to the victim's anus.

Submitting on the fourth ground of appeal, the appellant stated that witnesses PW2 and PW3 brought hearsay evidence in the case as PW2 was told by PW1 and stayed with the information for more than three (3) days and still claimed that the victim was in a state of pain, whereas PW3 testified on exhibit P.1, which he did not prepare. To the appellant's opinion, the whole evidence in the case was fabricated by family members without any investigation officer from the investigation machinery.

In registering ground number five of appeal, the appellant contended that the victim (PW1) complained that she was sodomised on 26th October 2020 and stayed in pain until 30th October 2020 without telling anyone of the pain while she was living with several other individuals at home and school, and all those persons could not notice the pains in the victim until when PW2 showed up at her residence.

To the appellant's opinion, that brings a doubt in the case and in any case the evidence of PW3 shows that he attended the victim on 6th November 2020 whereas PW2 noticed the matter on 30th October 2020. According to appellant's opinion the facts show that the case was fabricated on the sense that it is impossible for a victim to remain in pains for such long period since 26th October 2020 to 6th November 2020 or PW2, an adult female to remain silent with the facts for a week to take the victim child to hospital.

In his conclusion, the appellant stated that district court ignored his defence and facts registered in the case as they show series of events of conflicts, misunderstanding and several filed cases in both primary and district court. In bolstering his claim, the appellant stated that on 22nd November 2020, he was arrested and taken to the police station and interrogated on 3rd November 2020 in the presence of PW2 on obtaining money by false pretense and agreed the offence and payment of Tanzanian Shillings Fifty Thousand (50,000/=). However,

PW2 declined the deal and filed a case before Bunda Urban Primary Court on 4th November 2020 and on 5th November 2020, he was arraigned in the court to answer the charges of obtaining money in false pretense, but the case ended in amicable settlement from the advice of learned assessors. The appellant submitted further that the advice and settling of the matter aggrieved PW2 hence initiated the present criminal case on 28th January 2021 claiming sexual harassment to PW1, which brings doubt as why he was not prosecuted for the offence on 5th November 2020 when he was arraigned before the primary court. To his opinion, how possible for the offence claimed to have been committed on 26th October 2020 to be prosecuted on 28th January 2021.

In replying the grounds of appeal, Ms. Agma Haule, who appeared for the Republic, protested the appeal contending that the offence against the appellant was not fabricated and the prosecution proved its case beyond reasonable doubt. In justifying his protest, Ms. Haule submitted that the first complaint of the appellant is related to the old enactment of section 127 (1) & (2) of the Evidence Act, which has already received amendment and does not insist on *voire dire* test. To his opinion, as of current what is required is the child under fourteen years of age to promise to tell the truth and PW1 did that in the case.

On the second and third ground of appeal, Ms. Haule submitted that the evidence of PW3 and exhibit P.1 are correct as PW3 is a

competent witness who has a knowledge on exhibit P.1 and in any case, had previously attended and examined the victim PW1 in his office at Bunda DDH and that is allowed by the law established in the case of **Director of Public Prosecutions v. Mirzai Cirbakhshi @ Hadiji & Three (3) Others**, Criminal Appeal No. 493 of 2016 and any slight penetration in anus is enough to establish unnatural offence as stated in the decision of **Sospeter John v. Republic**, Criminal Appeal No. 237 of 2020.

With evidence of PW2, Ms. Haule submitted that she was the first person to note the pain in PW1 and inspected the victim hence she is competent person to testify and corroborated evidence of PW1. To Ms. Haule's argument, PW2 and PW3 are competent and each played its role hence cannot be doubted as were not eye witnesses while they were observers and expert on the issues of sexual offences.

Concerning the gap of dates of the claimed occurrence of the offence, reporting of the matter to the police and examination of the victim, Ms. Haule submitted that PW2 clearly stated that she was at Election Seminar at Bunda Town between 26th October 2020 to 30th October 2020 and in any case the victim was a minor, but complained on stomachache which is related to the offence. To Ms. Haule's opinion, the dates of delay does not negate the fact that the victim was not sodomised and that the best evidence in sexual offences comes from the victim as it was stated by the Court of Appeal in the

case of **Selemani Makumba v. Republic** [2006] TLR 376 and **Mawazo Anyonyile Makwaja v. Director of Public Prosecutions**, Criminal Appeal No. 455 of 2017.

