**IN THE COURT OF APPEAL OF TANZANIA**
**AT IRINGA**

**CORAM: LILA, J.A. KITUSI, J.A. And MWAMPASHI, J.A.)**

**CRIMINAL APPEAL NO. 31 OF 2020**

**ISAYA MSOFE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Iringa)**

**(Matogolo, J.)**

**dated the 10th day of December, 2019**
**in**

**DC Criminal Appeal No. 50 of 2019**

---

# JUDGMENT OF THE COURT

22nd & 25th March, 2022

## MWAMPASHI, J.A.:

In Criminal Case No. 49 of 2019, before the District Court of Mufindi at Mafinga (the trial court), the appellant, Isaya s/o Msofe, was charged and convicted of unnatural offence contrary to section 154 (1)(a) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code). It was alleged before the trial court that on 10.11.2019 at Changarawe area within the District of Mufindi in Iringa Region, the appellant did have carnal knowledge against the order of nature of a fifteen (15) years old

boy whom, for the sake of protecting his modesty and privacy, shall henceforth be referred to as "PW1" or "the Victim".

The facts leading to the appellant's arraignment, prosecution and conviction, as can be gathered from the record, are not much complicated. It was common ground that the appellant, who was a barber, used to have his hair cutting salon at Changarawe close to Changarawe Secondary School, where the victim and his friend, whose name is also hidden and who we will hereinafter be referring to as "ML" or "PW2", were Form Two students. The said appellant's hair cutting salon was also close to Kiwele hostel where the two boys used to stay. According to PW2, on a certain day the appellant who was his friend, saw him with PW1. He then told him that PW1 was 'beautiful' and that he had fallen in love with him and wanted to have carnal knowledge of him. The appellant did also ask PW2 to seduce PW1 for him and promised to pay him, should the mission succeed.

The mission succeeded and on 10.11.2018, PW2 took PW1 to the appellant at his hair cutting salon. According to PW1 after being taken there, he was asked by the appellant to follow him to his room which was not far from the salon and while therein he was asked to take off his pair of trousers and bend. Thereafter, the appellant applied oil to his penis as

lubricant and inserted it in PW1's anus. After finishing sodomizing him, the appellant took him to a nearby bar where he bought chips for him and gave him TZS. 10,000/=. The appellant did also give PW2 TZS. 5,000/= for the work done by him. PW1's story was supported by PW2 who is on record telling the trial court that after the appellant had taken PW1 to his room, the two spent some considerable time therein and that when they came back to the salon, he was given TZS. 5,000/= by the appellant. It was also testified by PW2 that PW1 told him that he had been sodomized by the appellant.

It is also on record from PW1 that on another day he followed the appellant at his salon and again the appellant took him in his room and sodomized him. On a certain other day, the appellant sent PW2 to fetch him from school and was taken to the salon. After getting there, the appellant took him to the nearby bar, bought him beer and when he was totally drunk, the appellant took him to his room where he spent the night with him and again, he sodomized him. From that day, for more than ten times, PW1 kept going to the appellant and the appellant used to sodomize him till when PW1 felt tired of being sodomized and decided to reveal the ordeal and name the appellant to his teacher one Mr. Akida Kibasa (PW4).

PW4 was a teacher at Changarawe Secondary School and also a patron of Kiwele hostel where PW1 and PW2 were staying. According to him, PW1 did on 11.11.2018 fall sick and he had to permit him to go home for treatment. Sometimes later, after PW1 had returned back to school, PW4 realized that PW1 and his friend PW2, had the tendence of absconding from the hostel at night. On 11.12.2018, PW4 decided to interrogate PW1 and that is when PW1 revealed to him that he had been absconding and going to the appellant who had been sodomizing him. Having learnt so, PW4 reported the case to the school administration for further legal steps.

The prosecution did also call Dr. Rock Kibasa of Mafinga Hospital who testified as PW3 telling the trial court that on 27.02.2019 he medically examined PW1 who was being suspected to have been sodomized. He observed that PW1's anus was wide open to the extent that stool was coming out freely. The conclusion by PW3 was that PW1's anus had been penetrated by a blunt object. PW3 posted his findings in a PF3 which was tendered and admitted in evidence as exhibit P1.

The appellant was the sole witness in his defence. In his sworn evidence as DW1, he totally distanced himself from the offence claiming that he was framed for the case. He maintained that the case was framed

against him because his landlord was not called as a witness by the prosecution. He also defended himself by telling the trial court that his landlord could not have allowed the offence to be committed in his house. Further, it was complained by the appellant that PW1 and PW2 did not tell the truth and he wondered how come PW2 could also not be punished if what was testified by him was true.

Having heard the evidence from both sides, the trial court, finally found that the case against the appellant had been proved to the hilt. The trial court found that PW1 was a witness of truth and that his evidence was aptly corroborated by the evidence from PW2 and PW4. The appellant's defence was found too weak to raise any reasonable doubt. The appellant was therefore found guilty of the charged offence and was duly convicted and sentenced to life imprisonment. Aggrieved, the appellant appealed to the High Court whereby the trial court's findings and decision were confirmed save for the sentence which was reduced to thirty (30) years imprisonment on the ground that since PW1 was not below ten (10) years of age then under section 154 (2) of the Penal Code, the appropriate sentence was thirty (30) years imprisonment.

Still aggrieved, the appellant has filed this second appeal on four (4) grounds of appeal which can conveniently be paraphrased as follows:

1. *That the Honourable High Court Judge erred in law in dismissing the appellant's appeal without taking into account that there was no evidence from the prosecution side which contravened the appellant's claim that the case was a frame-up.*
2. *That the Honourable High Court Judge erred in dismissing the appellant's appeal basing on the testimony of PW1, PW2 and PW4 and also on circumstantial evidence which did not prove the offence charged.*
3. *That the Honourable High Court Judge erred in dismissing the appellant's appeal without taking into account that the prosecution did not call any of the occupants of the house in which the appellant was residing to prove the claim that PW1 used to get in the appellant's room.*
4. *That the case against the appellant was not proved beyond reasonable doubt.*

Before us at the hearing, the appellant appeared in person unrepresented whilst the respondent Republic, was represented by Ms. Magreth Mahundi, learned State Attorney.

When invited to argue his appeal, the appellant maintained that he did not commit the offence in question. He prayed for his appeal to be allowed on the grounds listed in his memorandum of appeal. He however, amplified the fourth ground of appeal by arguing that since according to PW4, PW1 fell seriously sick on 11.11.2018 then he could not have

sodomized PW1 on that particular day or on the following days as claimed by PW1. The appellant also complained and contended that a delay in arresting him supported his defence that the case was framed against him. He argued that there was no explanation as to why he was arrested on 03.03.2019 while the offence was allegedly committed by him on 10.11.2018. For the above reasons and arguments, he prayed for his appeal to be allowed.

At this stage, the appellant was also prompted by the Court to comment on the correctness and propriety of the thirty (30) years imprisonment sentence that was imposed by the High Court after setting aside the life imprisonment sentence imposed by the trial court. On this the appellant had nothing to say rather than that the High Court was right in reducing the sentence from life imprisonment to thirty (30) years imprisonment.

Responding to the appeal, Ms. Mahundi unhesitatingly expressed her stance that she was not supporting the appeal. Beginning with the complaints raised by the appellant in regard to PW4's testimony that PW1 fell sick on 11.11.2018 and that there was a delay in arresting him, Ms. Mahundi argued that, under the circumstances of the instant case where the evidence in support of the charge was very strong, the complaints by

the appellant are baseless. She contended that although it is true that PW4 stated that PW1 fell sick on 11.11.2018, PW1 did not say that 11.11.2018 was one of those other days he was sodomised by the appellant. Ms. Mahundi further argued that the appellant cannot therefore be heard arguing that PW1 could not be sodomised on 11.11.2018 merely because according to PW4, PW1 was sick on that day. Regarding the delayed arrest, it was submitted by Ms. Mahundi that although the date the appellant was arrested is not known but after PW1 had revealed about the sodomy to PW4 on 11.12.2018, the case was immediately reported to the school administration and to the police. She contended that it is not clear what steps the school administration and the police took before the appellant was arraigned on 08.03.2019 but the ailment is immaterial bearing in mind that the evidence led by the prosecution against the appellant was very strong.

As on the grounds of appeal, Ms. Mahundi combined and argued them together under the fourth ground which is to effect that the case against the appellant was not proved beyond reasonable doubt. She submitted that all the grounds are baseless because the evidence in support of the charge was so strong. It was contended that PW1's evidence was so elaborate, straight and clear so much that the trial court

did not find it hard to conclude that the evidence was credible and reliable. Ms. Mahundi further argued that PW1 gave the best evidence in line with the Court's decision in a number of cases including **Wilson Musa @ Jumanne v. Republic**, Criminal Appeal No.109 of 2018 (unreported).

Ms. Mahundi further argued that PW1's evidence was corroborated by the evidence from PW2 whose evidence that he was paid TZS. 5,000/= by the appellant for taking PW1 to him on 10.11.2018 and that he knew that the appellant sodomized PW1 on that day and on other days, was never controverted by the appellant in cross examination. Ms. Mahundi argued that the failure by the appellant to cross examine PW2 meant that what was testified by PW2 was true.

It was also submitted by Ms. Mahundi that, in addition, there was evidence from PW3 who medically examined PW1 and which corroborated PW1's evidence that he was sodomized. She contended that although the relevant PF3 was expunged by the High Court, PW3's oral evidence survived. To buttress her argument Ms. Mahundi referred us to our earlier decision in **Bashiru Salum Sudi v. Republic,** Criminal Appeal No. 379 of 2018 (unreported).