Finally, Ms. Haule submitted that the appellant cannot claim his defence was not considered whereas page 3 of the judgment shows it all save for the issue of money amounting to Tanzania Shillings Fifty Thousand (50,000/=) which the appellant stated in the district court. To the opinion of Ms. Agma Haule, this court, being the first appellate court, may scrutinize the evidence and come up with its own conclusion on the matter.

On my part I will take up the advice of Ms. Haule, as officer of this court, on examining the record of the present appeal. The record shows that the district court in its judgment at page 3, stated that:

> *On his defence Marwa Daniel @ Omi (DW1) testified that on 2nd November 2020 at 10:00 am, he was at his daily routine at Gutta Village where three police officer came and arrested him and bought him to police station, upon interrogation DW1 admitted that he is owed to one Zaituni Tshs. 50,000/=, but at the material time he had no money. On 5th November 2020, DW1 was sent to Primary Court for obtaining money by false pretense upon returning to police station DW1 was forced to sign a document which he was not aware about it, but on 6th November 2020, DW1 was brought before this court for sexual*

harassment and the case was withdrawn. DW1 was then taken back to police station and on 28th January 2021, he was brought before this court for the offence at hand.

On the other hand, the defence case shows the following materials as registered at pages 18 & 19 of the proceedings conducted on 4th August 2021:

On 2nd November 2020 at 10:00 am, I was at Gutta and then three police officers came and arrested me, then at police station...sent me in interrogation room with Zainabu Maganga (PW2). I admitted that Zaituni to claim 50,000/=, but I had no money. On 4th November 2020, I was sent to primary court for obtaining money for false pretense, then I returned at police station and I was forced to sign a paper which I didn't know. On 6th November 2020, I was brought before this court for sexual harassment, and the case was withdrawn, but I was sent to police station and on 28th January 2021, I was brought to this court for this case. Since 2nd November 2020, I was not in bail for the offence. When did it happened, the offence don't know. It was fabricated...The victim said on 26th October 2020...the evidence of PW2 stated 30th October 2020 is the time she noticed that her child was sodomized...the evidence of the doctor...examined in the victim's vagina but found nothing, but in anus also he did not see blood, male sperms

nor bruises, but said the victim had pain...the prosecution said to bring five witnesses, but brought three witnesses only...there is no any other independent witness. They failed to bring because the act did not happen...the source of all is 50,000/=, which I have not paid till now after getting lose from my job...I came to know the victim at this court. The victim was a child. She has been taught...

It is obvious from the facts registered in defence case and statement of the district court at page 3 of the judgment are at discrepancies. Several issues were left untouched by the district court, or touched without reasons in arriving decisions, namely: first, silence on part of PW2 as when she reported the matter to police station, which occasioned the arrest of the appellant on 28th January 2021; second, why the appellant was not prosecuted for the claimed offence on 6th November 2020 when he was brought in the district court for sexual harassment or on 4th November 2020 when he was brought before the primary court for the offence of false pretense; third, silence on where was the appellant between the 2nd November 2020 when he was initially arrested to 28th January 2021, when he was brought before the district court to answer the present charges; fourth, the issue of independent witness; and finally, complaint on money of PW2 remaining to the appellant. In short, as from the record, it cannot be

said that the defence evidence was considered. The law is very obvious on the subject.

According to the Court of Appeal in the decision of **Daniel Severine and Two (2) Others v. Republic**, Criminal Appeal No. 431 of 2018, at page 7 of the judgment, it was stated that:

> *It is trite law that, non-consideration of the defence evidence is a fatal irregularity to the trial and the whole proceedings and it vitiates the conviction.*

The reasoning of the Court in the case at page 15 of the decision is that: *the trial magistrate ignored the defence case and he did not put into balance and weighted that defence evidence with the prosecution case in order to be fully satisfied that the prosecution proved its case beyond reasonable doubt.* Their Lordships in the precedent of **Yusuph Amani v. Republic**, Criminal Appeal No. 255 of 2014, stated, at page 8 of the decision, that: *both the trial and first appellate court did not treat the appellant fairly who was all the same not availed a fair trial which occasioned a miscarriage of justice as his evidence was not considered. Thus the conviction was not safe and it cannot be sustained.*

In the present appeal, the appellant has been claiming innocence on his part and gave a testified story and sequence of events which bring doubts against the prosecution case. For instance, nothing was said by the learned magistrate regarding the series of prosecution

against the appellant in three (3) months' time with three (3) cases against the appellant and all cases initiated by PW2.