For the above arguments Ms. Mahundi insisted that the case against the appellant was proved beyond reasonable doubt and therefore that the appeal is baseless. She thus prayed for the appeal to be dismissed.

As regards to the propriety of the thirty (30) years imprisonment sentence that was imposed by the High Court after setting aside the life imprisonment sentence imposed by the trial court, it was argued by Ms. Mahundi that it was a misdirection on the part of the High Court to set aside the sentence imposed by the trial court. She argued that by the time the offence was being committed by the appellant, section 154 (2) of the Penal Code had already been amended since 2009 setting the sentence of life imprisonment for unnatural offence committed against victims who are below the age of 18 years. Since PW1 was 15 years of age, she contended, then the proper sentence was life imprisonment as it was correctly imposed by the trial court. That being the case, Ms. Mahundi urged us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002] (the AJA) and set aside the sentence imposed by the High Court and replace it by the life imprisonment.

In his brief rejoinder, the appellant disagreed with Ms. Mahundi and maintained that the case against him was not proved to the hilt. He

argued that he did not commit the offence in question and also that PW1 was just his customer at his hair cutting salon. The appellant reiterated his claim that he was framed up for the reasons he could not know. He therefore prayed for the appeal to be allowed.

Having heard the arguments for and against the appeal, the issue for our determination is whether the appeal has merits or not. In doing so, we propose to firstly consider the three first grounds of appeal, which, in our view, are plainly very light, before dwelling on the fourth general ground on whether the case against the appellant was proved to the required standard or not.

Beginning with the first ground of appeal whereby it is complained by the appellant that his claim that he was framed for the offence, was not controverted, it is our considered view that this ground should not detain us. Apart from the fact that the appellant had no duty to prove his allegation that the case was framed against him, the strong evidence given by the prosecution against him, controverted the claim. The ground therefore fails.

The second ground of appeal is also without merits because the evidence forming the basis of the conviction was not circumstantial as

claimed by the appellant. The conviction was based on direct evidence from PW1 and PW2. PW1 testified on what he himself experienced and the evidence from PW2 was on what he saw and heard. The evidence from PW1 that the appellant sodomized him on 10.11.2018 and on other times, was direct. Likewise, the evidence from PW2 that he is the one who took PW1 to the appellant on 10.11.2018 and that he saw the appellant taking PW1 to his room was not circumstantial but direct.

The appellant's complaint on the third ground of appeal is that the prosecution did not call any of the occupants of the house in which his room was, as a witness to support the prosecution evidence that PW1 used to be taken therein by him. This ground is also, like the other two grounds discussed above, found to be baseless. Apart from the fact that according to the record, there was no evidence to the effect that the house in which the appellant's room was, had other occupants, there is no evidence that any of them used to see PW1 when being taken therein. It is for this reason that we do not see any logic in the complaint that the prosecution did not call any of the said occupants as a witness. As intimated above, this ground is also without merit and it is accordingly dismissed.

Turning to the fourth ground of appeal, we entirely agree with Ms. Mahundi that looking at the evidence given in support of the charge and the defence from the appellant, it cannot be said that the case against the appellant was not proved beyond reasonable doubt. The evidence from PW1 that he was, on the material day, sodomized by the appellant was so consistent and cogent. The trial court which heard PW1 and observed his demeanour rightly found his evidence credible and reliable. As rightly argued by Ms. Mahundi, in sexual offences cases, like the instant case, the best evidence comes from the victim because she/he is the one in the best position to explain what transpired and the sufferings she/he endured during the incident. See- **Suleiman Makumba v. Republic** [2006] T.R.L. 379, **Wilson Musa @ Jumanne v. Republic** (supra), **Hamis Mkumbo v. Republic,** Criminal Appeal No. 124 of 2007 and **Rashid Abdallah Mtungwa v. Republic,** Criminal Appeal No. 91 of 2011 (both unreported).

The evidence from PW1 was aptly corroborated by PW2 who testified on how he connected PW1 to the appellant. He also told the trial court that on 10.11.2018 he took PW1 to the appellant and that he saw the appellant taking PW1 in his room. When the two came out, he was given TZS. 5,000/= by the appellant for the work done and PW1 told him that

he had been sodomized by the appellant. PW2's evidence was never controverted by the appellant who had no question to ask PW2 in cross examination. As it was on PW1, the trial court rightly believed and acted on PW2's evidence. Even the High Court cannot be faulted in confirming the trial court's findings on the credibility and reliability of PW1 and PW2. We should also state at this stage that since we are sitting on a second appeal and as the two courts below concurrently gave full credence to PW1 and PW2, the issue of the credibility of the said two witnesses, is outside our inquiry. See- **Bashiru Salum Sudi** (supra) and **Saada Abdallah and Others v. Republic** [1994] T.L.R. 132.