This is unfortunate shift of the use of our courts from civil wrongs to criminal cases. First, the appellant was prosecuted at Bunda Urban Primary Court for false pretense and the case was settled by the parties; second, the appellant was prosecuted at the district court for sexual harassment and the case was withdrawn and finally the present case was preferred. All this was done between 2nd November 2020 and 28th January 2021. Had the learned magistrate at the district court considered the whole evidence on record, the result would have been different. Having said so to my opinion, this fault alone is sufficient to dispose the appeal. However, for purposes of appreciation of the current law and practice, I will briefly touch the other grounds of appeal.

I am aware the complaint of the appellant in interpretation of section 127 (1) & (2) of the Evidence Act which had received a reply from Ms. Haule on the changes of the law with regard to the *voire dire* test. I think Ms. Haule is correct. The law as of current reads that:

> *127 (1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause;*

(2) ***A child of tender age may give evidence*** *without taking an oath or making an affirmation but shall, before giving evidence,* ***promise to tell the truth to the court and not to tell any lies****.*

(Emphasis supplied).

This enactment was inserted in section 127 of the Evidence Act via section 26 of the **Written Laws (Misc. Amendment Act) No. 4 of 2016** and has already received a bundle of precedents of the court of Appeal in **Selemani Bakari Makota @ Mpale v. Republic**, Criminal Appeal No. 269 of 2018; **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018; **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015; and **Edward Nyegela v. Republic**, Criminal Appeal No. 321 of 2019.

The present record shows that the victim promised to tell the truth as is depicted at page 6 of the proceedings conducted on 6th April 2021: **PW1:** PY2 (6) years of age, a student of Gutta B Primary School, resident of Gutta Village, Standard Two (II) Class. I will tell the truth and not lies.

Court: PY2 (6) has promised to tell the truth and not lies. Section 127 (2) of the Evidence Act complied with.

In my considered opinion, and considering replies from the victim, that was enough for the requirement of the law. From the record, the evidence in support of the allegation of PW1 was brought by PW2 and

PW3. In my opinion, and considering three (3) filed cases by PW2 against the appellant that goes to the reliability and credibility of a witness. In any case, a aunt in pains of her child, cannot stay from 30th October 2020 to 28th January 2018 to initiate criminal proceedings to prosecute offender of her child and at the same time busy following up in police and subordinates courts of her 50, 000/= Tshs. In any case, the investigation machinery which investigated the present case was not marshalled to state on two things, *viz*: first, where was the appellant from his arrest by three (3) police officers at Gutta area on 2nd November 2020 to 28th January 2021; and second, subsequent arrest and prosecution of the appellant.

In serious cases like the present one which may attract life imprisonment, the case need to be proved without doubts. This court has said in a number of decisions that failure to involve investigation machinery may bring doubts in criminal cases (see: **Zakaria Benjamini Keraryo v. Republic**, Criminal Appeal No. 119 of 2022 and **Alex Rwebugiza v. The Republic**, Criminal Appeal No. 85 of 2020). The practice of this court and Court of Appeal has shown that doubts are to be resolved in favour of accused persons (see: see: **Maduhu Nhandi @ Limbu v. Republic** (supra); **Mohamed Said Matula v. Republic** [1995] TLR 3; **Makuru Joseph @ Mobe v. Republic**, Criminal Appeal Case No. 146 0of 2021; and **Mathias Maisero Marwa @ Omi & Another v. Republic**, Criminal Appeal Case No. 104 of 2021).

I understand the law and practice regulating admission of evidence allows persons with knowledge to appear and tender exhibit on their area of expertise (see: **Director of Public Prosecutions v. Mirzai Cirbakhshi @ Hadiji & Three (3) Others** (supra). Similarly, in the same level, the expert evidence does not bind the court. In the present appeal, PW3 was initially involved in examining the victim and later had the report from other institution called Bugando Medical Centre. His evidence after reading exhibit P.1 containing PF.3 and the Report from Bugando Medical Centre, reflected at pages 12 & 13 of the proceedings of the district court conducted on 12th May 2021, shows that:

> *I took her to examination room, examine her both private parts, her vagina and anus, then I noticed her vagina was okay no blood, nor bruises, but her anus she was in great pain that make me not to proceed as she was in great pain...there was a thing which was forced to enter into her anus...after three days we referred her to Bugando Hospital as our facility was not enough...we received a letter from Bugando explaining that the victim was fragmented inside her anus...during examination, I was with nurse, one relative of the victim.*

Reading this paragraph and the story from PW1 and PW2 is quietly shocking. Any person may ask himself as how it was possible

for such pains of a child of six (6) years to remain for more than four (4) days to wait for PW2. Similarly, PW2 after receipt of the information from PW1, she waited for one (1) week to take the victim to PW3 for examination. I think there are questions here and those questions from the practice of our courts are doubts. I am aware Ms. Haule stated that any slight penetration in anus is enough to establish unnatural offence and cited the authority of **Sospeter John v. Republic** (supra). I entirely agree with her, but that slight is not stated anywhere on the record. The record shows that there was a thing which was forced to enter into her anus, but the facts registered by the witness PW3 are questionable, if you compare with other facts registered in the case.

I also agree with Ms. Haule that the best evidence evidence in sexual offences comes from the victim. I am aware there is large family of precedents on the subject (see: **Selemani Makumba v. Republic** (supra) and **Mawazo Anyonyile Makwaja v. Director of Public Prosecutions** (supra) **Yohana Said @ Bwire v. The Republic** (supra); **Bashiri John v. The Republic, Criminal Appeal** No. 486 of 2016 **Abasi Ramadhani v. Republic** (1969) HCD 226; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; and **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015. However, that has to be looked with other facts. In the present appeal, the victim stated that:

...it was on 26th October 2020 about 4pm. I was coming from school...going home. On my way I met Omi staying at Gutta...then he pulled my hand and lay on me down and put his hand on my mouth and undressed my school uniform then akanivua nguo akaniingiza mdudu wake mkunduni....I felt pains then he did put on clothes...then aunt came. She lied me down on bed and examined me...I was able to walk.

However, the words of victims of sexual offences cannot be taken as gospel truth, but their testimonies should pass the test of truthfulness (see: **Mohamedi Saidi v. Republic**, Criminal Appeal No. 145 of 2017 and **Alex Rwebugiza v. The Republic**, Criminal Appeal No. 85 of 2020). In the present appeal, I do not think, in my considered opinion that the victim has passed the test of truthfulness.

I am also aware that no particular number of witnesses is required for proof of any fact in criminal cases as per interpretation of section 143 of the Evidence Act and from the precedents in **Selemani Makumba v. Republic** [2006] TLR 376 and **Yohana Msigwa v. Republic** [1990] TLR 148. What is important is the weight of materials the evidences tendered in court to substantiate the prosecution case. However, in the circumstances of the present case, and considering the investigation machinery was not summoned to testify without registered reasons, and noting the defence evidence

was partly declined, I do not think the prosecution has established its case beyond doubt.

Finally, considering the foregoing deliberations and taking the evidences on record as a whole, I am satisfied that the prosecution evidence leaves shadow of doubts hence did not prove the case beyond reasonable doubt against the appellant in the district court as per requirement of the law in proving criminal cases (see: section 3 (2)(a) of the Evidence Act [Cap. 6 R.E. 2019] and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005).

In the event, I find this appeal to have merit and was brought in this court with sufficient reasons, and hereby allow the appeal and proceed to quash the conviction and set aside the sentence of life imprisonment meted to the appellant. I further order the appellant be released forthwith from prison unless he is held for some other lawful cause.

It is so ordered.

Right of appeal explained.

F.H. Mtulya

Judge

05.05.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Ms. Agma Haule and in the presence of the appellant, Mr. Marwa Daniel @ Omary Daniel @ Omi through teleconference placed at Musoma Prison Mara Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

F.H. Mtulya

Judge

05.05.2022