We also agree with Ms. Mahundi that even after the expunction of the PF3 from the record by the High Court, the oral evidence given by PW3 which supported PW1's evidence that he had been sodomized, survived the obliteration of the PF3. See- **Bashiru Salum Sudi** (supra).

Regarding the appellant's complaint that there was delay in arresting him, we are of the view, as it was also argued by Ms. Mahundi, that under the circumstances of this case, the complaint is immaterial. We agree with Ms. Mahundi that although it is not clear on what steps were taken or on what transpired after the sodomy had been revealed and reported to the school administration on 11.12.2018, the fact that the appellant was

arraigned before the trial court on 08.03.2019, does not raise any reasonable doubt or defeat the strong evidence that was given to support the charge. The credibility of PW1 and PW2 was not affected by the inaction on the part of the authorities to whom the crime in question was reported. It could have been different if there was a delay in reporting the crime. But in this case, the alleged crime was immediately reported to the school administration and the police, so we cannot blame on PW1 for the inaction by the authorities. See- **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 and **Muhsin Mfaume v. Republic**, Criminal Appeal No. 99 of 2012 (both unreported). In the latter case where there was a delay in medically examining the victim, the Court made this observation:

> *"In this case PW1 reported the rape immediately in the morning following the night when it took place. Whether PW2 and PW4 dragged their feet and failed to take action immediately but that inaction cannot be blamed on PW1".*

We have also observed that the appellant's complaint that he was arrested on 03.03.2019 was raised for the first time before us. The complaint was neither raised during the trial nor before the High Court.

This, in our view, suggests that there might have not been a delay in arresting the appellant. We think that under these circumstances, it will not be to the prejudice of the appellant if we infer that the case might have been under the police investigations resulting into the delay in bringing the appellant to the court rather than delaying in arresting him. All the same, as we have held above, even if there was the complained delay in arresting the appellant, under the circumstances of this case, the delay was immaterial and did not defeat the strong evidence given against the appellant.

Likewise, the appellant's complaint that PW4's evidence to the effect that PW1 fell seriously sick on 11.11.2018, contradicted the prosecution other evidence which was to the effect that after the sodomy of 10.11.2018, PW1 was again sodomized by the appellant about ten times, is also without merit. As rightly argued by Ms. Mahundi, there was no evidence from PW1 or from any other prosecution witness, which suggested that 11.11.2018 was among the other days PW1 was sodomized by the appellant. Apart from 10.11.2018, PW1 did not specifically tell the dates on which he was again sodomized by the appellant. The appellant cannot therefore be heard complaining that it

was impossible for PW1 to be sodomized by him on 11.11.2018 because according to PW4, on that day PW1 was seriously sick.

That being the case therefore, the findings and the decision of the two lower courts cannot be faulted. The appellant's defence was too weak to raise any reasonable doubt in the prosecution case against him. The case against the appellant was proved beyond reasonable doubt.

Finally, it is on the issue of the sentence imposed on the appellant. Unhesitatingly, we agree with Ms. Mahundi that the High Court misdirected itself when it set aside the life imprisonment sentence imposed by the trial court and when it replaced it with the thirty (30) years imprisonment term. By 2018 when the offence in question was being committed, section 154 (2) of the Penal Code had already been amended since 2009 by section 16 of the Law of the Child Act No.21 of 2009. The amendments enhanced the thirty (30) years imprisonment sentence to life imprisonment. The sentence of thirty (30) years imprisonment imposed by the High Court was therefore illegal and it is hereby quashed.

In fine, for the reasons we have given above we find the appeal unmerited and dismiss it in its entirety. Additionally, invoking our revisional powers bestowed on us by section 4 (2) of the AJA, we also

quash the illegal sentence of thirty (30) years imprisonment imposed by the High Court and substitute it with the mandatory sentence of life imprisonment in accordance with section 154 (2) of the Penal Code.

Appeal dismissed.

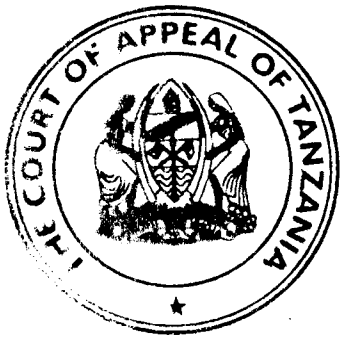
**DATED** at **IRINGA** this 25th day of March, 2022.

S. A. LILA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

A. M. MWAMPASHI
**JUSTICE OF APPEAL**

The judgment delivered this 25th day of March, 2022 in the presence of appellant in person and Ms. Edna Mwangulumba, learned State Attorney for the respondent/Republic is hereby certified the true copy original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**